IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FLORIDA STATE CONFERENCE OF BRANCHES AND YOUTH UNITS OF THE NAACP, *et al.*,
Plaintiffs-Appellees,

v.

FLORIDA SECRETARY OF STATE, *et al.*,
Defendants-Appellants.

FLORIDA RISING TOGETHER, *et al.*,
Plaintiffs-Appellees,

v.

FLORIDA SECRETARY OF STATE, *et al.*,
Defendants-Appellants.

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

FLORIDA NAACP APPELLEES' AND *FLORIDA RISING TOGETHER* APPELLEES' RESPONSE IN OPPOSITION TO TIME-SENSITIVE MOTION FOR STAY PENDING APPEAL

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Fla. Rising Together, et al. v. Fla. Sec'y of State, et al. (No. 22-11145)

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(3), Plaintiffs-Appellees the Florida State Conference of Branches and Youth Units of the NAACP, Disability Rights Florida, Common Cause, Florida Rising Together, UNIDOSUS, Equal Ground Education Fund, Hispanic Federation and Poder Latinx, through undersigned counsel, hereby submit this Certificate of Interested Persons and Corporate Disclosure Statement.

Appellees state that they have no parent corporations, nor have they issued shares or debt securities to the public. The organizations are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock.

I hereby certify that the disclosure of interested parties submitted by Defendants-Appellants is complete and correct except for the following corrected or additional interested persons or entities:

Interested Persons

1. Grimm, Dillon, *Attorney for NAACP Plaintiffs-Appellees*

Entities

The following additional Plaintiffs-Appellees' counsel and parties listed on Defendants-Appellants' disclosure of interested parties can be dropped:

1. Saunders, Morgan (no longer at Covington & Burling LLP)
2. Williamson, Virginia (no longer at Covington & Burling LLP)
3. Reed, Mahogane (no longer at NAACP Legal Defense & Educational Fund, Inc.)
4. Bailey, Leslie (no longer at Arnold & Porter Kaye Scholer)
5. Faith in Florida (dismissed on October 29, 2021 and no longer party to the action)

/s/ Benjamin L. Cavataro
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INTRODUCTION

In a 288-page order issued after a two-week bench trial, the district court held that four provisions of Florida Senate Bill 90 ("SB 90") violate the U.S. Constitution and the Voting Rights Act of 1965 ("VRA"). This court should deny Appellants' motion for a stay pending appeal. They are not entitled to this "extraordinary remedy," *Garcia-Mir v. Meese*, 781 F.2d 1450, 1455 (11th Cir. 1986): they are unlikely to succeed on the merits and the equities disfavor a stay.

Appellants' merits arguments are unpersuasive. On the intentional discrimination claims, Appellants fault the district court for not using a specific phrase and argue it did not apply this court's decision in *Greater Birmingham Ministries v. Secretary of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021) *("GBM")*. Both contentions are wrong: The district court is not required to use any magic words, and it repeatedly cited and applied *GBM*. Appellants' other merits arguments likewise do not cite to record evidence or meaningfully challenge the district court's meticulous factual findings, which are entitled to significant deference on appeal. *See Bellitto v. Snipes*, 935 F.3d 1192, 1197-98 (11th Cir. 2019). Instead, Appellants devote most of their argument to criticizing the district court's preclearance remedy. Their critiques, which again claim the district court did not consider the legal authority it expressly relied upon, fail to undercut the district court's detailed factual findings and legal conclusions on the merits.

Nor do the equities favor a stay. Appellants almost exclusively rely on *Purcell v. Gonzalez*, 549 U.S. 1 (2006). But Appellants failed to raise this argument in the district court, and for good reason: This case is not on the eve of an election, as Florida's next statewide elections are months away. This case shares none of the features of cases in which courts have relied on *Purcell* to stay injunctions. Moreover, the relevant testimony—which was credited by the district court and unrebutted by Appellants—established that an injunction will neither burden election officials or cause confusion: indeed it will restore pre-SB 90 features that made the 2020 election successful. Appellants' other cursory assertions of irreparable harm are unsupported and do not justify a stay. Accordingly, Appellants' motion should be denied.

STANDARD OF REVIEW

Appellants bear a "heavy burden" to obtain a stay pending appeal, *United States v. Bogle*, 855 F.2d 707, 708 (11th Cir. 1988) (per curiam), because it is an "intrusion into the ordinary processes of administration and judicial review," *Nken v. Holder*, 556 U.S. 418, 427 (2009). Appellants are not entitled to a stay unless (1) they make a strong showing that they are likely to succeed on the merits, (2) they will be irreparably harmed absent a stay, (3) the stay will not substantially

injure other interested parties, and (4) the public interest favors a stay. *Nken*, 556 U.S. at 426.[1]

ARGUMENT

I. Appellants Have Not Shown A Likelihood Of Success On The Merits

A. Overwhelming Record Evidence Supports the District Court's Conclusion that SB 90 Intentionally Targeted Black Voters Because of Their Propensity to Favor Democratic Candidate

Appellants argue that the district court failed to presume legislative good faith or apply recent precedents clarifying the application of *Arlington Heights* to Appellees' intentional discrimination claims. Mot. 7. Both arguments are wrong.

Appellants misguidedly emphasize that "[t]he words 'good faith' don't even appear in the [district court's] opinion." Mot. 7-8. But "a district court, writing after a bench trial, is not required to use 'magic words.'" *Burrell v. Bd. of Trs.*, 125 F.3d 1390, 1395 (11th Cir. 1997). In fact, the district court's analysis expressly rested on the premise that Plaintiff-Appellees bore the burden of proving "that SB 90 has *both* a discriminatory impact and that the Legislature passed it with discriminatory intent." Op.39. Across nearly 100 pages, the court meticulously examined each *Arlington Heights* factor and weighed the relevant evidence in the record. Op.39-136. After considering all factors, the court concluded that the

[1] Moreover, Appellants must make this showing for each portion of the order they seek to stay. *E.g.*, *People First of Alabama v. Sec'y of State for Alabama*, No. 20-13695-B, 2020 WL 6074333, at *1 (11th Cir. Oct. 13, 2020) (granting motion for stay only in part).

Legislature enacted three of SB 90's provisions to specifically target Black voters. Op.134. Plainly, the court did afford the Legislature the presumption of good faith, requiring Plaintiffs to prove otherwise to succeed on their claims and even rejecting some of Plaintiffs' intentional discrimination claims. Op.133.

Appellants also incorrectly argue that the district court "never applied the Supreme Court's decision in *Brnovich* or this court's decision in *Greater Birmingham*." Mot. 8. *Brnovich* identified non-exhaustive "guideposts" for courts to consider when evaluating claims under Section 2 of the VRA. 141 S. Ct. 2321, 2336-43 (2021), which the district court weighed when evaluating Appellees' Section 2 claims. Op.256-57. *Brnovich* is only relevant to Appellants' intentional discrimination claim to the extent that it underscores the deference that should be afforded to a district court's fact-finding. 141 S. Ct. at 2348-50. *Brnovich*'s findings regarding discriminatory motive are inapposite, as the record here showed none of the nondiscriminatory rationales found in *Brnovich*.

The court unequivocally relied on, and applied, *Greater Birmingham*, citing to it nearly a dozen times. Indeed, *GBM* supports the district court's intentional discrimination finding. In *GBM*, the Court concluded that the plaintiffs failed to present sufficient evidence of such discrimination because, in part, "[p]erhaps most significant[ly] … Plaintiffs provide[d] no evidence that the Alabama legislators who supported the law intended the law to have a discriminatory impact or

believed that the law would have such an effect." *Id.* at 1324-26. Here, the court found substantial evidence that the Legislature was aware of SB 90's discriminatory impact and refused to adopt ameliorative measures, and that key proponents made statements probative of discriminatory intent.

In addition, "[t]he *Arlington Heights* factors require a fact intensive examination of the record," *GBM*, 992 F.3d at 1299, 1322 n.33, and the presence of discriminatory purpose is determined "from the totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976). The district court's factual findings "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). Here, as explained below, the district court methodically addressed the *Arlington Heights* factors, as elucidated in *GBM*, and its finding of discriminatory intent is supported by overwhelming record evidence. Op.126.

1. Disparate impact

In concluding that SB 90's drop box restrictions would disparately impact Black voters, the district court credited unrebutted evidence that drop boxes will be less available to voters because of SB 90 and that Black voters will be disproportionately affected by their limited availability. Op.90-104; *see, e.g.*, Tr. 1250:25-1252:1 (Broward County SOE Scott testifying that he "would have gone

for 40 drop boxes if it weren't for Senate Bill 90," but will instead only offer eight); ECF[2] 608-6 at ¶ 127. In addition, the court weighed expert analysis indicating that "Black voters use drop boxes at a greater rate than other racial groups" and "tend to use drop boxes in just the way that SB 90 targets." Op.103; *see, e.g.*, ECF No. 608-1 at ¶ 215; see also ECF No. 608-6 at ¶ 223; Tr. 2393:10-14. The district court found that these expert conclusions were further supported by expert demographic and socioeconomic analysis from William Cooper, who gave unrebutted testimony that Black voters face more barriers to voting than White voters. Op.103-04; Tr. 622:4-22, 629:12-630:4, 630:9-631:12; ECF No. 608-16 ¶¶ 23-24.

The district court's conclusion that SB 90's expansive definition of prohibited "solicitation" will disproportionately impact minority voters is also supported by expert analyses. Op.109-13. The court concluded that this definition discouraged groups from offering items of relief to voters waiting in line, and would disproportionately affect minority voters, based on unrebutted expert evidence proving that minority voters faced disproportionately long in-person wait times. Op.29-35, 109-13; Tr. 2558:8-2559:4; *see also* ECF No. 608-6 at ¶¶ 235-250. These expert conclusions were consistent with a "large body of peer-reviewed

[2] Unless otherwise noted, all ECF references are to the first filed *League of Women Voters* case, No. 4:21cv186-MW/MAF.

literature [that] concludes that Florida has, on average, longer lines than much of the country and that minority voters are more likely to be affected by those lines." Op.109; *see also* Tr. 2541:3-2545:25.

Finally, the district court's determination that the registration delivery provision would have a racially discriminatory impact had ample record support. The court credited Plaintiffs' testimony that the provision will impose additional costs on third-party voter registration organizations ("3PVROs"), "thus limiting the number of voters each 3PVRO can reach." Op.113; *see also* Tr. 208-09, 769-76, 1424-33, 2040-41. The court then weighed extensive expert testimony demonstrating that minority groups, which rely more heavily on 3PVROs, would be disproportionately harmed by their reduced capacity to register voters. Op.113-15. Dr. Herron, for example, analyzed post-2012 voter registrations in Florida and found that 15.37% of Black voters, but just 2.79% of White voters, registered using 3PVROs. Op.113-14 (citing Tr. 2297, 2302-05). Dr. Smith similarly estimated that 10.86% of Black voters registered using 3PVROs compared to just 1.87% of White voters. Op.114-15 (citing Tr. 2570-71). Both Dr. Herron and Dr. Smith found that the disparity was consistent across Florida counties. *Id.* (citing Tr. 2305, 2310, 2574).

2. Historical background

Contrary to Appellants' contention that the court's historical analysis "consisted of events disconnected from SB 90, dating back to the Civil War," Mot. 8, the district court focused on discriminatory measures adopted in the last 20 years. Op.52-65. For example, the court considered the enactment of HB 1355, a discriminatory law passed in 2011 which, like SB 90, was sponsored by Senator Dennis Baxley. Op.58. The court found a consistent pattern by the Legislature of restricting voting methods favored by Black voters in reaction to Black voter turnout, Op.64-65, and that SB 90 "fits neatly" into this pattern. Op.128.

3. Sequence of events leading up to the law's passage

The district court correctly determined that the 2020 election in Florida "differed from past elections in two important ways." Op.65. *First*, there was a large increase in VBM usage, especially among Black voters, who doubled their usage to 40%. Op.66; *see also*, *e.g.*, Tr. 2409:1-13, 2407:16-2408:5. Notably, Black voters also deposited their ballots in drop boxes at much higher rates than White voters. Op.128; *see also*, *e.g.*, Tr. 2159:20-25, 2256:4-21.

Second, voter turnout surged in the 2020 election. Op.67. This increase was not accompanied by any reports of significant issues at the polls. To the contrary, it was universally hailed as a success. Op.129; *see also*, *e.g.*, ECF No. 608-48; Tr. 965:3-966:8, 969:3-12.

Nonetheless, the Legislature "moved quickly to revamp Florida's election laws" while simultaneously "struggl[ing] to articulate why its changes were needed." Op.129. In general, "SB 90's stated purpose was to proactively 'instill . . . voter confidence by ensuring election integrity and security.'" Op.70 (quoting Tr. 970:8-17). However, there was "[no] evidence before the Legislature that fraud [wa]s even a marginal issue in Florida elections," with Senator Baxley himself stating that he had no evidence of fraud regarding drop boxes. Op.70-71 (citing Tr. 1763-1764). Moreover, the evidence also shows that Florida voters had "high confidence in the [2020] election outcome." Op.70; Tr. 980:9-981:12. After weighing the evidence, the court concluded that "SB 90 was not motivated by a desire to prevent voter fraud and ensure voter confidence." Op.131.

Contrary to Appellants' contentions, *GBM* does not mean that the mere incantation of "voter fraud" dispels any inference of discrimination. Combatting fraud *can be* a "valid neutral justification" for a voting law when there is no evidence of a discriminatory motive. *GBM,* 992 F.3d at 1327. Here, however, the court concluded that the bill's sponsors eschewed combatting election fraud as a justification. Op.70-72. Appellants simply ignore the court's factual findings on this factor.

4. Contemporaneous statements

The court noted that lawmakers who supported SB 90 made statements on the Senate floor that included "the oldest racial tropes known to man" and "could be considered evidence of racial animus." Op.87, 129. For example, Senator Baxley explicitly acknowledged that there would be a disparate impact from SB 90's drop box provisions, and that there would be a "learning curve" for Black voters. Op.88, 121 (citing ECF No. 461-98 at 100). The court also found that a text message conversation between Senator Gruters and Representative Ingoglia laid bare that the supposed justifications for SB 90 were merely pretextual and that the real purpose of the bill was to "favor the Republican Party over the Democratic Party." Op.129, 133. As the district court explained, the Legislature accomplished this goal by enacting "some of SB 90's provisions with the intent to target Black voters because of their propensity to favor Democratic candidates." Op.135.

5. Foreseeability and Knowledge of the Disparate Impact

The district court correctly found that the evidence "not only suggests that the Legislature had [ ] knowledge [of the disparate impact that SB 90 would have on Black and Latino voters], but also that it specifically sought it out," by specifically asking the Division of Elections for demographic data about drop box usage, VBM ballot usage, and who relies on 3PVRO assistance. Op.116-19. The Legislature "had before it exactly the same demographic information [as] this

Court. . . show[ing] that SB 90 would have a disparate impact on Black voters." Op.119-120. Appellants fail to demonstrate that these findings were clearly erroneous. *GBM* noted that foreseeability/knowledge was a key factor, which, unlike here, weighed against the plaintiffs. *GBM*, 992 F.3d at 1322, 1327.

6. The availability of less discriminatory alternatives

In reaching its conclusion, the court carefully weighed the evidence and found that, in general, "less discriminatory alternatives to each challenged provision not only were available but were presented to and rejected by the Legislature." Op.122-25. For example, the Legislature considered amendments which would allow drop box use outside of early voting hours. The court noted that "cutting the use of drop boxes outside of early voting hours serves no purpose" and these proposed amendments were less discriminatory alternatives. Op.124; *see also*, *e.g.*, Tr. 1046:22-1049:2. This is another key distinction between this case and *GBM*, 992 F.3d at 1327.

In sum, Appellants fail to show that they are likely to succeed on the merits of their appeal of the district court's finding that SB 90 was passed with discriminatory intent. The district court's factual findings were supported by ample record evidence, and Appellants have not, and cannot, demonstrate that these findings were clearly erroneous.

B. First and Fourteenth Amendment Claims[3]

1. Solicitation Provision – First Amendment and Fourteenth Amendment Claims

This court's precedent forecloses Appellants' argument that Plaintiffs' "line warming" activities are not expressive and are not entitled to First Amendment protection. *Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 11 F.4th 1266, 1291-92 (11th Cir. 2021); *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1336 (11th Cir. 2021). The district court found (1) that Plaintiffs' line warming activities were intended to convey a particularized message; and (2) that a reasonable person would interpret the conduct as conveying "some sort of message." Op.161-67.

The Defendant SOEs for Volusia, Bay, Broward, Palm Beach, Duval, Miami-Dade, Seminole, Pinellas, Orange, and Osceola counties are the only defendants with standing to appeal the court's vagueness and overbreadth findings in the *NAACP* and *FRT* cases. Op.181, 187. Appellants lack such standing. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950-51 (2019).

Even if Appellants had standing, the district court's findings were based on controlling case law, *see e.g., Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1190 (11th Cir. 2019), and basic principles of statutory interpretation. With

[3] Appellees incorporate by reference the arguments made in Plaintiffs-Appellees *League of Women Voters'* opposition filed in Appeal 22-11143 (also consolidated in Appeal 22-11133).

respect to vagueness, it must be noted that Appellants have drastically shifted course, arguing in their motion to dismiss that the provision of nonpartisan relief was not prohibited, No. 4:21-cv-00187, ECF No. 92-1 at 26, but now abandoning that position.[4]

C. The Preclearance Remedy is a Narrowly Tailored, Appropriate Response to the Constitutional Violations in This Case

1. The District Court Properly Determined that "Bail-in" Is Appropriate Here

Based on the thoroughly supported findings that intentional racial discrimination motivated several provisions of SB 90, the district court properly applied Section 3(c) of the VRA to require a period of preclearance for a narrow category of changes in the State's voting laws. 52 U.S.C. § 10302(c). Section 3(c) "empowers a court, in a proper case, to impose a preclearance remedy on states," known as "bail-in" relief. *Perez v. Abbott*, 390 F. Supp. 3d 803, 807 (W.D. Tex. 2019) (citing *Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990)); *see also Allen v. City of Evergreen*, No. 13-0107-CG-M, 2014 WL 12607819, at *1-*2 (S.D. Ala. Jan. 13, 2014).

When considering Section 3(c) relief, courts ask (1) "whether violations of the Fourteenth or Fifteenth Amendments justifying equitable relief have occurred

[4] Appellants offer no substantive argument disputing (and have waived challenging) the district court's finding the registration disclaimer violates the First Amendment. Mot. 12. Appellants' contention that a provision of SB 524 repeals the registration disclaimer, *id.*, is addressed below.

within the State"; and (2) whether, if so, "the remedy of preclearance should be imposed." Op.275-76 (citing *Perez*, 390 F. Supp. 3d at 813).

Here, the district court made extensive factual findings of intentional discrimination and found violations of the Fourteenth and Fifteenth Amendments with respect to the Registration Delivery, Drop Box, and Solicitation Provisions. Op.136, 181, 257, 276-77. "[T]raditional principles of equitable discretion" guide whether courts should impose bail-in relief, "as conditioned by the necessities of the public interest." *Jeffers*, 740 F. Supp. at 600-01.

The court examined several factors, including: "(1) whether 'the violations [have] been persistent and repeated,' (2) whether the violations are 'recent or distant in time,' (3) whether preclearance would prevent future violations, (4) whether the violations have 'been remedied by judicial decree or otherwise,' (5) whether the violations are likely to recur, and (6) whether 'political developments, independent of this litigation, make recurrence more or less likely.'" Op.276-77 (citing *Jeffers*, 740 F. Supp. at 601).

As to the first and second factors, the court correctly found that "Florida has repeatedly, recently, and persistently" acted to deny Black Floridians access to the franchise." Op.277. As to the third, the court found that preclearance would prevent future violations. *Id.* The court acknowledged that the fourth factor weighed against preclearance. *Id.* As to the fifth and sixth factors, the court found

that "violations are likely to recur, because political developments, if anything, make recurrence more likely" given that the legislature and the Governor's office "are controlled by a party that, in the words of its own expert witness, stands to gain 'if voting were to decrease among African-Americans.'" *Id.* (quoting testimony of Appellants' expert, Dr. Moreno, Tr. 3362).

The Legislature's passage of SB 524 (it has not yet been signed by the Governor) is a perfect example of why the bail-in remedy is justified here. SB 524 increases the maximum cumulative fines on 3PVROs fifty-fold to $50,000 for turning in registration applications later than 14 days from receiving them–a provision clearly designed to chill 3PVROs from registering voters. Without preclearance review, Plaintiffs will be forced to re-litigate the discriminatory aspects of SB 524, which still would not foreclose the Legislature from pivoting to new tactics in the 2023 session. This is precisely the value of a bail-in remedy; preclearance "shift[s] the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). For all of these reasons, providing bail-in relief was an entirely appropriate exercise of discretion in this case.

2. The Scope of the Bail-in Relief Ordered by the District Court is Appropriately Tailored

The bail-in relief ordered here is narrowly tailored to the violations found and is time-limited. The court's bail-in relief is limited to just three categories of

voting practices: restrictions on 3PVROs; drop boxes, and non-partisan assistance to voters waiting in voting lines.

The court also limited the bail-in-relief to 10 years. There is nothing in the text of Section 3 that requires bail-in to be time limited. Five to ten years for Section 3 bail-in coverage is consistent with what other courts have ordered. *See* Edward K. Olds, *More than "Rarely Used": A Post-Shelby Judicial Standard for Section 3 Preclearance,* 117 Colum. L. Rev. 2185, 2215-16 (2017).

Appellants' objections to the bail-in relief fail. They complain that the district court erred by considering the equitable factors considered by *Jeffers,* and ignored the impact of *Shelby County.* Mot. 5. However, the court *began* its analysis with *Shelby County*. Op.270. The court examined the federalism concerns animating the Supreme Court's decision to strike down the Section 4 coverage formula, *id.* at 270-72, and considered the impact of *Shelby County* on Section 3 cases—a provision not before the *Shelby County* Court. Op.273-74. Indeed, a prominent critic of Section 5 preclearance has praised Section 3 bail-in as an appropriately tailored and constitutional remedy upon a finding of current discrimination. Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. 42 (2013) (testimony of Hans von Spakovsky). Because the Supreme Court has never addressed a case in which Section 3 bail-in has been applied, the court properly looked to *Jeffers* here.

Op.276-77. *See also Perez*, 390 F. Supp. 3d 818. And neither of the cases Appellant cites (Mot. 11-12) analyze factors relevant to Section 3 or counsel against its application here. Appellants' arguments would transform Section 3 coverage from relief that is "rarely" used into relief that may never be used, contrary to Congress's intent.

3. The Constitutionality of Section 3's Bail-in Coverage is not Properly Before This Court

After eleven months of litigation, Appellants suggested the possible unconstitutionality of Section 3's bail-in provision for the first time in a 3-sentence footnote in their post-trial brief. *See* ECF 648, 65 n.18. In their stay motion, Appellants offer no meaningful elaboration regarding the supposed unconstitutionality of Section 3. Mot. 9-12.

Appellants' untimely effort to raise a constitutional issue is improper because a party raising a constitutional challenge to a federal statute must provide written notice to the court and certification of the challenge to the Attorney General. 28 U.S.C. § 2403; Fed. R. Civ. P. 5.1. The same requirements apply on appeal. *Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co.,* 304 U.S. 243, 249 (1938); *see also Schwier v. Cox,* 340 F. 3d 1284, 1286 (11th Cir. 2003). Appellants' failure to do so makes it clear that there is no constitutional challenge to Section 3 before this court.

II. Appellants Will Not Be Irreparably Harmed Absent A Stay

Appellants fail to meet the exceedingly high bar of showing irreparable harm absent a stay. As this court recently underscored, "[t]he possibility of an irreparable injury is not enough." *Florida v. Dep't of Health & Human Servs.*, 19 F.4th 1271, 1291 (11th Cir. 2021). Rather, Appellants must show that the irreparable harm is "actual and imminent," and neither "remote nor speculative." *Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1267 (11th Cir. 2019) (Pryor, J., concurring) (quotations omitted).

Appellants never squarely address this *Nken* factor, and instead assert as "irreparable harm" (i) that Florida will be prohibited from implementing democratically passed laws; (ii) unspecified "administrative burdens"; and (iii) potential "voter confusion." Mot. 15. None of these assertions is persuasive.

Appellants invoke the abstract principle that Florida will be unable to enforce its laws absent a stay. Mot. 15-16. If that notion were sufficient for a stay, "the rest of the stay factors would be meaningless, and a state would be entitled to a stay pending appeal any time a lower court enjoined its statutes." *Memphis A. Philip Randolph Inst. v. Hargett*, 977 F.3d 566, 573 (6th Cir. 2020) (Moore, J., concurring). This court routinely declines to stay injunctions of state laws, demonstrating that this fact alone cannot constitute irreparable harm. *E.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019)

("*DEC*"); *see also People First of Ala, v. Secretary of State for Ala.*, 815 F. App'x 505 (11th Cir. 2020). Moreover, there is no harm to the state in failing to enforce an unconstitutional law. *See Hisp. Int. Coal. of Ala. v. Governor of Ala.,* 691 F.3d 1236, 1249 (11th Cir. 2012).

Next, Appellants' conclusory claims that they will suffer irreparable harm because of unspecified "administrative burdens" fail. Mot. 16. Appellants neither specify what burdens they are referring to, nor cite to record evidence to substantiate such burdens. *See DEC*, 915 F.3d at 1326 (rejecting "entirely unsubstantiated" claim that stay of district court's injunction in election case was needed to prevent irreparable harm). Moreover, the district court's findings contradict this assertion, given the SOE testimony that an injunction would either improve or not affect their operations. Op.266-67. Appellants offered no testimony to rebut this evidence. *Id*.

Appellants protest that these election officials "cannot speak for other counties whose preparations will be disrupted by the district court's injunctions." Mot. 19. But Appellants provide no details about these "other counties" or point to any record evidence that their "preparations will be disrupted" (much less how or why). *See Kemp*, 918 F.3d at 1268; *DEC*, 915 F.3d at 1326 (denying motion to stay and noting "the manageability of the district court's order").

Finally, Appellants cite no evidence to support their vague assertion of "voter confusion" absent a stay. Mot. 16. No such record evidence exists. As the district court recognized, Plaintiffs request an injunction "*preventing* changes to Florida's election law from going into effect." Op.265. The injunction essentially preserves the 2020 status quo ante, and given record turnout in 2020, more voters than ever are already familiar with voting in the pre-SB 90 regime.

III. A Stay Will Substantially Injure Appellees

Appellants do not squarely address this *Nken* factor either, arguing instead that the only harm Plaintiffs would experience by a stay is a "victory . . . at worst delayed pending appeal." Mot. 16. To the contrary, a stay will severely injure Plaintiffs by permitting an unconstitutional law to remain in effect.

The district court found that SB 90 will unconstitutionally deprive Floridians, particularly Black Floridians, of the right to vote. Op.125-36. A violation of constitutional rights, particularly the right to vote, is a grave harm that constitutes irreparable injury. *See DEC*, 915 F.3d at 1327 (holding stay would cause harm because it "would disenfranchise many eligible voters"); *League of Women Voters v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *A.H. ex rel. Hester v. French*, 985 F.3d 165, 184 (2d Cir. 2021); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Am.*

Trucking Assn's, Inc. v. City of Los Angeles, 559 F.3d 1046, 1058-59 (9th Cir. 2009). This *Nken* factor disfavors a stay, as well.

IV. Public Interest Lies In Denying The Motion For A Stay

For many of the same reasons, the public interest disfavors a stay. First, as this court has emphasized, "the public interest is served when constitutional rights are protected." *DEC*, 915 F.3d at 1327. Conversely,"[t]he public has no interest in enforcing an unconstitutional" law. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). Where granting a stay would create "a substantial risk that citizens will be disenfranchised," *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016), the public interest disfavors a stay. *See DEC*, 915 F.3d at 1327; *Ga. Muslim Voter Project*, 918 F.3d at 1274.

Nor can the *Purcell* principle justify a stay. First, Appellants have waived that argument: they never raised *Purcell* below as a basis for denying injunctive relief, even after the district court expressly invited them to brief it. *See* Tr. 3070-71. More fundamentally, *Purcell* is relevant only when an injunction would "alter the election rules *on the eve of an election*." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (emphasis added). Here, Florida's next statewide elections are not scheduled to take place until August 23, 2022—nearly five months after the district court issued its injunction. *See Election*

Dates, Fla. Dep't of State, https://dos.myflorida.com/elections/for-voters/election-dates/ (last visited April 21, 2022). Early in-person voting does not begin until August, and VBM ballots will not be mailed to domestic voters until mid-July. *Id.* State and local officials thus have ample time to make the modest changes required by the injunction before Floridians cast their ballots. The injunction against the registration disclaimer requires no action at all on the State's part, and the remaining provisions require only minimal changes, if any.[5]

Appellants point to the Supreme Court's decision to grant a stay in *Milligan* as evidence that the injunction was "too close" to an upcoming election. Mot. 17. But that case bears no resemblance to this one. Unlike in *Milligan*, Appellants do not point to record evidence or explain how the district court's injunction creates meaningful, administrative challenges or "disruptive implementation." 142 S. C. at 881 n.1.

Thompson v. Dewine, No. 19A1054, 2020 WL 3456705 (Mem.) (S. Ct. June 25, 2020), is even less helpful. Neither the Supreme Court's summary order nor the underlying Sixth Circuit decision indicates, as Appellants suggest (Mot. 17), that *Purcell* categorically bars injunctions against state election laws during the *six-month* period before an election. The district court had enjoined, among other

[5] The preclearance remedy does not implicate *Purcell* at all, as it does not directly "alter [the State's] election rules." *RNC*, 140 S. Ct. at 1207.

things, the statutory deadlines for submitting initiative petitions, and *those* deadlines were "imminent." *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020). *Thompson*, like *Milligan*, thus reinforces the need to examine the specific changes required by an injunction to determine whether it was issued "too close" to an election. Here, the modest changes required by the district court's injunction can easily be implemented by the start of voting and will not otherwise disrupt the electoral process.

CONCLUSION

Appellants' Motion for a Stay should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2) and 32(g)(1), the undersigned counsel for appellees certifies the following:

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,091 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared using Microsoft Office Word 365 and is set in Times New Roman font in a size equivalent to 14 points or larger.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing response in opposition to time sensitive motion for stay pending appeal was filed electronically on April 21, 2022 and will therefore be served electronically upon all counsel.

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