Nos. 22-11143 (L); 22-11133; 22-11144; 22-11145

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC. 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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus curiae certifies that, in addition to those identified by plaintiffs-appellees, defendants-appellants, and other amici the following persons may have an interest in the outcome of this case:

1. Baldwin, Anna, U.S. Department of Justice, Civil Rights Division, counsel for the United States; and
2. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States; and
3. Flynn, Erin, U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States is not aware of any publicly-traded company or corporation that has an interest in the outcome of this appeal.

s/ Anna M. Baldwin
ANNA M. BALDWIN

Date: August 17, 2022

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INTEREST OF THE UNITED STATES

This case involves questions concerning Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, and preclearance relief under Section 3(c) of the VRA, 52 U.S.C. 10302(c). The Department of Justice is charged with enforcing the VRA, 52 U.S.C. 10308(d), and has a substantial interest in how courts construe its provisions. The Department files this brief under Rule 29(a)(2).

STATEMENT OF THE ISSUE

In 2021, Florida enacted Senate Bill 90 (SB 90), which includes restrictions on ballot drop boxes and third-party voter registration, and amends the ban on solicitation of voters near polling places to include the provision of non-partisan aid (such as water). After a two-week bench trial, the district court found that the Florida Legislature enacted these three provisions at least in part to suppress the votes of Black citizens. The court permanently enjoined their use and also granted preclearance relief. The United States primarily addresses the following question:

Whether the totality of the evidence supports affirming the district court's factual findings that three provisions of SB 90 intentionally discriminate against Black voters, or, alternatively, supports remanding to the district court for the limited purpose of confirming whether it would have reached the same findings absent any error in its treatment of Florida's history of discrimination.

STATEMENT OF THE CASE

1. Statutory Framework

Section 2 of the VRA, 52 U.S.C. 10301, imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 557 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C.

10301(a). Section 2 prohibits practices that are enacted at least in part with discriminatory intent, as well as those that have a discriminatory result. See *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2334, 2348-2349 (2021); *Chisom* v. *Roemer*, 501 U.S. 380, 394 n.21, 404 (1991); *Greater Birmingham Ministries* v. *Secretary of State of Ala.*, 992 F.3d 1299, 1329 (11th Cir. 2021) (*GBM*).

Section 2 discriminatory intent claims rely on the same assessment of circumstantial and direct evidence of intent that courts undertake for unconstitutional discrimination claims. See *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-268 (1977); see also *Brnovich*, 141 S. Ct. at 2349; *Veasey* v. *Abbott*, 830 F.3d 216, 229-230 (5th Cir. 2016) (en banc); *North Carolina State Conf. of the NAACP* v. *McCrory*, 831 F.3d 204, 220-221 (4th Cir. 2016). Discriminatory intent "sufficient to constitute a violation of the [F]ourteenth" or Fifteenth Amendments is "sufficient to constitute a violation of [S]ection 2." *McMillan* v. *Escambia Cnty.*, 748 F.2d 1037, 1046 (Former 5th Cir. 1984); see also *United States* v. *Marengo Cnty. Comm.*, 731 F.2d 1546, 1556 (11th Cir. 1984).[1]

[1] In *City of Mobile* v. *Bolden*, 446 U.S. 55, 61 (1980), a plurality of the Supreme Court held that Section 2, as originally enacted, reached only constitutionally prohibited conduct. When Congress amended Section 2 in 1982, it added a discriminatory results test, see *Chisom*, 501 U.S. at 403-404, but it did not

In *Arlington Heights*, the Supreme Court articulated a non-exhaustive list of evidentiary factors a court may consider to determine whether officials acted with racially discriminatory intent, including: (1) whether the impact of the decision bears more heavily on one racial group than another; (2) the historical background of the decision; (3) the sequence of events leading up to the decision; (4) substantive and procedural departures from the normal decision-making process; and (5) contemporary statements and actions of key decision-makers. 429 U.S. at 266-268. Courts in this circuit also consider "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives." *GBM*, 992 F.3d at 1321.

To establish discriminatory intent, a plaintiff must show that race was a motivating factor for the official action. Mere "awareness of consequences" is not enough; rather, discriminatory intent requires that the legislature acted at least in part "because of," and not "in spite of," a law's "adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979). The evidence need not show "that the challenged action rested solely on

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alter the showing for a statutory intent violation, which remains the same as the showing required under the constitution. See *Thornburg* v. *Gingles*, 478 U.S. 30, 34-37, 43-45 (1986); see also S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) ("Plaintiffs must either prove [discriminatory] intent, or alternatively, must show that the challenged system or practice * * * results in minorities being denied equal access to the political process.").

racially discriminatory purposes" or even that the discriminatory purpose "was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265; see also *McCrory*, 831 F.3d at 222 (holding that "targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose"); *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) (affirming that fragmenting Hispanic population in pursuit of a non-racial objective was purposeful racial discrimination). Moreover, establishing discriminatory intent does not require proof of racial animus, only an intent to disadvantage minority citizens, for whatever reason. *McCrory*, 831 F.3d at 222-223; *Garza*, 918 F.2d at 778 & n.1 (Kozinski, J., concurring and dissenting in part). That reason can include a simple desire by decision-makers to "entrench themselves" in power. *McCrory*, 831 F.3d at 222. See also *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 440 (2006) (LULAC).

Once the plaintiff shows that racial discrimination was a motivating factor behind the challenged law's enactment, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter* v. *Underwood*, 471 U.S. 222, 228 (1985); see also *GBM*, 992 F.3d at 1321. At this step, "courts must scrutinize the legislature's *actual* nonracial motivations to determine whether they *alone* can justify the legislature's choices." *McCrory*, 831 F.3d at 221.

2. Procedural History

a. Florida's Governor signed SB 90 into law on May 6, 2021. Two sets of plaintiffs alleged that the Legislature's enactment of certain provisions of SB 90 was motivated, at least in part, by racially discriminatory intent in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the VRA.[2] As relevant here, plaintiffs challenged, and the district court addressed, the following provisions of SB 90 as intentionally denying or abridging the rights of Black voters:

- *Vote-By-Mail (VBM) Application Request Restrictions*. Section 24 of SB 90 requires voters to submit a new VBM application every two years, for each general election cycle. Fla. Stat. § 101.62(1)(a) (2022).

- *VBM Application Verification Restrictions*. Section 24 of SB 90 also requires voters requesting a VBM ballot to "provide the elector's Florida driver's license number, * * * Florida identification card number, or the last four digits of the elector's social security number, whichever may be verified in the supervisor's records." Fla. Stat. § 101.62(1)(b) (2022). Supervisors of Elections (SOEs), the elected officials in each of Florida's 67 counties who administer Florida's elections, may only provide a VBM ballot if the information that the voter provides is already on file—but such information is missing for hundreds of thousands of currently registered Florida voters. Order 107.

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[2] See *Florida Conf. of the NAACP* v. *Lee*, No. 4:21-cv-187 (N.D. Fla.); *Florida Rising Together* v. *Lee*, No. 4:21-cv-201 (N.D. Fla.). All "Order" citations refer to the district court's final order, Doc. 665, in *League of Women Voters of Florida, Inc.* v. *Byrd*, No. 4:21-cv-186-MW-MAF (N.D. Fla.). All "Br." citations refer the opening brief for Florida's Secretary of State and Attorney General as Defendants-Appellees.

- *Drop-Box Restrictions*. Florida law allows voters to return their VBM ballots by mail as well as via secure ballot drop boxes. Fla. Stat. § 101.69(2) (2022). Section 28 of SB 90 requires that drop boxes at any location other than an SOE office may receive ballots only during the hours and days of early in-person voting. SB 90 also requires that, regardless of a drop box's location, "an employee of the supervisor's office" continuously monitor all drop boxes "in person" during the times when ballots may be deposited. See Fla. Stat. § 101.69(2) (2022). Under SB 90, drop boxes not located at an SOE office are no longer available on the day before Election Day or on Election Day.

- *Third-Party Voter Registration Restrictions*. Florida law permits third-party voter registration organizations (3PVROs) to register with the Secretary of State and engage in voter registration drives to collect and submit voter registration applications. Under Section 7 of SB 90, 3PVROs are fined if they fail to deliver the application, within 14 days, to the "[SOE] in the county in which the applicant resides." Fla. Stat. § 97.0575(3)(a) (2022). SOEs will no longer process out-of-county voter registration applications from 3PVROs.

- *Solicitation Definition*. Florida law prohibits certain activities defined as the "solicitation" of voters within 100 feet of a polling place. Section 29 of SB 90 expands the definition of solicitation to include "engaging in any activity with the intent to influence or effect of influencing a voter." Fla. Stat. § 102.031(4)(b) (2022). The district court interpreted this provision to reach "the non-partisan provision of aid to voters waiting in line to vote, such as giving out water, fans, snacks, chairs, ponchos, and umbrellas." Order 12.

b. Following a two-week bench trial, the district court issued a lengthy decision evaluating plaintiffs' intentional discrimination claims, as well as other statutory and constitutional challenges. After detailed consideration of the *Arlington Heights* and *GBM* factors, the court found that plaintiffs had proven that some, but not all, of the challenged provisions were motivated, at least in part, by racially discriminatory intent.

The court found that plaintiffs had proven that the Florida Legislature passed SB 90's solicitation definition and its drop-box and 3PVRO restrictions with an intent to discriminate against Black voters in violation of Section 2 of the VRA and the Fourteenth and Fifteenth Amendments. Order 133-136 (findings of ultimate intent); see also Order 37-133 (underlying findings). The court permanently enjoined these provisions and also imposed a ten-year preclearance remedy under Section 3(c) of the VRA limited to statewide voting-related enactments or regulations governing third-party voter registration, drop boxes, or line-warming activities. Order 269-281.

c. Defendants appealed and sought a stay pending appeal of the district court's permanent injunction and imposition of Section 3(c) relief, which a panel of this Court granted. *League of Women Voters of Fl.*, *Inc.*, v. *Florida Sec. of State*, 32 F.4th 1363, 1369 (11th Cir. 2022).

SUMMARY OF ARGUMENT

This Court should affirm the district court's ultimate findings that three provisions of SB 90 were motivated, at least in part, by racially discriminatory intent in violation of Section 2 of the VRA. The district court's core factual findings are that, in the face of surging turnout in the 2020 election, the Florida Legislature responded by enacting provisions that impose disparate burdens on Black voters (SB 90's solicitation definition and its drop-box and 3PVRO

restrictions), and which were chosen precisely because of those burdens to secure a partisan advantage. The court's findings of discriminatory intent are a permissible view of the record based on the entirety of the evidence.

In analyzing plaintiffs' Section 2 intent claims, the district court properly considered evidence of racially polarized voting. When race and party are tightly intertwined, polarized voting patterns can provide a powerful incentive to enact restrictions that, by design, bear more heavily on minority voters. Indeed, when a legislative majority acts to entrench itself by targeting voters by race because those voters are unlikely to vote for the majority party, that purpose "constitute[s] racial discrimination" that both the Constitution and Section 2 prohibit. *North Carolina State Conf. of the NAACP* v. *McCrory*, 831 F.3d 204, 233 (4th Cir. 2016).

Nor did the district court err by failing to specifically apply a "presumption of legislative good faith" to its analysis of SB 90. The court applied the well-established framework from *Arlington Heights* and *GBM*, and did not shift plaintiffs' burden of proof onto defendants in analyzing the role that race played in the enactment of the challenged provisions. To be sure, the court included an extensive discussion of Florida's history of discrimination, but it also carefully scrutinized the specific decisions of the Legislature that enacted SB 90, striking down only those provisions that targeted Black voters specifically, as opposed to Democrats generally.

To the extent the district court's treatment of Florida's history of discrimination calls into question whether it would have reached the same ultimate findings absent that treatment, this Court may wish to issue a limited remand. This would allow the district court to indicate whether it would have reached the same determinations absent such treatment. It would further ensure the timely disposition of this case and protect against the imposition of intentionally discriminatory, unconstitutional practices in upcoming election cycles.

ARGUMENT

THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDINGS THAT RACIALLY DISCRIMINATORY INTENT MOTIVATED THE ENACTMENT OF THREE SB 90 PROVISIONS

A. Standard Of Review

A discriminatory intent finding is a "pure question of fact" reversible only for clear error. *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982) (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-288 (1982)). Under clear-error review, the question for this Court is not whether it would have made the same factual findings and inferences as the district court, but whether such findings are permissible based on the entire record. See *Brnovich*, 141 S. Ct. at 2349 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (citation omitted). Here, the intentional discrimination findings are supported by the totality of facts and evidence before the district court.

B. The District Court's Ultimate Findings Of Discriminatory Intent Are Entirely Permissible In View Of The Entire Record

1. This Court should affirm the district court's ultimate findings that the Florida Legislature enacted three provisions of SB 90 with racially discriminatory intent, in violation of Section 2 of the VRA and the Constitution. The district court's core factual findings are that, in response to surging turnout in the 2020 election, the Legislature enacted SB 90's solicitation definition and its drop-box and 3PVRO restrictions to disparately burden Black voters in order to secure a partisan advantage.

Consistent with an overall legislative purpose of gaining partisan advantage, the court pointed to evidence indicating that the Legislature enacted SB 90 in the wake of massive turnout for the 2020 election that featured Black and Democratic voters increasingly voting by mail (VBM). Order 67. Among other findings, the court found that:

- "In the first legislative session after the 2020 election," the [Florida] Legislature enacted SB 90 and "made a sweeping set of changes to Florida's election code, with a specific focus on VBM." Order 69.

- The 2020 general election in Florida saw "a surge in turnout," with "1,565,612 *more* voters" casting ballots "than in 2016." Order 67. In addition to this "massive turnout," the election saw a "surge in VBM usage by Black and Democratic voters." Order 129.

- Historically, "White and Latino voters have generally used vote by mail in greater percentages than Black voters." Order 66. In 2020, while white VBM use (at 45%) still remained greater than Black VBM use, that election nonetheless saw "Black VBM use double[] to around 40%." Order 66.

- The partisan affiliation of voters using VBM in 2020 election also shifted. For the first time, Democrats outpaced Republicans in using VBM. Order 66.

- Despite increased mail voting and overall turnout, the court found that Florida's 2020 election proceeded smoothly. Order 129. State officials, including the Governor and House and Senate sponsors of SB 90, "praised Florida's election performance." Order 68.

Against this backdrop, the court made numerous findings to support its determination that the stated justifications for the three challenged provisions were largely pretextual:

- The court found that "sponsors and supporters offer[ed] conflicting or nonsensical rationales" for SB 90's enactment. Order 69. While SB 90's stated purpose was "to proactively instill . . . voter confidence by ensuring election integrity and security," there was no "evidence before the Legislature that fraud is even a marginal issue in Florida elections." Order 70.

- The court found that the stated justifications for the drop-box restrictions were largely baseless. Order 74-75. While proponents claimed that "drop box tampering is a regular phenomenon that happens," there was "[n]o evidence * * * presented to the Legislature that [it] actually occurs." Order 74. Supporters also claimed that "the provision was necessary to ensure the chain of custody of the ballot." Order 74. The court found this assertion "nonsensical" because most VBM ballots "are still deposited through mailboxes" without a "chain of custody." Order 74.

- As to the solicitation restriction, the court found that the existing law already addressed the justifications given, which were "respect for privacy" or to ban "political solicitation." Order 75.

- As to the restrictions on 3PVROs, the court found that the justification given was "simply * * * false." Order 75. In both the Florida Senate and the House, proponents claimed, without any basis, that the changes were

"absolutely required by court ruling." Order 75. The court found these claims were "simply not true." Order 76.

- The court also found that the SOEs opposed SB 90. The SOEs "did not ask for SB 90, did not want SB 90, and did not like SB 90." Order 78. See also Order 77 (noting that "Senator Brandes—a Republican—stated that 'to my knowledge, not one Republican supervisor has stood up and . . . said they support this piece of legislation'").

- Notwithstanding SOE opposition, SB 90 was passed in "hyper-partisan" fashion (Order 83), with little time for testimony or debate. Order 81-82.

The court found that certain of the challenged provisions would disproportionately burden Black voters, and that the Legislature, in an effort to gain a partisan advantage, intentionally targeted Black voters in order to impair their voting strength because of highly racially polarized patterns in Florida elections:

- The court found that SB 90's drop-box restrictions will "burden voters who use drop boxes." Order 97. The court found that "Black voters disproportionately use drop boxes" and disproportionately "use them in precisely the ways SB 90 prohibits," namely, "outside of early voting and outside of typical business hours." Order 101-103. The court based this finding on expert testimony showing that in Columbia County, Black voters were more likely than either white or Latino voters to deposit their ballots in a drop box outside of early voting hours. Order 102. Likewise, evidence from Manatee County showed that Black voters were more likely than either white voters or Latino voters to deposit their VBM ballots outside of normal business hours. Order 102-103.[3]

- By restricting the availability of drop boxes, the court found that SB 90 effectively "increase[s] the time, transportation, and information costs of

[3] The court made these findings based on the subset of counties for which data was available, and noted that plaintiffs' experts had explained that this data could be extrapolated to drop-box use by race statewide. Order 99-100.

voting by drop box," and that "[b]ecause of the lingering effects of past discrimination, these costs will fall more heavily on Black voters," who are more likely to work jobs with inflexible hours and have less access to transportation. Order 104.

- The court found that the solicitation definition will also disparately affect Black voters. Based on expert evidence, the court found that Black (and Latino) voters in Florida are "disproportionately likely to wait in line to vote," and that the provision "discourages third parties from helping those waiting to vote." Order 112.

- The court also found that the 3PVRO provision will disparately affect Black voters. The court found that "minority voters use 3PVROs at rates much higher than White voters," such that approximately 15.37% of Black voters registered using a 3PVRO, in contrast to just 2.79% of white voters. Order 114. By "imposing additional costs" on 3PVROs, the court found that SB 90 would "limit[] the number of voters each 3PVRO can reach." Order 113.

Importantly, the court also found that the evidence "suggest[ed]" that the Legislature not only knew about these racially disparate effects, but "that it specifically sought" out such information. Order 116-117. The Legislature received detailed voter registration and voter history demographic information from the Florida Department of Elections following the 2020 election, and it also sought out information about first-time VBM voters, "who uses drop boxes," and the racial demographics of voters registered by 3PVROs. Order 117-119 (noting that Senator Farmer testified that the Legislature was in possession of statistical evidence regarding rates of registration through 3PVROs by race).

The court also found that the prevalence of racially polarized voting in Florida contributed to SB 90's passage. Order 127. The court found that "politics

in Florida are racially polarized," such that in "every statewide election for the past 20 years, about nine in every ten Black voters has voted for the Democratic [P]arty" while "White voters heavily favor the Republican Party, and make up about 80% of its constituency." Order 127. The court explained that because "Florida's elections are decided by razor thin margins, depressing just a few thousand of your opponent's supporters can easily swing an election." Order 127. As such, the "temptation is therefore great for the party in the majority to target the particular racial groups that support the minority party." Order 127. Faced with 2020's surge in turnout and the growing use of VBM ballots by Black and Democratic voters, the court found that the Florida Legislature "enacted SB 90 to improve the Republican Party's electoral prospects." Order 132.

Yet, the court did not find that the Legislature targeted Black voters as to every challenged provision. As to the VBM request provision, the court found—consistent with text messages between SB 90's House sponsor and the chair of the Florida Republican Party—that the provision was meant "to cancel Democratic VBM requests generally, and not to specifically target Black VBM requests." Order 133. Likewise, the court found that plaintiffs had not proven that the VBM Application Verification provision disproportionately affected Black voters, or that the Legislature believed that it would have such an effect. Order 134.

In contrast, the court found that the remaining challenged provisions—the drop-box and 3PVRO restrictions, and the solicitation definition—"specifically target Black voters" (Order 134), and not Democrats generally. The court found that while "Democrats are more likely to use drop boxes" (Order 134), "SB 90 effectively bans drop-box use at the specific times and the specific days that Black voters, not all Democratic voters, are most likely to use them." Order 134-135. The court explained that "[t]he same is true" for the solicitation and 3PVRO restrictions. Order 135. "White Democrats do not wait in long lines, nor do they use 3PVROs to register." Order 135. Instead, "to advance the Legislature's main goal of favoring Republicans over Democrats," the Legislature adopted these provisions "with the intent to target Black voters because of their propensity to favor Democratic candidates." Order 135. The court concluded that "[b]ecause the Legislature passed the drop-box provisions, the solicitation definition, and the [3PVRO] registration return provision with the intent to discriminate against Black voters, those provisions violate the VRA." Order 135.

2. As reflected in the findings highlighted above, the court's ultimate findings of discriminatory intent do not depend on one or even a handful of individual facts. Rather, ample evidence supports the court's overarching finding that "to advance the Legislature's main goal of favoring Republicans over Democrats," the Legislature adopted SB 90's drop-box and 3PVRO restrictions,

and solicitation definition "with the intent to target Black voters because of their propensity to favor Democratic candidates." Order 135. Against a backdrop of racially polarized voting patterns, the pretextual rationales, strong opposition of the SOEs, and the foreseeable racially-disparate impacts amply support the district court's findings that these restrictions were enacted "because of," and not merely "in spite of," their racially disparate impacts. See *Feeney*, 442 U.S. at 279. As the Fourth Circuit held in a similar discriminatory intent challenge to omnibus voting legislation that North Carolina adopted in the wake of significant increases in turnout by Black voters, "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." *McCrory*, 831 F.3d at 222; see also *LULAC*, 548 U.S. at 440 (stating that Texas "took away * * * Latinos' opportunity [to elect] because Latinos were about to exercise it" and that "[t]his bears the mark of intentional discrimination").

As part of its intent analysis, the district court appropriately considered Florida's racially polarized voting patterns. While "[r]acially polarized voting is not, in and of itself, evidence of racial discrimination," it is well-established that such voting patterns are highly relevant because polarized voting provides "an incentive for intentional discrimination in the regulation of elections." *McCrory*, 831 F.3d at 222. Defendants argue (Br. 39) that racially polarized voting is

relevant only to vote dilution (*i.e.*, districting) cases, but racially polarized voting patterns also provide important evidence in vote-denial and abridgement cases. When race and party are highly correlated, patterns of "racially polarized voting may motivate politicians to entrench themselves through discriminatory election laws" by making it more difficult for members of a racial minority to register and vote. *McCrory*, 831 F.3d at 222.

Given the evidence presented at trial and the court's factual findings, defendants cannot argue that the invalidated provisions of SB 90 were motivated solely by party, and not race. The court carefully explained that the three invalidated provisions "specifically target Black voters" and not Democratic voters generally. Order 134. Even "if done for partisan ends," when a majority party uses the law to "entrench itself * * * by targeting voters who, based on race" are unlikely to vote for the majority party, such a purpose constitutes impermissible racial discrimination. *McCrory*, 831 F.3d at 233.

C. In Light Of The Entirety Of The District Court's Factual Findings, Its Analysis Of Florida's History Of Discrimination Does Not Constitute Reversible Error

Contrary to the stay panel's initial determination, the district court did not commit reversible error in its consideration of Florida's history of discrimination. Evidence of past discrimination is unquestionably relevant to the discriminatory-intent inquiry. See *Abbott* v. *Perez*, 138 S. Ct. 2305, 2325 (2018) ("The 'historical

background' of a legislative enactment is 'one evidentiary source' relevant to the question of intent.") (quoting *Arlington Heights*, 429 U.S. at 267). To be sure, this Court has cautioned that proper application of this *Arlington Heights* factor does "not provid[e] an unlimited look-back to past discrimination." *GBM*, 992 F.3d at 1325. Even though the district court discussed this factor extensively, its ultimate findings were based on its consideration of all of the *Arlington Heights* and *GBM* factors, as well as more recent evidence explaining the Legislature's impetus for enacting the three invalidated SB 90 provisions. See pp. 11-16, *supra*.

The district court correctly recognized that a jurisdiction's history of discrimination is not, by itself, outcome-determinative: while "Florida has a long history of racial discrimination against Black and Latino Floridians," such "historical discrimination cannot, on its own, prove that any law that harms racial minorities was passed with discriminatory intent." Order 126. If the court had given the sort of near-dispositive weight to this factor as the stay panel suggested, one would have expected the court to have invalidated all of the provisions plaintiffs challenged as racially discriminatory. But the court did not do so. Instead, it found that the evidence supported only a partisan purpose as to both of the challenged VBM restrictions, and that plaintiffs had not proven that the Legislature specifically acted to target Black voters in particular. See Order 134.

By contrast, as to the three provisions that it did enjoin—SB 90's drop-box, 3PVRO, and line-warming restrictions—the court made extensive findings explaining why the evidence showed that these provisions were enacted because of, and not in spite of, the disparate burdens those provisions would impose on Black voters. None of the court's key findings regarding the drop-box restrictions—namely that Black voters are more likely to use drop boxes, and use them in ways restricted by SB 90—depend on the court's discussion of distant events in Florida's history of discrimination. The same is true for the court's findings about the disparate burdens that the Legislature imposed on Black voters through the 3PVRO restriction and solicitation definition.

The court's findings that the Legislature intended to make certain forms of registering and casting a ballot more difficult for Black voters under SB 90 are grounded not in long-past history. Instead, the district court's intent findings flow primarily from contemporaneous evidence—*e.g.*, about the voter information the Legislature had before it, racially polarized voting patterns and increased turnout featuring a surge in Black VBM use in 2020, the Legislature's refusal to impose less-burdensome alternatives, and the pretextual explanations provided for these provisions in light of the strong opposition from election supervisors. The court's view of the invalidated provisions as evincing discriminatory intent is certainly plausible in light of the entire record, and this Court should affirm based on the

deference owed to the district court where the record supports either of two permissible views. See *Brnovich*, 141 S. Ct. at 2349.

D. There Is No Special Showing Needed To Overcome The Presumption Of Good Faith In The Context Of Statewide Legislative Enactments

Defendants argue (Br. 17) that the district court reversibly erred by failing to apply a "presumption of legislative good faith" to SB 90. Not so. That contention misunderstands the application of the presumption of good faith and the Supreme Court's decision in *Abbott* v. *Perez*, 138 S. Ct. 2305 (2018).

Abbott must be viewed in the context of that case's unique procedural history, which differs significantly from this case. The question in *Abbott* was whether the challengers or the State bore the burden of proof in establishing that a redistricting plan adopted in 2013 was not tainted by discriminatory intent animating an earlier redistricting plan adopted in 2011. 138 S. Ct. at 2324. The 2013 plan made "only very small changes" from a plan a three-judge district court developed to remedy the 2011 plan. *Id*. at 2325. In addressing the 2013 plan that the Texas Legislature subsequently enacted, *Abbott* stressed that the good faith of the enacting legislature must be presumed, and that the lower court had improperly placed the burden of proof on the State to show that its 2013 plan was not tainted by the unlawful intent underlying the 2011 plan. *Ibid.* ("Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State.").

Abbott's discussion of a presumption of good faith did not change the well-established *Arlington Heights* framework. *Abbott* simply made clear that "past discrimination" does not "flip[] [plaintiffs'] evidentiary burden on its head." 138 S. Ct. at 2325. *Abbott* does not require a district court addressing a discriminatory purpose challenge to assign special credence to particular types of evidence or draw only positive inferences from the actions or statements of state officials. The Supreme Court's decision in *Brnovich* confirms that *Abbott* did not change the "familiar approach outlined in *Arlington Heights*." *Brnovich*, 141 S. Ct. at 2349. Indeed, *Brnovich* does not even mention the presumption of good faith in its discussion of the *Arlington Heights* framework and its reversal of the Ninth Circuit's en banc holding (contrary to the findings of the district court in that case) that certain Arizona voting changes were enacted with discriminatory intent.

The Fourth Circuit's decision in *North Carolina State Conference of the NAACP* v. *Raymond*, 981 F.3d 295 (4th Cir. 2020), which Florida also relies on, is consistent with this understanding of *Abbott*. See Br. 17. *Raymond* concerned a challenge to a voter-identification law that the North Carolina General Assembly passed in 2018. The Fourth Circuit held that the district court erred in enjoining the 2018 law, because, in doing so, it "considered the General Assembly's discriminatory intent in passing the 2013 Omnibus Law," which the Fourth Circuit had struck down, as "effectively dispositive" of the intent underlying the 2018 law.

Raymond, 981 F.3d at 303. Accordingly, the Fourth Circuit held that the district court had "improperly flipped the burden of proof" and required the State to prove that its actions in 2018 did not bear "the taint of [the 2013 General Assembly's] discriminatory intent." *Id*. at 304. It is only after a plaintiff shows that racial discrimination was a motivating factor behind the challenged law's enactment that "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without" this factor. *Id*. at 303 (quoting *Hunter*, 471 U.S. at 228).[4]

The district court here did not improperly shift the burden of proof to defendants at the outset to show that past racial discrimination did not taint SB 90's enactment. Instead, the court properly held plaintiffs to their burden under *Arlington Heights* and *GBM* of proving that race was a motivating factor in SB 90's enactment. Under this well-settled framework, there is no need to apply a further, heightened presumption of legislative good faith because plaintiffs already

[4] The district court did not apply the burden-shifting framework for Fourteenth and Fifteenth Amendment claims to plaintiffs' Section 2 claims, instead stating that "[o]nce intent is shown, it is not a defense that the same action would have been taken regardless of the racial motive." Order 135 (quoting *Askew* v. *City of Rome*, 127 F.3d 1355, 1373 (11th Cir. 1997)). In our view, the same two-step burden-shifting framework applies to all intentional discrimination claims, whether brought under Section 2 or the Constitution. See *City of Mobile*, 446 U.S. at 60-62(explaining that Section 2, as originally enacted, was coterminous with the Fifteenth Amendment). The distinction is immaterial here, however, because the district court applied the two-step framework to plaintiffs' constitutional intentional discrimination claims. It concluded that defendants had failed, and indeed did "not even try," to show that the challenged provisions would have been adopted absent discriminatory intent. Order 136.

face an appropriately difficult task in proving discriminatory intent in statewide legislative enactments. See *Hunter*, 471 U.S. at 228; *GBM*, 992 F.3d at 1324.

Admittedly, in evaluating the first *Arlington Heights* factor, the court characterized prior cases challenging different enactments not at issue here as evincing a repeated pattern of racial discrimination by the State notwithstanding the fact that those earlier decisions did not find an intent to discriminate:

> Skilled and well-respected judges from multiple courts examined the provisions discussed above, and they all found that the Florida Legislature did not enact them with the intent to discriminate based on race. * * * This case is different because this Court now has 20 years of legislation before it. * * * Based on the indisputable pattern set out above, this Court finds that, in the past 20 years, Florida has repeatedly sought to make voting tougher for Black voters because of their propensity to favor Democratic candidates.

Order 64. But the court's characterization of past cases did not result in the type of burden-shifting error that the Supreme Court deemed inappropriate in *Abbott*. Nor does this aspect of the court's findings undermine the validity of its ultimate findings of discriminatory intent regarding the three invalidated provisions. Cf. *Holton* v. *City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1354 (11th Cir. 2005) (stressing that reversal is not appropriate where "the district court's account of the evidence is plausible in light of *the record viewed in its entirety*" notwithstanding any evidentiary conflicts or the failure of the district court to discuss certain evidence) (citation omitted)). Affirmance of the Section 2 violation and permanent

injunction remains appropriate based on the factual findings that the district court made specific to the Legislature's enactment of the three provisions at issue here.

If the district court's treatment of the first *Arlington Heights* factor gives this Court pause with respect to an outright affirmance of the intent findings, this Court could issue a limited remand for the district court to indicate whether it would have made the same ultimate findings as to the three provisions at issue here even absent its view of those prior enactments. By retaining jurisdiction, this Court will be better positioned to timely determine the merits of plaintiffs' Section 2 claim and the propriety of the permanent injunction. See *Veasey*, 830 F.3d at 234-236, 242 (noting that although the district court decision "contained some legal infirmities, the record also contained evidence that could support a finding of discriminatory intent" and accordingly remanding for reweighing of the evidence); cf. *Fils* v. *City of Aventura*, 647 F.3d 1272, 1280 (11th Cir. 2011) (noting a prior limited remand where the district court was instructed to set forth the complete factual basis for a legal decision); *Pettway* v. *American Cast Iron Pipe Co.*, 681 F.2d 1259, 1269 (11th Cir. 1982) (retaining jurisdiction in order to "promote efficiency" in appellate review after the correction of legal error by the district court on limited remand).

* * * * *

While the United States takes no position on other issues in this case, including the propriety of Section 3(c) relief, this Court may wish to remand the question of Section 3(c) relief before reaching any of the legal questions defendants posit as to that relief.

Titled "[r]etention of jurisdiction to prevent commencement of new devices to deny or abridge the right to vote," Section 3(c) of the VRA allows courts to impose a preclearance remedy upon finding "violations of the Fourteenth or Fifteenth Amendments justifying equitable relief." 52 U.S.C. 10302(c). In finding preclearance relief justified here, the district court stated that "over the past 20 years, Florida has repeatedly targeted Black voters for their affiliation with the Democratic Party" (Order 275-276), but did not further specify the unconstitutional conduct on which this relief was premised. A remand would allow the district court to clarify the basis for its equitable determination. A remand would also permit the district court to conform the preclearance remedy to the statutory language. Compare 52 U.S.C. 10302(c) (stating that voting changes must be submitted before they "may be enforced") with Order 288 (using the term "enact" instead of "enforce[]").

CONCLUSION

For the reasons stated above, this Court should affirm the district court's determination that three provisions of SB 90 were enacted, at least in part, with discriminatory intent, in violation of Section 2 of the VRA and the Constitution, and should uphold the permanent injunction against the enforcement of those provisions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6472 words.

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rules of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman, 14-point font.

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