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LEGAL MEMO

In Defense of SB90: Florida's Election Integrity Law

To: FGA Partners

From: Stewart Whitson, Legal Affairs Fellow, Foundation for Government Accountability

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Background

On April 29, 2021, the Florida Legislature passed SB90, a commonsense law that seeks to strike an appropriate balance between making it easy to vote, yet hard to cheat. The bill was presented to Florida Governor Ron DeSantis on May 3, and on May 6, 2021, he signed the bill into law.

Within minutes of the governor signing, the same Democratic-Party aligned law firm that filed lawsuits earlier this year following the passage of election integrity bills in Georgia, Iowa, and Montana filed yet another suit, this time in Florida. That same day, a second lawsuit was filed making additional meritless claims which the first lawsuit did not, namely alleged violations under Section 2 of the Voting Rights Act (VRA) and under Title II of the Americans with Disabilities Act.

Both lawsuits seek a court order barring Florida's Secretary of State (as well as the Attorney General, or its election supervisors as was the case in the second lawsuit) from enforcing the new law, relying on unsubstantiated claims that the new law will place an undue burden on Floridians' rights to free speech, to assemble, and to vote. In addition to alleged violations under Section 2 of the Voting Rights Act (VRA) and under Title II of the Americans with Disabilities Act, the lawsuits further claim that the ban on "solicitation" within 150 feet of a drop box or polling entrance is unconstitutionally vague, and that the information third party registrants are required to provide to voters to inform and empower them constitutes compelled speech that chills the "expressive speech that occurs during voter registration."[1]

SB90 Does Not Place an Undue Burden on Florida Voters

Florida courts citing the U.S. Supreme Court have held that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."[2] Such regulation, courts have explained, "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[3]

Authority over the time, place, and manner of elections in Florida rests with the Florida Legislature.[4] The Florida Constitution specifically authorizes Florida's legislature to enact laws regulating the election process, and both the U.S. Supreme Court and Florida courts have recognized the prevention of potential election fraud as an important and legitimate state interest which will justify state laws that impose reasonable, non-discriminatory restrictions upon voters.[5] [6] In accordance with that authority, the Florida Legislature passed SB90 by a significant majority and the governor signed the bill into law.

Where a plaintiff challenges the constitutionality of a state election law based on a prediction as to its future impact, as Plaintiffs do here, courts will generally uphold the statute, disfavoring challenges grounded in mere speculation.[7] Courts have been clear that even where a new law imposes some additional burden upon voters, so long as the reforms are evenhanded and reasonable, the statute will be considered constitutional. As noted by the Supreme Court, "`[s]tates have a major role to play in structuring and monitoring the election process'…and states are afforded `significant flexibility in implementing their own voting systems.'"[8]

In determining whether new voting reforms enacted by a state are constitutionally permissible under the First and Fourteenth Amendment of the U.S. Constitution, courts will consider the character and magnitude of the burden placed upon voters along with the interests put forward by the state as justifications for that burden, taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[9] Here, the burden imposed upon Floridian voters is minimal, with some of the reforms actually reducing burdens that existed during the last election which, as Plaintiffs admit, saw record turnout.

Beginning with the state's interests, a review of the reforms included in SB90 makes it clear that the state's interests here include deterring and detecting voter fraud, addressing the lack of elector confidence in the election system across the political spectrum, and improving election procedures while creating uniformity in voting throughout the state. As the U.S. Supreme Court held in *Crawford*, these are all legitimate state interests that justify reasonable, non-discriminatory burdens on voters.[10]

Ballot Harvesting

One of the reforms in the new Florida law that Plaintiffs find most troubling is its ban on ballot harvesting, a practice where political operatives gather stacks of absentee ballots from vulnerable voters at places like nursing homes or long-term care facilities promising to turn them in on behalf of the voter. Since the groups and individuals that harvest ballots are generally highly partisan, legitimate concerns exist that they might tamper with ballots or otherwise exert improper influence over voters as they fill them out. In fact, the bipartisan Commission on Federal Election Reform—which was co-chaired by former President Jimmy Carter—concluded in 2005 that "absentee balloting is vulnerable to abuse in several ways" and that "citizens who vote at home, at nursing homes, in the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation."[11]

In response to these concerns, the Florida Legislature included in SB90 a restriction on this practice, limiting a person's lawful possession of ballots to his or her own, those of an immediate family member, and two others.[12] At the same time, the law expands the definition of "immediate family member" to include a grandchild (in addition to a spouse, parent, child, grandparent, sibling, or in-law), and clarifies that supervised voting at assisted living facilities and nursing homes is not subject to the limit.[13] In other words, under SB90, people who actually need assistance to vote will still receive it so long as safeguards are in place to protect voters to ensure they are not taken advantage of or otherwise denied their right to vote for the candidate of their choosing. In the eyes of the Florida Legislature, vulnerable senior citizens and others should be able to vote without having to face undue influence or pressure from a highly partisan volunteer "helping" them fill out their ballot. SB90 provides this safeguard while still allowing those who need assistance to receive it.

Annual Request to Vote by Mail

Under SB90, Florida voters wishing to vote by mail are asked to make the request to do so annually, as opposed to every other year under the old law.[14] Plaintiffs claim that this minor change will confuse voters, causing voters to inadvertently miss their opportunity to vote by failing to register on time. There are several problems with Plaintiffs' logic here. At least two of those problems are worth mentioning.

First, if the court were to accept Plaintiffs' logic that a simple change of the registration requirement from every other year to every year would cause unconstitutionally permissible confusion, then arguably any change at all to Florida's election laws would be unconstitutional since they too, under Plaintiffs' logic, would cause confusion. The result: Florida would be forever locked into the status quo, with the legislature's hands tied, prohibited from carrying out its constitutional duty to design and pass new laws to regulate elections in an ever-changing world.

Second, Plaintiffs' reasoning wrongly assumes that people would be less confused by a bi-annual requirement than they would be by an annual one. Voters are much more likely to find it easier to remember when they should request a vote-by-mail ballot if they are required to do so every year, rather than trying to remember whether it was last year or the year before that they requested one. It simply makes more sense for voters to decide each year whether they want to vote by mail or in person, not to be locked into a decision they made two years earlier. Moreover, if they've moved to a new address since their last registration, then the annual requirement will have the added benefit of ensuring the vote-by-mail ballot is actually sent to the proper address.

Drop Boxes

The law also protects the integrity of drop boxes while requiring that they be placed geographically in a manner that ensures, as practicably as possible, that everyone who wishes to utilize them can.[15] In addition, SB90 limits the use of drop boxes other than those at a supervisor's office to early voting hours and requires in-person monitoring of all drop boxes while accessible for deposit of ballots.[16] To help voters find a conveniently located drop box well in advance of the voting deadline, SB90 requires each supervisor to publish the location of drop boxes at least 30 days in advance of each election.[17]

Plaintiffs claim that these commonsense rules governing the use of drop boxes will have a deleterious effect, especially when combined with the effect of SB90's new $25,000 civil penalty election supervisors will face if they fail to properly monitor drop boxes in accordance with the law.[18] Plaintiffs claim this will cause election supervisors to significantly limit the number of drop boxes out of fear that they might be fined if they refuse to follow the law.[19] If this is true, that election supervisors will only operate drop boxes that they are actually able to monitor in accordance with the law, then the law is not unconstitutional, it is effective. It is doing exactly what it is supposed to do. Plaintiffs' argument therefore actually supports the need for a civil fine to motivate election supervisors to follow the law, as even Plaintiffs agree it will work. Allowing drop boxes to exist that are un-monitored and subject to tampering is precisely what the Florida Legislature has sought to avoid. The fact that Plaintiffs argue that this is a weakness in the new law makes it clear that Plaintiffs have no regard for securing elections. The integrity of the election is irrelevant to Plaintiffs so long as their preferred

candidate wins. For Florida legislators, their constitutional duty requires them to seek to strike a reasonable balance between election integrity and election convenience, and they have done that fairly and responsibly with SB90.

Protecting No-Solicitation Zones

Finally, Plaintiffs complain about SB90's reforms aimed at protecting no-solicitation zones, a designated area surrounding drop boxes and polling locations wherein no person, political committee, or other group may solicit votes, distribute political or campaign material, or otherwise harass Floridians on their way to vote with the intent or effect of influencing their vote.[20] To this end, SB90 adds drop box sites to the locations protected by the zones (under the old law only in-person voting sites were), clarifies the definition of "solicitation" and specifies that the definition does not prohibit supervisors' staff or volunteers from providing nonpartisan assistance or giving items to voters within the zone (such as water and food).[21] In other words, water and food may be provided to voters standing in line by an employee or volunteer working under the direction of the election supervisor, just not by highly partisan third parties seeking to sway people's votes or otherwise harass Floridian voters.

In the end, contrary to the arguments made by Plaintiffs, grounded not in fact but in illogical speculation, the reforms provided in SB90 will significantly improve Florida elections, keeping them fair and free while promoting transparency and reasonable oversight. With such smart and evenhanded reforms as these imbedded in SB90, Floridians can expect the efficiency of their elections to continue to improve, and voter participation to continue to rise.

SB90's Prohibition on Solicitation within 150 Feet of Drop Boxes and Polling Locations is Neither Unconstitutionally Vague nor Overly Broad

In 2009, in a reversal of a Florida District Court decision, the Eleventh Circuit eloquently stated that "the sanctity of the voting process and the abuse it has historically faced must allow the Florida Legislature to exercise some foresight, to take precautions, and to prohibit questionable conduct near polling places before that conduct proves its danger; a compromised election is too great a harm to require otherwise."[22]

Here, the Florida Legislature has done just that, simply exercised foresight through passage of SB90 with the aim of prohibiting questionable conduct near polling places and drop boxes that poses a well-documented risk of abuse. In passing SB90, the Florida Legislature has promoted several highly compelling state interests including the state's desire to protect voters from confusion, undue influence, and harassment while preserving the integrity of the election process.[23] As courts have noted, "[t]he State wants peace and order around its polling places, and we accord significant value to that desire for it preserves the integrity and dignity of the voting process and encourages people to come and to vote…our country's long history of election regulation, the consensus emerging from that history, and the practical need to keep voters and voting undisturbed all prove that the ban is warranted."[24]

In an attempt to weaken the protection the state has provided to Florida voters within no-solicitation zones, Plaintiffs argue that the statute's definition of "solicitation" is unconstitutionally vague and overly broad, pointing to the portion of the statutory definition that reads, "engaging in any activity

with the intent to influence or effect of influencing a voter."[25] Interestingly, Plaintiffs quote just two lines of the detailed definition which extends 13 lines in length, then claim, based on those two lines alone, that the definition is vague. A fuller version of the statute's definition of "solicitation" provides additional details and includes, "seeking or attempting to seek any vote…distributing or attempting to distribute any political or campaign material, leaflet, or handout…selling or attempting to sell any item; and engaging in any activity with the intent to influence or effect of influencing a voter."[26] In addition to offering clarity as to what constitutes impermissible "solicitation," the statute goes even further clarifying what does not. It states that the term "solicitation," "may not be construed to prohibit an employee of, or a volunteer with, the supervisor from providing nonpartisan assistance to voters within the no-solicitation zone such as, but not limited to, giving items to voters, or to prohibit exit polling."[27]

Under the Constitution, a regulation will only be found to be void on its face if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[28] A claimant asserting that a statute is void for vagueness must prove either that the statute fails to give fair notice of wrongdoing or that the statute lacks enforcement standards such that it might lead to arbitrary or discriminatory enforcement.[29]

Here the statute is very clear that any partisan activity conducted within 150 feet of a drop box or polling site with the intent or effect of influencing a voter to vote in a particular way will not be tolerated. Examples of the types of activities that constitute impermissible behavior are provided, as are activities that do not. SB90 is clear that anyone, regardless of political affiliation, who violates the rights of voters to peacefully vote without facing undue influence or harassment, within a well-defined space of 150 feet, will be subject to prosecution. The language is clear, and any Floridian of "common intelligence" as the law requires, will know that partisan activity will not be tolerated within this zone. Thus, the statute is not unconstitutionally vague, and serves the state's interest in promoting a voting environment free from harassment and undue influence.

Regardless, even were a court to find the language here to be vague that does not automatically render SB90's definition of "solicitation" unconstitutional. Instead, the court would simply cure the vagueness through statutory interpretation rather than striking the law down as unconstitutional.[30] As the Eleventh Circuit has held, citing U.S. Supreme Court precedent, "[i]f a law is susceptible to an interpretation that supports its constitutionality, we must accord the law such meaning."[31]

In addition to their vagueness claim, Plaintiffs also claim that the statute is overly broad in violation of First Amendment. To overcome such a challenge the State must merely show that SB90 is "reasonable and does not significantly impinge on constitutionally protected rights."[32] As noted above, the burden SB90 imposes upon Floridian voters is minimal, with some of the reforms actually reducing burdens that existed during the last election. Thus, the statute's language banning solicitation within 150 feet of drop boxes and polling sites is neither unconstitutionally vague nor overly broad.

SB90's Disclaimer and Notice Requirement for Third Party Registrants Does Not Violate the First Amendment

Plaintiffs further argue that the law's requirements for third parties wishing to collect and turn in voter registration applications on behalf of others are unconstitutional because the requirements

purportedly constitute compelled speech that chills the "expressive speech that occurs during voter registration."[33]

More specifically, Plaintiffs take issue with Section 97.0575(3)(a) which requires third parties to "notify the applicant at the time the application is collected that the organization might not deliver the application," on time or at all, that the voter has the option to "deliver the application in person or by mail" themselves, while also informing the applicant how to register online so that they may track their registration and confirm that it has actually been turned in.[34] Plaintiffs take issue with the disclaimer and notice requirement because, as they themselves argue, compelling third parties to provide voters with all of this true information might cause those voters to opt to simply register themselves rather than relying on these third party organizations to do it for them. In other words, they fear speaking the truth might put them out of business.

But it won't put them out of business. Instead, it will free up third-party organizations to provide their time, services, and resources to those who still refuse or prove unable to register themselves even after being provided the disclaimer and notice. It will enable them to help more people register who actually need help registering.

Here, the Florida Legislature, in exercising its constitutional duty to regulate elections, is simply asking third-party organizations wishing to register voters to provide truthful information to Florida voters that will inform and empower them. The law is reasonable under the *Zauderer* doctrine, which holds that laws get less scrutiny under the First Amendment when they merely require the disclosure of factual information, which is precisely what SB90 does.[35] The disclaimer and notice requirement in SB90 passes constitutional muster.

Plaintiffs' VRA Section 2 Claim Fails

In addition to the claims addressed above, the second lawsuit challenging SB90, filed on behalf of the Florida State Conference of Branches and Youth Units of the NAACP and others,[36] alleges two additional claims under Section 2 of the Voting Rights Act (VRA) and under Title II of the Americans with Disabilities Act.[37] Both are without merit.

First, in order to succeed on their claim under Section 2 of the VRA, plaintiffs here must show, "based on the totality of circumstances," that SB90 causes the denial of the right to vote on the basis of race, color, or language.[38] Plaintiffs have failed to meet this requirement.

Plaintiffs' complaint is packed with conflicting assertions that defy logic. On one page, Plaintiffs applaud the "unprecedented turnout and engagement" of voters in the most recent election, particularly minority voters, then, just a few pages later they decry what they describe as Florida's "long, ongoing history of racially charged discriminatory voting restrictions," claiming a successful systematic effort over the years by Florida's elected officials to deny the right to vote to minority voters.[39] Which is it? Are minority voters being denied the opportunity to vote, or are they voting in record numbers? It can't be both.

Clearly, the high turnout of all Floridian voters in recent elections, regardless of race or language spoken, shows that voting discrimination that occurred in Florida's distant past is no longer at play.

As noted by Congress in 2006, "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, state legislatures, and local elected offices."[40] The Supreme Court has agreed with Congress that the disparity that existed in the past is no longer at play, noting that, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[41]

In the end, Plaintiffs' facts fail the "results test" of VRA Section 2, by failing to show that racial or language minorities in Florida "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[42] Since there is no discriminatory purpose behind SB90, and because the reasonable burdens the law does impose are borne by all Floridian voters irrespective of their race, Plaintiffs' VRA claim will likely fail.

Plaintiff's Claim Under Title II of the Americans with Disabilities Act Fails

Lastly, Plaintiffs claim that SB90 violates Title II of the Americans with Disabilities Act (ADA). To state a claim under Title II, Plaintiffs here must demonstrate, "(1) that [s]he is a 'qualified individual with a disability;' (2) that [s]he was 'excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity' or otherwise 'discriminated [against] by such entity;' (3) 'by reason of such disability.'"[43] Mere difficulty in accessing a benefit is not, by itself, a violation of the ADA, but rather, Plaintiffs must show "that the failure to accommodate created an injury."[44]

Here, Plaintiffs claim that the burdens imposed by SB90 "will deny voters with disabilities equal access to the franchise" and prevent them "from exercising their fundamental right to vote."[45] In support of this claim Plaintiffs fail to offer concrete facts, relying instead on mere speculation as to potential difficulty that could theoretically arise during the next election following the passage of SB90. For instance, Plaintiffs predict that as a result of SB90, "many election officials will place most or all drop boxes indoors where staff are already located, which may be less accessible to voters with disabilities."[46]

This claim fails because the stated burden, besides being speculative, isn't an injury at all. Moreover, given that buildings wherein the staff of election officials work, will presumably already be required to offer handicap access in accordance with the ADA, it is simply untrue that the indoor locations would present accessibility issues rising to the level of an injury. Regardless, even if they did, which they won't, such accessibility issues would exist irrespective of SB90, as these kinds of public facilities would need to be accessible for reasons other than voting. This claim is undeniably without merit.

Thus, Plaintiffs here have failed the second requirement for demonstrating a claim under Title II of the ADA, as they have provided no evidence to indicate that Floridians with disabilities will in any way be excluded from exercising their right to vote. As there is no injury stated, this claim will also likely fail.

Bottom Line

Both lawsuits filed to date opposing SB90 are likely to fail because they provide no evidence that SB90 places undue burden on any protected class of voters, and the minimal burdens it does create help to advance compelling state interests. In the end, the reforms provide in SB90 will significantly improve Florida elections, keeping them fair and free while promoting transparency and reasonable oversight. With smart and reasonable reforms imbedded throughout SB90, Floridians should expect the efficiency of their elections to continue to improve, and voter participation to continue to rise. SB90 makes it easier to vote, yet hard to cheat.

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[1] Plaintiff's Brief, 4:21-cv-00186-MW-MAF, pg. 66.
[2] League of Women Voters of Fla. V. Browning, 863 F.Supp. 2d 1155, 1159 (N.D. Fla., 2012) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788-90 (1983) and Storer v. Brown, 415 U.S. 724, 730 (1974)).
[3] Ibid.
[4] State by Butterworth v. Republican Party of Fla., 604 So. 2d 477 (Fla. 1992); U.S. Const. art. I, § 4, cl. 1 (stating "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof") & art. II, § 1, cl. 2 (providing that presidential electors shall be chosen in each state "in such Manner as the Legislature thereof may direct").
[5] Fla. Const. art. VI, § 1 (stating "[r]egistration and elections shall…be regulated by law").
[6] Crawford v. Marion County Election Bd., 553 U.S. 181, 191 (2008); See, e.g. League of Women Voters of Fla., Inc. v. Detzner, 314 F.Supp.3d 1205, 1215 (N.D. Fla. 2018) (stating, "[w]hen rights are subjected to 'reasonable, nondiscriminatory restrictions' then 'the state's important regulatory interests are generally sufficient to justify' the restrictions.").
[7] See e.g., Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).
[8] California Democratic Party v. Jones, 530 U.S. 567, 572 (2020); Doe v. Reed, 561 U.S. 186, 195 (2010).
[9] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); See also Burdick v. Takushi, 504 U.S. 428, 434 (1992).
[10] Crawford v. Marion County Election Bd., 553 U.S. 181, 191 (2008) (finding the State has a valid interest in "deterring and detecting voter fraud," improving election procedures that have been criticized, and "in safeguarding voter confidence").
[11] "Report of the Commission on Federal Election Reform," Center for Democracy and Election Management, American University, Pg. 46, (2005), https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf
[12] § 104.0616(2), pg. 47-48, ln. 1356-1366.
[13] Ibid.
[14] § 101.62(1)(a).
[15] § 101.69(2)(a), pg. 41, ln. 1173-1176.
[16] Id. at ln. 1176-1183.
[17] Id. at ln. 1186-1188.
[18] Plaintiff's Brief, 4:21-cv-00186-MW-MAF, pg. 53.
[19] Ibid.
[20] § 102.031(4)(a) and (b), pg. 42-43, ln. 1210-1228.
[21] Id. at ln. 1207-1233.
[22] Citizens for Police Accountability Political Comm. V. Browning, 572 F.3d 1213, 1221-1222 (11th Cir. 2009).
[23] Ibid.
[24] Ibid.
[25] Plaintiff's Brief, 4:21-cv-00186-MW-MAF, pg. 60.
[26] § 102.031(4)(b), pg. 43, ln. 1220-1228.
[27] Id. at ln. 1229-1233.
[28] Konikov v. Orange County, 410 F.3d 1317, 1329 (11th Cir. 2005) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Citizens for Police Accountability Political Comm. V. Browning, 572 F.3d 1213, 1221 (11th Cir. 2009) (citing Burson v. Freeman, 504 U.S. 191 (1992)).
[33] Plaintiff's Brief, 4:21-cv-00186-MW-MAF, pg. 63-66.
[34] § 97.0575(3)(a), pg. 14-15, ln. 389-407.
[35] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626 (1985)
[36] Plaintiff's Brief, 4:21-cv-00187-WS-MAF.
[37] Ibid.
[38] 52 U.S.C. § 10301(b), https://codes.findlaw.com/us/title-52-voting-and-elections/52-usc-sect-10301.html.
[39] Plaintiff's Brief, 4:21-cv-00187-WS-MAF, pg. 2,15, and 20.
[40] Shelby County v. Holder, 570 U.S. 529, 547 (2013).
[41] Id. at 667 (quoting Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (1990).
[42] 52 U.S.C. § 10301(b) (2021), https://codes.findlaw.com/us/title-52-voting-and-elections/52-usc-sect-10301.html.

[43] People First of Ala. V. Merrill, 467 F.Supp.3d 1179, 1214 (N.D. Ala. 2020) (citing Shotz v. Cates, 256 F.3d 1077, 1079 (11th Cir. 2001). (quoting 42 U.S.C. § 12132)).
[44] People First of Ala. V. Merrill, 467 F.Supp.3d 1179, 1214-1216 (N.D. Ala. 2020).
[45] Plaintiff's Brief, 4:21-cv-00187-WS-MAF, pg. 50.
[46] Plaintiff's Brief, 4:21-cv-00187-WS-MAF, pg. 51.