

# **Report on Voting Rights in Florida Following Recent Amendments to the Election Code**



A Report of the  
Florida Advisory Committee to the  
U.S. Commission on Civil Rights

August 2023

## **Advisory Committees to the U.S. Commission on Civil Rights**

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states, the District of Columbia, and five U.S. Territories. The committees are composed of local residents who serve without compensation. The committees advise the Commission of civil rights issues in their state, district, or territory that are within the Commission's jurisdiction. They are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

## **Acknowledgments**

The Florida Advisory Committee (Committee) would like to acknowledge the speakers who presented during the Committee's series of public meetings taking place between March and September 2022, as the Committee worked to understand broad and diverse perspectives on the civil rights impact of recent changes to Florida's election code. The Committee is also grateful to those who contributed to this work during public comment and via written testimony.

## **Florida Advisory Committee to the U.S. Commission on Civil Rights**

The Florida Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding recent changes to Florida’s election code and related civil rights impacts. The Committee submits this report as part of its responsibility to study and report on civil-rights issues in Florida. The contents of this report are primarily based on testimony the Committee heard during public meetings held via videoconference on March 28, April 29, and September 14, 2022. The Committee also includes related testimony submitted in writing during the relevant period of public comment.

This report begins with a brief background of the issues to be considered by the Committee. It then presents primary findings as they emerged from this testimony, as well as recommendations for addressing areas of civil-rights concerns. This report is intended to focus on civil-rights concerns regarding state voting procedures and recent related statutory changes. Specifically, the Committee sought to examine the extent to which recent changes to the state election code may have a disproportionate and/or discriminatory impact on voting rights based on race, color, or national origin. While additional important topics may have surfaced throughout the Committee’s inquiry, those matters that are outside the scope of this specific civil-rights mandate are left for another discussion.

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**U.S. COMMISSION ON CIVIL RIGHTS  
Florida Advisory Committee**

**REPORT ON VOTING RIGHTS IN FLORIDA  
FOLLOWING RECENT AMENDMENTS TO THE  
ELECTION CODE**

**August 14, 2023**

## EXECUTIVE SUMMARY

### FINDINGS

#### **FINDING I: THE HISTORY OF FLORIDA’S ELECTION CODE**

- *From the mid-nineteenth through the mid-twentieth centuries, Florida’s election code effectively prevented voting by racial minorities, offered limited voting opportunities to others, and contained problematic voting procedures. Since then, laws have been passed at the federal and state levels and judicial rulings were issued providing greater access to the ballot for members of historically marginalized communities as well as for the electorate as a whole.*
- *Over the past two decades, the State has repeatedly reformed its election code. These reforms have both expanded and restricted voting opportunities in a range of ways.*

#### **FINDING II: SB 90’S AMENDMENTS TO THE ELECTION CODE**

- *The Legislature adopted SB 90 after the 2020 election, even though the election was a success and no evidence of systemic voter fraud existed, to amend laws governing vote-by-mail ballot requests, dropboxes, third-party voter registration groups, voter solicitation (“line warming”) activities, and third-party ballot collection (“ballot harvesting”).*
- *The U.S. District Court for the Northern District of Florida entered a preliminary injunction against S.B. 90, primarily on the grounds it was enacted with racially discriminatory intent. The U.S. Court of Appeals for the Eleventh Circuit stayed that ruling, allowing S.B. 90 to take effect pending appeal. That court ultimately overturned most of the district court’s rulings, concluding that the statute was not adopted for racially discriminatory purposes and did not violate either the Fifteenth Amendment or Section 2 of the Voting Rights Act.*
- *Despite the new restrictions SB 90 imposed to improve voter integrity, the available data suggests that the law did not reduce voter registration or voting during the 2022 midterm elections, either for the electorate as a whole or racial minority voters in particular.*

#### **FINDING III: SB 524’S AMENDMENTS TO THE ELECTION CODE**

- *SB 524 eliminates some of SB 90’s restrictions on third-party voter registration groups*
- *SB 524 establishes a new Office of Election Crimes and Security which has raised concerns about potential voter intimidation and chilling the exercise of voting rights*
- *SB 524’s new list maintenance requirements can be a positive development if state officials observe due process protections to avoid the inadvertent removal of qualified voters*

## RECOMMENDATIONS

The Legislature could consider various modifications to SB 90 and SB 524 to eliminate unnecessary burdens, if any, on voting without jeopardizing the statute's goals or undermining its efficacy.

1. **Dropboxes**—*The Committee recommends that the Commission encourage the Legislature to:*

- *allow dropboxes to be placed at consistently staffed offices of other county agencies and used during those offices' ordinary hours of operation;*
- *allow staffed dropboxes to remain open, during ordinarily applicable access hours for that location and day of the week, between the end of the early voting period and the close of polls on Election Day (or the day before, if logistically necessary to ensure the timely tallying of votes);*
- *consider whether continuous live monitoring of video cameras at dropbox locations may be an adequate substitute for in-person staffing; and*
- *encourage county supervisors of election to have an employee or volunteer circulate among dropbox locations at least twice each day to temporarily monitor them so that individuals staffing those locations have adequate restroom opportunities.*

2. **Third-Party Registration Organizations**—*The Committee recommends that the Commission encourage the Legislature to:*

- *notify third-party voter registration groups about voter registration requirements to reduce potential confusion concerning people's eligibility to vote, and specifically inform such groups that they may avoid the inconvenience of confirming the correct county on completed registration forms by providing such forms directly to the Secretary of State's Division of Elections; and*
- *reduce the penalties for inadvertent or isolated violations of registration-related requirements (excluding the fraudulent completion or modification of voter registration forms, or wrongful destruction of completed forms) by third-party voter registration groups acting in good faith.*

3. **Request Duration for Vote-by-Mail Ballots**—*The Committee recommends that the Commission encourage:*

- *Florida election officials to gather, provide to the legislature, and publicly disclose data concerning the validity of addresses on the voter registration rolls, the*

*expiration of requests for vote-by-mail ballots, the number of requests for vote-by-mail ballots by people whose previous requests have expired, voting turnout for people whose requests for vote-by-mail ballots have expired, and statistics regarding the erroneous delivery of non-forwardable mail, to assist informed public discussion of the impact of SB 90's reduction in the duration of vote-by-mail requests; and*

- *supervisors of elections to enclose vote-by-mail ballot request forms (including prepaid return envelopes) with general election ballots to remind voters of the need to renew their requests, make it easier for them to do so, and minimize any adverse impact of SB 90's changes.*

**4. Identification for Vote-by-Mail Ballot Requests**—*The Committee recommends that the Commission encourage the Legislature to:*

- *make a Florida birth certificate available upon request without charge to otherwise eligible members of the state's citizen voting-age population, to facilitate their acquisition of a required form of identification;*
- *print a request on state-created voter registration forms urging the applicant to provide both: (i) a driver's license number or state identification number, as well as (ii) the last four digits of the social security number, in order to avoid potential difficulties in requesting vote-by-mail ballots;*
- *require supervisors of election to proactively take steps to obtain both: (i) a driver's license number or state identification number, as well as (ii) the last four digits of the social security number, of each person registered in their database, to avoid potential problems of voters including the "wrong" number on their vote-by-mail ballot request form; and*
- *require supervisors of election to contact voters via phone, e-mail, or mail, as appropriate, to notify them if they provided an identification number that does not appear in their records and transmit a blank vote-by-mail ballot if the voter provides the requisite information, as well as a blank registration form to allow the voter to update their information, if necessary.*

**5. Anti-Solicitation ("Line Warming")**—*The Committee recommends that the Commission encourage the Legislature to:*

- *clarify the scope of SB 90's prohibitions;*
- *expressly specify that individuals and private groups may provide food, water, chairs, and other resources to polling place officials for officials to distribute to people waiting in line as part of line relief efforts;*

- *mandate that election officials provide port-a-potties whenever feasible if restroom facilities are not available at early voting locations or polling places at which long lines are reasonably expected;*
- *require polling place officials to collect information concerning waiting times at early voting locations and polling places and report it in real time via a publicly accessible online app and website so voters can avoid unnecessary lengthy waits, because “line warming” activities often occur where voters face long wait times; and*
- *require polling place officials to measure waiting times at each early voting location and polling place. If, after the first day of the early voting period, the wait at any such location exceeds a half hour, election officials should be required to take remedial action at that location in the next election cycle. Such remedies might include providing additional voting machines or personnel, providing additional training or supervision for those polling place officials, or creating an additional nearby early voting location or polling place. Anyone eligible to vote at the original location would be permitted to vote either at the original location or the additional new early voting location or polling place.*

**6. Office of Election Crimes and Security**—*The Committee recommends that the Commission encourage the Legislature to:*

- *prohibit the Office from referring for prosecution or knowingly continuing to investigate individual voters who are suspected or determined to be acting on their own from discrete good-faith mistakes relating to registration or voting;*
- *require the Office to focus on identifying widespread or systemic voter fraud or other intentional problems or violations, in particular by conducting systemic or large-scale analysis of voter registration records, vote-by-mail ballot requests, and voter signatures that is beyond the capacity of individual election offices;*
- *direct the Office to specialize in cybersecurity efforts to identify potential intrusions into state or local election systems and develop countermeasures to ensure the integrity of voter registration rolls, voting equipment, and election-related computer systems;*
- *ensure that the state provides an easy, accessible, quick mechanism to allow any person convicted of an offense in a Florida court to determine whether any outstanding fines, court costs, restitution, or other fees exist that would render them ineligible to vote under Amendment 4;*
- *establish a statutory “safe harbor” providing that, if search records demonstrate that a felon checked their eligibility to vote in the recommended new database*

*described in the preceding bullet point and were erroneously informed that they were eligible to vote, that person will not be deemed to have been acted “willfully” for purposes of the state’s voter registration fraud statute, should it later be determined that they were actually still subject to unpaid fines, court costs, restitution, or other fees of which they were unaware, and*

- *provide specific guidance for third-party registration groups as to how to confirm a person’s eligibility to register.*

**7. Voter List Maintenance Requirements**—*The Committee recommends that the Commission suggest that the legislature:*

- *require that supervisors of elections ensure that a person who is erroneously removed from the voter registration list prior to an election is permitted to correct any errors and vote in that election, even if the registration book closing deadline for the election has elapsed;*
- *direct supervisors of elections to attempt to contact a person using available contact information in their voter registration record, including phone, e-mail, and mail, before removing them from the voter registration rolls;*
- *ensure that systematic efforts at updating voter registration rolls do not become “purges” of qualified voters based on dubious or inaccurate information;*
- *direct the Secretary of State and supervisors to enter into agreements with the Circuit Executive for the Eleventh Circuit or the clerks of the federal district courts in Florida to obtain information about people who decline to serve on federal juries on the grounds they are non-citizens;*
- *require the Secretary of State or supervisors of election to use the federal SAVE database or any other similar or successor databases, including as permitted by any consent decrees or judgments, and attempt to enter into other agreements with the appropriate federal agencies to confirm the citizenship of people on the voter registration rolls; and*
- *ensure election officials have sufficient financial and other resources to fulfill state mandates.*

**8. Communicating Changes in Election Law**—*The Committee recommends that the Commission suggest that the legislature:*

- *ensure that state and county election officials clearly notify voters of changes in election-related statutes, requirements, and procedures well in advance of elections to give them adequate opportunity to meet all registration requirements, request*

*vote-by-mail ballots if desired, and be able to cast a ballot and have their vote counted;*

- *make special effort to ensure that members of historically underrepresented and marginalized communities are aware of changes to the requirements for registering, requesting vote-by-mail ballots, and voting to ensure that changes in election statutes do not prevent them from voting.*
- *make special efforts to evaluate the potential that changes in election laws could improperly make voting more difficult, particularly for members of historically marginalized communities.*

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## INTRODUCTION

Florida’s 2020 presidential election, held in the midst of the global COVID-19 pandemic, was an overwhelming success.<sup>1</sup> According to University of Florida Professor Daniel Smith, “Voting was made accessible and convenient to our voters. The results were tabulate[d] accurately, reported to the state on time and voters had a pleasant experience.”<sup>2</sup> Vote-by-mail reached record levels, including “an unprecedented surge in minority voters requesting and casting mail ballots.”<sup>3</sup> Over 11 million ballots were cast, including 4.8 million vote-by-mail ballots.<sup>4</sup> Few voters experienced long lines at early voting locations and rejection rates for vote-by-mail ballots were historically low.<sup>5</sup>

Following the 2020 election, due in part to unsubstantiated claims about widespread voter fraud in that election,<sup>6</sup> the legislature adopted two main measures—SB 90<sup>7</sup> and SB 524<sup>8</sup>—to amend various provisions of the election code. The U.S. District Court for the Northern District

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<sup>1</sup> See, e.g., Oral Testimony of Prof. Daniel Smith, at 5 (hearing of Mar. 28, 2022) (“The state’s 67 supervisor of elections also heralded the success of the 2020 general election.”); Oral Testimony of Supervisor of Elections Wesley Wilcox, at 17 (hearing of Mar. 28, 2022) (“[T]he way that the professionals in the State of Florida conducted the election in 2020, I think was a national model.”); Oral Testimony of Secretary of State Cord Byrd, at 4 (hearing of Sept. 14, 2022) (“[W]e set the bar for election administration in 2020 . . .”).

<sup>2</sup> Smith Test., 3/28/2022 Hearing Trans., at 5.

<sup>3</sup> *Id.* at 6; see also *id.* at 19 (“[T]he supervisors did a remarkable job of transitioning voters from voting in person . . .”); Oral Testimony of Prof. Franita Tolson, at 7 (hearing of Apr. 29, 2022) (discussing Florida’s 100% increase “in vote by mail by Black voters between 2014 and 2002”).

<sup>4</sup> Oral Testimony of Amir Badat, at 11 (hearing of Mar. 28, 2022).

<sup>5</sup> Smith Test., 3/28/2022 Hearing Trans., at 19 (“[T]he 2020 general election did not have problems that we have seen in the past, specifically the 2021 general election with very long lines during early voting . . .”). Texas, in contrast, had a rejection rate of approximately 13%. Badat Test., 3/28/22 Trans., at 22. During the 2020 election cycle, African American voters cast a total of 522,038 vote-by-mail ballots that were initially deemed valid and subsequently counted. Election officials initially rejected an additional 7,093 vote-by-mail ballots from African American voters—or 1.4% of the total vote-by-mail ballots cast by African Americans. Of those, 5,352 ballots—constituting 75.5% of the initially rejected ballots—were cured and ultimately counted. Daniel A. Smith, *Casting, Rejecting, and Curing Vote-by-Mail Ballots in Florida’s 2020 General Election* 10 (Feb. 16, 2021), [https://allvotingislocal.org/wp-content/uploads/2021/03/031121\\_FL\\_VBM-Report\\_final.pdf](https://allvotingislocal.org/wp-content/uploads/2021/03/031121_FL_VBM-Report_final.pdf).

<sup>6</sup> See *infra* note 138.

<sup>7</sup> Ch. 2021-11, 2021 Fla. Laws 242.

<sup>8</sup> 2022 Fla. Laws 549, ch. 2022-73 (Apr. 27, 2022, effective date July 1, 2022).

of Florida enjoined several of SB 90's amendments.<sup>9</sup> The U.S. Court of Appeals for the Eleventh Circuit questioned the district court's analysis, however, and stayed its ruling on appeal, allowing those provisions to take effect for the 2022 midterm election.<sup>10</sup> Despite those changes, it appears the 2022 election was generally smooth and without widespread complaints. Following the election, the Eleventh Circuit rejected the district court's finding that the legislature had enacted SB 90 for racially discriminatory reasons, as well as the district court's ruling that the statute violated the Voting Rights Act or Fifteenth Amendment.<sup>11</sup>

One major component of SB 524 was the creation of the Florida Office of Election Crimes and Security ("FOECS"), a new division of the Department of State for investigating potential voter fraud.<sup>12</sup> Many critics questioned the need for a new entity and expressed concern about potential voter suppression.<sup>13</sup> Shortly after the office's creation, Governor Ron DeSantis announced the arrests of 20 people for voter fraud for voting despite disqualifying felony convictions for murder or sex offenses,<sup>14</sup> triggering new concerns about potential chilling of voting rights. A few of the resulting prosecutions have been dismissed, generally on the grounds the statewide prosecutor lacked jurisdiction to bring the case.<sup>15</sup> Some media outlets displayed video

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<sup>9</sup> League of Women Voters of Fla., Inc. ("LWV") v. Lee, 595 F. Supp. 3d 1042 (M.D. Fla. 2022) ("*LWV I*"), stay granted, LWV v. Fla. Sec'y of State, 32 F.4th 1363 (11th Cir. 2022) ("*LWV II*").

<sup>10</sup> *LWV II*, 32 F.4th 1363 (11th Cir. 2022). The Eleventh Circuit also invoked the *Purcell* Principle, *id.* at 1372, which counsels against federal courts changing the rules of an election shortly before the voting period begins. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

<sup>11</sup> League of Women Voters v. Fla. Sec'y of State, No. 22-11143, 2023 U.S. App. LEXIS 10350, at \*19 (Apr. 27, 2023) ("*LWV III*"). The court also held that the amendment to the anti-solicitation provision was unconstitutionally vague, and remanded for the district court to consider whether the other provisions unduly burdened the right to vote under the First and Fourteenth Amendments. *Id.*

<sup>12</sup> 2022 Fla. Laws 549, 552, ch. 2022-73, § 3 (Apr. 27, 2022, effective date July 1, 2022), *codified at* FLA. STAT. § 97.022.

<sup>13</sup> Shanya Jacobs, "DeSantis, Others Sued Over Alleged 'Election Police' Voter Intimidation, WASH. POST (July 19, 2023), <https://www.washingtonpost.com/national-security/2023/07/19/desantis-lawsuit-felon-voting-rights/>

<sup>14</sup> Aja Dorsainvil, *20 Charged with Voter Fraud; DeSantis Touts New Office of Election Crimes and Security*, 5WPTV WEST PALM BEACH (Aug. 18, 2022), <https://www.wptv.com/news/state/desantis-voter-fraud-arrests>.

<sup>15</sup> CBS Miami Team, *3rd Case Brought by Gov. Ron DeSantis' Election Police Dismissed*, CBS MIAMI (Dec. 24, 2022), <https://www.cbsnews.com/miami/news/3rd-case-brought-by-gov-ron-desantis-election-police-dismissed/>; see also Miles Cohen, *Florida Voter Has Election Fraud Charges Touted by DeSantis Dismissed*, ABC NEWS (Oct. 21,

of police separately arresting two African Americans and one white resident who had allegedly been convicted of murder or sex offenses and subsequently voted.<sup>16</sup> Despite the relatively limited number of arrests, the office’s activities pose a risk of chilling eligible voters with felony convictions, and potentially others, from exercising their fundamental right to vote due to voters’ concerns about inadvertently or unknowingly violating election restrictions.

This report is a follow-up to the Florida Advisory Committee’s October 2020 report entitled “Voting Rights and Voter Disenfranchisement in Florida.”<sup>17</sup> It begins by placing recent legislative amendments in context by offering a brief historical overview of voting rights in Florida. It then examines the concerns that have been raised about SB 90 and SB 524 and assesses the state’s first experience with these statutes in the 2022 midterm elections. The report concludes by examining the FEOCS established by SB 524. This report broadly concludes that many of the potential worst-case scenarios raised about SB 90 and SB 524 impeding voting overall have not come to pass, and the data available does not suggest these measures had a racially disparate impact against African Americans or members of other racial minority groups, as some opponents and a federal district court had feared. The Committee cautions that it is difficult to draw definitive conclusions from a single election cycle, however, and recognizes that the impact of these laws may change over time, particularly if racial or partisan disparities in the decision to use vote-by-mail continue to increase. Moreover, where data concerning potential disparities among different racial groups of voters were not available, some of the statistics in this report relied upon political

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2022), <https://abcnews.go.com/US/voter-fraud-charge-dismissed-florida-arrest/story?id=91858299>; see also Lawrence Mower, *Prosecutors Drop Charges Against DeSantis’ Voter Fraud Suspect*, TAMPA BAY TIMES (Nov. 21, 2022), <https://www.tampabay.com/news/florida-politics/2022/11/21/tampa-illegal-vote-desantis-voter-fraud-arrest-charges-dropped-hillsborough/>.

<sup>16</sup> Lawrence Mower, *Police Cameras Show Confusion, Anger Over DeSantis’ Voter Fraud Arrests*, TAMPA BAY TIMES (Oct. 18, 2022), <https://www.tampabay.com/news/florida-politics/2022/10/18/body-camera-video-police-voter-fraud-desantis-arrests/>.

<sup>17</sup> FLA. ADVISORY COMM. TO THE U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS AND VOTER DISENFRANCHISEMENT IN FLORIDA (Oct. 2020), <https://www.usccr.gov/files/2020/2020-10-06-FL-Voting-Rights-Advisory-Memo.pdf>.

party affiliation as a rough proxy for race, even though that is obviously an indirect and imperfect measure.

The Committee further recommends that the Commission emphasize the importance of the legislature devoting attention to reducing unnecessary burdens on the voting process and minimizing, avoiding, or reducing unnecessary racially or politically disparate impacts of election restrictions.

**FINDING I: THE HISTORY OF FLORIDA’S ELECTION CODE**

- *From the Mid-Nineteenth Through the Mid-Twentieth Centuries, Florida’s Election Code Effectively Prevented Voting by Racial Minorities, Offered Limited Voting Opportunities to Others, and Contained Problematic Voting Procedures. Since Then, Laws Have Been Passed at the Federal and State Levels and Judicial Rulings Were Issued Providing Greater Access to the Ballot for Members of Historically Marginalized Communities, as well as for the Electorate as a Whole.*
- *Over the Past Two Decades, the State has Repeatedly Reformed Its Election Code. These Reforms Have Both Expanded and Restricted Voting Opportunities in a Range of Ways.*

**A. Historical Election Laws**

Florida had a long history of disenfranchising minority voters throughout the eighteenth and early-mid nineteenth centuries.<sup>18</sup> Vice Dean Franita Tolson, one of the nation’s leading experts on election law and voting rights, explained that “[d]uring the 1890s, and since, Florida has enacted voting laws to not only disenfranchise minority voters, but also to create a cohesive white majority . . . .”<sup>19</sup> The state relied upon a range of strategies including “facially

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<sup>18</sup> See Smith Test., 3/28/22 Hearing Trans., at 8 (explaining that Florida has a “history of discriminatory barriers to voting dating back to the days of reconstruction”); Oral Testimony of Cynthia Slater, at 15 (hearing of Mar. 28, 2028) (“Florida has a history of disenfranchising black and other minority voters.”); Tolson Test., 4/29/22 Hearing Trans. at 4 (“Florida has tried to curb the political power of minority communities for over a century. And its efforts . . . have continued in a pretty much unbroken line since the end of reconstruction.”); *LWVI*, 595 F. Supp. 3d at 1077-78.

<sup>19</sup> Tolson Test., 4/29/22 Hearing Trans., at 4.

discriminatory practices”; racially discriminatory enforcement of “facially neutral laws” such as “poll taxes, annual registration requirements, and Eighth Box laws”; and “violence, intimidation, and voter fraud” to prevent voting by minorities and poor whites.<sup>20</sup>

Florida further impeded voting in the nineteenth century by requiring people wishing to vote to travel to their polling place on Election Day with their registration certificate.<sup>21</sup> In 1887, Florida adopted an annual voter registration requirement, forcing voters to renew their registration each year to remain eligible to vote.<sup>22</sup> The state further sought to reduce the influence of racial minorities through “extensive gerrymandering.”<sup>23</sup> By the 1890s, southern states including Florida had amended their state constitutions “to embrace more facially race neutral voting restrictions that specifically targeted black and brown voters.”<sup>24</sup> As a result of such measures, African American voter turnout plunged by more than half during the 1890s.<sup>25</sup> The Florida Supreme Court did not abolish the state’s whites-only primary until 1945,<sup>26</sup> and violence against African Americans to deter them from voting continued in the years afterward.<sup>27</sup>

Dean Tolson expressed the opinion that, in more recent years, states have engaged in race-based disenfranchisement in three main ways.<sup>28</sup> First, voter registration laws can make it unduly burdensome to register at the outset, preventing minorities from joining the voter rolls in the first place. Second, states may adopt election-related procedures that have the effect of preventing

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<sup>20</sup> *Id.* at 4-5; *see also id.* at 8.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 32.

<sup>25</sup> Tolson Test., 4/29/22 Hearing Trans., at 7.

<sup>26</sup> *See Davis v. State*, 156 Fla. 181, 184 (1945) (citing *Smith v. Allwright*, 321 U.S. 649 (1944)).

<sup>27</sup> Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 98 (2001) (“Harry Moore, founder of Florida’s Progressive Voters League, was assassinated by a bomb planted in his home on Christmas night, 1951-possibly in retaliation for his voting rights work.”).

<sup>28</sup> Tolson Test., 4/29/22 Hearing Trans., at 5.

minorities who are registered voters from casting ballots or having them counted. Finally, states may “purge voters ahead of the next election cycle.”<sup>29</sup> Dean Tolson added that many recent laws “rely[] on the same tactics as the Florida legislature of the 1890s.”<sup>30</sup> In 1975, five counties in Florida became “covered jurisdictions” under the Voting Rights Act “for problems, with respect to access to the polls for black and Latino voters.”<sup>31</sup> The Supreme Court invalidated the Voting Rights Act’s formula for identifying covered jurisdictions in the 2013 case *Shelby County v. Holder*,<sup>32</sup> suspending such preclearance requirements. On several occasions, courts have enjoined the state’s efforts to update its voter registration rolls on various grounds, including violations of the National Voter Registration Act,<sup>33</sup> as well as the use of unreliable procedures that had a racially disparate impact and were triggering the erroneous removal of eligible voters.<sup>34</sup>

#### **B. Election Law Reforms Following Bush v. Gore**

The controversy over the 2000 presidential election, culminating in the U.S. Supreme Court’s ruling in *Bush v. Gore*,<sup>35</sup> brought national attention to Florida’s election code. The state’s use of punch-card<sup>36</sup> and “butterfly”<sup>37</sup> ballots received widespread criticism, and the Court held

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<sup>29</sup> *Id.*: see also Testimony of Supervisor Joe Scott, 4/29/22 Hearing Trans., at 11 (echoing Prof. Tolson’s testimony about the various stages of the electoral process impacted by SB 90).

<sup>30</sup> Tolson Test., 4/29/22 Hearing Trans., at 36.

<sup>31</sup> Voting Rights Act Amendments of 1975: Partial List of Determinations Made Pursuant to Section 4(b) of the Voting Rights Act of 1965, *as amended*, 41 Fed. Reg. 34,329 (Aug. 13, 1976); Voting Rights Act Amendments of 1975: Partial List of Determinations, 40 Fed. Reg. 43,746 (Sept. 23, 1975); Smith Test., 3/28/22 Hearing Trans., at 30.

<sup>32</sup> *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

<sup>33</sup> See *Arcia v. Sec’y of Fla.*, 772 F.3d 1335 (11th Cir. 2014).

<sup>34</sup> See, e.g., Lizette Alvarez, *After Mistakenly Purging Citizens, Florida Agrees to Let Them Vote*, N.Y. TIMES (Sept. 13, 2012), <https://www.nytimes.com/2012/09/13/us/politics/florida-agrees-to-let-citizens-mistakenly-purged-from-rolls-to-vote.html>; Tia Mitchell, *Settlement Will Keep Most Potential Non-U.S. Citizens on Florida Voter Rolls*, TAMPA BAY TIMES (Sept. 12, 2012), <https://www.tampabay.com/news/politics/elections/settlement-will-keep-most-potential-non-us-citizens-on-florida-voter-rolls/1251223/>.

<sup>35</sup> *Bush v. Gore*, 531 U.S. 98, 106 (2000) (per curiam).

<sup>36</sup> See John Mintz, *Most States Don’t Count Dimples*, WASH. POST (Nov. 24, 2000), <https://www.washingtonpost.com/archive/politics/2000/11/24/most-states-dont-count-dimples/d2c0741a-4a2d-474d-8321-643ea930a375/>.

<sup>37</sup> Charles Lane, *Territory is Uncharted for Court Action*, WASH. POST (Nov. 10, 2000), <https://www.washingtonpost.com/archive/politics/2000/11/10/territory-is-uncharted-for-court-action/823245c9-dfda-4740-a9d2-98a5126dc7e5/>.

that the state’s standard for counting disputed ballots was too vague and subjective, violating the Equal Protection Clause.<sup>38</sup> In addition to these widely known problems, state law at the time also restricted the use of absentee ballots and did not provide for provisional ballots.

Over the following two decades, the legislature repeatedly amended the Election Code, eliminating many of the problems that led to the 2000 election. It outlawed the use of antiquated voting systems, directed the Secretary of State to adopt a “uniform” ballot design for all elections,<sup>39</sup> reformed ballot-counting rules,<sup>40</sup> expanded the availability of absentee voting, authorized provisional voting and ballot dropboxes, and adopted a range of other rules to make the state’s electoral system more reliable and accessible. Several of the amendments adopted throughout this period also imposed new security measures and other restrictions, however, raising concerns about burdens on voting rights and racially disparate impacts.

1. Voter Bill of Rights—Most basically, following the 2000 election, Florida adopted a new Voter Bill of Rights, which election officials must post at each polling place.<sup>41</sup> It provides:

#### VOTER BILL OF RIGHTS

Each registered voter in this state has the right to:

1. Vote and have his or her vote accurately counted.
2. Cast a vote if he or she is in line at the official closing of the polls in that county.<sup>42</sup>
3. Ask for and receive assistance in voting.
4. Receive up to two replacement ballots if he or she makes a mistake prior to the ballot being cast.
5. An explanation if his or her registration is in question.
6. If his or her registration is in question, cast a provisional ballot.

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<sup>38</sup> *Bush*, 531 U.S. at 106.

<sup>39</sup> 2001 Fla. Laws 117, 123, ch. 2001-40, § 7 (May 10, 2001), *codified at* FLA. STAT. § 101.151(8)(a)(2)-(3) (2001).

<sup>40</sup> *Id.* at 132, 145, 151-52, §§ 22, 37, 42, *codified at* FLA. STAT. §§ 101.5614(2), (6), 102.166(5)-(6); *see also* 2003 Fla. Laws 3986, 4014, ch. 2003-415, § 26 (July 24, 2003; effective date Jan. 1, 2004), *codified at* FLA. STAT. § 102.141(6)(d).

<sup>41</sup> 2001 Fla. Laws 117, 164-65, ch. 2001-40, § 60 (May 10, 2001), *codified at* FLA. STAT. § 101.031(2).

<sup>42</sup> This language is slightly revised from the original version. *See* 2002 Fla. Laws 429, 432, ch. 2002-17, § 5 (Apr. 11, 2002), *codified at* FLA. STAT. § 101.031(2).

7. Written instructions to use when voting, and, upon request, oral instructions in voting from elections officers.
8. Vote free from coercion or intimidation by elections officers or any other person.
9. Vote on a voting system that is in working condition and that will allow votes to be accurately cast.<sup>43</sup>

In addition to the bill of rights, the legislature adopted a list of voter responsibilities, as well. Following a 2002 revision, it read:

#### VOTER RESPONSIBILITIES

1. Familiarize himself or herself with the candidates and issues.
2. Maintain with the office of the supervisor of elections a current address.
3. Know the location of his or her polling place and its hours of operation.
4. Bring proper identification to the polling station.
5. Familiarize himself or herself with the operation of the voting equipment in his or her precinct.
6. Treat precinct workers with courtesy.
7. Respect the privacy of other voters.
8. Report any problems or violations of election laws to the supervisor of elections.
9. Ask questions, if needed.
10. Make sure that his or her completed ballot is correct before leaving the polling station.

NOTE TO VOTER: Failure to perform any of these responsibilities does not prohibit a voter from voting.<sup>44</sup>

2. Voting Machines—In 2001, the legislature prohibited voting systems that required voters to “pierc[e] . . . ballots” with a device, such as punch-card ballots.<sup>45</sup> Several years later, the legislature went on to require that all voting, except for people with disabilities, be conducted through “marksense ballots” which are completed by darkening the oval adjacent to the

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<sup>43</sup> 2001 Fla. Laws 117, 164-65, ch. 2001-40, § 60 (May 10, 2001), *codified at* FLA. STAT. § 101.031(2). The legislature repealed a provision concerning the voter’s right to “[p]rove his or her identity by signing an affidavit if election officials doubt the voter’s identity” when it amended the voter identification statute. 2005 Fla. Laws 2614, 2641, ch. 2005-277, § 22 (June 20, 2005; effective date Jan. 1, 2006), *amending* FLA. STAT. § 101.031(2) (repealing #7).

<sup>44</sup> 2002 Fla. Laws 429, 432-33, ch. 2002-17, § 5 (Apr. 11, 2002), *codified at* FLA. STAT. § 101.031(2); *cf.* 2001 Fla. Laws 117, 164-65, ch. 2001-40, § 60 (May 10, 2001), *codified at* FLA. STAT. § 101.031(2).

<sup>45</sup> 2001 Fla. Laws 117, 127, ch. 2001-40, § 1 (May 10, 2001), *codified at* FLA. STAT. § 101.56042; *see also id.* at 127-28, § 18, *codified at* FLA. STAT. § 101.5606(15).

names of each preferred candidates.<sup>46</sup> More recently, in 2019, the legislature empowered election officials to adopt electronic voter interface devices.<sup>47</sup> A voter may mark her candidate selections on a touchscreen, and the device will print out a completed marksense ballot reflecting those choices. The statute requires any tabulation to be based on a “subsequent scan” of those printed ballots.<sup>48</sup> Automatic tabulation equipment must be able to detect undervotes and overvotes and give the voter an opportunity to correct any problems.<sup>49</sup>

3. Voter Registration—The 2001 amendments also required the Secretary of State to establish a statewide online voter registration database.<sup>50</sup> Election officials were required to compare voter records to data held by other state agencies to confirm voters’ eligibility, duplicate registrations, and identify voters who had been declared incompetent, convicted of a disqualifying felony, or died.<sup>51</sup> The legislature also made it easier to register to vote. At the time of the 2000 election, state law required voters to include the last four digits of their Social Security number on their voter registration forms. In 2003, the legislature amended the law to allow applicants to include their driver’s license number or non-driver identification card numbers, instead.<sup>52</sup> Supervisors of election are required to notify an applicant if their form is missing this

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<sup>46</sup> 2007 Fla. Laws 320, 326, ch. 2007-30, § 6 (May 21, 2007; effective date Jan. 1, 2008), *codified at* FLA. STAT. § 101.56075(1)-(3).

<sup>47</sup> 2019 Fla. Laws 2019, 2031, ch. 2019-162, § 13 (June 28, 2019; effective date July 1, 2019), *amending* FLA. STAT. § 101.56075(1).

<sup>48</sup> *Id.* in 2022, § 2, *amending* FLA. STAT. § 97.021(41).

<sup>49</sup> 2001 Fla. Laws at 127, § 18, *codified at* FLA. STAT. § 101.5606(3); *see also* 2002 Fla. Laws 429, 435, ch. 2002-17, § 10 (Apr. 11, 2002), *amending* FLA. STAT. § 101.048(3)-(4).

<sup>50</sup> 2001 Fla. Laws 117, 170, ch. 2001-40, § 70 (May 10, 2001), *codified at* FLA. STAT. § 98.0977(1); *see also* 2005 Fla. Laws 2690, 2709, ch. 2005-278, § 17 (June 20, 2005; effective date Jan. 1, 2006) (requiring the Department of State to maintain a “single, uniform, official, centralized, interactive, computerized statewide voter registration system” with the name, address, and unique identification number for every legally registered voter), *codified at* FLA. STAT. § 98.035(1)-(3); 2003 Fla. Laws 3986, 3999, ch. 2003-415, § 10 (July 24, 2003; effective date Jan. 1, 2004); 2002 Fla. Laws 429, 431, ch. 2002-17, § 3 (Apr. 11, 2002), *codified at* FLA. STAT. § 98.0977(4).

<sup>51</sup> 2001 Fla. Laws 117, 170-71, ch. 2001-40, § 70 (May 10, 2001), *codified at* FLA. STAT. § 98.0977(1)-(4).

<sup>52</sup> 2003 Fla. Laws 3986, 3993, ch. 2003-415, § 4 (July 24, 2003; effective date Jan. 1, 2004), *codified at* FLA. STAT. § 97.053((5)(a)(5)).

information<sup>53</sup> or the information they provided cannot be verified against outside databases.<sup>54</sup> The legislature also authorized the state motor vehicle agency to share images of drivers' licenses and signatures with election officials to aid them in determining applicants' eligibility to register.<sup>55</sup>

In 2007, the legislature made registration easier for younger voters by allowing anyone who receives a Florida driver's license to pre-register to vote.<sup>56</sup> The following year, the state dropped the age for preregistration down to 16.<sup>57</sup> Several years later, the state further reduced barriers to registration by allowing online voter registration through a secure Internet portal,<sup>58</sup> though some may have potential security concerns about the way in which the process is implemented since online registrants who have a signature on file with the department of motor vehicles are not required to provide a signature for comparison purposes in connection with their voter registration application.<sup>59</sup> Finally, in 2019, the legislature authorized the secretary of state to join the Electronic Registration Information Center ("ERIC").<sup>60</sup> ERIC is a non-profit organization established by the Pew Charitable Trust and managed by its state members to "assist[] states to improve the accuracy of America's voter rolls and increase access to voter registration

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<sup>53</sup> 2005 Fla. Laws 2690, 2707, ch. 2005-278, § 13 (June 20, 2005; effective date Jan. 1, 2006), *codified at* FLA. STAT. § 97.073(1).

<sup>54</sup> 2007 Fla. Laws 320, 329, ch. 2007-30, § 13 (May 21, 2007; effective date Jan. 1, 2008), *codified at* FLA. STAT. § 97.053(6); *see also* 2005 Fla. Laws 2690, 2699-2701, ch. 2005-278, § 6 (June 20, 2005; effective date Jan. 1, 2006), *codified at* FLA. STAT. § 97.053(2), (6).

<sup>55</sup> 2005 Fla. Laws 2690, 2737, ch. 2005-278, § 52 (June 20, 2005; effective date Jan. 1, 2006), *codified at* FLA. STAT. § 322.142(4).

<sup>56</sup> 2007 Fla. Laws 320, 329, ch. 2007-30, § 12 (May 21, 2007; effective date Jan. 1, 2008), *codified at* FLA. STAT. § 97.041(1)(b).

<sup>57</sup> 2008 Fla. Laws 1029, 1031, ch. 2008-95, § 2 (June 5, 2008; effective date, Jan. 1, 2009), *amending* FLA. STAT. § 97.041(1)(b).

<sup>58</sup> 2015 Fla. Laws 386, 386-88, ch. 2015-36, § 1 (May 15, 2015; effective date July 1, 2015), *codified at* FLA. STAT. § 97.0525(1)-(2).

<sup>59</sup> *Id.*, *codified at* FLA. STAT. § 97.0525(4)(a).

<sup>60</sup> 2018 Fla. Laws 981, 982, ch. 2018-32, § 1 (Mar. 19, 2018; effective date January 1, 2019), *codified at* FLA. STAT. § 98.075(2)(b). The statute authorizes the Department of State to "become a member of a nongovernmental entity whose sole purpose is to share and exchange information in order to verify voter registration information." FLA. STAT. § 98.075(2)(b)(1). It directs the FLHSMV to "provide driver license or identification card information" to the Department of State "for the purpose of sharing and exchanging voter registration information with the nongovernmental entity." *Id.* § 98.075(2)(b)(4).

for all eligible citizens.”<sup>61</sup> It helps states identify potentially duplicative or outdated voter registration records by “compar[ing] voter registration data between states, to motor vehicle licensing agency data, and to the Social Security Administration master death index list.”<sup>62</sup> More recently, however, the State of Florida has decided to withdraw from this system.<sup>63</sup> This Committee is planning on holding a hearing on the state’s withdrawal and make recommendations regarding it in a future report.

4. Vote by Mail—Florida dramatically changed its rules governing virtually all aspects of vote-by-mail ballots following the 2000 election. During that election, Florida had excuse-based absentee voting, permitting only people who satisfied certain criteria to submit their votes by mail.<sup>64</sup> In 2001, the state dramatically expanded absentee voting, allowing the entire electorate to cast absentee ballots.<sup>65</sup> That law also abolished the state’s previous requirements that voters include their voter registration number and the last four digits of their social security number (SSN-4) on their absentee ballots request forms, as well as their SSN-4 on their completed ballots.<sup>66</sup>

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<sup>61</sup> Electronic Registration Information Center, *Home*, <https://ericstates.org/>.

<sup>62</sup> Electronic Registration Information Center, *ERIC at Work*, <https://ericstates.org/statistics/>.

<sup>63</sup> Fla. Sec’y of State Cord Byrd, Press Release, *Florida Withdraws from Electronic Registration Information Center (ERIC) Amid Concerns About Data Privacy and Partisanship* (Mar. 6, 2023),

<https://dos.myflorida.com/communications/press-releases/2023/press-release-florida-withdraws-from-electronic-registration-information-center-eric-amid-concerns-about-data-privacy-and-blatant-partisanship/#:~:text=DOS.MyFlorida.com->

[,PRESS%20RELEASE%3A%20Florida%20Withdraws%20From%20Electronic%20Registration%20Information%20Center%20\(ERIC,Data%20Privacy%20and%20Blatant%20Partisanship&text=Today%2C%20Secretary%20of%20State%20Cord,is%20terminating%20its%20ERIC%20Membership.](https://dos.myflorida.com/communications/press-releases/2023/press-release-florida-withdraws-from-electronic-registration-information-center-eric-amid-concerns-about-data-privacy-and-blatant-partisanship/#:~:text=DOS.MyFlorida.com-)

<sup>64</sup> See FLA. STAT. § 97.021(1) (2000).

<sup>65</sup> 2001 Fla. Laws 117, 137, ch. 2001-40, § 34 (May 10, 2001), *codified at* FLA. STAT. § 97.021(1); *see also id.* at 158, § 53, *amending* FLA. STAT. § 101.64(1). In 2016, the state underscored the general availability of absentee voting by renaming it “vote-by-mail.” *See* 2016 Fla. Laws 392, ch. 2016-37 (Mar. 10, 2016; effective date July 1, 2016).

<sup>66</sup> 2001 Fla. Laws 117, 157, 162, ch. 2001-40, §§ 52, 56 (May 10, 2001), *amending or repealing* FLA. STAT. §§ 101.62(1)(b)(3)-(4) 101.68(2)(c)(1); *see also id.* at 159-60, §§ 53-54, *amending* FLA. STAT. §§ 101.64(1), FLA. STAT. § 101.65.

The length of time for which requests for absentee ballots remain valid has similarly varied over time. In 2000, a voter could specify on their absentee ballot request that they wished to receive absentee ballots for all elections through the end of that calendar year.<sup>67</sup> In 2007, the legislature amended that provision to allow voters to request absentee ballots for all elections “through the next two regularly scheduled general elections.”<sup>68</sup> That period was reduced in 2010, so that requests were valid only through the following general election.<sup>69</sup> The following year, the legislature undid that amendment, restoring the validity period to two general elections.<sup>70</sup>

The deadline for submitting absentee ballots requests has likewise varied over the years. The Election Code did not originally contain a deadline. In 2005, the legislature specified that Supervisors of Elections had to receive requests for an absentee ballot to be mailed to a voter by 5:00 P.M. on the sixth day before Election Day,<sup>71</sup> though absentee ballots could be picked up in person after that deadline. In order to ensure that voters received their ballots on time, the legislature later pushed back that deadline so that any requests to have absentee ballots transmitted by mail had to be submitted at least ten days before Election Day (though a voter could personally request a ballot at the Supervisor’s office up through the closing of the polls on Election Day).<sup>72</sup> Completed absentee ballots likely must be returned by the close of polls on Election Day (i.e., 7:00 P.M.).<sup>73</sup>

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<sup>67</sup> FLA. STAT. § 102.62 (2000).

<sup>68</sup> 2007 Fla. Laws 320, 343, ch. 2007-30, § 30 (May 21, 2007; effective date Jan. 1, 2008), *codified at* FLA. STAT. § 102.62(1)(a).

<sup>69</sup> 2010 Fla. Laws 2075, 2081, ch. 2010-167, § 7 (May 19, 2011), *amending* FLA. STAT. § 101.62(1)(a).

<sup>70</sup> 2011 Fla. Laws 585, 628, ch. 2011-40, § 37 (May 19, 2011), *codified at* FLA. STAT. § 101.62(1)(a).

<sup>71</sup> 2005 Fla. Laws 2614, 2656, ch. 2005-277, § 43 (June 20, 2005; effective date Jan. 1, 2006), *amending* FLA. STAT. § 101.62(2).

<sup>72</sup> 2019 Fla. Laws 2019, 2032, ch. 2019-162, § 15 (June 28, 2019; effective date July 1, 2019), *amending* FLA. STAT. § 101.62(2)-(4).

<sup>73</sup> *See* FLA. STAT. § 101.65 (2000).

Over the years, the legislature has both added and removed various safeguards for the absentee voting process. For example, during the 2000 election, Florida required voters to have their absentee ballots either notarized or witnessed by another registered Florida voter.<sup>74</sup> The following year, the legislature loosened these requirements, eliminating any need for notarization and allowing anyone, not just registered voters, to witness absentee ballots.<sup>75</sup> A few years later, the legislature completely abolished witness requirements.<sup>76</sup>

Likewise, in 2001, the legislature also abolished the state's restriction on third-party ballot collection (called by opponents "ballot harvesting").<sup>77</sup> Over a decade later, the legislature attempted to deter the practice by making it a crime to offer or receive any benefit for collecting, delivering, or possessing multiple absentee ballots, unless they belong to family members.<sup>78</sup>

Signature match requirements for absentee ballots, to confirm the identity of the person completing them, have likewise varied over time. As of 2000, the state election code required either the Supervisor of Election or the county canvassing board to compare a voter's signature on the certificate accompanying their absentee ballot to their signature in the registration book to confirm the voter's identity.<sup>79</sup> The supervisor was required to notify voters whose signatures did not match and send them a form to update their signature on record.<sup>80</sup>

Finally, as a security measure, state law during the 2000 election cycle also generally required election officials to transmit absentee ballots only to people's homes (i.e., the address at

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<sup>74</sup> FLA. STAT. § 101.68(2)(c) (2000).

<sup>75</sup> 2001 Fla. Laws 117, 161-62, ch. 2001-40, § 56 (May 10, 2001), *amending* FLA. STAT. § 101.68(2)(c)(1); *see also id.* at 159-60, §§ 53-54, *amending* FLA. STAT. §§ 101.64(1), 101.65.

<sup>76</sup> *See generally* 2004 Fla. Laws 716, ch. 2004-232 (May 25, 2004; effective date July 1, 2004).

<sup>77</sup> 2001 Fla. Laws 117, 162-63, ch. 2001-40, §§ 57, 58 (May 10, 2001), *repealing* FLA. STAT. §§ 104.047(5), 101.647(2); *id.* at 159, § 53, *amending* FLA. STAT. § 101.64(1).

<sup>78</sup> 2013 Fla. Laws 1165, 1187-88, ch. 2013-57, § 21 (May 21, 2013; effective date Jan. 1, 2014), *amending* FLA. STAT. § 104.0616(1).

<sup>79</sup> FLA. STAT. § 101.68(1) (2000).

<sup>80</sup> *Id.* § 191,68(4) (2000).

which the voter was registered), with a few specified exceptions.<sup>81</sup> The legislature removed this restriction, allowing a voter to request in writing that their absentee ballot be sent to an alternate address.<sup>82</sup> This responsibility was transferred specifically to supervisors of election in 2004.<sup>83</sup>

Nearly a decade later, the legislature went on to require supervisors to notify all voters if their absentee ballots were rejected for any reason—not just voters whose ballots were rejected due to failure in the signature match.<sup>84</sup> This statute also allowed voters who omitted their signature from the absentee ballot certificate to “cure the unsigned absentee ballot” by 5:00 on the day before Election Day through any means, including in person, by mail, e-mail, or fax.<sup>85</sup> A federal district court required the state to extend this opportunity to voters whose submitted signatures that did not match their records, as well.<sup>86</sup> In 2019, the legislature amended this provision to specify that, when notifying voters of defects in their absentee ballot materials, supervisors must use an immediate method of communication, such as e-mail, text message, or phone, in addition to first-class mail.<sup>87</sup>

Over the past few years, the state also loosened the restrictions on absentee voting. For example, a person whose signature did not match official records, even after submitting a “cure” affidavit, could still have their ballot counted if they showed identification.<sup>88</sup> Likewise, a ballot

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<sup>81</sup> FLA. STAT. § 101.68(4)(b)(1).

<sup>82</sup> 2011 Fla. Laws 585, 629, ch. 2011-40, § 37 (May 19, 2011), *codified at* FLA. STAT. § 101.62(4)(c); *see also* 2013 Fla. Laws 1165, 1174-75, ch. 2013-57, § 11 (May 21, 2013; effective date Jan. 1, 2014), *amending* FLA. STAT. § 101.62(1)(b).

<sup>83</sup> 2004 Fla. Laws 716, 718, ch. 2004-232, § 3 (May 25, 2004, effective date July 1, 2004), *amending* FLA. STAT. § 101.68(1).

<sup>84</sup> 2013 Fla. Laws 1165, 1180, ch. 2013-57, § 15 (May 21, 2013; effective date Jan. 1, 2014), *amending* FLA. STAT. § 101.68(4)(a).

<sup>85</sup> *Id.* at 1180-91, § 15, *codified at* FLA. STAT. § 101.68(4)(b) -(e); *see also* 2017 Fla. Laws 336, 339, ch. 2017-45 (June 2, 2017), *amending* FLA. STAT. § 101.68(4).

<sup>86</sup> Fla. Democratic Party v. Detzner, No. 4:16-cv-607-MW/CAS, 2016 U.S. Dist. LEXIS 143620, at \*27-29 (N.D. Fla. 2016); *see also* 2017 Fla. Laws 336, 339, ch. 2017-45 (June 2, 2017), *amending* FLA. STAT. § 101.68(4)(a).

<sup>87</sup> 2019 Fla. Laws 2019, 2037, ch. 2019-162, § 19 (June 28, 2019; effective date July 1, 2019), *amending* FLA. STAT. § 101.68(4)(a); *see also* 2017 Fla. Laws 336, 339, ch. 2017-45 (June 2, 2017), *amending* FLA. STAT. § 101.68(4)(a).

<sup>88</sup> 2017 Fla. Laws 336, 337-40, ch. 2017-45 (June 2, 2017), *amending* FLA. STAT. § 101.68(2)(c)(1), (4)(c).

may not be rejected on signature match grounds unless a majority of the county canvassing board reached that conclusion “beyond a reasonable doubt.”<sup>89</sup>

5. Early Voting—At the time of the 2000 election, a person who could attest that they were “unable to attend the polls” on Election Day could cast an absentee ballot either by mail or in person at the Supervisor of Elections’ office prior to Election Day.<sup>90</sup> As noted above, following *Bush v. Gore*, the legislature authorized universal absentee voting so eligible voter could cast their votes before election day either in person at their Supervisors’ offices or by mail.<sup>91</sup>

In 2004, the legislature replaced this in-person absentee voting with “early voting” and specified that supervisors could establish early voting polling locations at city halls or public libraries in addition to their offices.<sup>92</sup> Any such additional locations had to be “geographically located so as to provide all voters in the county an equal opportunity to cast a ballot, insofar as is practicable.”<sup>93</sup> In 2013, the legislature authorized early voting at a wide range of additional locations, as well, including fairgrounds, civic centers, courthouses, county commission buildings, stadiums, convention centers, and government-owned senior or community centers.<sup>94</sup> Counties that lacked any such facilities could conduct early voting at alternate locations.<sup>95</sup> Several years

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<sup>89</sup> 2019 Fla. Laws 2016, 2037, ch. 2019-162, § 19 (June 28, 2019; effective date July 1, 2019), *amending* FLA. STAT. § 101.68(2)(c)(1).

<sup>90</sup> 2000 Fla. Laws 2424, 2424-25, ch. 2000-249, § 2, *codified at* FLA. STAT. § 101.657(2).

<sup>91</sup> 2001 Fla. Laws 117, 160-61, ch. 2001-40, § 55 (May 10, 2001), *codified at* FLA. STAT. § 101.657(1).

<sup>92</sup> Early voting is defined as casting a ballot prior to Election Day at a location designated by the supervisor of elections, where the voted ballot is deposited into the tabulation system. 2004 Fla. Laws 829, 841, ch. 2004-252, § 9 (May 26, 2004; effective date July 1, 2004), *codified at* FLA. STAT. § 97.021(7).

<sup>93</sup> 2004 Fla. Laws 842, ch. 2004-252, § 13, *codified at* FLA. STAT. § 101.657(1)(a).

<sup>94</sup> 2013 Fla. Laws 1165, 1178, ch. 2013-57, § 13 (May 21, 2013; effective date Jan. 1, 2014), *amending* FLA. STAT. § 101.657(1)(a). The Secretary of State had construed this provision as excluding college-owned facilities, but a federal district court held that that interpretation was unconstitutional. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1210-11, 1225 (N.D. Fla. 2018).

<sup>95</sup> *Id.*

later, the legislature required supervisors to ensure that early voting sites had “sufficient nonpermitted parking to accommodate the anticipated amount of voters.”<sup>96</sup>

Under the original 2004 statute, early voting had to commence fifteen days before Election Day and conclude the day before it.<sup>97</sup> Supervisors were required to keep early voting locations open for at least eight hours each weekday and for a total of eight hours each weekend.<sup>98</sup> Following several fluctuations, the legislature granted supervisors additional flexibility over the length of the early voting period. State law requires supervisors to conduct early voting in the period between ten and three days before Election Day,<sup>99</sup> but also grants them discretion to commence early voting as many as fifteen days before Election Day and allow it to extend up through the second day before the election.<sup>100</sup> On each day that early voting is held, polling locations must remain open between eight and twelve hours.<sup>101</sup> In 2011, the legislature clarified that these mandates apply only to federal and state elections; supervisors retain discretion over whether to offer early voting for county and local elections and, if so, the dates and times for it.<sup>102</sup>

6. Provisional Ballots—Another way the legislature sought to remedy the problems that permeated the 2000 election was by creating “provisional ballots.”<sup>103</sup> A provisional ballot is a vote that is set aside when a voter’s eligibility is questioned so that their validity can be determined after Election Day. Originally, a person could cast a provisional ballot only under

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<sup>96</sup> 2019 Fla. Laws 2019, 2030, ch. 2019-162, § 10 (June 28, 2019; effective date July 1, 2019), *amending* FLA. STAT. § 101.657(1)(a).

<sup>97</sup> 2004 Fla. Laws 829, 842, ch. 2004-252, § 13 (May 26, 2004; effective date July 1, 2004), *codified at* FLA. STAT. § 101.657(1)(b).

<sup>98</sup> *Id.*

<sup>99</sup> 2011 Fla. Laws 585, 631-32, ch. 2011-40, § 39 (May 19, 2011), *codified at* FLA. STAT. § 101.657(d).

<sup>100</sup> 2013 Fla. Laws 1165, 1178, ch. 2013-57, § 13 (May 21, 2013; effective date Jan. 1, 2014), *amending* FLA. STAT. § 101.657(1)(d).

<sup>101</sup> *Id.*

<sup>102</sup> 2011 Fla. Laws 585, 631-32, ch. 2011-40, § 39 (May 19, 2011), *codified at* FLA. STAT. § 101.657(d). Supervisors retained discretion over whether to offer early voting in county and local races. *Id.*

<sup>103</sup> 2001 Fla. Laws 117, 140, ch. 2001-40, § 34 (May 10, 2001), *codified at* FLA. STAT. § 97.021(25).

certain circumstances,<sup>104</sup> which were slightly expanded as a result of the federal Help America Vote Act in 2003.<sup>105</sup> That statute also required the Department of State to develop a system to allow voters to find out whether their provisional ballot had been counted and, if not, the reason it was rejected.<sup>106</sup>

Two years later, the legislature again further expanded the use of provisional ballots, requiring polling place officials to make them available to any person who claimed to be eligible to vote there, but whose eligibility could not be confirmed<sup>107</sup>—even if the official believed they were ineligible to vote.<sup>108</sup> The legislature also established a “cure period,” allowing people who cast provisional ballots to provide evidence of their eligibility to vote to the Supervisor of Elections’ office up to three days after Election Day.<sup>109</sup> In 2007, this cure period was shortened to two days.<sup>110</sup> Finally, the legislature specified that provisional ballots are presumptively valid and must be counted, by allowing them to be invalidated only if the county board of canvassers determines by a preponderance of the evidence that a valid basis for rejection exists.<sup>111</sup>

7. Voter ID—At the time of the 2000 election, to vote in person at a polling place, a voter had to show a driver’s license, non-driver’s identification card, or other form of

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<sup>104</sup> See *id.* at 140-42, §§ 34-35, *codified at* FLA. STAT. §§ 97.021(25), 101.048(1), 101.69(3); *cf.* 2002 Fla. Laws 429, 439, ch. 2002-17, § 18 (Apr. 11, 2002), *codified at* FLA. STAT. § 101.69(1).

<sup>105</sup> 2003 Fla. Laws 3986, 3991, 4003-04, ch. 2003-415, §§ 1, 16 (July 24, 2003; effective date Jan. 1, 2004), *codified at* FLA. STAT. §§ 97.012(25), 101.049(1); *see also* 2004 Fla. Laws 88, 90, ch. 2004-5, § 3 (Mar. 29, 2004), *amending* FLA. STAT. § 101.049(1) (clarifying terminology); 2005 Fla. Laws 2614, 2661, ch. 2005-277, § 48 (June 20, 2005; effective date Jan. 1, 2006), *amending* FLA. STAT. § 101.69(1).

<sup>106</sup> 2003 Fla. Laws 3986, 4003, ch. 2003-415, § 15 (July 24, 2003; effective date Jan. 1, 2004), *codified at* FLA. STAT. § 101.048(4).

<sup>107</sup> 2005 Fla. Laws 2690, 2728, ch. 2005-278, § 32 (June 20, 2005; effective date Jan. 1, 2006), *codified at* FLA. STAT. § 101.048(1).

<sup>108</sup> 2005 Fla. Laws 2614, 2643, ch. 2005-277, § 24 (June 20, 2005; effective date Jan. 1, 2006), *amending* FLA. STAT. § 101.048(1).

<sup>109</sup> *Id.* at 2643-44, § 24, *amending* FLA. STAT. § 101.048(1), (5).

<sup>110</sup> 2005 Fla. Laws 320, 341-42, ch. 2007-30, § 27 (May 21, 2007; effective date Jan. 1, 2008), *codified at* FLA. STAT. § 101.048(1); *see also* 2019 Fla. Laws 2019, 2027, ch. 2019-162, § 8 (June 28, 2019; effective date July 1, 2019), *amending* FLA. STAT. § 101.048(6)(b).

<sup>111</sup> 2005 Fla. Laws 2614, 2643, ch. 2005-277, § 24 (June 20, 2005; effective date Jan. 1, 2006), *amending* FLA. STAT. § 101.048(2)(a).

picture identification to vote.<sup>112</sup> In 2003, the legislature amended the law to specify that a person may show any of the following forms of identification, so long as it is “current and valid” and contains a picture of the voter: Florida driver’s license, non-driver identification card, U.S. passport, employee ID card, buyer’s club card, credit or debit card, military ID card, student ID card, retirement center or neighborhood association ID, entertainment card, or public assistance card.<sup>113</sup> If the card lacked the voter’s signature, the voter was required to display another form of identification that contained it.<sup>114</sup> The legislature later removed entertainment cards, employee ID cards from non-governmental entities, and buyer’s club cards from the list of valid forms of identification,<sup>115</sup> but added veteran health cards from the U.S. Department of Veterans Affairs, concealed carry permits, and employee identification cards from governmental agencies.<sup>116</sup>

To reduce the burden of these identification requirements, the legislature specified that special first-time voters who were required to show photo identification by the federal Help American Vote Act<sup>117</sup> could cast a provisional ballot if they lacked proper identification at the polling place.<sup>118</sup> In 2005, the legislature expanded this provision by allowing any voter who lacked proper identification to cast a provisional ballot.<sup>119</sup>

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<sup>112</sup> FLA. STAT. § 98.471 (2002).

<sup>113</sup> 2003 Fla. Laws 3986, 4001, ch. 2003-415, § 13 (July 24, 2003; effective date Jan. 1, 2004), *codified at* FLA. STAT. § 101.043(1); *see also id.* at 3996, § 6, *codified at* FLA. STAT. § 97.0535(3)(a)(1)-(12).

<sup>114</sup> *Id.* at 4001, § 13, *codified at* FLA. STAT. § 101.043(1).

<sup>115</sup> 2007 Fla. Laws 320, 341, ch. 2007-30, § 26 (May 21, 2007; effective date Jan. 1, 2008), *amending* FLA. STAT. § 101.043(1)(d)-(e); 2005 Fla. Laws 2690, 2726, ch. 2005-278, § 30 (June 20, 2005; effective date Jan. 1, 2006), *amending* FLA. STAT. § 101.043(1)(a)-(k).

<sup>116</sup> 2016 Fla. Laws 1922, 1923, ch. 2016-167, § 2 (Apr. 1, 2016; effective date July 1, 2016), *codified at* FLA. STAT. § 101.043(1)(a)(10)-(12).

<sup>117</sup> 52 U.S.C. § 21083(b).

<sup>118</sup> 2003 Fla. Laws 3986, 4002, ch. 2003-415, § 13 (July 24, 2003; effective date Jan. 1, 2004), *amending* FLA. STAT. § 101.043(3).

<sup>119</sup> 2005 Fla. Laws 2614, 2642-43, ch. 2005-277, § 23 (June 20, 2005; effective date Jan. 1, 2006), *amending* FLA. STAT. § 101.043(2)-(3); 2005 Fla. Laws 2690, 2726-27, ch. 2005-278, § 30 (June 20, 2005; effective date Jan. 1, 2006), *amending* FLA. STAT. § 101.043(3).

8. Special Populations—Consistent with federal laws such as the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”)<sup>120</sup> and the Military and Overseas Voter Empowerment (“MOVE”) Act,<sup>121</sup> the legislature adopted a series of laws to facilitate voting by military personnel. In addition to the range of registration and voting opportunities that these federal statutes require states to provide for military and overseas voters, the legislature has permitted a person discharged from the military or other employment outside the country,<sup>122</sup> or returning from a deployment,<sup>123</sup> after the deadline for registering for an election to register for that election through 5:00 P.M. on the Friday before Election Day.

The legislature has also adopted several provisions to protect voting rights for disabled voters. In 2002, the legislature mandated that polling places<sup>124</sup> and voting systems<sup>125</sup> be accessible to disabled voters. Election equipment must use marksense ballots and “meet[] the voter accessibility requirements for individuals with disabilities” under the Help America Vote Act.<sup>126</sup> All election-related forms must be prepared in formats accessible to disabled voters and, except for absentee ballots, available over the Internet.<sup>127</sup> Election officials must receive at least one hour of training from a “recognized disability-related organization” before each election concerning

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<sup>120</sup> Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (42 U.S.C. 1973ff et seq.).

<sup>121</sup> Military and Overseas Voter Empowerment (“MOVE”) Act, Pub. L. No. 111-84, subtitle H, §§ 575-90, 123 Stat. 2190, 2318-2335 (42 U.S.C. §§ 1973ff et seq.).

<sup>122</sup> 2001 Fla. Laws 117, 155, ch. 2001-40, § 47 (May 10, 2001), *codified at* FLA. STAT. § 97.0555; *see also* 2002 Fla. Laws 429, 430, ch. 2002-17, § 1 (Apr. 11, 2002), *codified at* FLA. STAT. § 97.0555 (specifying that belated registration must occur in the office of the Supervisor of Elections).

<sup>123</sup> 2013 Fla. Laws 1165, 1166-67, ch. 2013-57, § 1 (May 21, 2013; effective date Jan. 1, 2014), *amending* FLA. STAT. § 97.0555(1).

<sup>124</sup> 2002 Fla. Laws 2101, 2111-12, ch. 2002-281, §§ 16, 17 (May 24, 2002), *codified at* FLA. STAT. § 101.715.

<sup>125</sup> *Id.* at 2108-09, § 12, *codified at* FLA. STAT. § 101.56062(1).

<sup>126</sup> 2007 Fla. Laws 320, 326-27, ch. 2007-30, § 6 (May 21, 2007; effective date Jan. 1, 2008), *codified at* FLA. STAT. § 101.56075, *as amended* 2019 Fla. Laws 2019, 2029, ch. 2019-162, § 13 (June 28, 2019; effective date July 1, 2019), *amending* FLA. STAT. § 101.56075.

<sup>127</sup> 2002 Fla. Laws 2101, 2105, 2111, ch. 2002-281, §§ 5, 14 (May 24, 2002), *codified at* FLA. STAT. §§ 97.026, 101.662.

“issues of etiquette and sensitivity with respect to voters having a disability.”<sup>128</sup> The legislature also codified voters’ rights to remain in a voting booth for more than five minutes,<sup>129</sup> and to be assisted in the voting booth by a person of their choice,<sup>130</sup> without having to reveal the reason to election officials.

**FINDING II: SB 90’S AMENDMENTS TO THE ELECTION CODE**

- ***The Legislature Adopted SB 90 After the 2020 Election, Even Though the Election was a Success and No Evidence of Systemic Voter Fraud Existed, to Amend Laws Governing Vote-by-Mail Ballot Requests, Dropboxes, Third-Party Voter Registration Groups, Voter Solicitation (“Line Warming”) Activities, and Third-Party Ballot Collection (“Ballot Harvesting”).***
- ***The U.S. District Court for the Northern District of Florida Entered a Preliminary Injunction Against S.B. 90, Primarily on the Grounds it was Enacted with Racially Discriminatory Intent. The U.S. Court of Appeals for the Eleventh Circuit Stayed that Ruling, Allowing S.B. 90 to Take Effect Pending Appeal. That Court Ultimately Overturned Most of the District Court’s Rulings, Concluding that the Statute was not Adopted for Racially Discriminatory Purposes and did not Violate Either the Fifteenth Amendment or Section 2 of the Voting Rights Act.***
- ***Despite the New Restrictions SB 90 Imposed to Improve Voter Integrity, the Available Data Suggests that the Law Did Not Reduce Voter Registration or Voting During the 2022 Midterm Elections, Either for the Electorate as a Whole or Racial Minority Voters in Particular.***

Several months after the 2020 election, the Florida legislature enacted SB 90, which amended numerous provisions of the election code.<sup>131</sup> Among the law’s most controversial provisions were new restrictions concerning dropboxes, third-party voter registration

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<sup>128</sup> *Id.* at 2112, § 18, *codified at* FLA. STAT. § 102.014(7). “The program must include actual demonstrations of obstacles confronted by disabled persons during the voting process, including obtaining access to the polling place, traveling through the polling area, and using the voting system.” *Id.*

<sup>129</sup> 2002 Fla. Laws 2101, 2108, ch. 2002-281, § 11 (May 24, 2002), *codified at* FLA. STAT. § 101.51(2).

<sup>130</sup> *Id.*

<sup>131</sup> 2021 Fla. Laws 242, ch. 2021-11 (May 6, 2021).

organizations, vote-by-mail applications, interactions with people waiting on line to vote, and third-party ballot collection (sometimes called “ballot harvesting” by its opponents). This Part discusses each of these provisions in detail.

Prior to the 2022 election, several witnesses expressed concern that SB 90 would hinder voting in Florida<sup>132</sup> and have racially disparate impacts.<sup>133</sup> Amir Badat, the NAACP Legal Defense Fund’s special counsel for voting, viewed SB 90 as part of “one of the most aggressive and concerted efforts to undermine voting rights in this country in more than a generation.”<sup>134</sup> Witnesses also expressed skepticism about the legislature’s motivations for passing the law, opining that it was enacted “specifically to make it harder for people . . . to participate,”<sup>135</sup> particularly for voters who oppose “the majority party.”<sup>136</sup> Broward County Supervisor of Elections Joe Scott testified that laws such as SB 90 were likely enacted due to “[c]onstant lies about what happened” in the 2020 election.<sup>137</sup> Many critics argued that SB 90 was unnecessary specifically based on the success of the 2020 election and the lack of evidence of widespread

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<sup>132</sup> Badat Test., 3/28/22 Hearing Trans. at 11 (testifying that SB 90 would “significantly limit[] access to the ballot box”); Tolson Test., 3/28/22 Hearing Trans., at 5 (“SB 90 disenfranchises voters through facially race-neutral means . . . .”); Testimony of Broward County Supervisor of Elections Joe Scott, at 8 (hearing of Apr. 29, 2022) (“[C]hanges in the laws . . . are now making it more difficult for people to register to vote as well as more difficult for people to actually participate when it comes time to vote.”).

<sup>133</sup> Slater Test., 3/28/22 Hearing Trans., at 15 (expressing concern that SB 90 would “affect voters of color in the upcoming elections and elections that follow”); Smith Test., 3/28/22 Hearing Trans., at 6 (“SB 90 [will harm] the ability of all voters, but particularly Black and Hispanic voters, as well as individuals with disabilities to register to vote and cast the valid ballot in Florida.”); Tolson Test., 4/29 Hearing Trans., at 6 (“[T]hese laws are expected to have a chilling effect on the voter registration efforts for minority groups . . . .”); Badat Test., 3/28/22 Hearing Trans., at 10 (claiming that SB 90 would “significantly impact the ability of Florida voters, particularly voters of color and those with disabilities to access the ballot box”).

<sup>134</sup> Testimony of Amir Badat, 3/28/22 Hearing Trans., at 10.

<sup>135</sup> Testimony of Broward County Supervisor of Elections Joe Scott, at 11 (hearing of Apr. 29, 2022).

<sup>136</sup> Tolson Test., 3/28/22 Hearing Trans., at 7; *see also id.* at 32 (noting some legislators may wish to impose burdens on people in certain areas based on their voting patterns).

<sup>137</sup> Scott Test., 4/29/22 Hearing Trans., at 8.

fraud.<sup>138</sup> County supervisors of election generally opposed the bill<sup>139</sup> because it would require them to “expend more resources . . . in order to basically have the same level of access for the voters . . . as what we had before.”<sup>140</sup>

In *League of Women Voters of Florida, Inc. v. Lee*, Judge Mark Walker of the U.S. District Court for the Northern District of Florida held that the “Legislature enacted some of SB 90’s provisions with the intent to discriminate against Black voters,” though found no discriminatory intent against Hispanic voters.<sup>141</sup> The court began by tracing Florida’s history of racially discriminatory voting laws dating back to the post-Civil War era, declaring that “it echoes into the present and sets the stage for SB 90.”<sup>142</sup> It went on to emphasize that the legislature rejected alternatives to many of the bill’s provisions that would have had less of a racially disparate impact.<sup>143</sup>

The court stated that the following exchange was “the most important statement” in the bill’s legislative history to determine the “Legislature’s motivations” in passing the law:

Senator Berman asked Senator Baxley, “[a]re you aware that the restrictions in this legislation including those related to drop box and access to voter assistance will have a disparate impact on black voters?” To which Senator Baxley responded, after denying SB 90 would disenfranchise anyone, “[n]ow to look at patterns of use and say, well, you may have to go about it a little different way. There’s a learning curve.”<sup>144</sup>

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<sup>138</sup> See Smith Test., 3/28/22 Hearing Trans., at 7-8 (“[T]here was no evidence of systemic fraud in the 2020 election.”); Badat Test., 3/28/22 Hearing Trans., at 11, 32 (“There was no evidence of systematic voter fraud relating to the 2020 elections in Florida.”); Slater Test., 3/28/22 Hearing Trans., at 17 (“If the 2020 election went as smoothly and with minimal incident as it has been claimed, then why the drastic changes?”).

<sup>139</sup> Wilcox Test., 3/28/22 Hearing Trans., at 17; *LWVI*, 505 F. Supp. 3d at 1092 (“[T]he Supervisors opposed SB 90.”).

<sup>140</sup> Scott Test., 4/29/22 Hearing Trans., at 8; see also *id.* at 9.

<sup>141</sup> *LWVI*, 595 F. Supp. 3d at 1076; see also *id.* at 1109 (“[T]he challenged provisions as a whole will have a disparate impact on both Black and Latino voters and will especially burden Black voters.”).

<sup>142</sup> *Id.* at 1079.

<sup>143</sup> *Id.* at 1113; see also Badat Test., 3/28/22 Hearing Trans., at 32.

<sup>144</sup> *LWVI*, 595 F. Supp. 3d at 1097.

Based on this evidence, the court rejected the notion that the legislature simply “enact[ed] SB 90 in response to the political mood,” because “if the Legislature were merely reacting to the political mood, we would expect to see the Legislature carpet-bomb the election code.”<sup>145</sup> Rather, the court declared, “[F]or the past 20 years, the Legislature has given into that temptation by repeatedly targeting Black voters because of their propensity to favor Democratic candidates.”<sup>146</sup> It concluded that the new restrictions on dropboxes, third-party voter registration organizations, and “line warming” were unconstitutional and violated the Voting Rights Act; it entered permanent injunctions barring their enforcement.<sup>147</sup> The court also “bailed in” the State of Florida to preclearance requirements under § 3(c) of the VRA.<sup>148</sup> It ordered that, for the next ten years, “Florida may enact no law or regulation governing [third-party voter registration organizations], drop boxes, or ‘line warming’ activities without submitting such law or regulation for preclearance.”<sup>149</sup>

In May 2022, however, the U.S. Court of Appeals for the Eleventh Circuit stayed these rulings pending a final judgment on appeal.<sup>150</sup> The Eleventh Circuit’s ruling was based in part on the *Purcell* Principle, which has come to be interpreted to generally bar federal courts from changing the rules governing an election shortly before the relevant stage of the election begins.<sup>151</sup> The court also held that the “district court’s determination regarding the legislature’s intentional discrimination suffers from at least two flaws.”<sup>152</sup>

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<sup>145</sup> *Id.* at 1115.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1180-81.

<sup>148</sup> 52 U.S.C. § 10302(c).

<sup>149</sup> *LWV I*, 595 F. Supp. 3d at 1179.

<sup>150</sup> *LWV II*, 32 F.4th 1363.

<sup>151</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam).

<sup>152</sup> *LWV II*, 32 F.4th at 1372.

First, the Eleventh Circuit concluded that the “district court’s historical-background analysis” was “problematic” because it focused too heavily on racial discrimination “after the Civil War” and “during the early and mid-1900s.”<sup>153</sup> Second, the district court failed to afford the Florida legislature “the presumption of legislative good faith.” It explained, “The Supreme Court has instructed that when court assesses whether a duly enacted statute is tainted by discriminatory intent, ‘the good faith of the state legislature must be presumed.’”<sup>154</sup> Reviewed in light of this presumption, the Eleventh Circuit concluded that at least some of the evidence the district court relied upon to infer the legislature’s discriminatory intent did not support any such conclusion.<sup>155</sup> The court went on to explain that evidence of racially disparate impact is not enough, on its own, to support an inference of discriminatory intent.<sup>156</sup>

Finally, the Eleventh Circuit held that the district court’s analysis concerning SB 90’s solicitation provision (i.e., the “line warming” restrictions) was also “sufficiently vulnerable to warrant a stay.”<sup>157</sup> The court held that, read in statutory context, the provision’s language may reasonably be interpreted more narrowly than the district court suggested.<sup>158</sup> The district court had also failed to adequately consider the statute’s range of “legitimate applications.”<sup>159</sup> Thus, the Eleventh Circuit allowed SB 90 to enter into effect. Because the Florida legislature repealed SB 90’s registration-disclaimer provision, the Eleventh Circuit did not address that aspect of the lower court’s ruling.<sup>160</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)).

<sup>155</sup> *Id.* at 1373.

<sup>156</sup> *Id.* (citing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

<sup>157</sup> *LWV II*, 32 F.4th at 1372.

<sup>158</sup> *Id.* at 1374.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1372 n.9.

This Part discusses the evidence that this committee received regarding each of SB 90's most controversial provisions:

**A. Dropboxes**

Prior to SB 90's adoption, state law already allowed voters to return vote-by-mail ballots to dropboxes.<sup>161</sup> Supervisors were required to establish dropboxes at their main office, as well as each branch office and early voting site.<sup>162</sup> Supervisors also had discretion to establish additional dropboxes anywhere else that could be used as an early voting site.<sup>163</sup> SB 90 tweaked these provisions so that dropboxes were required at branch offices only if those offices were "permanent."<sup>164</sup> It further specified that dropboxes "must be geographically located so as to provide all voters in the county with an equal opportunity to cast a ballot, insofar as is practicable."<sup>165</sup> Supervisors must identify dropbox locations at least 30 days before an election,<sup>166</sup> and the boxes must be emptied after each day of early voting.<sup>167</sup>

More controversially, SB 90 specified that dropboxes at actual or potential early voting locations may be used only during early voting hours and must be monitored in person by an employee of the supervisor.<sup>168</sup> Dropboxes at a supervisor's office must also be "continuously monitored in person" by an employee while they are publicly accessible.<sup>169</sup> A supervisor is subject to a civil penalty of up to \$25,000 if one of their dropboxes is "left accessible for ballot receipt" in violation of this provision.<sup>170</sup> Applied literally, if a dropbox location were staffed by a single

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<sup>161</sup> FLA. STAT. § 101.69(2)(a).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> 2021 Fla. Laws 242, 265, ch. 2021-11, § 28 (May 6, 2021), *codified at* FLA. STAT. § 101.69(2)(a).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*, *codified at* FLA. STAT. § 101.69(2)(b).

<sup>167</sup> *Id.*, *codified at* FLA. STAT. § 101.69(2)(c)(1) -(c)(2).

<sup>168</sup> *Id.*

<sup>169</sup> Ch. 2021-11, § 28, 2021 Fla. Laws 265, *codified at* FLA. STAT. § 101.69(2)(c)(1) -(c)(2).

<sup>170</sup> *Id.*, *codified at* FLA. STAT. § 101.69(3).

election employee, this provision could make it illegal for them to step away to use the restroom.<sup>171</sup> SB 90's monitoring requirements were intended to bolster both the statute's prohibition on third-party ballot collection as well as the security of deposited ballots.<sup>172</sup> Although there were no reports of problems with dropboxes in Florida during the 2020 election,<sup>173</sup> at least two dropboxes in other states were set on fire, destroying the ballots inside.<sup>174</sup>

Approximately 485 dropboxes were available in the 2020 election.<sup>175</sup> Roughly 1.5 million out of 4.85 million vote-by-mail ballots (31%) were returned via those dropboxes.<sup>176</sup> Professor Smith testified that 65 of those 485 dropboxes had been unmonitored.<sup>177</sup> Under SB 90, county supervisors of election would either need to provide staffing for those dropboxes or remove them. An additional 57 dropboxes had been made available outside of the early voting period<sup>178</sup>—generally on the Monday before Election Day and Election Day itself.<sup>179</sup> SB 90 allows those dropboxes to remain available, but only during early voting hours. The state's other 363 dropbox locations (approximately 75%) were already in compliance with SB 90 and unaffected by its enactment. Leon County was not planning on eliminating any dropbox locations in response to SB 90, while Hillsborough County was eliminating two for reasons “unrelated to SB 90.”<sup>180</sup>

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<sup>171</sup> Scott Test., 4/29/22 Hearing Trans., at 10.

<sup>172</sup> See *LWV I*, 595 F. Supp. 3d at 1091.

<sup>173</sup> Scott Test., 4/29/22 Hearing Trans., at 19-20.

<sup>174</sup> See, e.g., Tim Elfrink & Paulina Villegas, “*A Disgrace to Democracy*”: Man Arrested in Alleged Arson of a Boston Drop Box, WASH. POST (Oct. 26, 2020) (“By the time firefighters doused the blaze by filling the inside of the box with water, dozens of ballots in it had been destroyed.”), <https://www.washingtonpost.com/nation/2020/10/26/boston-ballot-dropbox-arson-election/>; Joshua Bote, *California Ballot Drop Box Set Ablaze in Possible Arson, Damaging Up to 100 Ballots*, USA TODAY (Oct. 20, 2020), <https://www.usatoday.com/story/news/nation/2020/10/20/ballot-drop-box-set-fire-california-100-ballots-damaged/5992101002/>.

<sup>175</sup> *LWV I*, 595 F. Supp. 3d at 1100.

<sup>176</sup> Badat Test., 3/28/22 Hearing Trans., at 11.

<sup>177</sup> Smith Test., 3/28/22 Hearing Trans., at 7; *LWV I*, 595 F. Supp. 3d at 1100.

<sup>178</sup> Smith Test., 3/28/22 Hearing Trans., at 6-7; *LWV I*, 595 F. Supp. 3d at 1100.

<sup>179</sup> *LWV I*, 595 F. Supp. 3d at 1099 (explaining that Miami-Dade and Broward Counties were eliminating dropboxes on the last two days of voting in the election).

<sup>180</sup> *Id.*

Secretary Byrd testified that none of the supervisors with whom he had met indicated there were problems with the cost of dropbox monitoring.<sup>181</sup>

The district court in *League of Women Voters*, albeit cautioning that it was relying on “limited data” and “data from a limited number of counties,”<sup>182</sup> concluded that “Black voters use drop boxes at a greater rate than other racial groups,” and did so “outside of [the] early voting [period] and outside of typical business hours.”<sup>183</sup> It found that SB 90’s dropbox restrictions were enacted for racially discriminatory reasons in violation of the Fourteenth Amendment, Fifteenth Amendment, and Section 2 of the Voting Rights Act.<sup>184</sup> As noted earlier, the U.S. Court of Appeals for the Eleventh Circuit rejected this conclusion and stayed the district court’s order.<sup>185</sup>

Several witnesses expressed concern that voters, particularly black and Latino voters, who relied on dropboxes that SB 90 is eliminating may not vote through alternate means, such as in-person voting, early voting, or returning their vote-by-mail ballots in person or by mail.<sup>186</sup> Mr. Badat explained that people with “limited access to transportation” and who have “inflexible work hours” would be inconvenienced by the reduction of dropboxes.<sup>187</sup> Moreover, some voters with disabilities “rely on outdoor drop boxes . . . because indoor drop boxes are less accessible to them.”<sup>188</sup>

Supervisor Scott explained that some communities have “cultural differences” and a “distrust of institutions” that lead them to prefer dropboxes to the mail service.<sup>189</sup> He added, “A

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<sup>181</sup> Byrd Test., 9/14/22 Hearing Trans., at 15-16 (“I haven’t had a single [supervisor] tell me that they had any concerns with cost regarding the secure ballot intake stations.”).

<sup>182</sup> *LWV I*, 595 F. Supp. 3d at 1102-03.

<sup>183</sup> *Id.* at 1103; *see also* Badat Test., 3/28/22 Hearing Trans., at 12.

<sup>184</sup> *LWV I*, 595 F. Supp. 3d at 1117.

<sup>185</sup> *LWV II*, 32 F. 4th at 1372-73.

<sup>186</sup> Badat Test., 3/28/22 Hearing Trans., at 12.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Scott Test., 4/29/22 Hearing Trans., at 12-13.

lot of people just prefer that security of knowing that it's going straight to the supervisor, and it won't get tied up in the system.”<sup>190</sup> “[R]eliability” concerns can also exist about mail service in certain areas,<sup>191</sup> disproportionately impacting minority voters.<sup>192</sup> A voter can return a vote-by-mail ballot to a dropbox on Election Day and be assured officials will receive it on time; the postal service, in contrast, is unable to return a ballot deposited in a mailbox on Election Day.<sup>193</sup>

Supervisor Scott mitigated SB 90's impact by opening several branch offices throughout the county to host dropboxes.<sup>194</sup> He suggested that the law be amended to allow him to place dropboxes at other staffed county offices that are open for the requisite number of hours.<sup>195</sup> Scott also suggested that video monitoring, rather than live on-site employees, might be sufficient to protect dropbox locations.<sup>196</sup>

Neither the U.S. Election Assistance Commission nor the Florida Department of State have made statistics available concerning dropbox usage. Nevertheless, the Committee has attempted to assess the impact of SB 90's dropbox provisions based on publicly available information. These figures focus only on congressional election years since turnout in presidential election years is consistently substantially higher:

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<sup>190</sup> *Id.* at 17-18.

<sup>191</sup> *Id.*

<sup>192</sup> Smith Test., 3/28/22 Hearing Trans., at 6-7.

<sup>193</sup> Scott Test., 4/29/22 Hearing Trans., at 15. Professor Smith added that voters experienced an unusually high rejection rate for vote-by-mail ballots in a recent special election in Gainesville due to the postal service's delays in delivering ballots, though it was unclear from his testimony when they had been mailed. *Id.* at 36.

<sup>194</sup> *Id.* at 10.

<sup>195</sup> *Id.* (“[W]e have multiple government facilities with excellent security that we could potentially just offer a drop box at the time that they're needed.”); *see also id.* at 21 (explaining that a security guard for a government building should be sufficient, rather than requiring an election official specifically to watch the dropbox).

<sup>196</sup> *Id.* at 10, 20.

Congressional Election	Total Turnout	Vote-by-Mail (including dropboxes when available)	
2022 <sup>197</sup>	7,796,916 overall turnout (out of 14,503,978 registered voters; 53.76%)	2,773,948 total vote-by-mail (35.58%)	Rep: 1,001,229 Dem: 1,194,857 Other: 40,361 NPA: 537,501
2018 <sup>198</sup>	8,305,929 overall turnout (out of 13,278,070 registered voters; 62.55%)	2,623,798 total vote-by-mail (31.59%)	Rep: 1,080,808 Dem: 1,026,600 Other: 15,826 NPA: 500,564
2014 <sup>199</sup>	6,027,674 overall turnout (out of 11,931,533 registered voters; 50.52%)	1,877,820 total vote-by-mail (31.15%)	Rep: 833,420 Dem: 705,752 Other: 53,761 NPA: 284,887

These statistics demonstrate that, although overall voter turnout declined between the 2018 election (which was held prior to SB 90’s enactment) and 2022 election (which occurred afterwards), the usage of vote-by-mail actually increased, both in absolute terms and as a percentage of overall ballots cast. In 2022, following SB 90’s enactment, 150,150 more vote-by-

<sup>197</sup> Fla Dep’t of State, *Vote-by-Mail Request & Early Voting Statistics*, <https://countyballotfiles.floridados.gov/VoteByMailEarlyVotingReports/PublicStats>; Fla. Dep’t of State, Div. of Elections, *November 8, 2022 General Election: Official Results*, [https://results.elections.myflorida.com/Index.asp?ElectionDate=11/8/2022&DATAMODE=.](https://results.elections.myflorida.com/Index.asp?ElectionDate=11/8/2022&DATAMODE=)

<sup>198</sup> Fla. Dep’t of State, *2018 General Election* (Dec. 18, 2018), <https://files.floridados.gov/media/700669/early-voting-and-vote-by-mail-report-2018-genpdf.pdf>; Fla. Dep’t of State, Div. of Elections, *November 6, 2018 General Election: Official Results*, [https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE=.](https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE=)

<sup>199</sup> Fla. Dep’t of State, *2014 General Election* (undated), <https://files.floridados.gov/media/696917/early-voting-and-vote-by-mail-report-2014-gen.pdf>; Fla. Dep’t of State, Div. of Elections, *November 4, 2014 General Election: Official Results*, [https://results.elections.myflorida.com/Index.asp?ElectionDate=11/4/2014&DATAMODE=.](https://results.elections.myflorida.com/Index.asp?ElectionDate=11/4/2014&DATAMODE=)

mail ballots were cast than in the 2018 election. Additionally, the percentage of voters using vote-by-mail increased from 31.59% to 35.58%. Of course, these statistics do not reveal specifically how these ballots were returned—whether in person, by mail, or via dropbox—but they suggest that the reduction in dropboxes has not caused a corresponding decrease in the usage of vote-by-mail ballots. Moreover, it is impossible to determine whether African American voter turnout would have been even higher without SB 90’s new dropbox restrictions.

Finally, these statistics do not suggest that SB 90’s dropbox provisions have had a racially regressive result. In the *League of Women Voters* case, the district court found that Florida’s Republican party was disproportionately white, and its Democratic party was disproportionately African American, with Hispanic voters split between them.<sup>200</sup> Between 2018 and 2022, the number of Republican voters casting vote-by-mail ballots declined, both in the total number of ballots cast (a 7.4% decrease) and as a percentage of vote-by-mail ballots cast (from 41% to 36%). This is likely in part due to President Trump’s repeated condemnation of vote-by-mail.<sup>201</sup> During that same period, despite SB 90’s enactment, the number of Democratic voters who cast vote-by-mail ballots increased by 168,257, or 16.4%. The share of vote-by-mail ballots cast by Democratic voters correspondingly grew from 37.6% to 39%. The percentage of vote-by-mail ballots cast by non-affiliated voters remained consistent at just over 19%. Again, not all of these ballots were returned via dropboxes. These statistics strongly suggest, however, that much of the feared impact of SB 90’s dropbox restrictions—both on the electorate as a whole, and specifically on African American voters—did not come to pass. It is difficult to draw robust results from a single election,

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<sup>200</sup> *LWV I*, 595 F. Supp. 3d at 1081 (explaining that 78.75% of black voters are Democrats, while only 27.4% of white voters are Democrats).

<sup>201</sup> See Matt Dixon, *Trump Condemns Vote-by-Mail, But the Florida GOP is Counting on It to Win*, POLITICO (Apr. 9, 2020), <https://www.politico.com/states/florida/story/2020/04/08/trump-condemns-vote-by-mail-but-the-florida-gop-is-counting-on-it-to-win-1274007>.

however. Moreover, if the percentage of Democratic and minority voters relying on vote-by-mail ballots continues to grow, SB 90 may come to have an adverse and disparate impact on minority communities. And continued high participation rates by minority voters may depend on assistance from voting rights and racial justice organizations. Finally, this report—like the district court and several witnesses—uses voters’ political party affiliations as a rough and imperfect proxy for race. The Committee will be monitoring the 2024 election results to ensure that SB 90 does not create unnecessary substantial hurdles for minority and other voters.

*With regard to dropboxes, the Committee recommends that the Commission encourage the Legislature to:*

- *allow dropboxes to be placed at consistently staffed offices of other county agencies and used during those offices’ ordinary hours of operation;*
- *allow staffed dropboxes to remain open, during ordinarily applicable access hours for that location and day of the week, between the end of the early voting period and the close of polls on Election Day (or the day before, if logistically necessary to ensure the timely tallying of votes);*
- *consider whether continuous live monitoring of video cameras at dropbox locations may be an adequate substitute for in-person staffing; and*
- *encourage county supervisors of election to have an employee or volunteer circulate among dropbox locations at least twice each day to temporarily monitor them so that individuals staffing those locations have adequate restroom opportunities.*

**B. Delivery Requirements for Third-Party Voter Registration Organizations**

SB 90 contained amendments regulating voter registration by private groups. It eliminated the requirement that every employee or volunteer of a group engaging in voter registration efforts submit a sworn statement promising to obey all state laws and rules governing the registration process.<sup>202</sup> It also exempted groups from having to provide the secretary of state with the names

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<sup>202</sup> 2021 Fla. Laws 242, 249, ch. 2021-11, § 7 (May 6, 2021), *repealing* FLA. STAT. § 97.0575(1)(d).

and addresses of volunteers or employees who only solicit voter registration applications and do not “collect or handle” the applications themselves.<sup>203</sup> Additionally, the bill deleted a provision requiring third-party registration groups to account for unused blank registration forms.<sup>204</sup> Most controversially, SB 90 went on to require third-party voter registration groups to return completed applications to either the Department of State or the supervisor of elections for the applicant’s county within 14 days of receiving them, but “not after registration closes for the next ensuing election.”<sup>205</sup> The statute thereby subjected third-party registration groups to potentially substantial penalties for a wide range of actions.<sup>206</sup>

In the *League of Women Voters* litigation, the district court found that requiring groups to either send voter registration forms to the correct supervisor of elections, or instead submit them all to the Department of State without having to identify each voter’s county, “impos[ed] additional costs” on such groups, “thus limiting the number of voters each [group] can reach.”<sup>207</sup> It suggested that new statutory deadlines are unnecessary because third-party registration organizations “very rarely turn in registrations late.”<sup>208</sup> Several supervisors testified they had not experienced problems with frequent late registrations from private groups.<sup>209</sup> The court rejected the testimony of the Director of the state’s Division of Elections, who claimed such groups submit late registrations “[o]n a fairly regular basis.”<sup>210</sup> The court also “excluded a compendium of documents addressing complaints related to late voter registration submissions as hearsay.”<sup>211</sup>

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<sup>203</sup> *Id.*, codified at FLA. STAT. § 97.0575(1)(c).

<sup>204</sup> *Id.*, amending FLA. STAT. § 97.0575(5).

<sup>205</sup> *Id.*, codified at FLA. STAT. § 97.0575(3)(a).

<sup>206</sup> Badat Test., 3/28/22 Hearing Trans., at 26; Tolson Test., 4/29 Hearing Trans., at 6.

<sup>207</sup> *LWW I*, 595 F. Supp. 3d at 1107-08.

<sup>208</sup> *Id.* at 1151; *see also id.* at 1149-50.

<sup>209</sup> *Id.* at 1150.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

Noting that third-party voter registration organizations “overwhelmingly serve minority communities,”<sup>212</sup> the court concluded that SB 90’s new delivery requirements “disproportionately harm Black and Latino voters.”<sup>213</sup> The court went on to conclude that the legislature had adopted them for racially discriminatory reasons, and they were therefore unconstitutional under the Fourteenth Amendment, Fifteenth Amendment, and Voting Rights Act.<sup>214</sup> Accordingly, the court found it was unnecessary to address whether these requirements imposed undue burdens on the right to vote.<sup>215</sup> It did not address whether requiring private groups to return completed voter registration forms to election officials within a two-week timeframe was a desirable policy. Nor did it identify the specific costs that registration groups would incur by returning completed forms to the Department of State which they would otherwise be able to avoid. The U.S. Court of Appeals for the Eleventh Circuit, disagreeing with the district court’s findings of discrimination, stayed its injunction against SB 90’s delivery requirements and deadlines.<sup>216</sup>

Third-party registration organizations play a limited but important role in the registration process, particularly for members of racial minority groups. Professor Smith explained that Florida offers a range of ways to register through which people may register directly with election officials:

Many people do it when they turn 16 and pre-register, many people do it at the driver’s license office when they get their drivers’ license, many people do it when they become naturalized citizens. And we have lots of places where you can do it. You can do it at the armed forces, recruitment centers or public libraries and so forth.<sup>217</sup>

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<sup>212</sup> *LWV I*, 595 F. Supp. 3d at 1108.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1117.

<sup>215</sup> *Id.* at 1163; *see also id.* at 1169 (declining to consider other challenges to the delivery requirements).

<sup>216</sup> *LWV II*, 32 F.4th at 1372-74.

<sup>217</sup> *See Smith Test.*, 3/28/22 Hearing Trans., at 23.

Approximately 760,000 out of Florida’s 14,596,866 registered voters (about 5.2%), however, either submitted or updated their registrations through third-party groups.<sup>218</sup> Members of racial minority groups were “five times more likely” to rely on such organizations than white voters.<sup>219</sup> As of summer 2021, 11% of African American voters had relied on a third-party group to register; nearly 90% of African American voters registered through other means.<sup>220</sup>

Imposing substantial penalties on voter registration groups for submitting registration forms to the wrong supervisor of elections may therefore deter them from engaging in voter registration activities, thereby making it disproportionately harder for minorities to register.<sup>221</sup> Professor Smith explained that such inadvertent mistakes may occur for a variety of reasons.<sup>222</sup> Several other witnesses likewise maintained that SB 90’s new requirements for voter registration groups constituted “voter intimidation” and “disenfranchisement”<sup>223</sup> or was “designed to drive down overall turnout.”<sup>224</sup> Professor Smith also acknowledged, however, that “some bad actors” could abuse the third-party registration process. In the past, such misconduct has included

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<sup>218</sup> Smith Test., 3/28/22 Hearing Trans., at 23. Over the past several decades, millions of Floridians have registered or updated their registrations through such groups. *Id.*

<sup>219</sup> *Id.* This figure included 222,381 African Americans, 253,370 Hispanics, and 173,716 whites. *Id.*: see also Testimony of Prof. Franita Tolson, at 7 (hearing of Apr. 29, 2022) (explaining that “third-party voter registration organizations . . . disproportionately register minority voters”).

<sup>220</sup> Smith Test., 3/28/22 Hearing Trans., at 23 (“[A]bout 11% of all black individuals registered as of this summer, actually had last registered with a 3PVRO.”). 9.6% of Hispanics voters and less than 2% of white voters had registered through a third-party group. *Id.*: see also Tolson Test., 4/29/22 Hearing Trans., at 7 (“[A]bout one in every 10 Black and Latino voters were registered through one of these organizations . . .”).

<sup>221</sup> Smith Test., 3/28/22 Hearing Trans., at 23-24.

<sup>222</sup> *Id.* at 26-27.

<sup>223</sup> Slater Test., 3/28/22 Hearing Trans., at 17.

<sup>224</sup> Tolson Test., 4/29 Hearing Trans., at 7.

submitting fraudulent registrations<sup>225</sup> and changing voters' party affiliations or registration information without their knowledge or consent.<sup>226</sup>

It is difficult to determine whether SB 90's restrictions have actually had any adverse impact on voter registration by members of racial minority groups, particularly due to COVID's impact on registration efforts starting in March 2020:

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<sup>225</sup> Dan Scanlan, *Jacksonville Men Charged with Falsifying Voter Registration Forms*, FLA. TIMES-UNION (Nov. 24, 2021), <https://www.jacksonville.com/story/news/crime/2021/11/24/two-jacksonville-men-charged-falsifying-voter-registration-forms/8752645002/>; Amy Bingham, *9 Florida Counties Report Faked Voter Registration Forms from GOP-Backed Firm*, ABC NEWS (Oct. 1, 2012), <https://abcnews.go.com/Politics/OTUS/voter-registration-fraud-gop-backed-firm-spreads/story?id=17370445>; see also Sandra Pedicini & Sentinel Staff Writer, *ACORN Group Faces Voter-Fraud Allegations*, ORLANDO SENTINEL (Oct. 10, 2008), <https://www.orlandosentinel.com/news/os-xpm-2008-10-10-acorn10-story.html>.

<sup>226</sup> See Michael Levenson, *Florida Woman Changed Voters' Party Affiliations, Officials Say*, N.Y. TIMES (Mar. 7, 2020) (discussing Florida woman "charged with submitting 10 false voter registration forms," who "might have submitted another 109 forms with false information"), <https://www.nytimes.com/2020/03/07/us/Cheryl-hall-voter-registration-fraud.html>; Ryan Bort & William Vaillancourt, *Elderly Florida Democrats Say GOP Canvassers Duped Them into Changing Party Affiliation*, ROLLING STONE (Feb. 3, 2022) ("WPLG Local 10 News confirmed that the woman's party affiliation was changed by a third-party voter registration organization, which regularly canvass neighborhoods to help people register to vote, and that the third-party organization was the Republican Party of Florida."), <https://www.rollingstone.com/politics/politics-news/florida-democrats-party-affiliation-changed-republican-canvassers-1294703/>.

<b>YEAR</b>	<b>TOTAL REGISTERED VOTERS<sup>227</sup></b>	<b>NEW VOTER REGISTRATONS (incl. pre-registrations)<sup>228</sup></b>	<b>REGISTRATIONS THROUGH THIRD-PARTY GROUPS</b>
<b>2022</b>	14,596,866	763,135	36,261 (0.25% of total registrations; 4.75% of new registrations)
<b>2021</b>	14,287,711	680,693	16,615 (0.12% of total registrations; 2.44% of new registrations)
<b>2020</b>	14,565,738	1,176,509	59,805 (0.41% of total registrations; 5.08% of new registrations)
<b>2019</b>	13,536,830	712,207	63,212 (0.47% of total registrations; 8.88% of new registrations)
<b>2018</b>	13,396,622	844,119	96,516 (0.72% of total registrations; 11.43% of new registrations)
<b>2017</b>	12,867,189	510,410	unavailable
<b>2016</b>	12,959,185	1,070,575	unavailable
<b>2015</b>	11,943,467	616,714	unavailable
<b>2014</b>	11,986,428	603,853	unavailable

It is difficult to tell from this data whether SB 90 has adversely impacted voter registration in Florida, in part because less than 1% of voter registrations are new. On the one hand, private third-party groups have registered fewer voters in the years following SB 90’s enactment—2021 (partial) and 2022—than before. Moreover, the percentage of new registrations that were processed by third-party groups dropped from 8.88%-11.43% in 2018 and 2019 to 2.44%-4.75% in 2021 and 2022. On the other hand, despite an extensive national push, voter registration by third-party groups had already been on a declining trend over a five-year period, and it is not

<sup>227</sup> Fla. Dep’t of State, Div. of Elections, *Voter Registration – By Party Affiliation* (Dec. 9, 2022), <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reports/voter-registration-by-party-affiliation/>; Fla. Dep’t of State, Div. of Elections, *By Party Affiliation Archive*, <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reports/voter-registration-by-party-affiliation/by-party-affiliation-archive/>.

<sup>228</sup> Fla. Dep’t of State, Div. of Elections, *Voter Registration – Method and Location* (Dec. 9, 2022), <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reports/voter-registration-method-and-location/>; Fla. Dep’t of State, Div. of Elections, *Voter Registration – Method and Location Archive*, <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reports/voter-registration-method-and-location/method-and-location-archive/>.

possible to definitively determine the causes. The COVID-19 pandemic also struck in 2020, permanently changing the way many people work and leading many people to conduct more business online, by mail, and through delivery services. It is difficult to disentangle the impact of COVID-19 from that of SB 90 or the trend that began before either.

Perhaps more importantly, it does not appear that SB 90 has adversely impacted the overall number of new voter registrations. To the extent the bill's restrictions have led some third-party voter registration organizations to reduce or curtail their activities as they testified in court, it may be that applicants simply obtained and returned voter registration forms themselves. 680,693 registered to vote in 2021, the year following a presidential election; SB 90 was enacted that year, but that figure includes people registered before the statute's enactment, as well. The number of new registrants in the previous year after a presidential election, 2017, was only 510,410. Again, it is difficult to speculate what these numbers would have been in the absence of SB 90's requirements.

The results are more mixed with regard to congressional election years. In 2022, a total of 763,135 registered to vote. This figure exceeds the registration total for 2014, which was 603,853 new registrants, but was less 2018, in which 844,119 new registrations occurred. The decline in voter registrations in 2022 compared to 2018 may not be attributable to SB 90, however. While 60,255 fewer people registered through third-party voter registration organizations in 2022 compared to 2018, the same is true for other forms of voter registration which were completely unaffected by SB 90. Specifically:

- 48,630 fewer people registered in person in Supervisors of Elections offices (93,985 in 2018 compared to 45,355 in 2022);

- 44,632 fewer people registered online (142,918 in 2018 compared to 98,286 in 2022); and
- 29,441 fewer people registered by mail (58,412 in 2018 compared to 28,971 in 2022).

Thus, the reduction in voter registrations through third-party voter registration groups was consistent with similar reductions in the same timeframe through other registration methods, and therefore may have been unrelated to SB 90. Moreover, despite SB 90, the total number of registrations grew between 2021 and 2022, while the number of people registered by third-party groups more than doubled in that period, from 16,615 to 36,261. In short, though the empirical evidence is somewhat muddled, it does not generally appear to suggest that SB 90 has caused a reduction in overall voter registration.

The evidence is likewise mixed when broken down by race:

<b>BOOK CLOSING YEAR<sup>229</sup></b>	<b>TOTAL NUMBER OF VOTER REGISTRATIONS</b>	<b>WHITE VOTERS</b>	<b>BLACK VOTERS</b>	<b>HISPANIC VOTERS</b>
<b>2022</b>	14,503,978	8,846,644 (66.1%)	1,925,171 (14.4%)	2,605,761 (19.5%)
<b>2020</b>	14,441,869	8,875,879 (66.7%)	1,938,191 (14.6%)	2,499,822 (18.8%)
<b>2018</b>	13,278,070	8,837,823 (69.1%)	1,764,586 (13.8%)	2,194,063 (17.2%)
<b>2016</b>	12,863,773	8,264,928 (68.8%)	1,723,402 (14.4%)	2,023,850 (16.9%)

NOTE: The tallies for the total number of voter registrations in this chart differ slightly from the previous chart because this chart's figures reflect voter registrations through the book-closing

<sup>229</sup> Fla. Dep't of State, Div. of Elections, *2022 General Election: Active Registered Voters Race Party* (Oct. 21, 2022), <https://files.floridados.gov/media/706003/2-by-county-by-race.pdf>; Fla. Dep't of State, Div. of Elections, *2020 General Election: County Voter Registration by Race* (Oct. 13, 2020), <https://files.floridados.gov/media/703594/2-by-county-by-race.pdf>; Fla. Dep't of State, Div. of Elections, *2018 General Election: County Voter Registration by Race* (Oct. 19, 2018), [https://files.floridados.gov/media/700187/2018gen\\_race.pdf](https://files.floridados.gov/media/700187/2018gen_race.pdf); Fla. Dep't of State, Div. of Elections, *2016 General Election: County Voter Registration by Race* (Oct. 28, 2016), [https://files.floridados.gov/media/697215/2016general\\_race.pdf](https://files.floridados.gov/media/697215/2016general_race.pdf).

deadline for the specified year's general election (*i.e.*, through early October), whereas the previous chart measured registrations for the complete calendar year. Other small groups included in the total registration figures have been excluded from this table for simplification.

Between 2020 and 2022—the period in which SB 90 entered into effect—the total number of voter registrations increased by 62,109. This growth was driven primarily by an increase in the number of registered Hispanic voters, which grew from 2,499,822 to 2,605,761 (a 4.08% increase). During that time, the number of registered white voters declined by 29,235 (a 0.32% decrease), while the number of registered black voters declined by 13,020 (a 0.67% decrease). Again, the evidence of SB 90's impact is mixed, and it is difficult to draw robust conclusions from a single election cycle. The drop in white voter registrations exceeded that of black registrations. Moreover, between 2020 and 2022, the share of registered voters who are white likewise declined (from 61.46% to 60.99%), and at a higher rate than for black voters (from 13.42% to 13.27%). On the other hand, black registrations declined at a higher rate than white registrations, albeit by only a third of a percent more in absolute terms. The most apparent change is in the substantial increases in both the relative and absolute numbers of Hispanic voters. Additionally, as discussed earlier, the number of people registered by third-party organizations grew from 16,615 in 2021 to 36,261 in 2022. Thus, it is difficult to assess whether any registration declines resulted from SB 90's impact on voter registration organizations, COVID-19, minor changes in the composition of the state's citizen voting-age population, broader political influences, or other factors.

In conclusion, the State of Florida should ensure that it does not needlessly chill third-party voter registration organizations from ensuring that all voters, including racial minorities, have an opportunity to register to vote. The evidence concerning SB 90's impact on voter registration is muddled at best and does not appear to establish that SB 90 has adversely impacted overall voter registration or had a substantial disparate impact against racial minorities.

*With regard to third-party voter registration organizations, the Committee recommends that the Commission encourage the Legislature to:*

- *notify third-party voter registration groups about voter registration requirements to reduce potential confusion concerning people’s eligibility to vote, and specifically inform such groups that they may avoid the inconvenience of confirming the correct county on completed registration forms by providing such forms directly to the Secretary of State’s Division of Elections; and*
- *reduce the penalties for inadvertent or isolated violations of registration-related requirements (excluding the fraudulent completion or modification of voter registration forms, or wrongful destruction of completed forms) by third-party voter registration groups acting in good faith.*

**C. Disclaimer Requirements for Third-Party Voter Registration Organizations**

SB 90 also required third-party voter registration organizations to provide certain information, disclaimers, and warnings to people whom the group was helping register to vote. Specifically, a group was required to:

- warn applicants that the group might not return their completed application forms to election officials by the statutorily required deadlines;<sup>230</sup>
- notify applicants of their right to return their completed applications to election officials themselves, either in person or by mail, rather than relying on the group to do so;<sup>231</sup> and
- inform each applicant how to register online and determine whether election officials have received their application form.<sup>232</sup>

The district court in the *League of Women Voters* litigation found that the legislature adopted these requirements “with intent to discriminate based on race” since black voters disproportionately rely on third-party groups to register, but did not invalidate the provisions on

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<sup>230</sup> 2021 Fla. Laws 242, 249, ch. 2021-11, § 7 (May 6, 2021), *codified at* FLA. STAT. § 97.0575(3)(a), (3)(a)(1)-(3), (5).

<sup>231</sup> *Id.*, *codified at* FLA. STAT. § 97.0575(3)(a).

<sup>232</sup> *Id.*

that basis.<sup>233</sup> Rather, the court ruled that these disclaimer requirements violated the First Amendment by requiring third-party voter registration groups to engage in compelled speech.<sup>234</sup> The court held that these requirements failed strict scrutiny under the First Amendment because they did not serve a compelling state interest, but would be similarly invalid even under a less exacting level of scrutiny.<sup>235</sup>

The court acknowledged that the required warning were “factually true,” but held that the risk of private groups returning voters’ forms late was “so small that forcing [them] to disclose [the risk] would mislead registrants into thinking it was likely.”<sup>236</sup> Accordingly, “warning voters that [private groups] *might* turn in registrations late is not a compelling interest.”<sup>237</sup> The court further pointed out that the state had a less restrictive alternative for conveying its message to applicants: “communicating its message itself” on the voter registration form.<sup>238</sup> For these reasons, the court enjoined the state from enforcing these disclaimer requirements.<sup>239</sup>

The Eleventh Circuit did not address this aspect of the district court’s ruling because the legislature amended these provisions in SB 524.<sup>240</sup> SB 524, following the district court’s reasoning, repealed the provisions requiring third-party groups to provide the required disclaimers to applicants, and directed the Secretary of State to print them on voter registration forms instead.<sup>241</sup> Thus, SB 90’s disclaimer requirements are no longer in force and impacted voter registration, if at all, for only a limited period of time.

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<sup>233</sup> *LWV I*, 595 F. Supp. 3d at 1149.

<sup>234</sup> *Id.* at 1148.

<sup>235</sup> *Id.* at 1152 (“[W]hether this Court applies Plaintiffs’ preferred test or Defendants’ preferred test; the registration disclaimer violates Plaintiffs’ First Amendment rights.”).

<sup>236</sup> *Id.* at 1148.

<sup>237</sup> *Id.*

<sup>238</sup> *LWV I*, 595 F. Supp. 3d at 1148.

<sup>239</sup> *Id.* at 1152.

<sup>240</sup> *LWV II*, 32 F.4th at 1363, 1372 n.9.

<sup>241</sup> 2022 Fla. Laws 549, 553, ch. 2022-73, § 5 (Apr. 27, 2022, effective date July 1, 2022), *codified at* FLA. STAT. § 97.052(3)(g). This amendment also specifies that a third-party voter registration group is liable if a person working

**D. Request Duration for Vote-by-Mail Ballots**

SB 90 specified that a supervisor may not send a vote-by-mail ballot to a voter without an express request, except for voters with disabilities, overseas voters, and local referenda.<sup>242</sup> Under previous law, a voter could request that the supervisor mail her all ballots for the next two general elections—a period of up to four years.<sup>243</sup> SB 90 reduced this period, so that a request may remain valid only through the next general election—a two-year period at most.<sup>244</sup> Existing vote-by-mail requests, however, remained valid through the end of 2022.<sup>245</sup> The district court in *League of Women Voters v. Lee* held that the “racial impact” of this provision is “unclear” because limited data was available about the races of people who had standing requests for vote-by-mail ballots.<sup>246</sup> Accordingly, it ruled that the plaintiffs had failed to show this amendment was adopted for a racially discriminatory purpose.<sup>247</sup> It further held that this provision does not impose a “severe burden” on “any class of voters,” including those who lack valid identification.<sup>248</sup> It also found that the state’s proffered justification for this requirement, of having “‘more current information’ on file” for voters, was “legitimate” and “justif[ies]” this requirement.<sup>249</sup> Secretary Byrd added that this amendment also helped address one of the “biggest complaint[s]” his office received,

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with that group is convicted of altering someone’s voter registration application without their consent. *Id.* at 554-55, § 7, *codified at* FLA. STAT. § 97.0575(3)(a)(4).

<sup>242</sup> 2021 Fla. Laws 242, 262, ch. 2021-11, § 24 (May 6, 2021), *codified at* FLA. STAT. § 101.52(7).

<sup>243</sup> FLA. STAT. § 101.62(1)(a) (2020).

<sup>244</sup> 2021 Fla. Laws 242, 259, ch. 2021-11, § 24 (May 6, 2021), *codified at* FLA. STAT. § 101.62(1)(a); *see also* Badat, Test., 3/28/22 Hearing Trans., at 12; Tolson Test., 4/29 Hearing Trans., at 5.

<sup>245</sup> 2021 Fla. Laws 242, 262, ch. 2021-11, § 25 (May 6, 2021), *codified at* FLA. STAT. § 101.62(1)(a).

<sup>246</sup> *LWV I*, 595 F. Supp. 3d at 1104.

<sup>247</sup> *Id.* at 1116 (“[T]his Court finds that Plaintiffs have not shown that the Legislature enacted the VBM request provision with the intent to discriminate against Black voters.”).

<sup>248</sup> *Id.* at 1166.

<sup>249</sup> *Id.* at 1168.

which is voters complaining about vote-by-mail ballots being sent to them that they hadn't requested (or they had forgotten they had requested years earlier).<sup>250</sup>

Several witnesses opposed SB 90's shortening of the duration for vote-by-mail requests.<sup>251</sup> Professor Tolson opined that this law was similar to Florida's 1887 annual voter registration requirement and could lead to "mistakes and errors" by voters.<sup>252</sup> Mr. Badat cautioned that this reduction could disproportionately impact "older voters, voters with memory issues, and blind voters."<sup>253</sup> Concerns were also raised that shorter durations could increase burdens on candidates, political parties, and third-party groups engaged in get-out-the-vote efforts.

Supervisor Scott testified that more frequently confirming the validity of voters' addresses was not worth the additional resources it would take to process their additional request forms.<sup>254</sup> Supervisor Wilcox added that, "every two to three months," approximately 12-13% of Floridians move.<sup>255</sup> In a recent election, he distributed approximately 90,000 vote-by-mail ballots; of those, approximately 10,000 were sent to the wrong address or otherwise returned as "undeliverable."<sup>256</sup> Wilcox did not believe it was "that great of a return on investment" to require the 80,000 people who didn't move to submit more frequent absentee ballot request forms in order to prevent approximately 10,000 ballots from being distributed to old addresses<sup>257</sup> or voters who had moved

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<sup>250</sup> Byrd Test., 9/14/22 Hearing Trans., at 21; *see also id.* at 6 ("[O]ne of the most common complaints we heard from voters was that they were receiving ballots that they never requested or that they were receiving other people's ballots unexpectedly.").

<sup>251</sup> Wilcox Test., 3/28/22 Hearing Trans., at 28 ("I don't know that this solves a problem that we have in my opinion."); Scott Test., 4/29/22 Hearing Trans., at 29 ("[W]hy wouldn't we move in the other direction instead of every four years? Why not let it go eight years? Or just let it go indefinitely as long as the person is continuing to use it . . ."); Smith Test., 3/28/22 Hearing Trans., at 29 (explaining the reform is "adding this additional layer that's not really doing anything with respect to security . . . It's now just an administrative burden on the supervisors."); Slater Test., 3/28/22 Hearing Trans., at 17.

<sup>252</sup> Tolson Test., 4/29 Hearing Trans., at 6.

<sup>253</sup> Badat, Test., 3/28/22 Hearing Trans., at 12.

<sup>254</sup> Scott Test., 4/29/22 Hearing Trans., at 29.

<sup>255</sup> Wilcox Test., 3/28/22 Hearing Trans., at 28.

<sup>256</sup> *Id.* at 28.

<sup>257</sup> *Id.*

out of the jurisdiction, were no longer eligible to vote, and had potentially registered elsewhere. Wilcox was planning to dedicate additional time and resources to proactively encourage voters to submit more frequent vote-by-mail request forms in order to maintain voter participation levels.<sup>258</sup>

Supervisor Scott opined that election officials should be able to rely on the postal service rather than requiring voters to submit more frequent request forms. Since ballots are non-forwardable, he reasoned, the postal service can simply return ballots sent to outdated addresses as non-deliverable.<sup>259</sup>

As mentioned above, SB 90 specified that existing requests for vote-by-mail ballots would not expire until after the 2022 election, to give voters an opportunity to acclimate to the new law.<sup>260</sup> Thus, vote-by-mail statistics concerning the 2022 election provides limited, if any, insight into the effect of reducing the duration of vote-by-mail requests. The committee was also unable to gather several other key statistics that would inform an objective assessment of this provision, including:

- prior to SB 90, the number of vote-by-mail ballots distributed: (i) for the first general election following a voter’s request that were returned as non-deliverable, and (ii) for the second general election following a voter’s request that were returned as non-deliverable. These figures would help reveal whether voters’ addresses were substantially more likely to become outdated after SB 90’s two-year expiration period.
- the number or percentage of mail, or non-forwardable election mail in particular, that is delivered to a person’s previous address despite that person no longer living there. Such figures would help confirm whether election officials can rely on the postal service declining to deliver vote-by-mail ballots to outdated addresses.
- the number or percentage of people whose requests for vote-by-mail ballots expire after the general election pursuant to SB 90 who: (i) fail to submit an updated request form, and (ii) of those people, the number who do not cast a ballot through other means. It would further be helpful to be able to gather similar information

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<sup>258</sup> *Id.* at 36.

<sup>259</sup> Scott Test., 4/29/22 Hearing Trans., at 11 (explaining that, under his county’s “list maintenance program,” if a vote-by-mail ballot “goes to an address and it gets returned, then we will basically cancel that vote-by-mail request”); *see also id.* at 12-13 (explaining that, when an absentee ballot is returned as non-deliverable, the voter is not automatically removed from the registration rolls).

<sup>260</sup> *See supra* note 245.

regarding voters whose requests expired after two general election cycles prior to SB 90's enactment, to determine whether the amendment has exacerbated such problems. These figures would demonstrate the extent to which SB 90 has led to reductions in voter turnout in general, and vote-by-mail specifically.

*With regard to vote-by-mail ballot requests, the Committee recommends that the Commission encourage:*

- *Florida election officials to gather, provide to the legislature, and publicly disclose data concerning the validity of addresses on the voter registration rolls, the expiration of requests for vote-by-mail ballots, the number of requests for vote-by-mail ballots by people whose previous requests have expired, voting turnout for people whose requests for vote-by-mail ballots have expired, and statistics regarding the erroneous delivery of non-forwardable mail, to assist informed public discussion of the impact of SB 90's reduction in the duration of vote-by-mail requests, and*
- *supervisors of elections to enclose vote-by-mail ballot request forms (including prepaid return envelopes) with general election ballots to remind voters of the need to renew their requests, make it easier for them to do so, and minimize any adverse impact of SB 90's changes.*

**E. Identification Requirements for Vote-by-Mail Requests**

One of the most controversial provisions of SB 90 is its requirement that voters provide additional identifying information to request a vote-by-mail ballot. SB 90 requires a request to contain a voter's driver's license number, state identification card number, or the last four digits of their social security number.<sup>261</sup> State law did not previously contain any such requirement. To help election officials gather the information they need to enforce this requirement, SB 90 requires voters changing their address to provide their supervisor of elections with their driver's license number, state identification card number, or last four digits of their social security number.<sup>262</sup> Secretary Byrd explained that people who vote in person are required to "show a valid ID to verify that they are who they say they are."<sup>263</sup> SB 90's new identification requirement for vote-by-mail

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<sup>261</sup> 2021 Fla. Laws 242, 259-60, ch. 2021-11, § 24 (May 6, 2021), *codified at* FLA. STAT. § 101.62(1)(b)(4), (1)(b)(7).

<sup>262</sup> *Id.* at 251, § 9, *codified at* FLA. STAT. § 97.1031(1)(b)(1).

<sup>263</sup> Byrd Test., 9/14/22 Hearing Trans., at 5.

requests was intended to ensure that “the same level of verification was in place for voter[s] who requested a vote-by-mail ballot.”<sup>264</sup> The statute seeks to ensure that “vote-by-mail ballots are sent only to the individuals that request them.”<sup>265</sup> Supervisor Wilcox testified that there were “relatively few voters” in his county whose registration records lacked this information.<sup>266</sup>

In the *League of Women Voters* litigation, the district court found based on Professor Smith’s testimony that more than 600,000 voters lacked a driver’s license, state identification card, or social security number prior to SB 90’s enactment. Following the statute’s adoption, however, that number dropped “from 600-plus to 400,000.”<sup>267</sup> Reviewing Professor Smith’s testimony, the court further noted that “of the individuals with no requisite form of identification, 80.18% were White, 12.70% were Black, 3.92% were Latino, and 3.20% were ‘other.’”<sup>268</sup> It found that there was some evidence that “(a) White voters will be the most impacted in the short term by the VBM request identification provision, and that (b) in the future, the VBM request identification provision could have a disparate impact on minority voters.”<sup>269</sup> The court concluded that there was no evidence that either “(a) the VBM identification provision has a disparate impact on Black voters or (b) the Legislature believed that the VBM request identification provision would have a disparate impact on Black voters.”<sup>270</sup> Thus, the Court found that the plaintiffs had failed to prove the law was passed with racially discriminatory intent, and allowed the provision to take effect.<sup>271</sup>

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 6 (“[I]t was imperative to ensure that only voters who submit a request for a vote-by-mail ballot are the ones who received them.”).

<sup>266</sup> Wilcox Text., 3/8/22 Hearing Trans., at 21.

<sup>267</sup> *LWV I*, 595 F. Supp. 3d at 1104.

<sup>268</sup> *Id.* at 1105.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 1116.

<sup>271</sup> *Id.*

It does not appear that SB 90's identification requirements impeded voting in the 2022 election, either. The following chart reprises vote-by-mail statistics from the past three congressional elections:

<b>Congressional Election</b>	<b>Total Turnout</b>	<b>Vote-by-Mail Total Ballots</b>	<b>VBM from Republican Voters</b>	<b>VBM from Democrat Voters</b>	<b>VBM from Other Parties' Voters</b>	<b>VBM from No Party Affiliation Voters</b>
<b>2022</b>	7,796,916	2,773,948	1,001,229	1,194,857	40,361	537,501
<b>2018</b>	8,305,929	2,623,798	1,080,808	1,026,600	15,826	500,564
<b>2014</b>	6,027,674	1,877,820	833,420	705,752	53,761	284,887

As discussed earlier, the total number of vote-by-mail ballots cast increased by 150,150 and the percentage of ballots cast through vote-by-mail increased from 31.59% to 35.58% between the 2018 and 2022 elections. The number of vote-by-mail ballots cast by Democratic voters, which are disproportionately African American,<sup>272</sup> rose by 168,257, or 16.4%. Thus, consistent with the district court's conclusions, there is no evidence that the new identification requirements for vote-by-mail requests depressed the use of vote-by-mail ballots, either in general or for minority voters.

One potential problem that voters may face arises from the fact that the state allows them to provide any of three different identification numbers to request a ballot. If a person provided only one identification number when they registered to vote, they would have to provide that same number when requesting a vote-by-mail ballot. Accordingly, if they had provided their drivers' license number when registering, but provided the last four digits of their social security number when requesting a ballot, their request would be invalid and they would not receive a vote-by-mail ballot unless and until they provided their drivers' license number.<sup>273</sup> Likewise, people who lose the form of identification they provided when registering to vote would be unable to request a

<sup>272</sup> *Id.* at 1081 (explaining that 78.75% of black voters are Democrats, while only 27.4% of white voters are Democrats).

<sup>273</sup> *See* Smith Test., 3/28/22, at 7; Badat Test., 3/28/22 Hearing Trans., at 13.

ballot, as well.<sup>274</sup> A similar requirement in Texas led to increased number of rejected absentee ballot applications.<sup>275</sup> Though these contingencies may affect only limited numbers of voters, the state may reform its process for requesting vote-by-mail ballots to reduce such problems even further.

*With regard to identification requirements for vote-by-mail ballot requests, the Committee recommends that the Commission encourage the Legislature to:*

- *make a Florida birth certificate available upon request without charge to otherwise eligible members of the state’s citizen voting-age population, to facilitate their acquisition of a required form of identification;*
- *print a request on state-created voter registration forms urging the applicant to provide both: (i) a driver’s license number or state identification number, as well as (ii) the last four digits of the social security number, in order to avoid potential difficulties in requesting vote-by-mail ballots;*
- *require supervisors of election to proactively take steps to obtain both: (i) a driver’s license number or state identification number, as well as (ii) the last four digits of the social security number, of each person registered in their database, to avoid potential problems of voters including the “wrong” number on their vote-by-mail ballot request form; and*
- *require supervisors of election to contact voters via phone, e-mail, or mail, as appropriate, to notify them if they provided an identification number that does not appear in their records, and transmit a blank vote-by-mail ballot if the voter provides the requisite information, as well as a blank registration form to allow the voter to update their information, if necessary.*

#### **F. Anti-Solicitation (“Line Warming”) Provisions**

Prior to SB 90, Florida’s anti-solicitation provision barred any person from “solicit[ing] voters” inside the polling place or within 150 feet of the entrance to a polling place, early voting location, or supervisor’s office where ballots are made available to voters.<sup>276</sup> The term “solicit”

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<sup>274</sup> Badat Test., 3/28/22 Hearing Trans., at 13.

<sup>275</sup> *Id.*

<sup>276</sup> 2021 Fla. Laws 242, 266, ch. 2021-11, § 29 (May 6, 2021), *codified at* FLA. STAT. § 102.031(4)(a).

was defined as including “seeking or attempting to seek any vote” or signature for a petition; distributing “any political or campaign material;” polling (except as otherwise permitted); and selling any item.<sup>277</sup>

SB 90 expanded the definition to also include “engaging in any activity with the intent to influence or effect of influencing any voter.”<sup>278</sup> The statute further specified that, notwithstanding this provision, a volunteer or employee of the Supervisor of Elections may “provid[e] nonpartisan assistance to voters within the no-solicitation zone,” specifically including “giving items to voters.”<sup>279</sup> Finally, the statute establishes non-solicitation zones not only around each polling place and early-voting location, but each dropbox, as well.<sup>280</sup> Secretary Byrd explained that these restrictions were not intended as “punitive.”<sup>281</sup> Rather, the legislature adopted them to prevent political operatives and other activists from attempting to “unduly influence” voters as they are preparing to cast their ballot, “whether it’s giving them good, water or other items of value.”<sup>282</sup> He also noted that long lines have become less of a problem due to the rise of vote-by-mail and early voting, which may last for up to two weeks.<sup>283</sup>

The district court held that SB 90’s amendment to Florida’s anti-solicitation provision “can be read to prohibit ‘line warming’ activities” such as “giving out water, fans, snacks, chairs, ponchos, and umbrellas.”<sup>284</sup> It found that such a restriction would have a racially disparate impact “because minority voters are disproportionately likely to wait in line to vote.”<sup>285</sup> The court

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<sup>277</sup> *Id.*, codified at FLA. STAT. § 102.031(4)(b).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*, codified at FLA. STAT. § 102.031(4)(b).

<sup>280</sup> *Id.*, codified at FLA. STAT. § 102.031(4)(a).

<sup>281</sup> Byrd Test., 9/14/22 Hearing Trans., at 16.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *LWW I*, 595 F. Supp. 3d at 1065; *see also* Badat Test., 3/28/22 Hearing Trans., at 13-14.

<sup>285</sup> *LWW I*, 595 F. Supp. 3d at 1107.

therefore concluded that legislators adopted the measure for racially discriminatory purposes<sup>286</sup> and struck it down under the Fourteenth Amendment, Fifteenth Amendment, and Voting Rights Act.<sup>287</sup> The district court also went on to hold that the statute’s prohibition on “all activities that ‘influence’ voters” was also both unconstitutionally vague<sup>288</sup> and overbroad.<sup>289</sup> The Committee notes the district court’s observation that minority voters are more likely to be impacted by long lines, and emphasizes that this should not be accepted as an inevitable or tolerable part of our electoral system. Polling place resources must be fairly distributed to ensure that voters, and particularly members of certain racial groups, are not subject to substantial, unreasonable waiting times.

The Eleventh Circuit disagreed with the district court’s rulings regarding SB 90’s amendments to the anti-solicitation provision, staying the district court’s injunction.<sup>290</sup> After finding that the district court’s findings concerning intentional racial discrimination were flawed,<sup>291</sup> the Eleventh Circuit further held that the state “has a substantial argument” that these provisions are neither vague nor overbroad. The statutory context, including the language surrounding the challenged amendment, could be used to narrow the statute’s scope and provide more concrete guidance as to the range of prohibited conduct.<sup>292</sup> Moreover, the lower court’s overbreadth ruling was erroneous because that court had “failed to contend with any of the ‘plainly legitimate’ applications of the Solicitation Provision.”<sup>293</sup>

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<sup>286</sup> *Id.* at 1116-17.

<sup>287</sup> *Id.* at 1117.

<sup>288</sup> *Id.* at 1136-37.

<sup>289</sup> *Id.* at 1138.

<sup>290</sup> *LWV II*, 32 F.4th at 1374-75.

<sup>291</sup> *Id.* at 1372-74.

<sup>292</sup> *Id.* at 1374.

<sup>293</sup> *Id.*

Several witnesses testified that line relief efforts are important when voters must wait more than an hour to vote.<sup>294</sup> Cynthia Slater of the Volusia County NAACP argued that SB 90's provisions restricting interactions with voters waiting in line were based on misperceptions about activist groups' activities.<sup>295</sup> She was concerned that legislators erroneously believed that "volunteers go up to the lines where those voters are and just start handing out water," potentially with the name of a group or candidate on it.<sup>296</sup> She argued that this was incorrect, and that activists "don't just go . . . up to the line and just start handing out bottles of water."<sup>297</sup> Rather, "We have tables and stations set up at a certain distance from where the restricted lines are . . . And the voters will come to us and ask if they could have a bottle of water or whatever."<sup>298</sup>

She elaborated:

We provide refreshments such as snacks, juice, and bottles of water to individuals waiting in line. We also provide items such as fans, Chairs, and umbrellas, to voters waiting in long lines at polling locations. By supplying food and water to help sustain individuals waiting in long lines, the NAACP and its volunteers, are . . . communicating that it is important to stay in line to exercise their right to vote.<sup>299</sup>

Volunteers with Ms. Slater's group also "walk[] with" disabled voters "to the polling site" or "help[] them move to the front of the line."<sup>300</sup> In addition, they coordinate with people to save disabled voters' spots in line if they need to use the rest room, and call the police when necessary.<sup>301</sup>

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<sup>294</sup> Slater Test., 3/28/22 Hearing Trans., at 16; Tolson Test., 4/29/22 Hearing Trans., at 30.

<sup>295</sup> Slater Test., 3/28/22 Hearing Trans., at 25.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 16.

<sup>300</sup> Slater Test., 3/28/22 Hearing Trans., at 16.

<sup>301</sup> *Id.*

*With regard to anti-solicitation provisions, the Committee recommends that the Commission encourage the Legislature to:*

- *clarify the scope of SB 90's prohibitions;*
- *expressly specify that individuals and private groups may provide food, water, chairs, and other resources to polling place officials for officials to distribute to people waiting in line as part of line relief efforts;*
- *mandate that election officials provide port-a-potties whenever feasible if restroom facilities are not available at early voting locations or polling places at which long lines are reasonably expected;*
- *require polling place officials to collect information concerning waiting times at early voting locations and polling places and report it in real time via a publicly accessible online app and website so voters can avoid unnecessary lengthy waits, because "line warming" activities often occur where voters face long wait times; and*
- *require polling place officials to measure waiting times at each early voting location and polling place. If, after the first day of the early voting period, the wait at any such location exceeds a half hour, election officials should be required to take remedial action at that location in the next election cycle. Such remedies might include providing additional voting machines or personnel, providing additional training or supervision for those polling place officials, or creating an additional nearby early voting location or polling place. Anyone eligible to vote at the original location would be permitted to vote either at the original location or the additional new early voting location or polling place.*

**G. Third-Party Ballot Collection ("Ballot Harvesting") Ban**

Finally, state law prior to SB 90 prohibited a person from providing or accepting "any pecuniary benefit" in exchange for requesting, collecting, or delivering more than two vote-by-mail ballots per election, other than immediate family members' ballots.<sup>302</sup> S.B. 90 amended this provision to bar any person from distributing, requesting, collecting, delivering, or possessing more than two vote-by-mail ballots, except for ballots from immediate family members.<sup>303</sup> The

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<sup>302</sup> FLA. STAT. § 104.0616(2) (2020).

<sup>303</sup> 2021 Fla. Laws 242, 266, ch. 2021-11, § 29 (May 6, 2021), *codified at* FLA. STAT. § 102.031(4)(a).

law also extended the definition of “immediate family” to include not only the spouse, parents, children, grandparents, and siblings of a person or the person’s spouse, but grandchildren, as well.<sup>304</sup> This measure was adopted to stop political operatives and other activists from soliciting and gathering vote-by-mail ballots from strangers to return them to election officials, due to concerns about the possibility that such intermediaries may collect and complete blank ballots, alter completed ballots, or discard ballots that were not filled out for their preferred candidates.<sup>305</sup>

Some witnesses explained that this restriction might make some people less likely to vote because they prefer to return their ballots through a neighbor or pastor,<sup>306</sup> either due to their “cultural practices” or “mistrust” of governmental institutions.<sup>307</sup> Florida does not appear to collect statistics about the number of vote-by-mail ballots returned through third-party intermediaries. Likewise, it is unclear whether people who choose to return ballots through such intermediaries would instead take advantage of other methods of voting, such as in-person voting at polling places, early voting, dropboxes, or returning vote-by-mail ballots either in-person or through the postal service. Substantial disagreement also exists over whether requiring people to use such alternatives, rather than being able to rely on third-party ballot collection, imposes a substantial burden on their rights—either generally, or with regard to certain populations.

There is no evidence that most third-party ballot collection leads to fraud or other irregularities. On the other hand, several Florida elections have been impacted by voter fraud

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<sup>304</sup> *Id.*; see also Byrd Test., 9/14/22 Hearing Trans., at 5.

<sup>305</sup> See Lawrence Mower, *After 20 Years, Florida Republicans Look to Ban Ballot Harvesting—Again*, TAMPA BAY TIMES (Mar. 22, 2021), <https://www.tampabay.com/news/florida-politics/2021/03/22/after-20-years-florida-republicans-look-to-ban-ballot-harvesting-again/>; see, e.g., Bill Smith, *Election Complaint Filed Over Campaign for Fort Myers Seat*, NEWS-PRESS (Sept. 6, 2022), <https://www.news-press.com/story/news/politics/elections/2022/09/06/chantel-rhodes-terolyn-watson-fort-myers-council-candidate-accused-campaign-law-violations/7970531001/>; Ryan Gillespie, *Former Eatonville Mayor Found Guilty of Voting Fraud, Election Violations*, ORLANDO SENTINEL (May 19, 2017), <https://www.orlandosentinel.com/news/breaking-news/os-anthony-grant-trial-verdict-20170519-story.html>.

<sup>306</sup> Badat Test., 3/28/22 Hearing Trans., at 26; Smith Test., 3/28/22 Hearing, at 9.

<sup>307</sup> Scott Test., 4/29/22 Hearing Trans., at 13; Tolson Test., 4/29/22 Hearing Trans., at 14.

facilitated by third-party ballot collection. Florida courts went so far as to invalidate Miami’s 1998 mayoral race<sup>308</sup> and Hialeah’s 1993 mayoral race<sup>309</sup> due to forged absentee ballots and other absentee ballot fraud involving third-party absentee ballot collection. Several other examples exist of people improperly filling out other Florida voters’ absentee ballots.<sup>310</sup> Thus, people disagree over whether the risk of such fraud warrants the additional restrictions entailed by bans on third-party ballot collection. The state may be able to reduce the impact of restrictions on the practice by ensuring that alternate voting methods are reasonably available.

#### **H. Other Provisions**

In addition to the provisions on which the committee took testimony, SB 90 contains a range of other reforms to various aspects of the electoral process. For example, the legislation increased transparency by guaranteeing candidates, political party officials, and political committee officials the right to inspect “ballot materials” including “voter certificates on vote-by-mail envelopes, cure affidavits, corresponding comparison signatures, duplicate ballots, and corresponding originals,” before canvassing or tabulation.<sup>311</sup> It also granted such parties’ observers the right to monitor the duplication process for damaged or unreadable vote-by-mail ballots and make “reasonable objection[s].”<sup>312</sup> During the canvass, each political party and

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<sup>308</sup> See Mireya Navarro, *Fraud Ruling Invalidates Miami Mayoral Election*, N.Y. TIMES (Mar. 5, 1998), <https://www.nytimes.com/1998/03/05/us/fraud-ruling-invalidates-miami-mayoral-election.html>.

<sup>309</sup> Nancy St. Martin, *Voting Fraud Invalidates Mayor’s Race in Hialeah*, SUN-SENTINEL (Nov. 8, 1994), <https://www.sun-sentinel.com/news/fl-xpm-1994-11-08-9411080140-story.html>; Mike Clary, *Hialeah’s Most Controversial Race is at City Hall*, L.A. TIMES (Dec. 1, 1994), <https://www.latimes.com/archives/la-xpm-1994-12-01-mn-3619-story.html>.

<sup>310</sup> See, e.g., Steve Litz, *Former Hialeah Mayor’s Uncle Arrested as Voter Fraud Case Expands*, NBC 6 S. FLA. (Aug. 10, 2012), <https://www.nbcmiami.com/news/local/former-hialeah-mayors-uncle-arrested-as-voter-fraud-case-expands/2034820/>.

<sup>311</sup> 2021 Fla. Laws 242, 258, ch. 2021-11, § 21 (May 6, 2021), *codified at* FLA. STAT. § 101.572(1)-(2).

<sup>312</sup> *Id.* at 257, § 20, *codified at* FLA. STAT. § 101.5614(4)(a).

candidate may also have an observer view the signature-matching process and other canvassing procedures for each ballot “directly or on a display screen.”<sup>313</sup>

By 7:00 P.M. on election night, the supervisor must post on their website the number of vote-by-mail ballots that have been received and the number that remains uncounted.<sup>314</sup> Throughout Election Day, supervisors must also post “live voter turnout data” on their websites and provide it to the Department of State for inclusion in a statewide dashboard.<sup>315</sup> All of these figures must be updated on an hourly basis.<sup>316</sup>

SB 90 also sought to protect voters against intimidation or other pressure by establishing an anti-solicitation zone around each dropbox; existing law had previously established anti-solicitation zones only around polling places and early voting sites.<sup>317</sup> The statute also extended the radius of each anti-solicitation zone from 100 to 150 feet.<sup>318</sup>

To facilitate last-minute voter registration, the Department of State must conduct “[l]oad testing and stress testing” to confirm that its online voter registration system “has sufficient capacity to accommodate foreseeable use, including during periods of high volume of website users in the week immediately preceding the book-closing deadline for an election.”<sup>319</sup> The law also attempted to alleviate concerns about the use of private funds to subsidize elections by prohibiting election officials from soliciting or accepting any donations of money, property, or services from people or non-governmental entities “for the purpose of funding election-related expenses or voter education, voter outreach, or registration programs.”<sup>320</sup> The measure contains

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<sup>313</sup> *Id.* at 268, § 31, *codified at* FLA. STAT. § 102.141(2)(a).

<sup>314</sup> *Id.* at 266, § 30, *codified at* FLA. STAT. § 102.072.

<sup>315</sup> *Id.* at 252, § 10, *codified at* FLA. STAT. § 98.0981(4).

<sup>316</sup> §§ 10, 30, 2021 Fla. Laws 266, *codified at* FLA. STAT. §§ 98.0981(4), 102.072.

<sup>317</sup> *Id.* at 255-56, § 16, *codified at* FLA. STAT. § 101.051(2), (5).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 246-47, § 4, *codified at* FLA. STAT. § 97.0525(3)(b)(1).

<sup>320</sup> *Id.* at 245, § 2, *codified at* FLA. STAT. § 97.0291.

an exception for the donation of space for polling places and early voting sites.<sup>321</sup> Finally, SB 90 attempted to enhance the accuracy of the voter registration database by requiring the Department of Highway Safety and Motor Vehicles to assist the Department of State in identifying changes in voters' residences.<sup>322</sup>

**FINDING III: SB 524'S AMENDMENTS TO THE ELECTION CODE**

- ***SB 524 Eliminates Some of SB 90's Restrictions on Third-Party Voter Registration Groups***
- ***SB 524 Establishes a New Office of Election Crimes and Security Which Has Raised Concerns About Potential Voter Intimidation and Chilling the Exercise of Voting Rights***
- ***SB 524's New List Maintenance Requirements Can Be a Positive Development If State Officials Observe Due Process Protections to Avoid the Inadvertent Removal of Qualified Voters***

A. *SB 524's New Provisions for Election-Related Law Enforcement*

Prior to SB 524's enactment, state law granted the Florida Secretary of State authority to "[c]onduct preliminary investigations into any irregularity or fraud" concerning elections and report findings to the Office of Statewide Prosecutor.<sup>323</sup> The Secretary's employees were granted "full access to all premises, records, equipment and staff" of county supervisors.<sup>324</sup> The Office of Statewide Prosecutor, rather than local prosecutors, was given jurisdiction to prosecute crimes involving voter registration or voting.<sup>325</sup>

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<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 248, § 6, *codified at* FLA. STAT. § 97.057(13). SB 90 also requires a state or county agency or official who is a defendant in a lawsuit challenging the constitutionality of a provision of the state election code to notify the President of the Senate, Speaker of the House of Representatives, and Attorney General before negotiating or executing a consent decree nullifying or suspending enforcement of that provision. *Id.* at 244-45, § 1, *codified at* FLA. STAT. § 97.029(1)(a)-(c). The law also contained some technical amendments to voter registration by felons pursuant to Amendment 4. *See id.* at 245-26, 247, §§ 3, 5, *codified at* FLA. STAT. §§ 95.052(2)(t), 97.053(5)(a)(6).

<sup>323</sup> 2005 Fla. Laws 2614, 2619, ch. 2005-277, § 1 (June 20, 2005; effective date Jan. 1, 2006), *codified at* FLA. STAT. § 97.012(14).

<sup>324</sup> *Id.* at 2653, § 40, *amending* FLA. STAT. § 101.58(2).

<sup>325</sup> *Id.* at 2687, § 73, *codified at* FLA. STAT. § 16.56(1)(a)(12).

The Legislature adopted SB 524 on April 27, 2022, establishing the Office of Election Crimes and Security within the Department of State.<sup>326</sup> The office is responsible for receiving reports of, and initiating and conducting “independent inquiries” into, alleged election law violations or “election irregularities.”<sup>327</sup> All investigations shall be conducted by “nonsworn officers.”<sup>328</sup> The office’s establishment does not limit other state agencies’ existing authority to investigate alleged election law violations.<sup>329</sup> The department must submit an annual report to the Governor and legislature summarizing its investigations and listing the number of complaints received, investigations initiated, and referral to other agencies “for further investigation or prosecution.”<sup>330</sup>

Separate from this new office, the Governor, “in consultation with the executive director of the Department of Law Enforcement [FDLE],” is required to appoint “special officers to investigate alleged violations of the election laws.”<sup>331</sup> These officers must be sworn special agents employed by the FDLE. Each of the FDLE’s “operational region[s]” must have at least one special officer dedicated to investigating election law violations.<sup>332</sup> Like other law enforcement personnel, however, such special officers are not permitted to enter a polling place “without permission from the clerk or a majority of the inspectors.”<sup>333</sup>

It is not clear that SB 524 actually increases the Secretary of State’s authority or responsibility compared to previous law. Even before SB 524’s enactment, the Secretary’s civilian employees were required to investigate potential election fraud and other violations. SB 524

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<sup>326</sup> 2022 Fla. Laws 549, 552, ch. 2022-73, § 3 (Apr. 27, 2022, effective date July 1, 2022), *codified at* FLA. STAT. § 97.022.

<sup>327</sup> *Id.*, *codified at* FLA. STAT. § 97.022(1)(a)-(b), (2).

<sup>328</sup> *Id.*, *codified at* FLA. STAT. § 97.022(4).

<sup>329</sup> *Id.*, *codified at* FLA. STAT. § 97.022(6).

<sup>330</sup> *Id.* at 552-53, *codified at* FLA. STAT. § 97.022(7).

<sup>331</sup> *Id.* at 569-70, § 24, *codified at* FLA. STAT. § 102.091(2).

<sup>332</sup> § 24, 2022 Fla. Laws at 569-70, *codified at* FLA. STAT. § 102.091(2).

<sup>333</sup> *Id.* at 570, § 25, *codified at* FLA. STAT. § 102.101.

requires the Secretary to place greater emphasis on such responsibilities by establishing an office that focuses specifically on them. The statute’s primary effect may be more psychological, chilling voters and groups who are concerned they may be wrongly targeted in voter fraud or other election-related investigations.

Shortly after the office’s creation, the Governor announced the arrests of 20 people for voting despite having felony convictions for murder or sex offenses that rendered them ineligible, even under Amendment 4.<sup>334</sup> Three of the resulting prosecutions have been dismissed on the grounds the statewide prosecutor lacked jurisdiction to bring the case.<sup>335</sup> Prosecutors dropped another case “because of ‘information received’ from the Hillsborough County elections supervisor and because [the defendant] was already being sentenced to prison in a separate case.”<sup>336</sup> One defendant, who was ineligible to vote under Amendment 4 because she had been convicted of second-degree murder, pled no contest to a felony charge of illegal voting.<sup>337</sup> These incidents are concerning because prosecuting people for good-faith mistakes or even negligence in exercising the constitutional right to vote can substantially burden the exercise of that fundamental right.

*With regard to the Office of Election Crimes and Security, the Committee recommends that the Commission encourage the Legislature to:*

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<sup>334</sup> Aja Dorsainvil, *20 Charged with Voter Fraud; DeSantis Touts New Office of Election Crimes and Security*, 5WPTV WEST PALM BEACH (Aug. 18, 2022), <https://www.wptv.com/news/state/desantis-voter-fraud-arrests>.

<sup>335</sup> See CBS Miami Team, *3rd Case Brought by Gov. Ron DeSantis’ Election Police Dismissed*, CBS MIAMI (Dec. 24, 2022), <https://www.cbsnews.com/miami/news/3rd-case-brought-by-gov-ron-desantis-election-police-dismissed/>; see also Miles Cohen, *Florida Voter Has Election Fraud Charges Touted by DeSantis Dismissed*, ABC NEWS (Oct. 21, 2022), <https://abcnews.go.com/US/voter-fraud-charge-dismissed-florida-arrest/story?id=91858299>. The legislature subsequently amended the law to expand the statewide prosecutor's jurisdiction to facilitate such prosecutions. See Ch. 2023-02, § 1, 2023 Fla. Laws, codified at FLA. STAT. § 16.56(C).

<sup>336</sup> Lawrence Mower, *Prosecutors Drop Charges Against DeSantis’ Voter Fraud Suspect*, TAMPA BAY TIMES (Nov. 21, 2022), <https://www.tampabay.com/news/florida-politics/2022/11/21/tampa-illegal-vote-desantis-voter-fraud-arrest-charges-dropped-hillsborough/>.

<sup>337</sup> Lawrence Mower, *Tampa Woman Takes Plea Deal in DeSantis Voter Fraud Case*, TAMPA BAY TIMES (Nov. 28, 2022), <https://www.tampabay.com/news/florida-politics/2022/11/28/tampa-woman-takes-plea-deal-desantis-voter-fraud-case/>.

- *prohibit the Office from referring for prosecution or knowingly continuing to investigate individual voters who are suspected or determined to be acting on their own from discrete good-faith mistakes relating to registration or voting;*
- *require the Office to focus on identifying widespread or systemic voter fraud or other intentional problems or violations, in particular by conducting systemic or large-scale analysis of voter registration records, vote-by-mail ballot requests, and voter signatures that is beyond the capacity of individual election offices;*
- *direct the Office to specialize in cybersecurity efforts to identify potential intrusions into state or local election systems and develop countermeasures to ensure the integrity of voter registration rolls, voting equipment, and election-related computer systems;*
- *ensure that the state provides an easy, accessible, quick mechanism to allow any person convicted of an offense in a Florida court to determine whether any outstanding fines, court costs, restitution, or other fees exist that would render them ineligible to vote under Amendment 4;*
- *establish a statutory “safe harbor” providing that, if search records demonstrate that a felon checked their eligibility to vote in the recommended new database described in the preceding bullet point and were erroneously informed that they were eligible to vote, that person will not be deemed to have been acted “willfully” for purposes of the state’s voter registration fraud statute, should it later be determined that they were actually still subject to unpaid fines, court costs, restitution, or other fees of which they were unaware, and*
- *provide specific guidance for third-party registration groups as to how to confirm a person’s eligibility to register.*

**B. SB 524’s Creation of New Voter List Maintenance Requirements**

SB 524 also requires county supervisors of election to update their voter registration lists annually rather than biennially.<sup>338</sup> The statute allows supervisors to choose between two different maintenance programs. *First*, a supervisor may send non-forwardable address confirmation requests to the “address of legal residence” of all registered voters who have neither voted in the past two general elections (or any other intervening elections), nor updated their registration

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<sup>338</sup> 2022 Fla. Laws 549, 555, ch. 2022-73, § 8 (Apr. 27, 2022, effective date July 1, 2022), *codified at* FLA. STAT. § 98.065(2).

records in that period.<sup>339</sup> **Second**, the supervisor instead may obtain change-of-address information from other “returned nonforwardable return-if-undeliverable mail” sent to the “address of legal residence” for “all registered voters in the county.”<sup>340</sup> If any of these dispatches are returned as undeliverable, any further notices must be sent to the voter’s address on file as part of their registration record.<sup>341</sup> If the address confirmation request form or other non-forwardable mail is “returned as undeliverable with no indication of an address change,” or a voter fails to respond to an address confirmation form within 30 days, the supervisor shall send a “final notice to all addresses on file for the voter.”<sup>342</sup>

SB 524 also requires greater interagency coordination to ensure the voter registration database’s accuracy. Circuit court clerks must provide the department of state with information about felony convictions, “including any financial obligations for court costs, fees, and fines.”<sup>343</sup> Similarly, the Department of Highway Safety and Motor Vehicles must notify the department of people who “presented evidence of non-United States citizenship” upon obtaining a driver’s license or identification card,<sup>344</sup> or are deceased.<sup>345</sup>

Secretary Byrd testified that these reforms were necessary because it is a “challenge” to ensure the accuracy of voter rolls “in a state with over 14 million registered voters.”<sup>346</sup> The rolls require annual maintenance because “[e]very day someone registers, someone dies, someone goes to prison, someone gets their rights restored, someone moves from out of state, someone moves within the state.”<sup>347</sup> Professor Smith, in contrast, testified that more frequent maintenance is

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<sup>339</sup> *Id.* at 555-56, *codified at* FLA. STAT. § 98.065(2)(a), (3).

<sup>340</sup> *Id.* at 555-56, *codified at* FLA. STAT. § 98.065(2)(b), (3).

<sup>341</sup> *Id.* at 556, *codified at* FLA. STAT. § 98.065(3).

<sup>342</sup> *Id.*, *codified at* FLA. STAT. § 98.065(5)(c); *see also id.* at 557, § 9, *codified at* FLA. STAT. § 98.0655(1)(c).

<sup>343</sup> *Id.* at 559, § 11, *codified at* FLA. STAT. § 98.093(2)(b)(2).

<sup>344</sup> 2022 Fla. Laws 560, *codified at* FLA. STAT. § 98.093(2)(g)(2).

<sup>345</sup> *See id.* at 558, § 10, *codified at* FLA. STAT. § 98.075(3)(a)(1)(c).

<sup>346</sup> Byrd Test., 9/14/22 Hearing Trans., at 15.

<sup>347</sup> *Id.* at 15.

unnecessary, especially since Florida recently joined the Electronic Registration Information Center (ERIC) to “identify voters who have moved in and out of the state.”<sup>348</sup> Professor Tolson added that voter registration maintenance degenerates into purges when the process is based on a “flawed” and “over broad” algorithm that “captures a disproportionate amount of individuals who are legally entitled to vote.”<sup>349</sup> During the 2000 election, for example, people’s voter registrations were challenged because their names were similar to convicted felons who were ineligible at the time to vote.<sup>350</sup> In other past election cycles, black voters were disproportionately removed from voting rolls, “often erroneously.”<sup>351</sup>

Secretary Byrd disagreed with this assessment. He explained that the state does not “purge” voters from its rolls, but rather follows an “individualized process” for each “specific person” that incorporates “extensive due process” protections:<sup>352</sup>

Notice is given to the individual. They can come in and request a hearing, that when they are given notification by the supervisors of elections that they may be considered for removal. If they’re sent a letter, if that’s returned undeliverable for some reason or there’s no reasons, a notice by publication is given. . . . It is an individualized process for that specific person.<sup>353</sup>

Secretary Byrd added it was especially difficult for election officials to confirm that people on the voter registration rolls are U.S. citizens, since the federal government does not assist the state in confirming people’s citizenship.<sup>354</sup> The state must rely on indirect methods of identifying potential non-citizens, such as reviewing forms on which people claim they are not citizens to be exempted from jury duty in state court.<sup>355</sup>

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<sup>348</sup> Smith Test., 3/28/22 Hearing Trans., at 9.

<sup>349</sup> Tolson Test., 4/29/22 Hearing Trans., at 24.

<sup>350</sup> *Id.* at 4, 24.

<sup>351</sup> Tolson Test., 4/29/22 Hearing Trans., at 4.

<sup>352</sup> Byrd Test., 9/14/22 Hearing Trans., at 17.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 18.

<sup>355</sup> *Id.*

Due to the recency of SB 524's enactment, the Committee has been unable to gather empirical evidence concerning the effects of updating the registration rolls more frequently. The main source of potential concern, however, seems to be the accuracy and fairness of the process that supervisors use to update voter registration rolls, rather than the frequency with which they do so. Given the size of Florida's population and frequency of people moving into the state, relocating to different addresses, moving out of state, and dying, updating the voter registration rolls on an annual basis seems reasonable. Election officials must be sure that, in the course of ensuring the accuracy of the rolls, they do not inadvertently disenfranchise qualified voters, particularly minority voters.

*With regard to SB 524's voter list maintenance requirements, the advisory committee recommends that the Commission suggest that the legislature:*

- *require that supervisors of elections ensure that a person who is erroneously removed from the voter registration list prior to an election is permitted to correct any errors and vote in that election, even if the registration book closing deadline for the election has elapsed;*
- *direct supervisors of elections to attempt to contact a person using available contact information in their voter registration record, including phone, e-mail, and mail, before removing them from the voter registration rolls;*
- *ensure that systematic efforts at updating voter registration rolls do not become "purges" of qualified voters based on dubious or inaccurate information;*
- *direct the Secretary of State and supervisors to enter into agreements with the Circuit Executive for the Eleventh Circuit or the clerks of the federal district courts in Florida to obtain information about people who decline to serve on federal juries on the grounds they are non-citizens;*
- *require the Secretary of State or supervisors of election to use the federal SAVE database or any other similar or successor databases, including as permitted by any consent decrees or judgments, and attempt to enter into other agreements with the appropriate federal agencies to confirm the citizenship of people on the voter registration rolls; and*

- *ensure election officials have sufficient financial and other resources to fulfill state mandates.*

**C. Other Changes**

SB 524 prohibits municipalities from adopting ranked-choice voting.<sup>356</sup> It also provides that people observing various aspects of the ballot-counting process may not reveal any information about interim vote totals before the polls are closed.<sup>357</sup> The administrator of an assisted living facility or nursing home must request election officials provide for supervised voting by the facility’s residents at least 28 days before an election, rather than 21 days.<sup>358</sup>

Dropboxes may be located at supervisors’ permanent branch offices if they meet the criteria in Section 101.657(1)(a) for branch offices used for early voting and that are open the minimum hours specified by section 98.015(4).<sup>359</sup> Ballot harvesting,<sup>360</sup> signing fraudulent names to petitions,<sup>361</sup> and paying petition circulators based on the number of names gathered<sup>362</sup> have been enhanced from a misdemeanor to third-degree felonies. Finally, the Department of State must develop a plan to require voters to include their driver’s license number, identification card number, or social security number when returning vote-by-mail ballots to confirm their identity.<sup>363</sup> Specifically, the plan must assess the feasibility of obtaining identification numbers from registered voters for whom the department lacks such information.<sup>364</sup>

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<sup>356</sup> 2022 Fla. Laws 549, 562-63, ch. 2022-73, § 14 (Apr. 27, 2022, effective date July 1, 2022), *codified at* FLA. STAT. § 101.019.

<sup>357</sup> *Id.* at 565-66, § 18, *codified at* FLA. STAT. § 101.5614(4)(a), (8).

<sup>358</sup> *Id.* at 568, § 21, *codified at* FLA. STAT. § 101.655(1).

<sup>359</sup> *Id.*, § 22, *codified at* FLA. STAT. § 101.69(2)(a).

<sup>360</sup> *Id.* at 570, § 26, *codified at* FLA. STAT. § 104.0616(2); *see also id.* at 571, § 30, *codified at* FLA. STAT. § 921.0022(3)(a).

<sup>361</sup> *Id.*, § 27, *codified at* FLA. STAT. § 104.185(2).

<sup>362</sup> § 28, 2022 Fla. Laws 549, 562-63, *codified at* FLA. STAT. § 104.186.

<sup>363</sup> *Id.* at 574, § 31(1).

<sup>364</sup> *Id.* § 31(2)(a).

*With regard to general changes in state election law, the Committee recommends that the Commission encourage the Legislature to:*

- *ensure that state and county election officials clearly notify voters of changes in election-related statutes, requirements, and procedures well in advance of elections to give them adequate opportunity to meet all registration requirements, request vote-by-mail ballots if desired, and be able to cast a ballot and have their vote counted;*
- *make special effort to ensure that members of historically underrepresented and marginalized communities are aware of changes to the requirements for registering, requesting vote-by-mail ballots, and voting to ensure that changes in election statutes do not prevent them from voting; and*
- *make special efforts to evaluate the potential that changes in election laws could improperly make voting more difficult, particularly for members of historically marginalized communities.*

## **CONCLUSION**

Numerous witnesses testified that SB 90 and SB 524 could have a deleterious effect on the electoral process in Florida, both in general and specifically for minority voters. The state's success in the 2022 election at least somewhat ameliorated many of those concerns. For the past decade, however, the turnout gap between black and white voters has grown. Some commentators attribute this to the U.S. Supreme Court's ruling in *Shelby County v. Holder*, which effectively suspended preclearance requirements for covered jurisdictions under the Voting Rights Act,<sup>365</sup> while others suggest it might be a function of President Barack Obama, the nation's first African American President, no longer being on the ballot or in office.<sup>366</sup> Florida had only five counties subject to preclearance, but even that limited coverage impacted the legislature's ability to enact

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<sup>365</sup> Kevin Morris, et al., Brennan Center for Justice, *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act* (Aug. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights>

<sup>366</sup> See, e.g., Nate Cohn, *Black Turnout in Midterms Was One of the Low Points for Democrats*, N.Y. TIMES (Nov. 30, 2022), <https://www.nytimes.com/2022/11/30/upshot/midterms-election-black-turnout.html?smid=nytcore-ios-share&referringSource=articleShare>.

election laws on a statewide level. Allowing the newly created Office of Election Crimes and Security to arrest ineligible electors for voting, based on their potential misunderstanding of Amendment 4's reach and the failure of election officials to detect their ineligibility when they applied to register, sends exactly the wrong message and can exert a substantial chilling effect that exacerbates this disparity.<sup>367</sup>

More broadly, when amending the election code, the legislature should ensure it is taking into account all three foundations of a sound electoral process.<sup>368</sup> The legislature appropriately recognizes the need to prevent fraud, mistake, and irregularities,<sup>369</sup> as well as the importance of bolstering public confidence in electoral outcomes. It should likewise be sure to focus on ensuring broad access to all eligible voters without racial disparities.

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<sup>367</sup> See, e.g., Douglas Soule, *Why Did Voter Turnout Drop in 2022 Versus 2018? Strict Voting Laws, Voter Arrests, Say Voting Rights Advocates*, PALM BEACH DAILY NEWS (Dec. 6, 2022), <https://www.palmbeachdailynews.com/story/news/politics/elections/2022/12/05/2022-voter-turnout-dropped-year-strict-voting-laws-voter-arrests-ron-desantis-florida/10816752002/>.

<sup>368</sup> See Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 80 WASH. & LEE L. REV. 359 (2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3964186](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3964186).

<sup>369</sup> Testimony of Secretary of State Cord Byrd, at 4 (hearing of Sept. 14, 2022).

## APPENDIX

### A. Briefing materials<sup>370</sup>

- i. Transcript
- ii. Agenda
- iii. Minutes
- iv. Panelist presentations (PPT)
- v. Other records

### B. Written testimony<sup>371</sup>

- i. League of Women Voters
- ii. American Civil Liberties Union of Florida
- iii. Daniel Smith
- iv. Florida Secretary of State (HAVA Complaint Records 2020-2022)

### C. Committee member statements

- i. Bradford Brown, dissenting
- ii. Debbie Maken, dissenting in part
- iii. Thomas Newcomb Hyde, dissenting
- iv. Zack Smith, concurring in part, dissenting in part

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<sup>370</sup> Briefing materials available at:

[https://securisync.intermedia.net/us2/s/folder?public\\_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L0ZML1ZvdGluZyBSaWdodHM%3D](https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L0ZML1ZvdGluZyBSaWdodHM%3D)

<sup>371</sup> Written testimony available at:

[https://securisync.intermedia.net/us2/s/folder?public\\_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L0ZML1ZvdGluZyBSaWdodHMvV3JpdHRlbiBUZXN0aW1vbnk%3D](https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L0ZML1ZvdGluZyBSaWdodHMvV3JpdHRlbiBUZXN0aW1vbnk%3D)

## **Appendix C: Committee Member Statements**

Bradford E. Brown PhD  
Statement of dissent

I dissent from the report on the impact of recent legislation on the vote of Black citizens in Florida's 2022 statewide election.

At the hearings, the committee heard from people familiar with Florida's Black voters and they were concerned about negative impacts. Testimony from the Administration did not provide any information as to evaluation of negative impacts before backing voter legislation. The Florida Committee, in its recommendations to the state, urges adjusting the regulations to make it easier to register and vote. While I support the recommendations, the legislature has already made steps in the opposite direction for example increasing the level of fines for third party voter registration so much that the venerable League of Women Voters intends to withdraw from voter registration activities. (Carole Jackson NAACP South DADE Civic engagement Chair personal communication)

The committee then accepted the premise that the Democratic vote statewide could be a proxy for the Black vote. Doing so resulted in the conclusion that the bills being investigated had no negative impact on Black voter turn-out. The assumption that the Black vote could be described by the Democratic vote was essential to this finding. While caveats were included, they were not sufficient, as the evidence which follows indicates:

NBC-TV6 reporter Phil Prazan published an informative post-election analysis (on November 10, 2022, at 11:45 PM). Democrats need a big turnout in the urban areas from Black voters in order to win. In 2018, DeSantis won the governorship by a hair, but won overwhelmingly in 2022 by almost 19 percentage points. The urban counties of Duval, Pinellas, Hillsborough, Palm Beach and Miami Dade voted for Gillum in 2018. Biden in 2020, and DeSantis in 2022. These results alone would indicate lower Black turnout. As the table below shows, while the big urban counties may have more registered Democrats than Republicans, Prazan points out that turnout is significantly higher for Republicans.

County	Democrats > Republicans	Democratic Turnout 2022	Republican Turnout
Miami-Dade	135,229	56%	61%
Palm Beach	106,299	55%	66%
Hillsborough	53,156	39%	44%
Duval	31,173	49%	65%

The analysis of turnout Florida Rising obtained from the consulting firm of TargetSmart information showing Black voter turnout dropped from 54% in 2018 to 40% in 2022, while white voter turnout was about the same, at 61% in 2018 and 62% in 2022. Data from Matthew

Isbell of MCIMAPS is even more alarming. “Looking at race, white voters had 58% turnout allowing them to go from 61% of registered voters to 71% of the vote cast.” Black voters, on the other hand, lost ground precipitously: their 37% turnout meant they went from 13.5% of registered voters, but only 10.1% of votes cast. [See [https://mcimaps.substack.com/p/issue-97-final-2022-florida-turnout?subscribe\\_prompt=free](https://mcimaps.substack.com/p/issue-97-final-2022-florida-turnout?subscribe_prompt=free)] The fact that approximately 20% Black Florida voters were registered to vote by third-party voter registration organizations (3PVROs), compared to 2% of White Florida voters, means that abandonment of voter registration efforts by 3PVROs will likely result in both lower Black voter registration and lower Black voter turnout. (Att. Pamela Burch Forte Florida NAACP Tallahassee, personnel communication)

Interestingly enough, Alachua County, home of the University of Florida and a county where white Democrats do not depend on the Black turnout to win, voted solidly Democratic in all three recent elections.

These results illustrate that the assumption of 2022 statewide Democratic votes as a proxy for Black voter does not hold up under scrutiny. The fact that Black vote fell does not mean that it was caused by the legislation. Prazan blamed the lack of Democratic money. However, the opinion of the experts called was never countered. In addition, a plethora of measures may be difficult to tease apart, but the sum total could create a climate with impact on turnout.

This all being said, the number one recommendation drawn from the testimony received, combined with evidence pointing to a drop in Black voting, should be to restore a modern replacement for Section 5 of the Voting Rights Act, because Section 2 would not stop the actions in Florida soon enough to be a viable remedy before long term damage is done.

U.S. COMMISSION ON CIVIL RIGHTS  
Florida Advisory Committee

REPORT ON VOTING RIGHTS IN FLORIDA  
FOLLOWING RECENT AMENDMENTS TO THE ELECTION CODE

Limited Dissent of Member Debbie Maken, as to Recommendation #1:

“Spurred by the Civil Rights movement,” the 1965 Voting Rights Act finally provided teeth to the Fifteenth Amendment’s guarantee that “the right of citizens ... to vote shall not be denied *or abridged* ... on account of race, color, or previous condition of servitude.” Allen v. Milligan, 599 U.S. \_\_\_, 143 S.Ct. 1487, 1498-99 (2023) (vote dilution case). Voting rights are civil rights.

However, elections have other vital interests at stake beyond just “access” to the ballot box. Preserving the integrity of the electoral process, preventing corruption, and preserving the individual citizen’s confidence in government are also “interests of the highest importance.” First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978). Indeed, civil democracy rests on the public having confidence in the integrity of elections and the outcome.

Processes, therefore, must be such that the “right to vote” is not rendered “illusory,” see Allen v. Michigan, 143 S.Ct. at 1498, or dilutes the “one person, one vote” conception of political equality on which our democracy hinges. In the context of the Fourteenth Amendment’s Due Process clause designed to guard against state infringement, the United States Supreme Court requires that processes reflect the interests at stake, especially where having an “accurate” outcome is at stake. See Santosky v. Kramer, 455 U.S. 745, 756-58 (1982); Lassiter v. Dept. of Social Services of Durham County, N.C., 452 U.S. 18, 31 (1981); Matthews v. Eldridge, 424 U.S. 319 (1976). The right to vote preserves or secures many of our other most basic rights. Wesberry v. Sanders, 376 U.S. 1 (1964). Therefore, our Report’s recommended “processes” should match the magnitude of the *multiple* “voting interests” at stake here.

I concur with the Report as a whole, but dissent as to Recommendation #1 to have the USCRC recommend to the legislature modifications to SB 90 and SB 524 to “eliminate unnecessary burdens, if any, on voting without jeopardizing [other

interests],” to the extent it includes the placement of drop boxes at “other county agencies.”

Not having additional drop boxes at consistently staffed county agency offices is not a “burden” on voting. Florida is not one of those states that limits its citizens to just one day to exercise their fundamental right but allows a number of other means--early voting, drop box, and mail in ballots. There is a point at which *even more* “access” becomes antithetical to (“jeopardizes”) preserving the perception of election integrity. Drop boxes invite attacks on accuracy, even if the goal was convenience. Yet, the U.S. Supreme Court has said that the Constitution recognizes values higher than speed and efficiency. Santosky, supra. For this Report to then recommend a secondary means for “consider[ation]”-- “live in camera monitoring” of drop boxes as “a substitute” for “in person staffing” (versus in addition to) both highlights and recognizes what hangs in the balance—secure, protected elections with defensible results on which the citizenry may repose confidence.

I would therefore eliminate altogether Rec. #1 first bullet point, and augment Rec. #1 third bullet point to consider live in camera monitoring “in addition to” in person staffing for drop boxes.

## Thomas Newcomb Hyde: Dissent on the Report of the Florida Advisory Committee

The Report on Voting Rights in Florida relies heavily on the testimony of Dean Franito Tolson who claims that since Florida enacted laws to disenfranchise minority voters in the 1890s, Florida continues to engage in race-based disenfranchisement in 2020. In support of her claim Dean Tolson argues that today Florida is using the same tactics as the Florida legislature in the 1890s. In other words, the sins of the great grandfather are laid upon his great grandchildren 130 years later. The report endorses and even adopts this view when it states that Dean Tolson is one of the nation's leading experts on election law and voting rights.

The proposed report also relies on the opinion of United States District Court Judge Mark Walker who also traces Florida's history of racially discriminating voting law dating back to the post-Civil War era declaring that it echoes the into the present and sets the stage for the actions of Florida in 2020. But this view, and that of Dean Tolson, has been found to be problematic by the 11<sup>th</sup> Circuit Court of Appeals because it focused too heavily on racial discrimination in the past and not the actions of today. Our committee should be writing about the law in the 21<sup>st</sup> century.

Speaking of the 21<sup>st</sup> century, the 11th Circuit Court of Appeals upheld Florida's election integrity legislation designed to secure and safeguard Floridians' right to vote. The 11<sup>th</sup> Circuit found that Judge Walker's opinion relied on fatally flawed statistical analyses, out-of-context statements by individual legislators, and legal premises that do not follow precedent. The appeals court also said judges must remain mindful of the danger of allowing old, outdated intentions of previous generations to taint Florida's legislative action forevermore on certain

topics. Similarly, the Florida Advisory Committee should avoid the danger of allowing old, outdated intentions of previous generations to influence its review of Florida law in 2023. Any report which of the Florida Advisory Committee submits to the United States Commission on Civil Rights should not directly contradict the opinion of the 11<sup>th</sup> Circuit Court of Appeals.

Therefore, I recommend that the “Finding I: The History of Florida’s Election Code” be omitted from the report. In particular, section “A Historical Election Law” which includes the unsupported testimony of Dean Tolson that is contrary to the law as expressed by the 11<sup>th</sup> Circuit of Appeals should be removed from the report.

Thank you.

Thomas Newcomb Hyde

U.S. COMMISSION ON CIVIL RIGHTS  
Florida Advisory Committee

REPORT ON VOTING RIGHTS IN FLORIDA FOLLOWING RECENT AMENDMENTS TO  
THE ELECTION CODE

STATEMENT OF ZACK SMITH CONCURRING IN PART AND DISSENTING IN PART

Let's cut to the chase: Despite the brouhaha over the Florida Legislature's recent enactment of two bills containing commonsense election integrity measures, the Florida Advisory Committee to the U.S. Commission on Civil Rights found that the "2022 election was generally smooth and without widespread complaints"<sup>372</sup> and that "the data available does not suggest these measures had a racially disparate impact against African Americans or members of other racial minority groups."<sup>373</sup> In fact, the Committee found that "the available data suggests that [SB 90, which implemented additional safeguards related to dropboxes, ballot trafficking, and third-parties providing items to those waiting to vote, among other actions] did not reduce voter registration or voting during the 2022 midterm elections, either for the electorate as a whole or [for] racial minority voters in particular."<sup>374</sup> In fact, the Committee found that in the wake of SB 90's passage, "the usage of vote-by-mail actually increased, both in absolute terms and as a percentage of overall ballots cast."<sup>375</sup> And available "statistics do not suggest that SB 90's dropbox provisions have had a racially regressive result."<sup>376</sup> Rather, as the Committee noted, these "statistics strongly suggest . . . that much of the feared impact of SB 90's dropbox restrictions—both on the electorate as a

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<sup>372</sup> Report on Voting Rights in Florida Following Recent Amendments to the Election Code at 2 [hereinafter Majority Report].

<sup>373</sup> *Id.* at 2.

<sup>374</sup> *Id.* at 20. Given these finding the Committee should not have labeled the changes the Legislature implemented in SB 90 as "New Restrictions." *Id.*

<sup>375</sup> *Id.* at 29.

<sup>376</sup> *Id.* at 30.

whole, and specifically on African American voters—did not come to pass.”<sup>377</sup> It also found that SB 524’s requirement that county supervisors of election “update their voter registration lists annually rather than biennially . . . seems reasonable” given “the size of Florida’s population and frequency of people moving into the state, relocating to different addresses, moving out of state, and dying, . . . .”<sup>378</sup>

But the Committee buried the lead, and a casual reader of the Committee’s report could be forgiven for coming away with a mistaken sense that something isn’t quite right. Although the Committee found no evidence of wrongdoing by the Legislature and found no adverse effects on turnout from the Legislature’s efforts to strengthen confidence in our electoral system, much of the language the Committee uses throughout the report seems to suggest there may be something nefarious going on despite the Committee finding no evidence to support such a claim. Take for instance the beginning of the Recommendations Section of its report. The Committee says that the “Legislature could consider various modifications to SB 90 and SB 524 to eliminate unnecessary burdens, if any, on voting without jeopardizing the statute’s goals or undermining its efficacy.”<sup>379</sup> Yet, repeatedly throughout the report, the Committee found no unnecessary burdens.<sup>380</sup> Similarly, it urges the Legislature to require Supervisors of Elections to try to “minimize any adverse impact

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<sup>377</sup> *Id.* at 30

<sup>378</sup> *Id.* at 59, 62

<sup>379</sup> *Id.* at ii.

<sup>380</sup> *Id.* at i.

of SB 90’s changes,” without having found any adverse impacts.<sup>381</sup> There are more examples, but you get the idea.<sup>382</sup>

Still more puzzling in light of the Committee’s conclusions that SB 90 and SB 524 didn’t have adverse impacts on the 2022 election are many of the Committee’s recommendations. They don’t make sense and seem like solutions in search of problems. Take for instance the Commission’s recommendations concerning penalties for third-party registration organizations and its recommendations for the newly formed Office of Election Crimes and Security. Both misapprehend basic tenets of the current law. The Committee recommends for the former that the Legislature:

Reduce the penalties for inadvertent or isolated violations of registration-related requirements (excluding the fraudulent completion or modification of voter registration forms, or wrongful destruction of complete forms) by third-party voter registration groups acting in good faith.<sup>383</sup>

Yet the current law already essentially contains such provisions. The aggregate total fine that can be imposed on a third-party voter registration organization, including affiliate organizations, is capped for each calendar year.<sup>384</sup> And the harshest fines are reserved for instances where “the third-party voter registration organization or [a] person, entity, or agency acting on its behalf acted willfully” to violate the relevant requirements.<sup>385</sup> Moreover the statute specifically provides that:

A showing by the third-party voter registration organization that the failure to deliver the voter registration application within the required timeframe is based upon force majeure or

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<sup>381</sup> *Id.* at iii.

<sup>382</sup> Of course, the language in the Report is the product of compromise and negotiation. But given the language used in the Report’s Conclusion, for instance, the overall findings of the Report would be far from apparent to someone looking there for the Report’s key findings. *See* Majority Report at 64.

<sup>383</sup> Majority Report at ii.

<sup>384</sup> Fla. Stat. § 97.0575 (2023). The current cap is \$250,000. Fla. Stat. §97.0575(5)(a)3.

<sup>385</sup> Fla. Stat. §97.0575(5)(a)1, 2, 3.

impossibility of performance shall be an affirmative defense to a violation of this subsection. The secretary may waive the fines described in this subsection upon a showing that the failure to deliver the voter registration application promptly is based upon force majeure or impossibility of performance.<sup>386</sup>

What more could be accomplished by adding further carveouts to the statute, especially under the auspices of the vague terms the Committee recommends?

As for the Office of Election Crimes and Security, the Committee recommends that the Legislature:

Prohibit the Office from referring for prosecution or knowingly continuing to investigate individual voters who are suspected or determined to be acting on their own from discrete good-faith mistakes relating to registration or voting<sup>387</sup>

And it recommends, among other things, that the Legislature should:

Require the Office to focus on identifying widespread or systemic voter fraud or other intentional problems or violations, in particular by conducting systemic or large-scale analysis of voter registration records, vote-by-mail request, and voter signatures that is beyond the capacity of individual election offices<sup>388</sup>

First, at what point in an investigation would someone be deemed to have made a “discrete good-faith mistake” related to registration or voting? Isn’t that a fact question typically resolved by a jury? And second, what is the cutoff for deciding whether something is “widespread or systemic voter fraud”? Everyone should agree that one fraudulently cast ballot is too many, especially since “one single vote has altered the outcome of hundreds of elections.”<sup>389</sup>

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<sup>386</sup> Fla. Stat. §97.0575(5)(b).

<sup>387</sup> Majority Report at iv.

<sup>388</sup> *Id.* at iv-v.

<sup>389</sup> J. Christian Adams & Hans von Spakovsky, *New Database Shows a Single Vote Has Altered Outcomes in Hundreds of Elections*, The Daily Signal (Jul. 12, 2023), <https://www.dailysignal.com/2023/07/12/one-illegal-vote-can-change-outcome-election/>.

The Committee also intimates that certain actions of the Office—such as investigating potential election fraud—are concerning. But the Office issued its first report on January 15, 2023,<sup>390</sup> where it detailed the enforcement actions and investigations it had taken to date, including enforcement actions against three third-party voter registration organizations. Rather than actions such as these “being concerning because prosecuting people for good-faith mistakes or even negligence in exercising the constitutional right to vote can substantially burden the exercise of that fundamental right,”<sup>391</sup> as the Committee said, these actions should strengthen the confidence that voters can have in the election process. The Committee itself later noted that “. . . several Florida elections have been impacted by voter fraud facilitated by third-party ballot collection. Florida courts went so far as to invalidate Miami’s 1998 mayoral race and Hialeah’s 1993 mayoral race due to forged absentee ballots and other absentee ballot fraud involving third-party absentee ballot collection.”<sup>392</sup>

Then there’s the Committee’s recommendations regarding ballot dropboxes and line warming activities. In general, the use of ballot dropboxes should be discouraged, but Florida has chosen to allow them under certain stringent conditions. In an ideal world, dropboxes should be monitored both in-person and by continuous video surveillance to make tampering or destruction of the dropbox and the ballots it contains as difficult as possible. As for the line warming activities, the

Committee recommends that the Legislature:

expressly specify that individuals and private groups may provide food, water, chairs, and other resources to polling place officials for officials to distribute to people waiting in line as part of line relief efforts<sup>393</sup>

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<sup>390</sup> Office of Election Crimes and Security Report, Florida Department of State (Jan. 15, 2023), *available at* <https://files.floridados.gov/media/706232/dos-oecs-report-2022.pdf>.

<sup>391</sup> Majority Report at 58.

<sup>392</sup> Majority Report at 53-54.

<sup>393</sup> Majority Report at iii.

While this recommendation is well-intentioned, it would be better for the Legislature to simply appropriate money for this purpose. Not only could this recommendation violate current Florida law saying that election officials may not “solicit, accept, use, or dispose of any donation in the form of money, grants, property, or personal services from an individual or a nongovernmental entity for the purpose of funding any type of expense related to election administration,” but also from a policy perspective it is likely to give rise to some of the same concerns that caused the Legislature to implement the current prohibition in the first place.<sup>394</sup>

### **Committee Recommendations Legislature Should Consider**

Still, not all of the Committee’s recommendations are bad. In fact, some are good, particularly two of its suggestions related to Voter List Maintenance Requirements. The Legislature should accept the Committee’s recommendations that it should:

direct the Secretary of State and supervisors to enter into agreements with the Circuit Executive for the Eleventh Circuit or the clerks of the federal district courts in Florida to obtain information about people who decline to serve on federal juries on the grounds they are non-citizens<sup>395</sup>

This is an easy, commonsense step to help make sure non-citizens are not casting ballots. And it should also heed the Committee’s advice to:

Require the Secretary of State or supervisors of election to use the federal SAVE database or any other similar or successor databases, including as permitted by any consent decrees or judgments, and attempt to enter into other agreements with the appropriate federal agencies to confirm the citizenship of people on the voter registration rolls.<sup>396</sup>

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<sup>394</sup> Fla. Stat. § 97.0291 (2023); *see also* Parker Thayer and Hayden Ludwig, *Shining a Light on Zuck Bucks in the 2020 Battleground States*, Capital Research Center (Updated Jan. 18, 2022) (discussing the “Zuck Bucks” issue many states faced and the potentially partisan manner in which the supposedly non-partisan grants were being deployed).

<sup>395</sup> Majority Report at v.

<sup>396</sup> *Id.* at v.

The Committee’s recommendation that the Legislature “ensure election officials have sufficient financial and other resources to fulfill state mandates” is also well-taken.<sup>397</sup> Also, the Committee’s recommendations to make a Florida birth certification available upon request without charge to help facilitate requiring the necessary forms of ID to vote is a good one, as are its suggestions to have the state create a form to collect both the driver’s license number and the last four digits of a voter’s social security number.<sup>398</sup>

### **Additional Recommendations for Legislature**

Of course, there are also additional safeguards and best practices the Legislature should implement that the Committee did not recommend.<sup>399</sup> Currently a loophole exists in Florida law that allows someone who casts a provisional ballot in certain circumstances not to have to show a photo ID to vote. The Legislature should close this loophole. The Legislature should also require the Secretary of State to run comparisons between the state’s voter registration lists and other state welfare and public assistance lists, along with using commercially available credit databases, to verify the accuracy of voter registration information. It should also require the state to notify a new registrant’s previous state of registration to help avoid duplicate registrations, and the Legislature should consider requiring photographs of registered voters to be included in any electronic poll books the state uses.

Moreover, now that the state has withdrawn from ERIC, the Legislature should require the Secretary of State to pursue reforms to that organization so that the state can re-join it, or require

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<sup>397</sup> *Id.* at v.

<sup>398</sup> *Id.* at iii.

<sup>399</sup> For a comprehensive list of election integrity best practices see The Heritage Foundation’s Election Integrity Scorecard. Election Integrity Scorecard, The Heritage Foundation, <https://www.heritage.org/electionscorecard/> (last visited Aug. 28, 2023).

the Secretary of State to explore setting up an alternative organization or arrangement with other states to provide the same services and functions. Finally, the Legislature should pass a law to give itself standing to sue to ensure compliance with the election laws it passes, require that it approve any court settlements that would change the state's election laws (in order to avoid collusive settlements), and give state residents standing, or the legal ability, to sue election officials who do not follow the state's election laws and procedures.

### **Eleventh Circuit Opinion and Expert Testimony**

Finally, a brief note on the Committee's use of history, reliance on experts, and the Eleventh Circuit Court of Appeals opinions that it mentioned. In its opinion overturning most of Northern District of Florida District Judge Mark Walker's decision enjoining many provisions of Florida's newly enacted election laws, Eleventh Circuit Chief Judge William Pryor, Jr., writing for the court, noted that the "district court delved deep into Florida's history...[and that from] the start, the district court erred" by "allowing the old, outdated intentions of previous generations to taint [Florida]'s legislative action forevermore on certain topics."<sup>400</sup> The Eleventh Circuit said that Judge Walker had not heeded its "precedent explaining the proper scope of historical inquiry" and had not afforded the Florida Legislature the presumption of good faith as it had been required to do.<sup>401</sup>

As I have said elsewhere, "[t]o be clear, no one condones past discrimination or disenfranchisement efforts anywhere. They were wrong and morally indefensible. But frankly, many of the arguments being made today against reforms like the ones implemented in Florida are

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<sup>400</sup> League of Women of Voters of Fla., Inc. v. Fla. Sec'y of State, 66 F. 4th 905, 923 (2023) (internal citations and quotations omitted).

<sup>401</sup> *Id.* at 923-24.

insulting and condescending to minority voters, implying that these voters are less willing or less able to follow these basic laws ensuring election integrity.”<sup>402</sup> Unfortunately, the Committee in several places adopts similar language and types of arguments such as suggesting that “continued high participation rates by minority voters may depend on assistance from voting rights and racial justice organizations”<sup>403</sup> and that the state must make special efforts and provisions for “members of historically marginalized communities.”<sup>404</sup> While well-meaning, these types of arguments are pernicious and harm all voters but particularly those they are intended to help.<sup>405</sup>

The Eleventh Circuit’s opinion also serves as a reminder that trial courts should carefully weigh and apply the Daubert factors and Federal Rule of Evidence 702 when deciding whether and what expert testimony to admit into evidence. For instance, in this case, the Eleventh Circuit extensively critiqued University of Florida Political Science Professor Dr. Daniel Smith, an expert for the organizations challenging the laws and from whom the Committee also heard testimony. The Eleventh Circuit said in various places that Dr. Smith “employed a flawed methodology”<sup>406</sup> and thus reduced the court’s “confidence in Dr. Smith’s conclusion” related to certain outcomes.<sup>407</sup> In another place, the court said that “[i]n sum, Dr. Smith’s analysis was based on an extremely limited—and not necessarily representative—dataset. And even if his analysis was

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<sup>402</sup> Zack Smith, Statement for the Record to the Committee on House Administration, Voting in America: Access to the Ballot in Florida (Jun 1, 2022), *available at* <https://www.heritage.org/testimony/voting-america-access-the-ballot-florida>

<sup>403</sup> Majority Report at 31.

<sup>404</sup> Majority Report at 64.

<sup>405</sup> *See, e.g.,* Students for Fair Admissions v. Harvard and UNC, 143 S. Ct. 2141, 2176 (Thomas, J. concurring).

<sup>406</sup> *League of Women of Voters of Fla., Inc.*, 66 F. 4th at 935.

<sup>407</sup> *Id.*

methodologically reliable, it yields mixed evidence . . . .”<sup>408</sup> As the Committee noted in its report, the concerns other experts expressed to the Committee before the 2022 election did not come to fruition either.<sup>409</sup> In future election law litigation in Florida, and elsewhere, courts should carefully examine the methodologies, and the claims based on them, that experts employ.

### **Conclusion**

All-in-all, the Committee deserves praise for taking a careful look at the current state of election law in Florida. Its current report is a much-improved effort over the Committee’s previous October 2020 report. The Florida Legislature has appropriately considered the need to maintain public confidence in the electoral process by enacting commonsense election integrity measures such as SB 90 and SB 524. As outlined above, the Legislature should accept several of the Committee’s recommendations, reject the rest, and continue its quest to make sure that every eligible voter is able to safely and securely exercise his or her fundamental right to vote.

For the foregoing reasons, I concur in part of the Committee’s Report and respectfully dissent from the remainder.

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<sup>408</sup> *Id.* at 937.

<sup>409</sup> Majority Report at 21.

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