Save Your Rights: How Florida and Other States Have Targeted Voting Access Following the 2020 Election

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Online ISSN: 2643-7759

Recommended Citation
DOI: https://dx.doi.org/10.25148/lawrev.17.4.13

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SAVE YOUR RIGHTS: HOW FLORIDA AND OTHER STATES HAVE TARGETED VOTING ACCESS FOLLOWING THE 2020 ELECTION

Francisco Varona*

ABSTRACT

Following the 2020 general election, Florida’s Republican-led legislature introduced Senate Bill 90 (“S.B. 90”), which sought to put many restrictions on various aspects of the voting process. S.B. 90 limited ballot drop-off boxes, restricts mail-in voting, proscribes “line-warming,” increased registration difficulty, and expanded identification requirements. Despite lauding Florida’s election as a gold standard for the rest of the country, Governor Ron DeSantis approved this bill in May of 2021, explaining that Florida should not become complacent despite its success. The Republican Governor approved this law against the backdrop of record voter turnout for Black and Latino voters and record mail-in voting by Democrats. Florida Rising Together, a grassroots organization working alongside other similar organizations, has filed suit against the State of Florida. Florida Rising Together’s suit alleged that this law intended to discriminate against Black, Latino, and elderly Florida voters by suppressing their vote. Florida Rising Together sought to introduce three professors from University of Florida as expert witnesses in their case against Florida. In response, the university—a public institution and organ of the Florida State government—barred all three professors from serving as expert witnesses for a party adverse to the State’s interests. While unprecedented, experts assert that the university’s conduct implicates violations of the professors’ First Amendment rights, despite any likelihood of a conflict of interest existing between them and their employer. By using the Pickering balancing test, the United States District Court for the Northern District of Florida should find that any conflict of interest the professors’ expert testimony may create in their relationship as state employees is far outweighed by the professors’ interest, as citizens, to comment upon matters of public concern—whether Florida’s newly implemented law violates the Fifteenth Amendment of the Constitution and

* Juris Doctor 2023, Florida International University (FIU) College of Law. Many thanks to Professor Juan Gomez, my faculty advisor. A special thanks as well to my family for supporting me through law school and always pushing me to reach new heights.
the Voting Rights Act. Furthermore, Florida Rising Together (“Florida Rising”) should bring a Section 1985 claim against University of Florida officials for intimidating witnesses in a civil rights case.

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I. INTRODUCTION

In the years leading up to and following the 2020 presidential general election, various states have introduced and enacted bills attacking voting rights to the point of practical revocation for many eligible voters. Following claims of widespread election and voter fraud plaguing the controversial 2020 election, nineteen states have enacted thirty-three laws seeking to impede voting access under the guise of protecting election integrity. However, the side effect of many of these laws has severely limited voting access for many marginalized groups, including Black, Hispanic, and elderly Americans. Many of these claims of pervasive election fraud have been debunked and even litigated in courts; nonetheless, many of these laws have been enacted in their respective states and will have drastic effects on American democracy in future elections.

3 See, e.g., Matter of Giuliani, 146 N.Y.S.3d 266 (App. Div. 2021) (discussing the grounds for suspending Rudy Giuliani’s license to practice as an attorney in the State of New York for his continuously making false statements of fact or law in the course of representing his client Donald Trump following the 2020 election).
4 See Fla. S.B. 90; see also Kan. H.B. 2183.
These new restrictive voting laws—including Senate Bill 90 (“S.B. 90”) in Florida—were borne against the backdrop of a historic election that faced many challenges, including a crippling global pandemic and unprecedented political tensions among the American people. Despite these challenges, the 2020 general election brought about the largest nominal voter turnout in United States history. Of the United States voting eligible population, the 2020 General Election saw 66.6% participation—with total ballots counted amounting to 159.7 million out of a total voting eligible population of 239.9 million. Not only was there a stark increase in voter turnout generally, but the 2020 General Election also saw record high participation in Hispanic voters, non-Hispanic Black voters, and other non-specified demographics of voters.

This large increase in voter participation amongst the voting eligible population, despite a global pandemic people predicted would dissuade voters from voting in person, can be attributed to a substantial increase in nontraditional voting methods, increased grassroots ballot initiatives in various states, and increased political polarization amongst Americans.

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For example, grassroots groups—many led by women of color—are credited for the Democrats’ victory in Georgia, a historically red state. This victory for Democrats came about despite heavy voter suppression tactics implemented following the *Shelby County v. Holder* decision in 2013, which held that the subsection four of the Voting Rights Act of 1965 was unconstitutional. These activists were successful in registering voters and encouraging voter turnout by focusing mobilization efforts on seniors, college students, formerly incarcerated citizens, and rural voters.

Following the 2020 General Election, Florida joined the list of states introducing and passing a law seeking to restrict voting access and rights in Florida. S.B. 90 was introduced to the Florida Senate on March 2, 2021. After two months, Florida Governor Ron DeSantis approved the bill on May 6, 2021, during a press conference that aired on only Fox News. During this press conference, Governor DeSantis declared that the new law “would prevent fraud and restore confidence in Florida’s elections.” The governor further ensured, “Floridians can rest assured that our state will remain a leader in ballot integrity . . . these changes will ensure this continues to be the case in the Sunshine State.”

Governor DeSantis even lauded Florida’s election as “a model for the rest of the nation to follow,” in a tweet following the 2020 election. Despite a smooth election, Governor DeSantis and Florida Republicans have passed S.B. 90, which modifies rules for voter observation, limits use of drop boxes

13 See Williamson & Memfis, supra note 11.
16 See Ferriss, supra note 14.
18 Id.
20 Id.
22 Ron DeSantis (@GovRonDeSantis), TWITTER (Nov. 4, 2020, 4:44 PM), https://twitter.com/GovRonDeSantis/status/1324105204241993728.
for mail-in ballots, limits who may collect mail-in ballots, restricts vote-by-mail registration and proscribes “line warming”—a practice that consists of giving food to voters that are waiting in lines at polling places. This bill is yet another example of Governor DeSantis’s campaign against Floridian voters’ rights.

Many organizations have mobilized against the enactment of S.B. 90 in Florida. Many view this law as an attempt to discriminate against Black, Hispanic, elderly, and disabled voters, directly in contrast to the Voting Rights Act of 1965. These organizations, including the NAACP and Florida Rising, explain, “[w]hile this law will affect all voters, the brunt of the harm will be borne by Black voters, Latino voters, and voters with disabilities.”

Many of these voters, particularly Black and Latino Floridian voters, currently lack access to the forms of identification now required by S.B. 90 to request mail-in ballots.

While Florida has seen significant use of mail-in voting in the 2016 and 2018 elections, the 2020 election was the first time more Democrats voted

25 Id.
26 Id.
29 See generally Duncan Hosie, When Will DeSantis Listen to His Own Voters on Ex-Felons’ Voting Rights?, ACLU (Sept. 24, 2020), https://www.aclu.org/news/voting-rights/when-will-desantis-listen-to-his-own-voters-on-ex-felons-voting-rights/ (explaining how Governor Ron DeSantis’s instituting a requirement for felons to pay off all their fees prior to regaining their right to vote goes against his Republican voter base’s wishes).
31 See generally Class Action Complaint for Injunctive and Declaratory Relief at para. 14, Fla. Rising Together, No. 4:21-cv-201.
32 Complaint for Declaratory and Injunctive Relief at para. 9, NAACP, No. 4:21-cv-00187.
33 Id.
34 Hassan, supra note 24.
by mail than Republicans.\textsuperscript{35} While these organizations challenging the law do not allege this as evidence of intent in their filings, it cannot be overlooked that Governor DeSantis and Florida Republicans introduced and passed S.B. 90 one year prior to the 2022 Florida gubernatorial election—one in which he will be running for re-election.\textsuperscript{36}

Because of this apparent intention behind S.B. 90, many organizations have filed suits against Florida Secretary of State Laurel M. Lee.\textsuperscript{37} Major organizations involved in these lawsuits include the NAACP Legal Defense Fund, Disability Rights Florida, Common Cause, Florida Rising Together, and the Hispanic Federation, among others.\textsuperscript{38} The suits filed against Lee allege that the Republican-led Florida Legislature\textsuperscript{39} passed S.B. 90 “against a backdrop of record turnout among Black and Latino voters during the 2020 general election.”\textsuperscript{40} One petition further emphasizes that S.B. 90 contains provisions that target strategies used by grassroots organizations in Florida that directly resulted in the record voter turnout among such demographics.\textsuperscript{41}

In its case against Lee, Florida Rising sought to introduce three expert witnesses who specialize in voting rights matters.\textsuperscript{42} These expert witnesses are all professors at the University of Florida, a state university.\textsuperscript{43} In response, the University of Florida barred these professors from appearing as expert witnesses against the State of Florida.\textsuperscript{44} University officials told the three professors that “participating in a lawsuit against the state ‘is adverse to U.F.’s interests’ and could not be permitted.”\textsuperscript{45}


\textsuperscript{37} See generally Class Action Complaint for Injunctive and Declaratory Relief, Fla. Rising Together v. Lee, No. 4:21-cv-201 (N.D. Fla. May 17, 2021); Complaint for Declaratory and Injunctive Relief, NAACP, No. 4:21-cv-00187.

\textsuperscript{38} See generally supra note 37.


\textsuperscript{40} Class Action Complaint for Injunctive and Declaratory Relief at para. 5, Fla. Rising Together, No. 4:21-cv-201; see also Complaint for Declaratory and Injunctive Relief at para. 50, NAACP, No. 4:21-cv-00187.

\textsuperscript{41} See Class Action Complaint for Injunctive and Declaratory Relief at para. 6, Fla. Rising Together, No. 4:21-cv-201.


\textsuperscript{43} Id.

\textsuperscript{44} Id.

\textsuperscript{45} Id.
This action by the University of Florida came as a surprise to the three professors, one of whom testified against Florida’s Republican-led government in two similar voting rights cases in 2018. This current barring of the professors from testifying is odd behavior for the University, which has often allowed professors to testify as experts in cases against the Florida government in the past. Robert C. Post, a professor at Yale Law School and expert in academic freedom and the First Amendment, says he has never seen another such case. The University has since reversed its decision and is now allowing the professors to testify; however, the professors are still considering pursuing legal action.

Because the University of Florida is a subsidiary of the State of Florida, it must be considered a state actor here. The University’s act of barring its professors from testifying as expert witnesses against the State of Florida should, therefore, constitute state action. In cases where a state actor limits its employees’ First Amendment rights to serve its own interests, courts apply the Pickering test, which balances the interests of a public employee, “as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.” By applying the Pickering test to this situation, a court likely would find that the University of Florida has very little interest in “promoting the efficiency of the public services it performs” by preventing these professors from “commenting upon matters of public concern,” such as issues of voting rights. Because the University likely cannot prevail in outweighing its interests against those of the professors and the public at large, the University of Florida—as a state institution—may not bar the professors from serving as expert witnesses, even for parties adverse to the State.

In fact, this conduct by the University appears so egregious that the plaintiffs and the professors in this case may be able to bring a Section 1985 claim against the University of Florida for barring the professors from “testifying to any matter . . . freely, fully, and truthfully . . . .” This, however, would need to be a separate case.

This note begins this discussion by introducing a brief history of voting rights cases from the twentieth century in Section II. Section III will cite examples of voter suppression that various states have enacted in the twenty-sixties.
first century to illustrate the real threat of such suppression in order to give context to the egregious nature of Florida’s passing of S.B. 90 and why it must be stopped. Section IV will briefly discuss the circumstances under which S.B. 90 was enacted and how it intends to unconstitutionally discriminate against voters. Section V will discuss the resulting case in the University of Florida violating the First Amendment rights of its professors. Section VI will conclude.

II. BRIEF HISTORY OF VOTING RIGHTS IN THE UNITED STATES

This section will give a brief, and admittedly simplistic, overview of the enfranchisement of various marginal groups in the United States following the ratification of the Fifteenth Amendment. This section seeks to add context of the historical relevance of Florida’s passing of S.B. 90 today. For a better understanding of the era, please see the below cited authorities for more in-depth overviews on the subject.

Following the Civil War, the Reconstruction Era government sought to heal the nation after the bloody Civil War and ensure that recently emancipated Black Americans would reap the benefits of their freedom. The “lame-duck” Fortieth Congress in 1869—led by Republicans—reasoned that the recently ratified Fourteenth Amendment did not impose on the States sufficient protections of voting rights for Black Americans. Therefore, Reconstruction Framers debated whether the best strategy to grant suffrage rights to Black Americans was to push for a statute or for an amendment. Following this debate, the Reconstruction Framers settled on passing an amendment using Article V of the Constitution. Thus, the Fifteenth Amendment was born.

The newly ratified Fifteenth Amendment expressly prevented both the federal government and the States from “den[y]ing] or abridg[ing]” the right of United States citizens to vote “on account of race, color, or previous condition of servitude . . . .” Additionally, the Fifteenth Amendment gave Congress the express power to enforce it through additional legislation.

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53 See Crum, supra note 52, at 1551, 1553–54.
54 Id. at 1552.
55 See id. at 1553; see also U.S. Const. art. V.
56 U.S. Const. amend. XV, § 1.
57 U.S. Const. amend. XV, § 2.
likely a compromise between the moderate and radical sects of the Reconstruction Framers who wrote it.\textsuperscript{58} Despite this second clause expressly granting such power, the Fifteenth Amendment has not been typically used when scrutinizing racially discriminatory voting laws.\textsuperscript{59} Instead, the Supreme Court typically looks to the Equal Protection Clause of the Fourteenth Amendment when deciding such cases.\textsuperscript{60} This overlooking of the Fifteenth Amendment has led scholars to label the Amendment as “superfluous.”\textsuperscript{61} Regardless of whether it fits this categorization, the Fifteenth Amendment was a cornerstone piece of legislation that laid the groundwork for twentieth century voting laws further protecting the right to vote for marginalized groups.

The twentieth century saw an expansion of the protection of voting rights and other civil rights in the form of a constitutional amendment and statutes passed by Congress. In 1920, the Nineteenth Amendment granted women the right to vote by proscribing the federal government and the States from “den[y]ing or abridg[ing] [the right to vote] on account of sex.”\textsuperscript{62} This amendment did not grant women the right to vote, rather, it proscribed states from denying women the right to vote on account of sex.\textsuperscript{63} It was—as is today—accepted that “[t]he right of suffrage is derived from the State.”\textsuperscript{64}

As the century progressed, further protections of voting rights grew. Many Black Americans and other non-White Americans, while ensured the right to vote in theory by the Fifteenth Amendment, unfortunately were unable to exercise this right in practice. This was most apparent in southern states where segregation through Jim Crow laws was prevalent. Jim Crow laws allowed states to pseudo-legally restrict or outright deny the right to vote for many Black and non-White Americans through various legal mechanisms such as literacy tests and poll taxes.\textsuperscript{65} These mechanisms—in conjunction with other socioeconomic factors caused by segregation policies—sought to lower Black participation in elections by increasing the costs of voting for these Americans in order to keep the Jim Crow order in place.\textsuperscript{66} Many of

\begin{footnotesize}
\begin{enumerate}
\item See Crum, supra note 52, at 1554.
\item See id. at 1557.
\item See id.
\item See id.
\item U.S. CONST. amend. XIX.
\item See, e.g., People ex rel. Murray v. Holmes, 341 Ill. 23, 26–27 (1930).
\item Holmes, 341 Ill. at 26.
\item Compare id. at 10, with Shelby County v. Holder, 570 U.S. 529, 551 (2013).
\end{enumerate}
\end{footnotesize}
these states succeeded in disenfranchising Black Americans, thereby creating fuel for the Civil Rights Movement of the 1960s.

As a result of the tumultuous Civil Rights Movement, President Lynden B. Johnson had the Voting Rights Act of 1965 (“The Act”) drafted as a mechanism to supplant the largely ineffective civil rights acts of 1957, 1960, and 1965. This new act sought to enforce the Fifteenth Amendment, which was signed ninety-five years before, by outlawing those discriminatory practices adopted in southern segregated states. In particular, the Act’s power to protect the suffrage of Black American voters came from Sections 4 through 9. Most notably, Section 4 abolished the usage of any form of test to determine ability to vote for five years. The following sections provided the methods of enforcement and remedies for violations of the Section 4 of the Act. Section 4 created a coverage formula, which applied “in any State” or “to any political subdivision” that (1) “the Attorney General determines maintained . . . any test or device;” and (2) where the “Director of the Census determines that less than [fifty percent] of the persons of voting age residing therein were registered on November 1, 1964, or less than [fifty percent] of such persons voted in the presidential election of November 1964.”

Following the enactment of the Voting Rights Act of 1965, various landmark Supreme Court cases were decided to further enshrine the Act’s legitimacy. The first major case decided on the issue was *South Carolina v. Katzenbach*.

In *Katzenbach*, the State of South Carolina filed a bill of complaint, seeking declaratory judgment that various sections of the Voting Rights Act of 1965 violated the Constitution of the United States. Many other states joined South Carolina in this complaint by submitting joining briefs and presenting oral arguments. South Carolina brought this action forward because its literacy test voting law fell under the coverage formula of Section 4 of the Act. South Carolina and its allies alleged that Section 4 of the Act violated the Constitution because “the coverage formula . . . violate[d] the principle of the equality of the States, deny[d] due process by . . . barring

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67 Naidu, *supra* note 65, at 18–19.
68 See Davidson, *supra* note 52, at 17.
69 See id. at 18; see also Voting Rights Act of 1965, 79 Stat. 437 (1965).
70 See Davidson, *supra* note 52, at 18.
73 Voting Rights Act § 4(b).
75 See id. at 307, 317.
76 See id. at 307.
77 See id. at 318.
judicial review of administrative findings, constitute[d] a forbidden bill of attainder, and impair[ed] the separation of powers by adjudicating guilt through legislation.”78 Additionally, South Carolina alleged that Section 5 of the Act infringed upon Article III of the Constitution because it directed United States District Courts to issue advisory opinions.79 South Carolina also challenged the Act because of its coverage formula.

In an 8-to-1 opinion written by Chief Justice Warren, the Court considered Justice John Marshall’s test to determine whether Congress’s action was appropriate with regard to Section 2 of the Fifteenth Amendment: “[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”80

Using this test, the Court concluded that the Act’s coverage formula was constitutional under the Fifteenth Amendment because (1) “[t]he measure” imposed by the Act was “clearly a legitimate response to the problem” of “widespread and persistent discrimination in voting;” and (2) “[i]n acceptable legislative fashion, Congress chose to limit its attention to geographic areas where immediate action seemed necessary.”81 Therefore, the Court concluded that the Act’s coverage formula was “rational in both practice and theory” and “permissible to impose ... on the ... States and political subdivisions covered by the formula ... .”82

The Court thus held that “the portions of [the Act] before us are a valid means for carrying out the commands of the Fifteenth Amendment” and dismissed South Carolina’s bill of complaint.83

Seventeen days after Katzenbach was decided, the Court heard the subsequent case Harper v. Virginia State Board of Elections.84 In Harper, Virginia residents brought an action against the State of Virginia seeking a declaratory judgment that Virginia’s poll tax was unconstitutional.85 The district court in this case dismissed the residents’ action after relying on Breedlove v. Sutliff because (1) the Virginia poll tax was “levied upon every adult . . . irrespective of his intent to vote;” and (2) “no racial discrimination

78 See id. at 323.
79 Id.
80 Id. at 326 (citing McCulloch v. Maryland, 17 U.S. 316, 421 (1819)).
81 Id. at 327–28.
82 See id. at 330.
83 See id. at 337.
85 See id. at 664.
[was] exhibited in its application as a condition of voting." The residents appealed. In a 6-to-3 opinion by Justice William Douglas, the Court reversed the district court’s decision and concluded that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes affluence of the voter or payment of any fee an electoral standard.” The Court emphasized that “[v]oter qualifications have no relation to wealth nor to paying or not paying this or any tax.” However, the Court here left the door open for States to “impose reasonable residence restrictions on the availability of the ballot.”

The Court in Harper further emphasized that voting is “a fundamental political right . . . [e]specially since the right . . . is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” The Court, borrowing logic from the earlier decision of Reynolds v. Sims, concluded, “The principle that denies the State the right to dilute a citizen’s vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.” The Court then overruled Breedlove, confidently held that “wealth or fee paying has, in our view, no relation to voting qualifications,” and reversed the district court’s dismissal.

Throughout its tenure, the Warren Court created a friendly environment for The Act by staunchly standing by Congress’s original legislative intent. The Warren Court expanded democracy’s reach in the United States by protecting the voting rights of marginalized groups, which led to the country moving closer to implementing the ideals of the Constitution. However, the Roberts Court undid many of the protections implemented by The Act and the Warren Court. Consequently, the United States is now seeing a resurgence of state legislation that seeks to abridge the right to vote of United States citizens with masked discriminatory intent and effect.

88 Id. at 666.
89 Id.
90 Id.
91 Id. at 667.
93 Harper, 383 U.S. at 668.
94 See id. at 670.
III. Twenty-First Century Voter Suppression

As states have adopted new legislation seeking to restrict the right to vote in the twenty-first century, many scholars argue that these states are implementing new forms of voter suppression that should be deemed unconstitutional.95 These attacks on voters’ rights have been largely allowed to stand by a disinterested Roberts Court,96 which has emboldened states to continue passing such legislation.97

States have recently been able to surpass the protections implemented in the twentieth century by enacting voter restricting legislation with the purported state interest of curtailing voter fraud; however, these suggested intentions fly in the face of little to no evidence of such a threat.98 Scholars argue that such a fragile state interest in these cases evidences a “darker motivation” influencing such legislation—a motivation that the Court has refused to engage with in recent years.99

The Court’s present inaction in such cases—in conjunction with apparent gridlock found in the contemporary legislative branch—has left scholars and voting rights advocates scratching their heads as to how to combat such state legislation.100

Furthermore, scholars posit that American democracy faces various novel obstacles to voting rights that the Warren Court never faced: modern campaign finance policies and widespread social media disinformation campaigns.101 Unfortunately, these issues are very complicated and outside the scope of this Comment, as they necessarily implicate the actions of private entities rather than the federal or state governments.102 Moreover, it is unlikely that a Court that has become exceedingly unbalanced and antagonistic to voting rights under former President Donald Trump will be willing to change its outlook on voting rights towards such issues.103

97 BRENNAN CTR. FOR JUST., supra note 2.
98 See Manheim & Porter, supra note 95, at 215–16.
99 Id. at 216.
100 See id. at 217.
101 See generally Ravel, supra note 95.
102 See id. at 1038, 1056.
Within the topic of the Court’s actions, no twenty-first century case has opened the door for states to enact vote suppressing legislation like Shelby County v. Holder has.\textsuperscript{104} In a 5-to-4 decision by Chief Justice Roberts, the Court effectively gutted the Voting Rights Act of 1965 after forty-eight years.\textsuperscript{105} Here, the Court reasoned that the Act’s coverage formula found in Section 4, while justified during Katzenbach, no longer was “sufficiently related to the problem it targets” because literacy tests have been outlawed since the passage of the Act and its subsequent case law.\textsuperscript{106} The Court came to this conclusion after applying the test it created in prior case law to the Section 4 coverage formula and determined that the statute’s “current burdens” no longer were justified by “current needs” and that the Act’s “disparate geographic coverage” was no longer “sufficiently related to the problem that it targets.”\textsuperscript{107}

Based on this finding, the Court deemed Section 4(b) of the Voting Rights Act of 1965 unconstitutional.\textsuperscript{108} The Court’s decision here has led to a sort of Pandora’s box of voter suppression legislation across the country and has directly created the environment seen today.

\textbf{IV. S.B. 90 IS ANOTHER EXAMPLE OF MODERN VOTER SUPPRESSION}

S.B. 90 is, on its face, an extraordinary piece of legislation. Without even reading a single word of the bill as passed, a reader would be surprised to see that S.B. 90 is forty-eight (48) pages long.\textsuperscript{109} One might be surprised to see that the Florida legislature felt inclined to pass a forty-eight page law changing election laws in Florida after the governor declared that the Florida election was a success and should serve as a model for state elections across the country.\textsuperscript{110}

A few provisions in particular have been attacked as intentional voter discrimination by groups challenging the law.\textsuperscript{111} In their complaint, the plaintiffs in League of Women Voters of Florida, Inc. v. Lee specify that S.B. 90 will impede access to voting unequally by (1) severely reducing access to

\begin{footnotesize}
\textsuperscript{104} See generally Shelby County v. Holder, 570 U.S. 529, at 556–57 (2013).
\textsuperscript{105} See id. at 557.
\textsuperscript{106} See id. at 550–51.
\textsuperscript{108} See id. at 557.
\textsuperscript{109} See generally S.B. 90 (Fla. 2021).
\textsuperscript{110} See DeSantis (@GovRonDeSantis), supra note 22.
\end{footnotesize}
vote-by-mail drop boxes; (2) effectively banning volunteer assistance to help voters return their vote-by-mail votes; (3) unnecessarily requiring voters to re-request vote-by-mail ballots; (4) banning anyone except election workers from giving food or drink, including water, to voters waiting in line to vote (i.e., line warming); and (5) requiring the voter registration organizations to recite the misleading and chilling “warning” that intends to discourage voters from registering with such organization. To justify passing these laws that severely restrict voting access for many of Florida’s most at-risk residents, proponents of the law provide “vague references to concerns about elections ‘integrity’ or ‘fraud,’ that were themselves contrary to reality.” Governor Ron DeSantis’s own website contains a memo with quotes from the Senate President, Wilton Simpson, stating, “Florida was a model for the nation in November, and that is something we can all take pride in.”

Despite the law purporting to be neutral, parties challenging S.B. 90 point to the fact that it will unequally affect Black, Hispanic, elderly, and disabled voters in Florida due to its targeting of vote-by-mail. In the 2020 General Election, Florida saw a record number of vote-by-mail ballots cast, as did the rest of the country. Florida has had a long, successful history of implementing absentee voting, but the 2020 General Election was the first election in which Democrat voters surpassed Republican voters in voting by mail. Furthermore, among all races, voter participation increased in the 2020 General Election since the last election. Not only did Florida experience between a 61% and 82.8% nontraditional voting rate in the 2020 General Election, but this rate was only a less than 19% change in nontraditional voting from the previous 2016 election. Upon seeing these facts, one must question why the party in power after the 2020 election would simultaneously applaud the success of the election while seeking to restrict future elections.

112 See Supplemental Complaint at 8–9, League of Women Voters of Fla., Inc., No. 4:18-cv-00251.
113 See id. at 28; see also Fla. Governor, supra note 21.
114 See Fla. Governor, supra note 21.
115 See, e.g., Supplemental Complaint at 8, League of Women Voters of Fla., Inc., No. 4:18-cv-00251.
117 See Scherer, supra note 10.
118 See Fla. Div. of Elections, supra note 35.
120 See id.
V. RESULTING UNIVERSITY OF FLORIDA CASE

As discussed, Florida’s S.B. 90 constitutes a textbook example of intentional voter suppression, especially with Governor Ron DeSantis explaining that this law seeks to prevent voter and election fraud that simply does not exist.

This comment stipulates that the parties challenging this recently passed law have a strong case against the Florida state government, especially since the assigned judge to the case, Chief Judge Mark Eaton Walker, has a friendly track record towards voting rights cases in recent years. However, a novel challenge has arisen in Florida Rising’s case against Florida Secretary of State Laurel M. Lee.

A. University of Florida and Its First Amendment Violations

In its case seeking to defeat S.B. 90, Florida Rising Together and its co-parties sought assistance from three professors from the University of Florida who are experts in voting rights. When these professors requested permission from the University to participate in the case, the University prohibited them from doing so. The University explained to the three professors that allowing them to participate in Florida Rising Together’s case is “adverse to U.F.’s interests” as a state institution.

This action by the University came as a shock to many, especially since the University has allowed one of the professors—Dr. Daniel A. Smith—to testify against a similar Republican-led Florida state government in two prior voting cases against the State of Florida in 2018. Dr. Smith assisted in a case that led to the State of Florida being required to provide Spanish-
language ballots for Spanish-speaking voters.\textsuperscript{129} In the other case, Dr. Smith assisted the League of Women Voters of Florida in a case against Secretary of State Ken Detzner, who imposed a ban on early voting locations sites on college campuses in Florida, in an effort to prevent college students from voting (a case over which Chief Judge Martin Walker presided).\textsuperscript{130} Observing experts in the field of academic freedom have been equally shocked with the University’s conduct here and believe that this action is most likely unconstitutional.\textsuperscript{131}

Because the University spokesperson and other administration members hide behind the explanation that allowing the professors to participate in the present case would amount to “outside activities that may pose a conflict of interest to the executive branch of the state of Florida” that therefore “create a conflict for the University of Florida,”\textsuperscript{132} it must be questioned whether such presumed conflict even merits protection.

Following the backlash of this case, University of Florida President Kent Fuchs\textsuperscript{133} asked the University’s conflict of interest office to reverse the decision and asked the office to approve the requests, given that the activity was conducted on the professors’ own time.\textsuperscript{134} Despite this change of position from the University, the affected professors\textsuperscript{135} decided to pursue litigation against the University of Florida for violating their First Amendment rights by “restricting [them] from testifying as expert witnesses or serving as expert consultants . . . on the basis of their viewpoint.”\textsuperscript{136} The professors’ complaint further alleged that the University of Florida violated their First Amendment rights by “requiring the University’s permission to testify” in the first place.\textsuperscript{137}

\begin{footnotes}
\item[130] See generally League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205 (N.D. Fla. 2018).
\item[131] See Wines, supra note 42.
\item[132] Id.
\item[133] See Dr. W. Kent Fuchs, OFF. OF THE PRESIDENT UNIV. OF FLA., https://president.ufl.edu/about/ (last visited Apr. 1, 2022).
\item[135] See Dara Kam, University of Florida Faculty Lawsuit over Vote-by-mail Testimony Sets Federal Court Date, ORLANDO WKLY. (Dec. 14, 2021, 10:01 AM), https://www.orlandoweekly.com/news/university-of-florida-faculty-lawsuit-over-vote-by-mail-testimony-sets-federal-court-date-30470672.
\item[136] Complaint at 16, Austin v. Univ. of Fla. Bd. of Trs., 580 F. Supp. 3d 1137 (N.D. Fla. 2022) (No. 1:21cv184).
\item[137] Id.
\end{footnotes}
B. Applying the Pickering Test to the University of Florida Case

The Supreme Court created a test for determining when a public institution has violated a public employee’s First Amendment rights in limiting said employee’s ability to speak about issues of public concern.\(^\text{138}\) In fact, the plaintiff professors from the University of Florida invoked the Supreme Court’s Pickering test in their complaint against the University.\(^\text{139}\)

The Pickering balancing test seeks to balance state interests against those of the public employee in exercising his or her First Amendment right to free speech.\(^\text{140}\) Pickering v. Bd. of Education is applicable to Austin because both are cases involving state employers attempting to silence public employees speaking on matters of public importance.\(^\text{141}\)

In Pickering, the Board of Education in Illinois dismissed a teacher from the Township High School District 205, Will County, Illinois, for writing and publishing a letter that attacked the School Board’s handling prior bond issue proposals and the subsequent allocation of financial resources.\(^\text{142}\) The teacher’s letter also claimed that the superintendent of schools attempted to “prevent teachers in the district from opposing or criticizing the proposed bond issue.”\(^\text{143}\) After a hearing held in compliance with Illinois law, the Board dismissed the teacher because the letter “was ‘detrimental to the efficient operation and administration of the schools of the district’ and hence, . . . ‘interests of the school require[d] [his dismissal].’”\(^\text{144}\) Consequently, the teacher filed suit against the Board of Education for violating his rights to freedom of speech.\(^\text{145}\)

After noting probable jurisdiction and setting the case for oral argument,\(^\text{146}\) the Court agreed with the teacher that his First and Fourteenth Amendment rights were violated,\(^\text{147}\) and held, “absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for


\(^{139}\) See Complaint at 16, Austin, 580 F. Supp. 3d 1137 (No. 1:21-cv-00184) (“The State has no compelling interest in silencing University faculty and preventing them from speaking on a topic of such significant public importance as elections.”).

\(^{140}\) See Pickering, 391 U.S. at 568.

\(^{141}\) See id. at 566-68; see also Austin, 580 F. Supp. 3d at 1145.

\(^{142}\) See Pickering, 391 U.S. at 566.

\(^{143}\) Id. at 566, 575–78 (Marvin L. Pickering’s letter included in the Appendix to the Opinion of the Court).

\(^{144}\) Id. at 564-65.

\(^{145}\) Id. at 565.


\(^{147}\) See Pickering, 391 U.S. at 565.
his dismissal from public employment.”\textsuperscript{148} In its opinion, the Court outlined its balancing test when it explained,

It cannot be said that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses . . . The problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.\textsuperscript{149}

The Court further explained that questions of school system funding are “matter[s] of legitimate public concern . . . .”\textsuperscript{150} On such matters, the Court explained, “free and open debate is vital to informed decision-making . . . .”\textsuperscript{151} Because teachers are the members of a community most likely “to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent,” the Court reasoned that “it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”\textsuperscript{152}

In applying its balancing test to the case, the Court afforded the “public interest in having free and unhindered debate on matters of public importance” heavy weight in the equation as compared to State interests.\textsuperscript{153} The Court emphasized that “[s]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.”\textsuperscript{154} Finally, to reach its holding,\textsuperscript{155} the Court reasoned that “[i]n a case . . . in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, . . . it is necessary to regard the teacher as the member of the general public. . . .”\textsuperscript{156}

\textit{Pickering} is applicable to \textit{Austin}, despite the fact that \textit{Austin} is not a case that involves dismissal of professors for speaking out against the University of Florida.\textsuperscript{157} \textit{Austin} is a case involving a state university attempting to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{148} See id. at 574.
\item \textsuperscript{149} See id. at 568.
\item \textsuperscript{150} Id. at 571.
\item \textsuperscript{151} Id. at 571–72.
\item \textsuperscript{152} Id. at 572.
\item \textsuperscript{153} Id. at 573.
\item \textsuperscript{154} Id. at 574 (citing Garrison v. Louisiana, 379 U.S. 64 (1964) and Wood v. Georgia, 370 U.S. 375 (1962)).
\item \textsuperscript{155} Id. at 575.
\item \textsuperscript{156} Id. at 574.
\item \textsuperscript{157} See generally Austin v. Univ. of Fla. Bd. of Trs., 580 F. Supp. 3d 1137 (N.D. Fla. 2022).
\end{enumerate}
\end{footnotesize}
prevent its public employees from speaking out on voting laws that affect the general population of the state. This is comparable to the teacher in *Pickering* who was dismissed for criticizing his state’s Board of Education and superintendent for their handling of state education funds. Furthermore, the University of Florida denied the professors’ ability to participate in the lawsuit challenging S.B. 90 because the professors’ “[o]utside activities that may pose a conflict [of interest] to the executive branch of the state of Florida create a conflict [of interest] for the University of Florida.” This is similar to grounds the Board of Education in *Pickering* used to dismiss the teacher, whose letter the Board deemed “detrimental to the efficient operation and administration of the schools of the district.”

If the *Pickering* test were applied to the University of Florida’s conduct in *Austin*, it would be very likely that the court would deem issues regarding voting rights as a “matter of legitimate public concern,” and thus, would determine that “free and open debate is vital to informed decision-making . . . .” Because these professors are experts in the field of voting rights and political behavior, the court is likely to find that they are “likely to have informed and definite opinions as to” the constitutionality of S.B. 90. Because voting rights are a “matter of legitimate public concern,” a court likely would find that the professors’ interests in freely testifying on such matters far outweigh those of the University (and thereby the State) in “promoting the efficiency of the public services it performs through its employees.” Furthermore, because their statements as expert witnesses would be of public concern, the professors’ statements must be “accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors,” which in the original *Florida Rising* case would be the Secretary of State of Florida, Laurel M. Lee.

As the professors in *Austin* asserted in their complaint, it cannot be so easily said that the University’s barring of the professors from participating in the present action promotes “the efficiency of public services” the

158 See id. at 1148–49.
159 See *Pickering*, 391 U.S. at 571 (“[T]he question whether a school system requires additional funds is a matter of legitimate public concern . . . .”).
160 *Austin*, 580 F. Supp. 3d at 1149.
161 *Pickering*, 391 U.S. at 564.
162 *Id.* at 571.
163 *Id.* at 571–72.
164 *Id.* at 572.
165 *Id.* at 568.
166 *Id.* at 574.
University performs through its employees. A university is a public institution that seeks to serve the greater intellect of a community by “allow[ing] scholars free rein to conduct research,” as eloquently stated by Henry Reichman, a professor emeritus of history at California State University, East Bay.\(^{168}\) A university’s “public services”—regardless of whether it is a state institution or not—do not include protecting the state government from a potential conflict of interest when it enacts legislation contrary to the interests of its people.

C. The United States Northern District of Florida’s Decision in Austin v. University of Florida Board of Trustees

In fact, Federal District Judge Mark E. Walker recently decided as much on January 21, 2022.\(^{169}\) In his opinion for *Austin*, Judge Walker asserts that the professors’ “expert testimony is imbued with a constitutional interest. Testifying in a public proceeding on matters of great public concern lies at the First Amendment’s heart.”\(^{170}\) In support of the preliminary injunction they sought, the professors argued that they had “a substantial likelihood of success on the merits”\(^{171}\) because the University of Florida’s policy violated the First Amendment for two reasons: “(1) the policy is an unconstitutional prior restraint on speech, and (2) the policy is overbroad.”\(^{172}\) In his analysis, Judge Walker expressly highlighted the fact that the University refused to concede that the professors “have a First Amendment right to testify about topics related to their expertise in litigation against the State of Florida.”\(^{173}\) To this, Judge Walker emphasized that “just because such testimony relates to their expertise—which is itself related to their work as public university professors—does not mean that it falls outside the First Amendment’s reach.”\(^{174}\) Judge Walker was shocked that the University instead chose the opposite position and “denigrated their own professors as being no better than two-faced mercenaries when they seek to testify as experts in their field in cases challenging Florida law.”\(^{175}\) To this position, Judge Walker pointed to *Lane v. Franks*, a Supreme Court case explaining that “the mere fact that a citizen’s speech concerns information acquired by virtue of his public

\(^{168}\) See Wines, *supra* note 42.

\(^{169}\) See generally *Austin*, 580 F. Supp. 3d 1137.

\(^{170}\) *Id.* at 1156.

\(^{171}\) See Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000).

\(^{172}\) *Austin*, 580 F. Supp. 3d at 1161.

\(^{173}\) *Id.*

\(^{174}\) *Id.*

\(^{175}\) *Id.*
employment does not transform that speech into employee—rather than citizen—speech.”\textsuperscript{176}

Further on in his analysis, Judge Walker explained that \textit{Pickering} test must be applied to determine whether “the State, as an employer, has an interest in ‘controlling the operation of its workplaces.’”\textsuperscript{177} As a rebuttal to one of the University’s \textit{Pickering} arguments, Judge Walker explains that the professors here “speak as private citizens on matters of public concern.”\textsuperscript{178} “To decide whether a public employee speaks as a citizen,” Judge Walker explained, “courts ask whether the employee’s speech ‘owes its existence to [the] employee’s professional responsibilities.’”\textsuperscript{179} In determining that the professors were speaking as private citizens, Judge Walker points to the U.F. UFOLIO disclosure forms signed by the professors that require them to “attest that they are speaking as private citizens.”\textsuperscript{180}

On the issue of whether the professors’ speech touched on matters of public concern, Judge Walker asserted, “[w]ithout question, Plaintiff’s speech touches on matters of public concern,” and that “sworn testimony is usually of public concern.”\textsuperscript{181} Judge Walker reasoned that “[the professors’] research—touching on some of the most pressing political, social, and scientific questions of our day—is of public concern. And it becomes doubly so when that research is presented to the public in a judicial proceeding.”\textsuperscript{182} Prior to applying the \textit{Pickering} balancing test, Judge Walker explained that court need not apply the test created in \textit{United States v. National Treasury Employees Union} (“\textit{NTEU}”)\textsuperscript{183} (a case that imposes an even heavier burden than \textit{Pickering} for prior restraints) because “Defendants cannot satisfy even the most lenient \textit{Pickering} analysis . . .”\textsuperscript{184}

To support this statement, Judge Walker explains that the University’s “side of the \textit{Pickering} scale is entirely empty” because they merely “regurgitate[d] the case law recognizing [the professors’] interests as legitimate, and add that, without its conflicts policy, ‘UF will be left with no ability to regulate such activities . . .’”\textsuperscript{185} Despite being given four opportunities to explain “either in writing or at oral arguments,” the

\textsuperscript{176} \textit{Id.} (quoting \textit{Lane v. Franks}, 573 U.S. 228, 240 (2014)).
\textsuperscript{177} \textit{Id.} at 1168.
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.} (citing \textit{Garcetti v. Ceballos}, 547 U.S. 410, 421–22 (2006)).
\textsuperscript{180} \textit{Id.} at 1169.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} at 1169–1170.
\textsuperscript{184} \textit{Austin}, 580 F. Supp. 3d at 1171.
\textsuperscript{185} \textit{Id.}
University was unable to articulate how the professors’ “speech disrupts UF’s mission . . .”186

On the other hand, Judge Walker found that the professors’ “interest in speaking weighs heavy.”187 Judge Walker reasoned that “[the professors] seek to speak on matters touching on the very heart of the First Amendment.”188 Furthermore, because the professors’ speech would be related to academic scholarship, their expression “by its very nature, may merit additional judicial solicitude.”189 Because of this drastic balance heavily favoring the professors’ First Amendment rights, Justice Walker concluded that the University’s conflict policy is unconstitutional.190

With this in mind, Judge Walker granted the professors’ motion for preliminary injunction “with respect to the conflict-of-interests policy on providing expert witness testimony or legal consulting in litigation involving the State of Florida.”191 The University and its officials have since entered an appeal against the preliminary injunction.

D. Why is This Case Important?

This case, while collateral to the main issue of S.B. 90 as a modern example of voter suppression, is worth noting because it portrays the hostile culture that Governor Ron DeSantis and the Florida G.O.P. have created against academic freedom192 and those who speak up against their policies since the 2020 General Election. University of Florida officials have strong ties to DeSantis.193 In fact, the chair of the Board of Trustees at the University of Florida, Mori Hosseini, is an adviser to Governor DeSantis and is a major Republican donor.194 Hosseini has had a major role in affecting DeSantis’s decisions in the past, such as selecting the Surgeon General of Florida.195
In his opinion, Judge Mark Walker emphasized that the University of Florida’s President Kent Fuchs felt threatened that if the administration did anything “that might provoke the legislature or governor to take a dim view of the University” then “the jobs of top administrators, including President Fuchs and Provost Glover, were at risk . . .”\textsuperscript{196} This looming threat against the University likely motivated the administration’s decision in denying the professors’ requests to participate in the cases against S.B. 90, despite their track record for allowing these professors in particular to participate in similar voting rights litigation in the past. This case is a concrete example of Governor Ron DeSantis’s policies having a chilling effect on free discourse and political engagement within the State of Florida.

VI. CONCLUSION

S.B. 90 is yet another example of egregious intentional voter suppression being passed in states across the country. The 2020 General Election proved to the American people that nontraditional voting methods are largely successful and perhaps provide an opportunity for even more political participation from the American people. Because of this, parties in power are now reacting as quickly as they can in order limit the voting rights of those who most likely would vote against them. Following Shelby County v. Holder’s decision, and the general ambivalence of the Roberts Court to voting rights cases, it is likely that this voter suppression legislation will rage on throughout the United States.

It is vital that these targeted people rise up against this oppression and demand protections from the government that posits to represent their interests. This is a democracy after all. Because of this, cases like Florida Rising Together v. Lee and League of Women Voters of Florida v. Lee are essential to protecting the right to vote in states like Florida until better voting rights protections are ensured by broader legislation at the federal level (something very unlikely to happen anytime soon). While the United States District Court for the Northern District of Florida ruled in favor of the parties challenging S.B. 90 and found that part of the new law is unconstitutional, the fight against such legislation is far from over. It is likely that the League of Women Voters of Florida case will be appealed, and Governor DeSantis has already announced as much. Furthermore, similar legislation has been passed or is being introduced around the country.

Going forward, courts should look to the Northern District of Florida’s decision as persuasive authority in determining whether such legislation

\textsuperscript{196} Austin, 580 F. Supp. 3d at 1153.
violates the Fourteenth and Fifteenth Amendments to the Constitution or the Voting Rights Act. In order to avoid unequal outcomes in cases across the country, Congress should also amend the Voting Rights Act to provide more protections for elderly voters and voters with disabilities.