UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NANCY CAROLA JACOBSON, *et. al*, Plaintiffs, v. LAUREL M. LEE, in her official capacity as the Florida Secretary of State, Defendant, and NATIONAL REPUBLICAN SENATORIAL COMMITTEE, and REPUBLICAN GOVERNORS ASSOCIATION, Defendant-Intervenors.	Case No. 4:18-cv-00262-MW-CAS

DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Rather than seeking to persuade Florida voters to vote for Democratic candidates and Democratic policies, the Democratic Party, affiliated organizations, and three democratic voters (together "Plaintiffs" or "Democratic Plaintiffs") bring this lawsuit to declare Florida's Ballot Order Statute is unconstitutional. Democrats do not like Florida voters' recent message that lead to Republican victories in the U.S. Senate, the Governor's office, and the state legislature. Instead of adjusting their policy message in the court of public opinion, Democratic Plaintiffs bring their generalized policy grievance to this Court. This Court should reject Plaintiffs invitation and remand Plaintiffs to the court of public opinion.

STATEMENT OF MATERIAL FACTS

In 1951, a Democratic majority passed, and a Democratic Governor signed Florida's Ballot Order Statute. *See* Ch. 26870, s.5, Laws of Fla. (1951) (originally codified at 101.151(4), Fla. Stat.). Then, *sixty-seven* years later, on the eve of the 2018 elections, Plaintiffs filed suit alleging violations under the First and Fourteenth Amendments to the U.S. Constitution. *See* Compl. ¶¶ 50-60 (ECF 1). Shortly thereafter, Defendant-Intervenors moved to intervene, (ECF 23) and intervention was granted by this Court, (ECF 36), over the objections of Plaintiffs, (ECF 33).

Despite waiting *sixty-seven* years to bring a lawsuit, Plaintiffs determined that a preliminary injunction was necessary. *See* Mot. Prelim. Inj. (ECF 29); Mot. Supp. Prelim. Inj. (ECF 30). After expedited briefing, the Court properly denied Plaintiffs request for preliminary injunction. ECF 70. The Court found that Plaintiffs' years long delay since the 2014 gubernatorial elections weighed against a finding of irreparable harm. *See* Order Denying PI at 2 (ECF 70). After the denial of preliminary injunction, this case proceeded in the normal course. Now, pursuant to the Court's modified scheduling order, (ECF 106), Defendant-Intervenors bring this Motion for Summary Judgment. In support of their Motion for Summary Judgment, Defendant-Intervenors make the following three arguments: (1) This Court lacks subject matter jurisdiction over the case and remedy on standing and non-justiciability grounds; (2) Florida's order statute is a facially neutral law; and (3) the equitable doctrine of laches bars Plaintiffs' relief.

A. <u>This Court Lacks Subject Matter Jurisdiction</u>

i. The Plaintiffs Lack Standing

The Supreme Court in *Gill v. Whitford* stated that in the voting arena, injuries are individual in nature. 138 S. Ct. 1916, 1929 (2018). After multiple bites at the apple, Plaintiffs have been unable to demonstrate that individual voters have been harmed. *See, e.g.*, ECF 113-10 at 10-11 (Ex. J); ECF 113-12 at 4 (Ex. L); ECF 113-90 at 10, 13-14 (Ex. I). Because there is no record evidence of

individualized harm, there is no injury in fact to support Plaintiffs' standing. Also, coupled with the injury-in-fact issue, Plaintiffs are unable to establish that their harms are redressable by this Court. Plaintiffs must prove that the remedy they seek is one that the Court may grant, something they are unable to do. *See, e.g.*, *Federal Deposit Ins. Corp. v. Morley*, 867 F.2d 1381, 1389 (11th Cir. 1989). Plaintiffs are seeking either precinct-by-precinct or county-by-county ballot rotation, *see* Compl. ¶47; however, this Court does not have the authority to legislate a remedy. *See, e.g., Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003). Furthermore, Plaintiffs' requested relief is impractical, even impossible, to implement in Florida. *See, e.g.*, ECF 113-7 at 54, 77-78, 121, 126, 131 (Ex. G); ECF 113-6 at 24-26, 32, 130 (Ex. F); ECF 113-11 at 72-73 (Ex. K); ECF 113-8 at 53-54, 68-70, 110-113 (Ex. H).

ii. Plaintiffs' Claims are Non-Justiciable.

Plaintiffs' claims are non-justiciable as political questions because there is no judicially manageable standard to determine how much ballot order effect is too much—if it even exists. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004). Plaintiffs have produced several numbers which supposedly indicate an impermissible windfall vote advantage to Republicans in Florida. *See, e.g.*, Compl. ¶3 (2.70%); *id.*(5.40%); ECF 113-9 at 24 (Ex. I) (4%). But none of these provided

figures assists the Court in making a reasoned decision regarding concerning how much windfall vote is too much.

B. Florida's Ballot Order Statute is Facially Neutral.

Florida's statutory framework for determining the order of candidates on the ballot is a constitutional use of the broad powers granted state legislatures by the constitution. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). There are approximately thirteen states that have a ballot ordering system that are identical or similar to Florida's. *See, e.g.,* Ariz. Rev. Stat. § 16-502; 25 Pa. Stat. § 2963. Plaintiffs have produced no evidence to differentiate the reasons why a voter may vote for the first listed candidate. *See* ECF 113-9 at 33-34, 35-36, 49-50 (Ex. I); ECF 110-12 at 21 (Ex. L); ECF 110-10 at 10-11, 17 (Ex. J). Furthermore, adopting a different ballot order would require significant administrative and financial burdens on both the state and county election administrators. *See, e.g.*, ECF 113-11 at 72-73 (Ex. K); ECF 113-8 at 53-54, 68-70, 110-113 (Ex. H).

C. Plaintiffs' Claims are Barred by Laches.

Plaintiffs' decades long delay in raising their claims militates in favor of an equitable bar to those very claims. *See, e.g., Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999); Plaintiffs knew or should have known their rights were impacted decades before they brought this lawsuit. *See, e.g.*, Compl. ¶¶13, 14, 15; ECF 113-

2 at 16-17 (Ex. B); ECF 113-3 at 14 (Ex. C). This delay has and will result in prejudice to Florida and Defendant-Intervenors. *See, e.g.,* ECF 113-5 at. 57 (Ex. E); ECF 113-8 53-54 (Ex. H). The prejudice is practical, (ECF 113-8 at 68-70) (Ex. H) (impossible to implement precinct-by-precinct voting by next election in Miami-Dade), procedural, ECF 113-5 at 57) (Ex. E) (certification is likely required in every County serviced by Dominion), financial, ECF 113-8 at 53-54) (Ex. H) (regarding a proposed ballot system change before the Florida legislature - a wholesale change in voting systems in Miami-Dade would cost $6.5 million), and even evidentiary, *Apotex, Inc. v. UCB, Inc.*, 970 F. Supp. 2d 1297, 1336 (S.D. Fla. 2013) (inability to mount an as effective defense due to delay is a prejudice).

ARGUMENT

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The facts at summary judgment are viewed in the light most favorable to the nonmoving party but only if there is a genuine dispute as to those facts. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). A dispute is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). Facts are material only if those facts "might affect the outcome of the suit

under the governing law[,] . . . [f]actual disputes that are irrelevant or unnecessary will not be counted." *Id*.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

This Court is one of limited jurisdiction and it is the Plaintiffs' burden to prove that they have standing to challenge Florida's Ballot Order Statute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 561 (1992); *Allen v. Wright*, 468 U. S. 737, 750 (1984). Requiring that Plaintiffs have a personal stake in the outcome of the litigation guarantees that this Court "exercise[s] power that is judicial in nature[]" and does not "engage in policymaking properly left to elected representatives." *Gill*, 138 S. Ct. at 1923, 1929. Plaintiffs must prove that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiffs do not, however, have standing because they have not suffered a cognizable injury in fact traceable to the actions of the defendants, and their injuries are not redressable.

A. PLAINTIFFS LACK STANDING

i. Plaintiffs Have not Suffered an Injury-In-Fact.

The injury in fact requirement demands that Plaintiffs demonstrate the invasion of a legally protected interest that is both concrete and particularized and

injures the plaintiffs in a unique and individualized manner. *Gill*, 138 S. Ct. at 1929. In the voting rights context, to have standing to sue, Plaintiffs must demonstrate that the Florida Ballot Order Statute has injured each voter individually. *Id*. Statistical methods that only show averages across elections are insufficient to prove individual standing in the voting rights context. *Id*. at 1933.

Individual and organizational Plaintiffs have not shown harm to their individual right to vote. At most, Plaintiffs' evidence demonstrates that the candidates who belong to the party who won the previous gubernatorial election obtain some slight advantage on average across several elections. Barber Report 16 (characterizing Tables 9-12 of Krosnick's report as predicting the average vote shares of the Republican and Democratic parties); ECF 113-9 34, 48 (Ex. I) (stating that his analysis is looking at Democratic vote share and comparing that vote share between down ballot and top of the ticket elections). But this evidence only demonstrates a generalized grievance by, currently, the Democratic Party. *Gill*, 138 S. Ct. at 1933. Neither Krosnick, nor Rodden, nor Hernson analyze the impact Florida's Ballot Order Statute has on individual voters. *See Gill*, 138 S. Ct. at 1933. There is no evidence in the record showing that the individual Plaintiffs are harmed. *Id*. (stating that the Court's role is not to vindicate generalized partisan preferences but to vindicate the individual rights of the parties).

The analyses of Plaintiffs' experts concerned the potential impact ballot order had on elections generally, both top-of-the-ballot elections and bottom-of-the-ballot elections. Plaintiffs' experts did not study or isolate individual elections to determine the idiosyncrasies involved in those individual elections and the impact those idiosyncrasies had with their proposed theory about ballot order effect. *See* ECF 113-9 at 49, 51 (Ex. I). Crucially, Plaintiffs' experts did not study the impact Florida's Ballot Order Statute had on individual voters. *Gill*, 138 S. Ct. at 1933

That is likely because Florida's Ballot Order statute does not impact individual voters. The statute does not determine the outcome of a gubernatorial election nor pre-determine that any particular party lead the ballot. Instead, it is the votes of the people of Florida that determine which party's candidates go first on the ballot.

Furthermore, the organizational Plaintiffs do not demonstrate an injury in fact. It is undisputed that the political party of the person elected governor has changed 5 times since the statute was adopted. Democrats have held the Governor's Office for 42 of those years. There is, therefore, no injury to the Democratic Party that is traceable to the actions of Defendant or Intervenor-Defendants.

Finally, Democrats now hold most of the offices in the 13 jurisdictions that determine ballot order based on winning a prior election. Democratic organizations cannot have standing in this case when they hold the advantage in a majority of these 13 jurisdictions. The individual plaintiffs simply do not have standing to assert the rights of political parties. *See Gill*, 138 S. Ct. at 1933.

ii. Plaintiffs Lack Standing Because This Court Lacks the Authority to Grant Plaintiffs' Requested Relief.

To establish redressability, Plaintiffs must prove that the remedy they seek is one the Court has the power to grant. *Morley*, 867 F.2d at 1389; *Levy v. Miami-Dade County*, 358 F.3d 1303, 1305 (11th Cir. 2004) ("[T]here is no doubt that the [Plaintiffs] must demonstrate that the federal courts have the power to grant a viable remedy."). Even though the redressability prong of standing assumes the plaintiff's claim has legal merit, this does not guarantee that the claim—even a constitutional claim—is redressable. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

Plaintiffs are seeking ballot rotation, either on precinct-by-precinct, county-by-county, or on some to be determined randomized basis. Compl. ¶47. This Court does not have the power to grant Plaintiffs' request nor to order a different scheme of ballot order.

This Court's power is to declare what the law is and to declare laws unconstitutional. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The requested relief

has the effect of enacting legislation that is within the Florida legislature's constitutionally vested authority. *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3 781, 797 (6th Cir. 1996) (stating that the district court exceeded its authority when—after it declared a city zoning ordinance unconstitutional—it ordered the City to pass the Court's amendment and stating that "[t]he choice of how to comply with this opinion by accommodating the elderly disabled rests with the City Council, not the Court."). Moreover, Plaintiffs' requested relief violates principles of federalism. *Rizzo v. Goode*, 423 U.S. 362, 380 (1976). This is particularly true when an injunction is sought from a federal court to enjoin a state executive branch agency. *Id*

States exercise a wide variety of discretion in determining ballot order: rotation (as the Plaintiffs seek here), alphabetical (used in a number of states and by the State of Florida in primary elections. Fla. Stat. § 101.151(4)(a)), lottery, or some method connected with election results.

While this Court may have the power to declare Florida's Ballot Order Statute unconstitutional, and to enjoin its enforcement, this Court does not have the authority to order Plaintiffs' ballot scheme. That is for the Florida legislature to decide. *Women's Emergency Network*, 323 F.3d at 949 (holding plaintiffs lacked standing on redressability grounds because the alternative remedy sought—making

certain funds available to abortion agencies—was one that the legislature would not have passed).

iii. Plaintiffs' Requested Relief Is Impracticable and Depends On the Abilities of Third Parties Not Before this Court.

To satisfy the redressability requirement, the ability to redress the injury must be likely, not speculative. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[I]t must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."); *TVA v. United States EPA*, 278 F.3d 1184, 1207 (11th Cir. 2002); *cf Wiesmueller v. Kosobucki*, 571 F.3d 699, 703 (7th Cir. 2009) (implying that if a favorable ruling would only have a negligible or theoretical probability of redressing plaintiff's injuries, then plaintiff lacks standing).

Furthermore, the ballots are organized and reviewed by the various Florida Supervisors of Elections; those officials would have the responsibility of rotating names on the ballot. *See, e.g.*, ECF 113-7 at 39, 42 (Ex. G). Because the implementation of precinct-by-precinct ballot order rotation is dependent on the ability of the 67 Florida Supervisors of Elections, the 67 County Boards who would need to obtain and spend the necessary public dollars to implement any change, and the manufacturers of voting machine technologies (individuals and entities not before this Court), this Court "cannot presume either to control or predict" the ability of the Supervisors to timely implement Plaintiffs' requested

remedy, compel the expenditure of public funds, and compel manufacturers to produce and certify new products and train staff within any particular time frame. *Lujan*, 504 U.S. at 562; ECF 113-7 at 54 (Ex. G) (stating that for a generic simple adjustment to an XML export required testing that lasted three election cycles and stating that no testing certification process has ever been easy). Therefore, it is Plaintiffs' "substantially more difficult" burden to prove that 67 Florida Supervisors are capable of precinct-by-precinct ballot rotation. Lujan, 504 U.S. at 562. Plaintiffs must also demonstrate that certified products are available at a reasonable cost and may be procured in a reasonable time frame. They have failed to do so.

State and Florida Supervisor witnesses have been unequivocal: a precinct-by-precinct ballot rotation will require several months of testing and may, in the end, be impracticable. ECF 113-7 at 54, 77, 78, 121, 126, 131 (Ex. G); ECF 113-6 at 24-26, 32, 130 (Ex. F); ECF 113-11 at 72-73; 78 (Ex. K); ECF 113-8 at 68-70; 110-113 (Ex. H). The cost to adjust election software and machinery to comply with an ADA statute is $6.5 million or 25% of the Miami-Dade Supervisor of Elections budget. *Id.* at 51, 53-54, 115. This Court should find that Plaintiffs lack standing to seek any particular ballot rotation scheme.

iv. There Is No Judicially Manageable Standard To Determine How Much Benefit[1] Is Too Much for a Facially Neutral Ballot Order Statute.

"One of the most obvious limitations" on the federal judiciary "is that judicial action must be governed by *standard*, by *rule*." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (emphasis in original).[2] This is because "[l]aws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id*. That is why, of the "independent tests for the existence of a political question," the lack of the judicially manageable standard is one of the most important. *See Id*. at 277-78.

There is no judicially manageable standard for the Court to use to decide this case. Plaintiffs' position seems to be that *any* amount of ballot order effect is too much and that a rotational system is required. *See* Compl. ¶¶47-49. However, this cannot be the rule because it is well settled that "not all restrictions . . . impose

[1] This section assumes *arguendo* that there is a ballot order effect in Florida, the existence and impact of which Defendant-Intervenors dispute.

[2] The "judicially manageable standards" and "initial policy determination" prong are largely addressing the same ultimate issue. *See Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J. concurring). The policy determination made by Democrats when the statute was passed 68-years ago was, at least facially, founded upon the policy that consistency of party appearance on the ballot was better and more efficient for the voters. The judiciary simply believing the Plaintiffs' assurances that a "more fair" or "better" system exists is not reason enough to invalidate a 68-year old law. Any such move would go against the heavy presumption of constitutionality afforded all legislative enactments. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324. (2018).

constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Anderson*, 460 U.S. at 788. If the rule were that *any* primacy effect is too much, then a ballot ordering system that had a candidate appearing first on a ballot more than another candidate—even once or twice more—would be constitutionally suspect. A rule of this type would result in bizarre outcomes, effectively finding a *constitutional right* to pure ballot order randomization: something that *no* court has ever found and would conflict with the ballot order statutes in numerous states.

Further, there is no constitutional guarantee to the "windfall vote" in the first instance. *Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708, 718-19 (4th Cir. 2016) ("[A]ccess to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern."), *cert denied sub nom. Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017). The "judicially manageable standards" test essentially poses the following question: "Would resolution of the question demand that a court move beyond areas of judicial expertise?" *See Goldwater*, 444 U.S. at 998 (Powell, J. concurring). The answer to this question must be a categorical yes. Plaintiffs' experts have produced several different numbers for the ballot order effect. Even taking these figures at face value, it is hard to see a way to fairly determine that some effect is too much effect. *See generally Vieth*, 541 U.S. at 286, 296-97; *see id*. at 307-08 (Kennedy, J.,

concurring). This is even more true given that these votes are *valid* votes, irrespective of the reason or reasons why they were cast by the individual voter. Like cases involving partisan gerrymandering, there is no principled way for the federal judiciary to decide how much windfall vote is too much.

Furthermore, Florida's Ballot Order Statute is distinguishable from the statute struck down in *Graves*. In *Graves*, no matter the will of the voters or any other factor, the Democratic candidate was *always* going to be listed first. *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Ok 1996). Any statute of the type in *Graves* is identifiable and, therefore, decidable by the federal judiciary. The issue in *Graves*, however, is not comparable to Florida's statute where no political party is granted access to the first ballot order position because of its *per se* existence as that party. Instead, the Florida statute respects the will of the voters by allowing the party winning the last gubernatorial election—something both parties have done in the last 68-years—to reap the benefits, if any, of the windfall vote by being listed first. So, for the Court to make a determination in this case the Court would either have to: (1) Determine that *any* windfall vote is impermissible—thereby finding a constitutional *right* to strict randomization, or (2) somehow devise, within the confines of the Constitution, a method for determining *how much* windfall vote is *too much*. Because the Court cannot find the former and the latter has no judicially

manageable guideposts with which to anchor any decision, the only reasonable result is a finding of non-justiciability.

II. FLORIDA'S BALLOT ORDER STATUTE IS FACIALLY NEUTRAL.

A. Florida Has Properly Exercised Its Constitutionally Vested Powers.

The Constitution vests state legislatures with "broad" authority to prescribe time, place, and manner restrictions for elections. U.S. Const. art. I, § 4; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). Although the right to vote is a fundamental right, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick*, 504 U.S. at 433. State supervision of elections ensures that fairness, honesty and order accompany the democratic process. *Anderson*, 460 U.S. at 788. The right to vote is, therefore, "the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic process." *Burdick*, 504 U.S. at 441.

All election laws "inevitably affect[] – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. This burden on the right to vote does not automatically classify these laws as constitutionally suspect. *Id*. Because constitutional protection under this approach depends on the extent an election law impinges on First and

Fourteenth Amendment rights, the Supreme Court sets forth a balancing test to determine the appropriate level of scrutiny. *See Burdick*, 504 U.S. at 434. Where the Court finds that a challenged law "severely" burdens voting rights, heightened scrutiny applies and the law must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (internal citation omitted).

Where the Court finds that a challenged law imposes only "reasonable, non-discriminatory restrictions" on voting rights, minimal scrutiny applies and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id*. (quoting *Anderson*, 460 U.S. at 788). The class of laws facing higher scrutiny in these challenges is limited, because "[s]ubjecting too many laws to strict scrutiny would unnecessarily 'tie the hands of States seeking to assure that elections are operated equitably and efficiently.'" *Alcorn*, 826 F.3d at 717 (quoting *Burdick*, 504 U.S. at 433).

Accordingly, states are permitted to enact comprehensive election codes that will inevitably impose some burden on voters. *Burdick*, 504 U.S. at 433; *see also Storer v. Brown*, 415 U.S. 724, 730 (1974).

The first step in the balancing test analysis to determine the appropriate level of scrutiny is to weigh the "character and the magnitude" of the asserted injury to constitutional rights. *Burdick*, 504 U.S. at 434. Courts must balance these asserted injuries against the State's interest, "taking into consideration the extent to which

those interests make it necessary to burden the plaintiff's rights." *Id* (internal quotation marks omitted). Only when constitutional rights are subjected to severe burdens, e.g., *Buckley v. Am. Constitutional Law Found*., 525 U.S. 182, 192 n.12 (1999), is the State's justification subjected to strict scrutiny. *Burdick*, 504 U.S. at 434.

When a "state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id* (internal quotation marks omitted). The Supreme Court has upheld statutes prohibiting write-in voting in primary elections, *Burdick*, 504 U.S. at 437, prohibiting candidates from appearing on a ballot as candidates of more than one political party, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997), and prohibiting candidates from appearing on the ballot as an independent candidate if they were registered with a political party within the previous year. *Storer*, 415 U.S. at 726-28; *see also Alcorn*, 826 F.3d at 717. In fact, the Supreme Court held that these three restrictions imposed only minimal burdens on constitutional rights. *Id*.

How a state structures its ballot is a proper exercise of its constitutionally vested power to enact time, place, and manner restrictions "to assure that the

integrity and reliability of the election process is protected." U.S. Const. art. I, § 4; *Graves*, 946 F. Supp. at 1578; *Alcorn*, 826 F.3d at 717.

In all, 13 jurisdictions have laws that determine ballot order based on election results in past elections. Among them, six list the Republican candidate first, and seven currently list the Democratic candidate first. Before November of 2018, Republicans had (nationally) held more of the offices that determine ballot order. After November of 2018, that changed. Democrats now hold more of these offices.

B. The Ballot Order Statute Is Neutral and Non-Discriminatory.

It is important to identify what the Plaintiffs are *not* claiming. Plaintiffs do not claim that Florida's Ballot Order Statute prevents them from voting. Plaintiffs do not claim that Florida's Ballot Order Statute makes it more difficult to vote. Plaintiffs do not claim that Florida's Ballot Order Statute prevents them from voting for the candidate of their choice. Instead, Plaintiffs claim that Florida's facially neutral statute denies them the benefit of the so-called windfall vote. Plaintiffs further contend that they have a constitutional right to this windfall vote. Nothing in the Constitution guarantees anyone a right to obtain the windfall vote.

Florida's ballot ordering statute is facially neutral and non-discriminatory. Florida places at the top of the ballot the candidates of the party that received the most votes for governor in the previous gubernatorial election. Fla. Stat. §

101.151(3)(a). The statute does not make classifications between candidates from different parties. *See generally Graves*, 946 F. Supp. 1569. Instead, under the statute, Republicans, Democrats, Libertarians, Greens, etc., are all subject to the same requirement and all have an opportunity to win the gubernatorial election every four years. As a result, under Florida's Ballot Order Statute, candidates from all parties have an equal opportunity to achieve the top position on the ballot. Since 1978, Democrats have won four gubernatorial elections and Republicans have won six gubernatorial elections. *See* Ex. A to Mot. to Dismiss, ECF 37 at 22-32. Both parties have an equal opportunity and ability to win gubernatorial elections "and equality of opportunity–not equality of outcomes–is the linchpin of what the Constitution requires in this type of situation." *Gill v. Rhode Island*, 933 F. Supp. 151, 155 (D.R.I. 1996). Florida's ballot ordering statute is therefore nondiscriminatory.

C. Florida' Ballot Order Statute Imposes Only Minimal Burdens.

Even if Plaintiffs could demonstrate a cognizable disadvantage imposed by ballot order, they still fail to implicate any protected constitutional right. Plaintiffs do not claim that the Ballot Order Statute excludes them from the ballot, denies them fair access to the ballot, or prevents them from communicating their issue positions to the public. *See New Alliance Party v. New York Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994). Instead, Plaintiffs claim that the Ballot Order

Statute impedes their ability to capture the "windfall vote", diminishing the weight of the votes of their supporters. While the Constitution does protect ballot access, there exists no constitutional right to a preferred ballot position. *See New Alliance Party*, 861 F. Supp. at 295; *Democratic-Republican Org. v. Guadagno*, 900 F. Supp. 2d 447, 457 (D.N.J. 2012); *Alcorn*, 826 F.3d at 717. Further, the Constitution does not confer a right to a "wholly rational election" based solely on reason and devoid of votes susceptible to the personal whims of the voter. *Sarvis v. Judd*, 80 F. Supp. 3d 692, 700-01 (E.D. Va. 2015). In fact, courts have overwhelmingly dismissed such "vote dilution" claims, finding that "an irrational vote is just as much of a vote as a rational one," and declining to analyze whether the motivations behind an individual's vote render other voters' ballots less meaningful. *Sarvis v. Judd*, 80 F. Supp. 3d at 700.

Even in cases where the court ultimately decided the state's Ballot Order Statute was unconstitutional, the Court stated the burden on plaintiffs' constitutional rights was "slight." *Graves*, 946 F. Supp. at 1576, 1579 (declaring Oklahoma's ballot order statute unconstitutional where the State required that the Democratic candidate always be listed first).

Here, Plaintiffs have failed to prove that Florida's Ballot Order statute causes them anything more than *de minimis* harm. *First*, Krosnick and Rodden's statistical models are deficient due to the phenomenon called omitted variable bias.

Rodden's statistical model cannot differentiate whether a voter is voting for a candidate because that candidate is listed first or because of the candidate's party affiliation. *See* ECF 113-9 at 9-10 (Ex. I). Importantly, there is significant research, including some that Krosnick authored, stating that—assuming it has an effect—ballot order effect has the most impact in non-partisan elections, open seats, and lower profile races. ECF 113-12 at 15 (Ex. L).The fact that Rodden could not differentiate between whether someone was voting based on ballot placement or partisan indicator makes his data questionable.

Furthermore, Rodden was unable to conduct this analysis to determine if people were voting based on ballot placement or partisan affiliation because the data on the down ballot races in Florida only goes back to 2000. Accordingly, Rodden's data set contains elections where only Republicans are listed first. There is no data to compare what happens when Democrats are listed first. *See* ECF 113-9 at 10 (Ex. I). During this time period, then, in down ballot races, the ballot placement and party affiliation were perfectly correlated. *Id*. Although it would have been desirable for Rodden to disentangle partisan affiliation from ballot placement, Rodden was unable to do so. *Id*. at 7, 13-14.

Furthermore, Rodden's analysis did not account for how well funded candidates were, whether a candidate had prior relevant experience for the office sought, i.e., a former prosecutor running for Attorney General or former farming

campaigning for Agricultural Commissioner, or a candidate's Get-Out-The-Vote effort. Rodden admitted that these present a plausible story for why a candidate may win an election. *Id*. at 24-25 49-50.[3]

Krosnick's analysis suffers from similar deficiencies concerning omitted variable bias that Dr. Krosnick did not account for in his statistical models. This makes Dr. Krosnick's model unreliable. *See* ECF 113-10 at 10-11 (Ex. J).

Additionally, Krosnick's studies comparing Florida to California, New Hampshire, North Dakota, and Ohio are flawed because his studies do not account for the demographic differences between those states. For example, Florida is a statewide language minority jurisdiction and has thirteen county jurisdictions that are considered language minority jurisdictions under the Voting Rights Act. *See Voting Rights Act Amendments of 2006, Determinations Under Section 203*, 81 Fed. Reg. 87532, 87534-35 (Dec. 5, 2016). This means that at least 5%, or 10,000

[3] Courts have discredited Rodden's analysis in the past for the same reason this Court should do so, namely, Rodden did not have sufficient data to prove his point. *See, e.g, Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 606-07 (E.D. Va. 2016) (stating that Rodden's data was incomplete in challenge to Virginia's Voter ID statute because Rodden's statistical model did not account for people who did not want to vote, people who were prohibited from voting, and it failed to account for people with other valid forms of identification); *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 836, 872 (D. Ariz. 2018) (noting that in case concerning whether minorities have disparate access to mail service, Rodden's analysis was deficient because it did not include Arizona's metropolitan counties and therefore does not demonstrate statewide harm and that Rodden's proxy for mail access—home mail address—was also deficient because people can still send mail; accordingly Rodden's analysis painted an incomplete picture).

people of the voting age citizens of a jurisdiction, do not ‘‘speak or understand English adequately enough to participate in the electoral process...” *Id*. at 87532-33. All of Florida’s language minority jurisdictions are covered for Spanish. *Id*. By contrast, New Hampshire, North Dakota, and Ohio do not have any language minority jurisdictions. “In fact, Florida is 18.8, 18.6, and 17.9 percentage points more Hispanic than New Hampshire, North Dakota, and Ohio, respectively.” ECF 113-12 at 12 (Ex. L).

California is a statewide language minority jurisdiction for Spanish, but also has jurisdictions with other languages. *Id*. at 87533-34. There are, therefore, substantial demographic differences between Florida and California, Ohio, North Dakota, and New Hampshire. ECF 113-12 at 11-12 (Ex. L). These differences also include where residents live. Florida has a substantially larger urban population than North Dakota, New Hampshire, and Ohio. These distinctions between Florida and California, Ohio and North Dakota are important because “there is significant scholarly research that finds differences in voting behavior across the urban and rural parts of the country, across ethnic differences, age, and income.” *Id*. at 12.

Herrnson’s analysis does not demonstrate that voters typically mistakenly vote for the candidate at the top of the ballot. *Id*. at 21. Thus, Herrnson’s report does not demonstrate that the candidate at the top of the ballot disproportionally benefits from mistaken votes or that the candidates at the bottom of the ballot are

disproportionally harmed. *Id*. Herrnson simply does not have evidence to support his assertion that "proximity error" generally benefits the candidate at the top of the ballot and harms the candidate listed second. *See* ECF 113-10 at 17 (Ex. J). His field studies contained too small of a sample size and his field study was not representative of Florida's population. *Id*.

D. The Statute Advances Florida's Legitimate Interests.

Florida has an interest in preventing confusion, promoting uniform ordering on the ballot, and promoting predictability on the ballot. Furthermore, it is not necessary that Florida justify its asserted interests with empirical evidence. *See Timmons*, 520 U.S. at 364.

Florida's ballot placement statute is necessary to prevent confusion through proper and uniform ordering of the ballot. Using a non-discriminatory metric to place one party at the top of the ballot consistently across all races on that ballot reduces confusion and promotes predictability because it "allows voters to more quickly find their preferred choice for a given office, especially when party loyalties influence many voters' decisions." *Alcorn*, 826 F.3d at 719. Plaintiffs seek an order from this Court mandating "random" ballot placement. Compl. ¶¶46-49. This risks "requiring voters to decipher lengthy multi-office, multi-candidate ballots in order to find their preferred candidates." *Sarvis*, 826 F.3d at 719. Additionally, if voters know that their party's candidate is listed second in the

gubernatorial race, then maintaining that symmetry throughout the ballot will help voters know that their party's candidate will be second in every other election on the ballot. *Id*. This too prevents confusion and promotes predictability and efficiency. *Id*.

Additionally, Florida's ballot placement statute maintains the integrity of Florida's election since the tabulation software with the State allows the various counties to upload their election results seamlessly. *See* ECF 113-11 at 84-88 (Ex. K); ECF 113-7 at 14, 52, 68 (Ex. G); *see Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (stating that the prevention of frustration of the democratic process, as well as deception, are sufficiently important state interests). Adopting another method of ballot order will require reconfiguring and testing the software to ensure the individual votes are properly transferred to the Secretary of State's Office for amalgamation and tabulation. *See* ECF 113-11 at 85-89 (Ex. K). Compelling the state to alter it election machinery adds complexity to the election and risks the integrity of the election. *Id*. at 178-79, 194.

Finally, when this Court balances the alleged minimal harms Plaintiffs suffer with Florida's important regulatory interests, Florida's ballot placement statute is justified. *See Timmons*, 520 U.S. at 358. As stated *supra*, the burdens imposed on Plaintiffs' constitutional rights are minimal. Consequently, there is no basis to find Florida's ballot placement statute unconstitutional. *Alcorn*, 826 F.3d at 721.

The State's identified integral interests, which include the establishment and maintenance of an orderly and democratic process through comprehensible ballots and streamlined voting, have been consistently upheld as not only important, as required under *Anderson/Burdick*'s flexible standard, but compelling, and wholly consistent with a state's constitutional power to regulate elections. *See New Alliance Party*, 861 F. Supp. at 293-94; *Sarvis v. Judd*, 80 F. Supp. 3d at 698. When weighed against even a moderate imposition on individuals' rights to vote and associate for political ends, state interests generally justify the restrictions. *Anderson*, 460 U.S. at 788.

III. PLAINTIFFS CLAIMS ARE BARRED BY LACHES.

The "[d]octrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). "To state the defense of laches, a party must show: (1) A delay in asserting a right or claim; (2) That the delay was not excusable; and (3) That the delay caused the party 'undue' prejudice." *Fouts*, 88 F. Supp. 2d at 1354 (citing *Citibank N.A. v. Citibanc Group, Inc.*, 724 F.2d 1540, 1546 (11th Cir. 1984)). Plaintiffs' extreme delay is inexcusable and only serves to highlight their partisan motivations. "It is well established that in election-related matters, extreme diligence and promptness are required." *McCafferty v. Portage Cty. Bd. of Elections*, 661 F. Supp. 2d 826, 839 (N.D. Ohio 2009). Plaintiffs have shown

neither diligence nor promptness[4], the result of which is undue prejudice to Defendants. As such, summary judgment should be granted on the issue of laches.

A. Plaintiffs' Inexcusably Delayed in Bringing Their Claim.

Assuming *arguendo* that the harm flowing to the Democratic Plaintiffs is as they claim it to be, that harm arose at one of three possible points. First, the harm arose immediately upon the passage of the law enacting the allegedly impermissible ballot ordering system. Second, the harm arose immediately following the first election under the enacted ballot order system. Or, third, the harm arose immediately after the first election was held under a Republican. The individually named Plaintiffs fair no better as they have each been active Democratic voters residing in Florida for at least the last 20 years. *See* Compl. ¶¶13 (registered Democrat in Florida for 34-years); 14 (same for 20-years); 15 (same for 43-years). Under *any* of these possible scenarios for calculating delay, it is incontrovertible that Plaintiffs delayed in asserting their claims.

"[D]elay is to be measured from the time at which the plaintiff knows or should know she has a provable claim . . ." *Karson Indus. v. Component Hardware*

[4] Plaintiffs, through actively reaping the alleged benefits of the Ballot Order Statute for the first twenty years of its existence are guilty of not just *laches* but *acquiescence*. *See Coach House Rest., Inc. v. Coach & Six Rests., Inc.*, 934 F.2d 1551, 1558 (11th Cir. 1991). "The difference between acquiescence and laches is that laches denotes passive consent and acquiescence denotes active consent." *Id*. In either event, Plaintiffs here are certainly guilty of sitting on their rights to the detriment of Defendants.

Grp., Inc., 120 F.3d 1199, 1206 (11th Cir. 1997). The law in question was initially passed by Florida Democrats (members or aligned Democratic affiliates of the Plaintiff organizations) in 1951. *See* Ch. 26870, s.5, Laws of Fla. (1951) (originally codified at 101.151(4), Fla. Stat.). Gov. Fuller Warren, a Democrat, was the Governor at the time the law was passed. *See* Fla. Dept. of State, Fuller Warren.[5] At the time the suit was filed, a full *sixty-seven* years had passed since the first election was held under this now allegedly unconstitutional system. Any impermissible ballot order effect would have certainly been evident at that time or shortly thereafter. Alternatively, *certainly* Plaintiffs would have been aware of their harms in 1970—the first election under a Republican governor with the Ballot Order Statute in place. *See* Fla. Dept. of State, Claude Roy Kirk, Jr.[6]

In their Complaint, Plaintiffs cite to a study from as early as 1998 as evidence of a ballot order effect. Plaintiffs could have brought a claim after there was publicly available research on the phenomenon. *See* Joanne M. Miller and John Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 PUBLIC OPINION QUARTERLY 291 (1998). In any event, it is uncontroverted that Plaintiffs' knew—or at least assumed, and therefore should have known—that there is a ballot order effect attributed with being listed first on the ballot. *See, e.g.*, ECF 113-2 at 16-17 (Ex. B) (the ballot order effect is "common knowledge" for

[5] https://dos.myflorida.com/florida-facts/florida-history/florida-governors/fuller-warren/
[6] https://dos.myflorida.com/florida-facts/florida-history/florida-governors/claude-roy-kirk-jr/.

those involved in politics); ECF 113-3 at 14 (Ex. C) (same); ECF 113-4 at 20-21 (Ex. D); (same); ECF 113-1 at 21-22, 24-26 (Ex. A) ("Informal conversations around ballot order have existed probably since I've been in politics."). Under any plausible scenario, Plaintiffs' either knew, or should have known, that they had an alleged claim for relief for years, if not decades, before they got around to filing this lawsuit.

B. Plaintiffs' Delay Has Resulted in Prejudice to the Defendants.

"Prejudice may be established by showing a disadvantage to the Defendants in asserting or establishing a claim, or some other harm caused by detrimental reliance upon the Plaintiffs' conduct." *Fouts*, 88 F. Supp. 2d at 1354, *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000); *see also White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). There are multiple significant harms that arise from Plaintiffs' dilatory action.

First, the State of Florida and county election administrators will be forced to incur exceptional costs and logistical burdens in complying with any ballot remedy requiring the randomization of ballot position[7]. "[I]mposing great financial and logistical burdens" is a recognized prejudice when applying laches in the voting rights context. *See White*, 909 F.2d at 104; *see also Chestnut v. Merrill*, 2019 U.S. Dist. LEXIS 51548, *20 (N.D. Ala. March 27, 2019) (mem. op.).

[7] It is ultimately unclear what remedy the Plaintiffs are actually seeking.

Dominion Voting Systems stated that any change to the election system for the seventeen Florida counties they service will require recertification by the State. *See, e.g.*, ECF 113-5 at 57 (Ex. E). Dominion also stated that there is at least one County with a "legacy" system that would be unable to randomize ballots and would therefore need to be replaced. *See id.* at 67.

The elections administrator for Miami-Dade County ("Ms. White") stated, in the context of a pending ADA statute, that the cost to the County could be at least $6.5 million if they need to replace their equipment. *See* ECF 113-8 at 53-54 (Ex. H). Additionally, if Plaintiffs request precinct-by-precinct rotation, the Ms. White affirmatively stated that it would be impossible to do before the next scheduled election. *Id*. at 68-70. Ms. White also expressed significant concerns regarding voter confusion. *Id*. at 87. There are also several hidden costs to a wholesale change in Florida's ballot ordering. The State's various election administrators will need to spend significant time and effort on staff training and testing of any new system that is implemented. ECF 113-5 at 57-58 (Ex. E). All of these are prejudices to the State of Florida directly attributable to the actions of Plaintiffs.

Second, there will be significant harm and confusion to the voters brought about by a sudden change in the Ballot Order Statute. The issue is not that ballot order randomization is *per se* confusing, it is the sudden *change* to how a ballot is ordered—and has been ordered for over *sixty*-years—that will undeniably result in

voter confusion. Voter confusion is an oft-acknowledged prejudice when applying laches to voting rights case. *See Fouts*, 88 F. Supp. at 1354; *see also White*, 909 F.2d at 104.

Finally, given the extraordinary length of time the Plaintiffs' have "slumbered" on their rights, there are certain practical and evidentiary prejudices that flow from Plaintiffs' delay. *See Apotex, Inc. v. UCB, Inc.*, 970 F. Supp. 2d 1297, 1336 (S.D. Fla. 2013) ("Evidentiary, or defense prejudice, may arise by reason of a defendant's inability to present a full and fair defense on the merits . . ." (internal alterations omitted)). Given that the Ballot Order Statute was enacted more than sixty-years ago, memories have most certainly faded and the individuals with the knowledge to either prove or disprove Plaintiffs' claims—the legislators themselves—are long since either retired or have passed away. In either event, the lack of diligence employed by Plaintiffs has resulted in several material and substantial prejudices to the Defendants.

C. Laches Applies to Both Constitutional Claims and Claims for Prospective Relief.

Constitutional claims, even those involving ongoing constitutional harms, are subject to the equitable defense of laches. "A constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise." *Block v. North Dakota*, 461 U.S. 273, 292 (1983) (citation omitted); *see also United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008)

(unanimous decision) (same). Similarly, "the availability of equitable relief"—of which injunctive relief is but a type—"depends on the same general principles as laches." *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep Redistricting Comm'n*, 366 F. Supp. 2d 887, 909 (Ariz. D.C. 2005).

It is "well settled" that laches can apply to "ongoing violation[s] of . . . constitutional rights." *Fouts*, 88 F. Supp. at 1354. In fact, "equitable considerations can and do factor into equal protections challenges, *in particular voting rights cases*, even when . . . found unconstitutional." *Maxwell v. Foster*, 1999 U.S. Dist. LEXIS 23447, *6-7 (W.D. La 1994) (three-judge court) (racial gerrymandering and VRA claims dismissed based on laches). Both First Amendment and Fourteenth Amendment claims are susceptible to the laches defense. *See, e.g.*, *Perry v. Judd*, 471 Fed. Appx. 219, 224 (4th Cir. 2012) (finding an alleged First Amendment violation to Virginia's ballot requirements was barred by laches); *Ariz. Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d at 909 (Fourteenth Amendment).

The Supreme Court's recent decision in *Benisek* is informative to whether prospective can be barred by laches. In *Benisek,* the Court stated that a party requesting a preliminary injunction must generally show reasonable diligence. That is true in election law cases as elsewhere." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (case

involving laches where the Court stated that "[a] suit in equity may fail though not barred by the act of limitations.") (internal quotation omitted)). It is also notable that the primary distinguishing authority on this point comes almost exclusively from copyright or other intellectual property cases. *See, e.g.*, *Peter Letterese & Assocs. Inc., v. World Inst. of Scientology Enters. Int'l*, 533 F.3d 1287, 1321 (11th Cir. 2008) (copyright claim). Therefore, the equitable defense of laches can bar Plaintiffs' extremely dilatory claims and does.

CONCLUSION

For the reasons above, this Court should grant Summary Judgment in favor of Defendants.

Respectfully Submitted, DATED: April 8, 2019

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

The foregoing Motion and Memorandum in Support of the Motion complies with Local Rule 7.1(F) because it contains 7,959 words, exclusive of the required certificates, case style, and signature blocs.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019 the foregoing was filed with the Clerk via the CM/ECF system that sent a Notice of Electronic Filing to all counsel of record.

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