UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NANCY C. JACOBSON., *et al.*,

Plaintiffs,

v. Case No. 4:18-cv-00262-MW-CAS

SECRETARY LAUREL M. LEE,
in her official capacity only,

Defendant.
_____/

SECRETARY'S RESPONSE IN OPPOSITION TO PLAINTFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Democrats' motion is telling for what it does not say. The Democrats say nothing of the growing body of federal precedent holding that the alleged "position bias" of which they complain is of no constitutional concern *and* that facially neutral ballot order statutes like Florida's further the State's compelling interests. The Democrats cannot identify a specific Florida election that has been affected by position bias to their detriment. And the Democrats make no mention of any remedy for their alleged deprivation. As such, the Democrats fail to establish a claim upon which relief can be granted, much less a remedy that would redress any such claim so as to provide them standing to assert it. The motion fails as a matter of law.

II. ARGUMENT

A. The Democrats cannot establish that position bias has affected a single, specific Florida election to their detriment, much less a cognizable constitutional burden that outweighs the State's important interests.

Summary judgment is only appropriate when "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). A dispute is "'genuine' . . . 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). "Material" facts are those that might affect the outcome of the case under the governing substantive law, not those that "are irrelevant or unnecessary." *Id.*

In their "Statement of Facts," the Democrats point out that there have been close elections in Florida recently, that the published literature suggests that position bias exists, and that position bias impacts unspecified elections to some unquantified degree. ECF 116 at 3-7. However, the Democrats do not and cannot identify a single, specific Florida election that was impacted by position bias to their detriment.

The Democrats' only discussion of the specific effect of position bias in Florida is reduced to a single footnote, which states that "[a]t least 165 elections were decided within the 5.35 percentage point margin that the Democrats' expert Dr. Jonathan Krosnick calculates the ballot order advantage conferred to

Republicans' in Florida." *Id*. at 4 n.6. But the Democrats fail to advise the Court that, during the course of this litigation, Krosnick himself has presented numerous estimates of position bias in Florida, or that the specific 5.35% estimate they now cite is almost double the estimate that Krosnick originally presented to the Court less than a year ago.[1] They also fail to advise the Court that Krosnick's 5.35% estimate "gives significantly more weight to the many sparsely populated rural counties of Florida and underweights the densely populated coastal counties, where most of the population lives," ECF 111 at 521, or that his regressions fail to consider potentially important omitted variables, such as gender and overall candidate quality.[2] Moreover, in suggesting—without any evidentiary support—that the outcome of "at least" 165 Florida elections have been determined by position bias, the Democrats completely ignore Krosnick's estimates of affected (or "outcome determinative") elections in Florida, which ranged from 65 elections at the preliminary injunction stage to over 300 elections in his January 2019 expert

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[1] *See* ECF 31 at 3, 57 (Dr. Krosnick's original expert report, citing 2.70% as the estimated advantage Republicans gain due to "primacy effect"); ECF 111 at 143 (citing differing estimates of Republican advantage when county population and density are accounted for in Dr. Krosnick's regression equations).

[2] As explained in the Secretary's motion for summary judgment, the Democrats' experts admitted to not considering gender or other omitted variables, like overall candidate quality, in their analyses, notwithstanding the fact that women candidates—including both Democrats and a Republican—have won three state-wide elections despite being listed second during the period at issue. *See* ECF 115 at 16-17 (citing ECF 67-2 at 6-7; ECF 111 at 433-34, 434-35; 507-08; 365-69).

report. *Cf.*, ECF 54 at 13 (July 20, 2018 Krosnick report); ECF 111 at 107-111 (Jan. 29, 2019 Krosnick report). The 165 figure now asserted by the Democrats did not come from Dr. Krosnick or any of the Democrats' other experts; it simply materialized out of the blue in the Democrats' motion.

The "facts" asserted in the Democrats' motion are neither "genuine" nor "material." They are not genuine because no reasonable jury would return a verdict in the Democrats favor on these points when their own expert cannot settle upon a specific estimate of position bias and their own lawyers apparently reject that expert's estimate of "outcome determinative" elections in Florida. They also are not material because, even if accepted as true, they would not establish a cognizable constitutional injury for the reasons discussed below and in the Secretary's motion for summary judgment.

The Democrats' Statement of Facts also fails to disprove Florida's important state interests. First, the State has an indisputable interest in defending the constitutionality of Florida's Ballot Order Statute as an enactment of the people's duly elected representatives that has remained unchanged for 68 years. Any second-guessing of these policy choices is a job for the people of Florida through their elected representatives because, after all, there is no constitutional right to a "rational election, based solely on a reasoned consideration of the issues and the candidates' positions, and free from [what the parties deem to be] other 'irrational

considerations.'"[3] Second, the State has a compelling interest in ballot uniformity, which would be undermined if ballot order were randomized by precinct, by-style, or by county, as the Democrats have varyingly advocated over the course of this litigation. *See* ECF 111 at 1649; 1655; 1651; 1668-71; 1462-63. Third, the State indisputably has a compelling interest in ensuring the integrity of the elections process, *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and Florida's ballot order statute furthers that interest. *See* ECF 111 at 1295-97; 1310; 719-20; 712-15; 763-64; 1437-39; 1652. Fourth, Florida's ballot order statute, as currently drafted, furthers "the important state interest" of "reducing voter confusion and speeding the voting process." *Libertarian Party of Va.*, 826 F.3d at 719; ECF 111 at 1295-97; 1310; 719-20; 712-15; 763-64; 1437-39; 1652.

Contrary to the Democrats' suggestion, the State need not make a particularized showing of the existence of voter confusion or other interest in justifying the ballot order statute. *See New Alliance Party v. N.Y. State Bd. of*

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[3] *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 718 (4th Cir. 2016) (citations omitted); *see*, U.S. Const. art. I, § 4, cl. 1; *id*. art. II, § 1, cl. 2; *Bush v. Gore*, 531 U.S. 98, 113-15 (2000) (Rehnquist, C.J., concurring); *Summit Cnty. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) (State's interest in the "smooth and effective administration of the voting laws" under "legitimate statutory processes"); *Sarvis v. Judd*, 80 F.Supp. 3d 692, 709 (E.D. Va. 2015) ("If Virginia has articulated a sufficiently weighty reason for its ballot design and employed reasonable regulations in its service, then the Commonwealth has acted within constitutional bounds and this Court may not stand in judgment of that discretion properly exercised by the legislative body.").

Elections, 861 F.Supp. 282, 297 (S.D.N.Y. 1994) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986)).

B. There is no claim for undue burden or vote denial under the Anderson-Burdick test.

Tellingly, the Democrats make no mention of the growing number of federal court decisions—rendered after *Anderson-Burdick*—that have held that "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern" and that ballot order statutes like Florida's further "the State's compelling need to construct and order a manageable ballot and prevent voter confusion." *New Alliance Party v. N.Y. State Bd. of Elections*, 861 F.Supp. 282, 295-97 (S.D.N.Y. 1994); *see*, *Green Party v. Hargett*, 2016 U.S. Dist. LEXIS 109161 (M.D. Tenn. Aug. 17, 2016), *aff'd*, 2017 U.S. App. LEXIS 18270 (6th Cir. May 11, 2017); *Sarvis*, 80 F.Supp. 3d 692 (E.D. Va. 2015), *aff'd sub nom.*, *Libertarian Party*, 826 F.3d 708 (4th Cir. 2016); and *Meyer v. Texas*, 2011 U.S. Dist. LEXIS 50325 (S.D. Tex. May 11, 2011). The Democrats do not and cannot identify a specific Florida election that has been affected by position bias to their detriment. As such, the Democrats fail to establish a claim upon which relief can be granted, much less a particularized injury so as to provide them standing to assert it.

Presumably, we will hear in the Democrats' reply, as we did at the preliminary injunction stage, that the post-*Anderson-Burdick* cases cited in the

Secretary's motion are distinguishable because they were brought by "minor" parties. But the Democrats cannot explain why that distinction matters because they cannot legitimately claim that Democrats have any greater rights than members of the New Alliance Party, the Green Party, or the Libertarian Party. They also cannot explain why the State's interest in ordering a manageable ballot and preventing voter confusion is any less compelling when weighed against the interests of Democrats rather than those of members of so-called "minor" parties. And they cannot articulate a limiting principle that would prevent any number of minor parties from suing for their share of the windfall vote.

Notably, all but one of the ballot order cases cited in the Democrats' motion are clearly distinguishable because, unlike this case, they involved ballot order regimes that expressly favored incumbents or candidates from a specific political party. For example, *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996), involved a law passed by Democratic-controlled legislature that expressly required Democratic—and only Democratic—candidates to be listed first. Similarly, *Gould v. Grubb*, 14 Cal. 3d 661, 664 (1975), involved a procedure that *always* gave "an incumbent seeking reelection, a top position on the ballot." Unlike Florida's facially neutral statute, the ballot order regimes in *Graves* and *Gould* and other

cases cited by the Democrats specifically discriminated in favor of a specific political party or a particular class of candidate.[4]

The only case cited by the Democrats that involved a ballot order statute like Florida's was *McLain v. Meier*, 637 F.2d. 1159 (8th Cir. 1980). As the federal district court recognized in *New Alliance Party*, however, the *McLain* court failed to recognize that the North Dakota law at issue did *not* impose an "incumbent-first" ballot order and "simply overlook[ed]" that "prevention of voter confusion is not merely a legitimate but a *compelling* state interest, which need not be supported by particularized evidence." 861 F. Supp. at 298 (emphasis in original). Moreover, unlike *New Alliance Party* and later ballot order cases, *McLain* pre-dated the *Anderson-Burdick* test. With only one exception involving a blatantly discriminatory law,[5] every federal court that has addressed the constitutionality of a

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[4] Like *Gould*, *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972) involved a law requiring listing of incumbents first. Similarly, *Sangmeister v. Woodard*, 565 F.2d 460, 464 (7th Cir. 1977), involved evidence of discrimination by election boards that had always listed candidates from *their* party first. And *Mann v. Powell*, 333 F. Supp. 1261, 1264 (N.D. Ill. 1969), involved the application of a "first-in-line" ballot order statute in a manner where "personal favoritism or [a] systematic bias in favor of incumbents [was used] in breaking ties."

[5] As noted above, in *Graves*, the court found a law unconstitutional because it expressly required Democratic candidates—and only Democratic candidates—to be listed first. The district court reasoned that the only conceivable interest in always listing Democrats first was "entirely political" and such "political patronage" was not a legitimate state interest. 946 F. Supp. at 1580-81. By contrast, Florida's Ballot Order Statute does not forever entrench any one political party in a particular position on the election ballot.

ballot order statute since *New Alliance Party* has held that any alleged burdens due to position bias are outweighed by the state's important regulatory interests. *See Green Party*, 2016 U.S. Dist. LEXIS 109161 (M.D. Tenn. 2016), *aff'd*, 2017 U.S. App. LEXIS 18270 (6th Cir. 2017) (upholding Tennessee statute requiring the candidate of the party in the majority in the combined houses of the general assembly to be listed first); *Sarvis*, 80 F.Supp. 3d at 692 (E.D. Va. 2015), *aff'd sub nom.*, 826 F.3d 708 (4th Cir. 2016) (upholding Virginia's three-tiered ballot order statute); *Meyer*, 2011 U.S. Dist. LEXIS 50325 (S.D. Tex. 2011) (upholding Texas statute which arranges party candidates in descending order beginning with party whose last gubernatorial candidate received the most votes).

As the U.S. Court of Appeals for the Fourth Circuit recently recognized, "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern." *Libertarian Party*, 826 F.3d at 718-19 (quoting *New Alliance Party*, 861 F.Supp. at 295). To conclude otherwise would put the courts in the position of casting "aspersions upon citizens who expressed their civic right to participate in an election and made a choice of their own free will" albeit for reasons that might not appear rational to all. *Id*. at 718. Furthermore, any minimal burden imposed by the statute is outweighed by "the State's compelling need to construct and order a manageable ballot and prevent voter confusion." *New Alliance Party*, 861 F.Supp. at 297; *see*,

Libertarian Party, 826 F.3d at 721 ("Here our job is easy — this case is one of the 'usual[]' variety in which the 'State's important regulatory interests . . . justify reasonable, nondiscriminatory restrictions.") (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

For these reasons, the Democrats have not established an *Anderson-Burdick* claim as a matter of law or fact.

C. The Democrats fail to establish a particularized injury in fact that is redressable so as to confer them Article III standing.

The Democrats not only fail to establish that position bias has affected any specific Florida election to their detriment, they are completely silent as to how this Court should—or even could—remedy their alleged constitutional deprivation. As such, the Democrats fail to establish a particularized *injury in fact* that is both *causally connected* to the conduct complained of and *redressable* by a favorable decision of the court, as required to establish Article III standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992). *See Lockridge v. City of Oldsmar*, 273 Fed. Appx. 786, 788 (11th Cir. 2008) (citing *Lujan*); *see also, Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-12 (2013) (requiring party invoking federal jurisdiction to prove that the alleged harm is redressable by a favorable ruling, and at the summary judgment stage "such a party can no longer

rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts." (internal quotation marks omitted)).

This is not a case where the causation necessary for Article III standing can be established through the Secretary's *inaction*, as the Secretary is simply implementing the law established long ago by the Florida Legislature. *Cf.*, *Madera v. Detzner*, 325 F.Supp. 3d 1269, 1276 (N.D. Fla. 2018) (citing *Massachusetts v. E.P.A.*, 549 U.S. 497, 523 (2007) for the proposition that an agency's "refusal to regulate" can contribute to plaintiffs' injury). Likewise, the redressability element of Article III standing cannot be satisfied in this case by simply ordering the Secretary to direct Supervisors of Elections to comply with federal law. In the absence of some Congressional guidance like the Voting Rights Act, to redress the Democrats' alleged deprivation, the Court would necessarily have to step into the Florida Legislature's shoes and determine an altogether new ballot order regime. Yet the Democrats' motion does not tell us what that regime should be or how it could be implemented as a practical matter, much less how it could be ordered within the constraints of the U.S. or Florida Constitutions.

The Democrats' utter failure to propose a remedy is particularly telling given the fact that the Democrats have advocated for at least three difference ballot order approaches at different times during the course of this litigation.

At first, the Democrats' witnesses, Ion Sancho and Dr. Krosnick, advocated for a precinct-by-precinct approach, but that was shown to be impractical at the preliminary injunction stage. ECF 31 at 58-62; ECF 111 at 541-43. Recently, in deposition, Supervisor White of Miami-Dade confirmed that precinct-by-precinct rotation would still be "very problematic" for Florida's most populous county. ECF 111 at 1277. Specifically, Supervisor White explained that requiring candidate rotation by precinct would force Miami-Dade to go from approximately 100 different ballot styles to approximately 900, "exponentially" increasing the burden and time required for ballot preparation and printing. *Id.* at 1318-22. As a result, Miami-Dade would be unable to meet the deadline for vote-by-mail ballot distribution or print ballots in time for election day. *Id.*

Just before the preliminary injunction hearing, the Democrats seized on a county-by-county rotation as their preferred remedy, but that approach is undercut by their own expert, Dr. Rodden, who argues that the windfall vote effect is more pronounced on down-ballot races. ECF 111 at 1118-19. By Rodden's logic, county-by-county rotation would have absolutely no effect on any windfall vote in down-ballot races involving districts or jurisdictions located solely within a single county. In those counties, a candidate from one party would still be listed first on all ballots for such races, undoubtedly prompting litigation by second-listed candidates seeking to secure their share of the windfall vote. There are currently 4

congressional districts, 15 state senate districts, and 85 state house districts located wholly within one of Florida's 67 counties. ECF 111 at 1207-09. That means as many as 104 lawsuits for a share of the windfall vote.[6] The Democrats have since probed by-style rotation, but that option suffers from the same infirmity as county-by-county rotation. *E.g.*, ECF 111 at 1456; 1317-18.

In the end, the Democrats' motion is silent as to their proposed remedy. As a result, the Democrats' motion fails to address evidence that shows that all three of the approaches they previously explored present varying degrees of technical and administrative concern and could cause voter confusion. *See* ECF 111 at 1295-97; 1310; 719-20; 712-15; 763-64; 1437-39; 1652. Moreover, the Democrats fail to explain how the Court can redress their claims without rewriting the State's election code in contravention of Article I, Section 4, of the U.S. Constitution which gives the Florida Legislature—not the courts, state or federal—the responsibility to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," or the Separation of Powers mandated in Article II, Section 3 of the Florida Constitution, which prescribes courts from "judicially alter[ing] the wording of statutes where the Legislature clearly has not done so."

[6] The Democrats' experts also offer no analysis showing how county-by-county rotation would affect the share of windfall vote in other races involving multiple counties. This Court is simply left to guess what, if any, effect county-by-county rotation would have on any such multi-county races.

See Democratic Exec. Comm. of Fla. v. Lee, Case No. 18-14758, at 76-77 (11th Cir. Feb. 15, 2019) (Tjoflat, J., dissenting) (quoting *Dep't of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001)).

Because the Democrats fail to establish Article III standing under *Lujan*, their motion for summary judgment fails as a matter of law.

IV. CONCLUSION

The Democrats have not established and cannot establish undisputed material facts demonstrating a constitutional cognizable claim. They also cannot explain why the State's interest in constructing a manageable ballot and preventing voter confusion is any less compelling when weighed against the interests of Democrats rather than those of members of minor parties. Nor can the Democrats explain their utter failure to address the *Lujan* test for Article III standing. Accordingly, the Democrats' motion fails as a matter of law.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned further certifies that this filing complies with the size, font, and formatting requirements of Local Rule 5.1(C), and that this filing complies with the word limit in Local Rule 7.1(F) because it contains 3,310 words, excluding the case style, signature block, and certificates.

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Dated: April 29, 2019

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CERTIFICATE OF SERVICE

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