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

INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Jason Torchinsky (VA 47481)
Shawn Sheehy (admitted *pro hac vice*)
Phillip M. Gordon (admitted *pro hac vice*)
45 North Hill Drive, Suite 100
Warrenton, VA 20106
P: (540) 341-8808
F: (540) 341-8809
E: JTorchinsky@hvjt.law
SSheehy@hvjt.law
PGordon@hvjt.law
Counsel to Intervenor-Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Democratic Plaintiffs fundamentally misrepresent or misapprehend the basis for their case so often that one could be forgiven if they were left with the impression (however mistaken) that the Republican Party orchestrated a system with both the specific intent and effect of benefiting Republicans because they are Republicans. The following statement is typical of the deeply flawed notion Plaintiffs have of their case: "[M]ore Democratic voters must turn out and support their candidates to counteract the advantage *the Statute confers on Republicans*, *one Republican voter has effectively more voting power than one Democratic voter*." Pls' Mot. Summ. J. at 17 (ECF 116) (emphasis added).

First, the Statute does nothing for Republicans or, for that matter, Democrats. The Statute merely organizes candidates by the victor of the last gubernatorial election. As a result, the first listed candidate on the ballot could be a Republican, a Democrat, or some third party. *See* Mot. to Dismiss (ECF 37 at 22-32 (Ex. A)). Thus, the Statute is a facially neutral law that every four years provides an opportunity for any political party to win an election and have their respective candidates placed first on Florida ballots for the next four years.

Second, neither the text of the Statute nor its practical effects dilutes or burdens the vote of any voter or political party.[1] The following process is perfectly representative of what a Florida voter will encounter when she arrives at the polls to vote on election day: (1) she will receive a ballot with the candidates listed as well as their party affiliation; (2) she will choose a candidate to vote for; (3) she will cast a vote. At what point is a voter burdened in that process? At what point is a Democratic organization burdened? The fundamental truth of this litigation, which has been obfuscated by Plaintiffs' attempt at a thin veneer of constitutional argumentation, is this: Democrats cannot seem to consistently win statewide elections in Florida in the last few statewide elections. Recent exceptions, however, do exist, including Nicole Fried in the 2018 election, and then President Obama in the 2012 election.

Rather than examine their policy positions and undertake the myriad of activities to convince voters to vote for their candidate, Plaintiffs would rather run to the judiciary in an attempt at overthrowing the will of the voters. Which, as this

[1] This, of course, assumes that there is a ballot order effect and that effect is of a magnitude sufficient for judicial determination. *See infra* at 20-23. Defendant Intervenors' experts dispute the method of calculation and evaluation of any ballot order effect. Additionally, the academic community has been and remains in a multi-decade debate in the academic literature over whether there is a ballot order effect. *See, e.g., New Alliance Party v. N.Y. Bd. of Elections,* 861 F. Supp. 282, 288-290 (S.D. N.Y. 1994) (describing various studies of ballot order effect, some concluding that there is an effect and others concluding that there is not).

Court well knows, is not an uncommon occurrence for Florida Democrats. *See, e.g., DNC Services Corp./Democratic Nat'l Comm.*, *et al. v. Lee*, No. 18-0520 (N.D. Fla. Nov. 8, 2018); *Democratic Nat'l Comm., et al. v. Detzner*, No. 18-0524 (N.D. Fla. Nov. 12, 2018); *Bonfiglio et al v. Detzner*, No. 18-527 (N.D. Fla. Nov. 13, 2018); *Democratic Senatorial Campaign Comm. et al. v. Ertel*, No. 18-cv-526 (N.D. Fla. Nov. 13, 2018)*; Democratic Senatorial Campaign Comm. et al. v. Detzner et al.,* No. 18-cv-528 (N.D. Fla. Nov. 13, 2018)*; Bill Nelson for U.S. Senate, et al. v. Detzner et al.*, No. 18-cv-536 (N.D. Fla. Nov. 16, 2018) (removed).

Make no mistake, overturning the will of the voters is exactly what Plaintiffs are aiming for. The truth of the matter is a voter who votes for the first person on the ballot could have done so for *any* reason. And no matter what that reason is, it is a valid one because that choice lies with the voters and the voters alone. Even facially, Plaintiffs' protestations hold little water. The political party of the Governor has changed 5 times in the 68 years the Ballot Order Statute has been in effect. When presented with the same playing field that Democrats now find themselves, Florida Republicans went out to engage Florida voters and convince them of their position on the issues. This would naturally include attempting to win every voter, including those who vote for reasons that seem otherwise irrational—such as for the person listed first, listed last, or even writing in the name of Mickey Mouse. However, rather than do the work, Democrats are hopeful that the judiciary will help them out of a

predicament, if one even exists, that their own party created 68 years ago when a Democratic legislature passed the Ballot Order Statute and a Democratic governor signed it into law. This Court should cut through the inherently partisan claims of Plaintiffs and deny their Motion for Summary Judgment and grant Summary Judgment for Defendants.

STATEMENT OF FACTS

In 1951, a Democratic majority passed, and a Democratic Governor signed Florida's Ballot Order Statute. *See* Ch. 26870, §5, 1951 Laws of Fla. (originally codified at Fla. Stat. §101.151(4)). 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).

A. The Ballot Order Statute

The Ballot Order Statute does nothing more and nothing less than order the names of the first two candidates on the ballot by the votes their candidate for governor received in the last gubernatorial election. *See* Fla. Stat. § 101.151(3)(a). The effect of the statute has been to list Democratic candidates first far more often than Republicans. Since the statute was passed in 1951 there have been approximately 19 gubernatorial elections held. Of those, a Democrat was listed first for 12 of the 19 times. Taking congressional elections into account, there have been

nearly double the number of Florida elections where a Democrat has been listed first on the ballot since 1951.

B. Plaintiffs Lack of Standing

Plaintiffs invite this Court to make a leap of logic that simply is not warranted—especially at the summary judgment stage of a proceeding—by noting that there is a history of close elections in Florida and therefore the windfall vote has been the determining factor in those close elections. That there have indeed been close elections in Florida, as there have been in every State, is not in dispute. What is also not in dispute is that there is *zero* evidence in the record, none at all, that shows that any *specific* election has been determined because of the so called "windfall vote" or Ballot Order Effect. Indeed, 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). As such, there is no evidence, *none*, that any of the Plaintiffs have standing to bring this lawsuit in the first instance. *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).

Beyond the issue of harm, there is also no record evidence as to the exact remedy Plaintiffs' are requesting. While *some* method of rotation seems to be what Plaintiffs want, *see* Compl. at ¶47, ultimately, Plaintiffs have been evasive on that front. Without having stated a precise remedy, it is impossible for Plaintiffs to prove

redressability with the proper precision required at summary judgment. In any event, ballot rotation is impractical or 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). And a county-by-county remedy, *if* that is what Plaintiffs are requesting, will not alleviate Plaintiffs' alleged harms.

C. Windfall Vote or Ballot Order Effect

There is also no evidence in the record, *none*, that any of the votes actually cast in any of these elections was an impermissible or invalid vote. Voters are permitted to vote for whomever they wish for whatever reason they wish. It makes no difference if that reason is because the person is listed first on the ballot, last on the ballot, or because the voter simply likes the sound of the candidate's name. And it is undetermined, in both the academic literature and with the experts in this case what, if any, Ballot Order Effect exists in Florida. *See, e.g., New Alliance Party,* 861 F. Supp. at 288-290.

D. The 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). 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). These burdens are sufficient enough to overcome rational basis review, and should it be necessary, even strict scrutiny.

ARGUMENT

I. THIS COURT LACKS 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. Nothing in their motion for summary judgment demonstrates standing to maintain this action.

A. PLAINTIFFS LACK STANDING

Plaintiffs' Motion for Summary Judgment confirms that which has been long assumed by Intervenor-Defendants: Plaintiffs' claims have nothing to do with voting rights and everything to do with Democratic partisanship. Simply put, the people of Florida currently prefer Republicans to Democrats in most of the recent statewide elections. Intervenors' Mem. Support at 1 (ECF 117). The evidence of this phenomenon is found in Plaintiffs continued shifting of position on remedy.

In their Motion for Preliminary Injunction, Plaintiffs requested precinct-by-precinct rotation. Pls.' Mem. Support at 2, 4 (ECF 30). After being denied preliminary injunctive relief, Plaintiffs have changed tactics considerably—likely after the deposition of the Miami-Dade County Supervisor of Elections[2]—and are instead relying purely on the Court to fashion a remedy, any remedy, that may potentially help Democrats win additional elections. *See, e.g.,* Pls' Mot. Summ. J. at 9 (ECF 116 at 15) ("at least one remedy that *the Court might consider*—specifically, switching the order of major party candidates on all ballots in half of the counties ("county-by-county rotation")—would impose no additional administrative burdens on the counties." (emphasis added)); *id*. at 24 (ECF 30) (the potential administrative burdens "fall away *if the Court were to order* county-by-county rotation as a remedy

[2] Ms. White testified at her deposition that it would be extraordinarily burdensome to do precinct-by-precinct rotation in Miami-Dade County. *See* ECF 113-8 at 53-54, 68-70, 87, 110 (Ex. H)

to the constitutional violation." (emphasis added)). Given these statements, the county-by-county rotation remedy Plaintiffs repeatedly invite this Court to *possibly*, *maybe* adopt, does nothing to actually remedy their alleged harms.

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 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 and each Plaintiff 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 at 16 (characterizing Tables 9-12 of Krosnick's report as predicting the average vote shares of the Republican and Democratic parties); (ECF 113-9 at 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 on a statewide basis by, currently, the

Democratic Party. *Gill*, 138 S. Ct. at 1933. None of Plaintiffs' experts 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 individualized harm. *Id*. (stating that the Court's role is to vindicate individual rights not generalized partisan preferences).

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 on 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 a 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.

ii. Plaintiffs Injuries Are Not Redressable.

As an initial matter, Plaintiffs have not proven that a county-by-county rotation scheme would actually remedy Plaintiffs' harms. The entirety of Plaintiffs proof seemed to be focused on a precinct level rotation system. While there is no evidence to show that a county-by-county rotation system would actually remedy Plaintiffs' harms, there is every reason to believe that a county-by-county system would be ineffective.

1. A County-By-County Approach Does Not Remedy Plaintiffs' Alleged Statewide Harms.

First, there is simply no way to randomly equalize population among Florida's counties.[3] As of the 2010 Census, the most populated county in Florida was Miami-Dade County with approximately 2.5 million people.[4] The least populated County in Florida was Liberty County with eight thousand people.[5] For example, putting Democrats at the top of the ballot in Miami-Dade County and Republicans at the top

[3] This is setting aside the complicating fact that Florida has an unequal number of counties (67).

[4] *See* Office of Economic and Demographic Research, *Florida Population Estimates for Counties And Municipalities*, Florida Legislature, at 6 (April 1, 2018) (as of the 2010 Census, Miami-Dade's population was 2,496,457) *available at* http://edr.state.fl.us/Content/population-demographics/data/2018_Pop_Estimates_Revised.pdf.

[5] *See id*. at 5.

of the ballot in Liberty County, does nothing to remedy any alleged harm. Obviously, that is an extreme example, but no evidence has been introduced that shows that Florida's counties can be randomly arranged by population so that each statewide candidate is eligible to receive equal numbers of ballots with their candidate's name listed first.

2. A County-by-County Approach Does Not Remedy the Harm to Down-ballot Candidates.

One of the key features of Plaintiffs' arguments is that while there is statewide harm, the harm inflicted upon the down-ballot candidates by the current ballot order statute is the most severe. *See, e.g.,* Rodden Rep. (ECF 111 at 996). This assertion makes Plaintiffs' newfound desire or acquiescence to a county-by-county remedy all the more puzzling as a county-by-county rotation system at best provides no remedy, and at worst actually exacerbates Plaintiffs' alleged harms. In either event, if this Court were to order county-by-county rotation, the only result will be ceaseless litigation.

First, a county-by-county rotation system provides *no remedy* for local and municipal candidates, state legislative candidates, or congressional candidates whose districts are contained wholly within a single county. For example, there are four congressional districts wholly contained within Miami-Dade County (CDs 24, 25, 26, & 27). Therefore, whichever way Miami-Dade County's ballots are ordered on a countywide basis, each of the four congressional candidates will receive the full

benefit or detriment of that order, as the case may be. In effect, a county-by-county rotation system does *nothing* to alleviate the alleged harm of these candidates.

This problem is not limited to only candidates that are wholly contained within a single county. Many congressional and legislative districts (as well as some municipal districts) are spread over two or more counties. Needless to say, this distribution is not in a way that is controlled for population. For example, Congressional District 9 is split between Polk, Orange, and Osceola Counties.[6] It is possible, that out of the approximately 300,000 votes cast for Congress in CD-9, the vast majority (up to approximately 225,000 votes) will be under a single party designation by virtue of being contained within one county. Having 75% of the total county ballots list one party first in an attempt to assuage any claimed Ballot Order Effect is nonsensical, and does little, if anything, to remedy Plaintiffs' alleged harms.

Second, even if there is a way to randomly assign Florida's counties to ensure equal ballot order position to each statewide candidate then there is still no way to ensure that the *impacts* or *effects* are equalized among and between candidates.[7] In

---

[6] Polk County had 111,228 votes cast in CD-9, https://enr.electionsfl.org/POL/Summary/1805/, Orange County had 71,756 votes cast in CD-9, https://www.ocfelections.com/Public%20Records/2018%20Elections/2018%20General/Results/18Gen_OfficialSummaryResults.pdf, and Osceola County had 113,753 votes in CD-9, https://results.enr.clarityelections.com/FL/Osceola/92457/Web02.222263/#/.

[7] Even looking at the Florida congressional delegation as a whole, it is impossible to equalize the number of times a Republican or Democrat gains the majority of any

Florida, there is a rough correlation between partisanship and population density. The more densely populated a geography, the more likely it is to vote Democratic. Chen, Jowei and Rodden, Jonathan, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures,* 8 Q.J. of Pol. Sci. 239, 241-42 (2013). The flip side of this is that Republican voters are typically more geographically dispersed among more counties. *Id*. The overarching concept is referred to in academic circles as "political geography." *Id*. Florida is actually one of the clearest cases of this phenomenon. *Id*. at 241. For example, Broward County is one of the more Democratic leaning counties in the country. In the 2018 general election in Broward County, Democrat Bill Nelson received 68.9% of the vote with Senator Rick Scott receiving 30.8% of the vote.[8] Compare those vote totals with Duval County where Mr. Nelson received 50.7% of the vote and Senator Scott received 49%

---

claimed windfall vote. Furthermore, Plaintiffs' cannot rely on the contention that, even though an individual election may not be remedied, the final outcome will, on average, result in an even distribution of Republicans and Democrats. *See Gill*, 138 S. Ct. at 1933 ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it" not to vindicate "group political interests.").

[8] Broward Cnty. Supervisor of Elections, *Summary Results – Election Night Reporting*, Elections Florida (Nov. 11, 2018), https://enr.electionsfl.org/BRO/Summary/1985/

of the vote,[9] or Walton County where Mr. Nelson received 24.6% of the vote and Senator Rick Scott received 75% of the vote[10].

Assuming, *arguendo*, that Plaintiffs' experts are correct about the size and effect of the windfall vote in Florida, it appears that for a remedy to have its intended consequence (i.e. normalizing any alleged windfall vote effect between political parties) ballots would need to be randomized based not only on the population between counties but also on the underlying partisanship of the voters between counties such that the effect is not "wasted" for one political party or the other – despite the political and legal problems that would come from having a state government predetermine the "expected" vote of voters. Any other outcome invites additional litigation brought by litigants negatively impacted by this new organizational system.

In a county that typically votes overwhelmingly for Democrat candidates, such as Broward or Miami-Dade, the Ballot Order Effect would have little to no actual effect on any individual countywide election in those, or similarly situated, counties. However, in more closely contested counties, such as Duval, the Ballot Order Effect—again assuming Plaintiffs' position as true—would have an outsized

[9] Duval Cnty. Supervisor of Elections, *Summary Results – Election Night Reporting*, Elections Florida (Nov. 11, 2018), https://enr.electionsfl.org/DUV/Summary/1964/
[10] Walton Cnty. Supervisor of Elections, *Summary Results – 2018 General Election*, Elections Florida (Nov. 17, 2018), https://enr.electionsfl.org/WAL/1988/Summary/

effect in that county. The end result being that, any effect would have minimal impacts on heavily Democratic counties, and oversized impacts on politically closer, typically Republican leaning counties.[11]

Should county-by-county rotation be implemented, the result would be lawsuits in each individual county, brought by individuals who will not receive any of the "effects" of the proposed remedy. A workable remedy is not one that will inevitably result in ceaseless litigation for years in every county in Florida.

iii. 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. *FDIC v. Morley*, 867 F.2d 1381, 1389 (11th Cir. 1989); *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 Plaintiffs' 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).

[11] This choosing of political winners and losers is the exact type of "political thicket" the Supreme Court warned against in *Colegrove v. Green*. *See* 328 U.S. 549, 556 (1946).

Plaintiffs are seeking ballot rotation, either on precinct-by-precinct, county-by-county, or on some other 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 declaring a zoning ordinance unconstitutional—it ordered the City to pass the Court's amendment). 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*

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' preferred ballot scheme (whatever that might actually be). That is for the Florida Legislature to decide. *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) (holding plaintiffs lacked standing on redressability

grounds because the alternative remedy sought was one that the legislature would not have passed).

iv. 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*, 504 U.S. at 561; *TVA v. EPA*, 278 F.3d 1184, 1207 (11th Cir. 2002); *cf Wiesmueller v. Kosobucki,* 571 F.3d 699, 703 (7th Cir. 2009) (implying that a plaintiff lacks standing if a favorable ruling would only have a negligible or theoretical probability of redressing plaintiff's injuries).

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 a generic simple adjustment required testing that lasted three election cycles and 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 (internal citations omitted). 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, for example, 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. Plaintiffs have made no showing of the cost to implement a precinct-by-precinct rotation system throughout a state the size of Florida. This Court should find that Plaintiffs lack standing to seek any particular ballot rotation scheme.

v. This Case Presents a Political Question Not Fit for Judicial Review.

The predicate of Plaintiffs' entire theory of harm is flawed from its inception because the mere existence of a windfall vote[12] is not a question of constitutional importance. *See Sarvis 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.") (internal citations omitted), *cert denied Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017). And make no mistake, Plaintiffs are effectively arguing that Democrats and Republicans together have a right to 50-percent of the so-called windfall vote.

The predicate issue aside, "[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." *Vieth v. Jubelirer,* 541 U.S. 267, 278 (2004) (plurality op.). The political question doctrine exists to insure that "judicial action . . . be governed by *standard*, by *rule*." *Id.* To that end, there are "six independent tests for the existence of a political question" the first three of which are of specific import here:

---

[12] This assumes that there is a windfall or Ballot Order Effect in the first instance, which is disputed by Intervenor-Defendants, and has been the subject of academic debate for decades. *See, e.g., New Alliance Party,* 861 F. Supp. at 288-290 (describing various studies of ballot order effect, some concluding that there is an effect and others concluding that there is not).

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion....

Id. at 277-78 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Each of the tests are independent—that is meeting any one of them can result in a finding of non-justiciability—and are "listed in descending order of both importance and certainty." *Vieth*, 541 U.S. at 277-78.

Initially, it is simple enough to identify the "textually demonstrable constitutional commitment of the issue to a coordinate political department.[13]" *Id.* Article I § IV grants state legislatures the power to choose the "Times, Places, and Manner of holding elections...." U.S. Const. art I, § IV. However, "Congress may at any time by Law make or alter such Regulations...." *Id*. Therefore, it is state legislatures in the first instance, and Congress in the second, who are given plenary authority over election laws and regulations.

The next two tests—"judicially manageable standards" and "initial policy determination"—largely address the same ultimate issue. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J. concurring). These tests essentially pose the

[13] Of course, the judiciary can and does sit in judgment on election related regulations with some frequency. *See, e.g., Anderson*, 460 U.S. 780; *Burdick*, 504 U.S. 428. However, the differentiator in this instance is the clear facial neutrality of the law, *see infra* at 24-25, and the decided lack of manageable standards with which to guide the judiciary, *see infra* at 20-23.

following question: "Would resolution of the question demand that a court move beyond areas of judicial expertise?" *See id.* The answer to that question must be categorically yes.

The issue—left unresolved by Plaintiffs—is the lack of any identified judicially manageable standard to determine, should a Ballot Order Effect even exist, how much effect is too much. Certainly, the answer cannot be zero, as there has been no showing that—even on a precinct-by-precinct basis—absolutely *all* or even substantially *all* Ballot Order Effect can be eliminated. As an intellectual exercise, the only way to eliminate all Ballot Order Effect is to ensure that each candidate is listed first on a ballot the exact same number of times as the other candidate (realistically plus or minus one ballot). If an effect greater than zero is permissible, which it most certainly must be, then there must be a "principled" and "rational" way to determine how much windfall vote is too much "based upon reasoned distinctions." *See Vieth*, 541 U.S. at 278. Here, there is absolutely no record evidence for this Court to begin to determine upon what threshold a windfall vote becomes unconstitutional. 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%). None of these provided figures assist the Court in making a reasoned decision concerning how much windfall vote is too much.

In fact, to even reach the fundamental question posed by the "judicially manageable standards" test under the facts of this case, one must have a firm grasp of the specific remedy. Because if there is no available remedy to Plaintiffs' alleged harms then they lack standing in the first instance. *See supra* at 11-19. For whatever reason, Plaintiffs have, thus far, been unwilling or unable to firmly assert the exact relief they are seeking in this case.

II. FLORIDA'S BALLOT ORDER STATUTE IS SUBJECT TO RATIONAL BASIS REVIEW.

Florida is vested with the constitutional authority to both structure and supervise elections to guarantee the fairness and integrity of the democratic process. U.S. Const. art. I, § 4; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Burdick*, 504 U.S. at 433, 441; *Anderson*, 460 U.S. at 788. In exercising this constitutionally vested power, the U.S. Supreme Court has recognized that a state's election code will "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*. In fact, 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.'" *Sarvis*, 826 F.3d at 717 (quoting *Burdick*, 504 U.S. at 433).

Accordingly, courts impose the flexible *Anderson/Burdick* standard. 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). "[T]he mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." *Id*. at 433 (quoting *Anderson*, 460 U.S. at 788). By contrast, 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*. at 434 (quoting *Anderson*, 460 U.S. at 788).

A. Florida's Ballot Order Statute Is Facially Neutral and Therefore Only Minimal Scrutiny Is Required.

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 v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996). 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. *See Sarvis*, 826 F.3d at 717 (describing Virginia's ballot order statute to be facially neutral and non-discriminatory because Virginia's election code subjected all parties to the same requirement, none are automatically elevated to the top of the ballot, and all political organizations have an evenhanded chance of obtaining top of the ballot position). Since 1978, Democrats in Florida have won four gubernatorial elections and Republicans have won six gubernatorial elections. *See* 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.

Furthermore, 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. Accordingly, the statute is facially neutral and does not impose substantial burdens on Plaintiffs' right to vote.

B. Plaintiffs' Contention That Strict Scrutiny Is Required Fails.

Plaintiffs contend that Florida's Ballot Order statute is discriminatory because it treats similarly treated major party candidates differently. If a candidate belongs to the party that received the most votes in the previous election, that candidate is placed at the top of the ballot. Conversely, if the candidate is from the party who received the second most votes, that candidate is placed second. Pls.' Mot. for Summ. J. at 13. This burdens Plaintiffs, they contend, because Florida elections are extremely close, and this statute's benefits have accrued to the Republican Party to the disadvantage of the Democratic Party. *Id*. at 13-14.

This allegation is not of constitutional significance. Democratic Plaintiffs are not denied access to the ballot; they are not denied the ability to associate for the advancement of their interests; they are not denied the right to vote. *Sarvis*, 826 F.3d at 717. And yet, under the Supreme Court's flexible approach to reviewing comprehensive state election codes, the Supreme Court has upheld statutes that prohibit write-in voting in primary elections, *Burdick*, 504 U.S. at 437, prohibit 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), prohibit candidates from appearing on the ballot as an independent candidate if they were registered with a political party within the previous year. *Storer v. Brown*, 415 U.S. 724, 726-28 (1974); and prohibited parties from appearing on the ballot. *Munro v.*

Socialist Workers Party, 479 U.S. 189, 190 (1986). Accordingly, given that Democratic Plaintiffs appear on the ballot, appear on the ballot as Democrats, appear on the ballot consistently—and currently—second, their claims of constitutional harm ring hollow.[14]

Plaintiffs' reliance on other cases does not change this fact. *Graves* involved a statute that did not give everyone a fair chance to earn a place at the top of the ballot. *Graves*, 946 F. Supp. at 1579. Instead, and crucially different from Florida's Ballot Order Statute, it automatically gave the top place on the ballot to the Democrats. *Compare* Fla. Stat. § 101.151(4) (placing the party of the candidate who won the previous gubernatorial election at the top of the ballot) *with Graves*, 946 F. Supp. at 1571 ("[O]klahoma's Election Code . . . which provides that in all Oklahoma General Elections, the election ballots are printed so that for each public office designated on the ballot form, the Democratic party candidate always appears in the top position--above any Republican party candidates."). Even with this automatic placement, regardless of the voice of voters, the court there still found the burden slight. *Id*. at 1571. Unmentioned by Democratic Plaintiffs, the *Graves* court declared the statute unconstitutional not because of the burden or automatic

[14] Democrat Plaintiffs' claims are especially ironic when the Democratic Party allegedly benefits from similar ballot order statutes in Pennsylvania and New York. To Intervenors' knowledge, the Democratic Party Plaintiffs are not demonstrating the same such concern for the rights of voters in Pennsylvania and New York as they ostensibly are here.

placement but because Oklahoma's justification—political patronage—was not a legitimate interest. *Id*. at 1581. Importantly, the court did not subject Oklahoma's statute to strict scrutiny.

Similarly, reliance on *Sangmeister v. Woodard* is misplaced because that case involved an Illinois statute that vested Illinois clerks with the authority to place their own political party at the top of the ballot. 565 F.2d 460, 462 (7th Cir. 1977). This "systematic and widespread exclusionary practice" clearly violate the Equal Protection Clause. *Id*. at 467. Rather than placing the authority to put certain candidates at the top of the ballot in other elected officials, Florida vests that authority in the voters. This way, every political party, large and small, has an equal opportunity to earn top ballot position. For similar reasons, the Illinois statute that vested the Secretary of State with the authority and discretion—without standards—to determine who would be placed at the top of the ballot violates the Constitution. *Mann v. Powell*, 333 F. Supp. 1261, 1266-67 (N.D. Ill 1969) (rejecting the Secretary's argument that under the Constitution and Illinois statute he was empowered to award top placement on the ballot to candidates on the basis of seniority or incumbency status).

Next, Plaintiffs' heavily rely upon *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980). Importantly, as Plaintiffs note, (Pls.' Mot. for Summ. J. at 22), *McLain* subjected North Dakota's ballot order statute to rational basis scrutiny. *Id*. at 1167.

This is because the court found that the ballot order's impact on the right to vote was "somewhat attenuated." *Id*. at 1167.

Ultimately, however, the court declared North Dakota's statute unconstitutional not because of the burden, but because North Dakota's asserted interest—convenience of the voter—was insufficient to surpass even rational basis review. *Id*. at 1167. But this holding is in tension with Supreme Court precedent that preventing confusion for voters is a compelling interest. *New Alliance Party*, 861 F. Supp. at 298 ("It is difficult to understand how *McLain* could simply overlook the strength of this interest, especially when invoking the rational basis test.").[15]

Finally, *Obama for America* is inapposite. That case involved Ohio's early voting statute that granted some voters the ability to vote early for three extra days while prohibiting others absent Ohio's Secretary of State granting a waiver to the local boards of elections. *Obama for Am. v. Husted*, 697 F.3d 423, 427, 431 (6th Cir. 2012). Again, Florida's Ballot Order Statute prevents no one from voting and does not give any group extra time to vote.

[15] Additionally, *McLain* was decided before the Supreme Court articulated the flexible weighing analysis under *Anderson/Burdick*. This Court therefore should accord *McLain* little weight. *See Obama for Am. v. Husted*, 697 F.3d 423, 431 n.4 (6th Cir. 2012) (distinguishing cases cited for the proposition that rational basis should apply to Ohio's early voting statute because those cases were decided prior to *Anderson/Burdick*).

In the final analysis, this Court should review Florida's Ballot Order Statute under rational basis review. The statute does not prohibit the Democratic Party Plaintiffs from appearing on the ballot, does not automatically place Republicans first, nor does it vest arbitrary power in an elected official to place whoever that official wants at the top of the ballot. Instead Florida's Ballot Order Statute provides all political parties with the same and equal chance to obtain top of the ballot status. Accordingly, the burdens, if any, are somewhat attenuated, and slight. This Court should review Florida's Ballot Order statute under rational basis.

III. FLORIDA'S BALLOT ORDER STATUTE IS RATIONALLY RELATED TO THE EFFICIENT ADMINISTRATION OF ELECTIONS.

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." *Sarvis*, 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, imposes unknown costs, 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. *Sarvis*, 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 692, 698 (E.D. Va. 2015). 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.

IV. VOTERS DECIDE ELECTIONS.

Plaintiffs' assert that it is clear that the RGA and the NRSC intervened in this case because the RGA and NRSC want "to retain the advantage of position bias." Pls.' Mot. for Summ. J. at 33. The RGA and NRSC clearly stated that their interests in this case originated when Democrats, months before an election, sought to upend a statute that has been on the books since 1951. Mot. to Intervene at 11 (ECF 23). Candidate members of the RGA and NRSC are governed by this statute and any ruling from this Court impacts them and would require the expenditure of funds to

educate volunteers and voters about the change in ballot order. *Id*. at 11-12. Additionally, any change in the Ballot Order Statute risked confusion. *Id*. at 12. Thus, intervention was predicated under a concern for candidate members of the RGA, NRSC, and voters. If, as Plaintiffs' suggest, the RGA and NRSC truly believed that ballot order mattered, they would have filed lawsuits in Pennsylvania and New York long ago. But they have not. Instead, Republicans contend that individual voters' matter, reject terms that Democrats espouse like "wasted" votes,[16] and refuse to believe that voters do not care enough about elections and simply cast their ballot for the first person listed.

Instead, it is Plaintiffs' actions that prove the rule in this case. Plaintiffs' ostensible constitutional challenge is nothing more than an excuse seeking validation, a thinly veiled garb of cynicism cloaked with a mantle of purported voter concern.

If Democratic Plaintiffs were truly concerned that ballot order statutes harm voters, Democrats in New York and Pennsylvania would be amending their ballot order statutes. Instead, Democrats have come to this Court of law to complain that a statute Democrats passed must explain why they cannot win elections in Florida.

[16] *See, e.g., Ohio A. Philip Randolph Institute et al v. Kasich et al,* No. 18-357 (S.D. Ohio March 23, 2019) (ECF 251) (Democratic Plaintiffs describing their votes as wasted); *Gill*, 138 S. Ct. at 1932 (stating that the Democratic Plaintiffs largely basing their case on a theory that their votes were wasted).

This Court should see this case for what it is, dismiss Plaintiffs' claims and remand Plaintiffs to the court of public opinion.

CONCLUSION

For the aforementioned reasons, Plaintiffs' Motion should be denied.

Respectfully Submitted, DATED: April 29, 2019

Holtzman Vogel Josefiak Torchinsky PLLC

/s/Jason Torchinsky
Jason Torchinsky (VA 47481)
Shawn Sheehy (admitted *pro hac vice*)
Phillip M. Gordon (admitted *pro hac vice*)
45 North Hill Drive, Suite 100
Warrenton, VA 20106
P: (540) 341-8808
F: (540) 341-8809
E: JTorchinsky@hvjt.law
SSheehy@hvjt.law
PGordon@hvjt.law
Counsel to Intervenor-Defendants

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

The foregoing Memorandum in Opposition complies with Local Rule 7.1(F) because it contains 7,956 words, exclusive of the required certificates, case style, and signature blocs.

Holtzman Vogel Josefiak Torchinsky PLLC

/s/Jason Torchinsky
Jason Torchinsky
VA Bar No. 47481
45 North Hill Drive, Suite 100
Warrenton, VA 20106
P: (540) 341-8808
F: (540) 341-8809
E: JTorchinsky@hvjt.law
Counsel to Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 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.

/s/Jason Torchinsky
Jason Torchinsky
VA Bar No. 47481
45 North Hill Drive, Suite 100
Warrenton, VA 20106
P: (540) 341-8808
F: (540) 341-8809
E: JTorchinsky@hvjt.law
Counsel to Intervenor-Defendants