UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NANCY CAROLA JACOBSON, TERENCE FLEMING, SUSAN BOTTCHER, PRIORITIES USA, DNC SERVICES CORPORATION / DEMOCRATIC NATIONAL COMMITTEE, DSCC a/k/a DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, DCCC a/k/a DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, DEMOCRATIC GOVERNORS ASSOCIATION, and DEMOCRATIC LEGISLATIVE CAMPAIGN COMMITTEE,

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as the Florida Secretary of State,

Defendant,

and

NATIONAL REPUBLICAN SENATE COMMITTEE, and REPUBLICAN GOVERNORS ASSOCIATION,

Defendant-Intervenors.

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

PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

There is no real dispute that the order of candidates on the ballot matters. Indeed, the presence, and efforts, in this case of two national Republican organizations ("Intervenors") removes any doubt. And, although both Intervenors and Florida's Secretary of State ("Secretary") (together, "Defendants"), nitpick the conclusions of Plaintiffs' experts, they advance no affirmative evidence that Florida Statute § 101.151(3)(a) (2017) (the "Statute") does not skew election after election in the Republican Party's favor. It is therefore unsurprising that Defendants' motions for summary judgment (the "Motions") are largely focused on convincing the Court that it should not even reach the merits of Plaintiffs' case. None of these arguments have merit. Moreover, both Motions raise significant issues of material fact, inappropriate for resolution on summary judgment. The Court should deny Defendants' Motions.

STATEMENT OF FACTS

Much of the relevant background is set forth in Plaintiffs' Motion for Summary Judgment (ECF No. 116) and not repeated here, except to respond to Defendants' Motions. Plaintiffs are various Democratic Florida voters, supporting organizations, and Party committees. On May 24, 2018, they filed their Complaint, alleging that the Statute dilutes votes cast in favor of Democratic candidates, hinders their ability to elect Democratic candidates and to advance causes of the Democratic Party, requires diverting resources, and disfavors the Democratic Party relative to the similarly situated Republican Party, in violation of the First and Fourteenth Amendments. *See* Compl. ¶¶ 13-21.

On June 19, the Secretary filed a motion to dismiss, arguing the Complaint failed to state a claim and was barred by laches. *See* ECF No. 21. Two days later, Intervenors moved to intervene, describing themselves as "the parties who stand to be most directly harmed by a change" to the Statute. ECF No. 23, at 16. Intervenors also moved to dismiss, arguing Plaintiffs failed to state a claim because the Statute's burdens are minimal and important state interests justify its ballot-order scheme. *See* ECF No. 37, at 12-17. The Court denied both motions to dismiss. ECF Nos. 69-72.

If the Court finds the Statute unconstitutional, Intervenors stand to lose the electoral advantage their preferred candidates enjoy by virtue of their position on the ballot. *See* ECF No. 116, at 1-4. This results from a phenomenon known as position bias, or primacy effect, which confers an advantage on the first-listed candidate based solely on being listed first. *See* ECF No. 116, at 5-8; ECF No. 140-16 [**Ex. 16**] at 41-47. Although political operatives have long suspected that ballot order tilts elections, the scientific evidence confirming that has recently become undeniably robust. *See id.* at 15-36 (summarizing over a dozen studies published since 2014). It is now the overwhelming consensus of those who have studied and published on the topic that position bias meaningfully impacts elections. *See id.*; *see also* ECF No. 112-3, at 176:4-8. And Plaintiffs' experts confirm that the Statute gives Florida Republicans a significant and unfair advantage. "In partisan races for federal and high-profile state races, Florida Republican candidates have gained 5.35 percentage points on average by being listed first on the ballot, and

Florida Democratic candidates have gained 4.57 percentage points on average by being listed first," solely due to ballot order. ECF No. 112-1, at 3.

Over the last decade, Republicans have reaped the benefits of the Statute based on gubernatorial elections decided by increasingly miniscule margins: the Republican candidate bested the Democrat by only 1.2% of the vote in 2010, 1% in 2014, and 0.4% in 2018. *See* ECF No. 116, at 3-4.[1] Exceedingly close elections occur regularly in Florida and are becoming more frequent. *See* ECF No. 116, at 4.

ARGUMENT

I. PLAINTIFFS HAVE STANDING

Plaintiffs easily satisfy the elements to invoke federal jurisdiction under Article III of the Constitution. Plaintiffs have clearly: "(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). Intervenors' arguments to the contrary have no merit.[2]

[1] Election results are available on a website maintained by the Secretary. *See* Div. of Elections, FLA. DEP'T OF STATE, https://results.elections.myflorida.com/Index.asp? (last visited Apr. 7, 2019).

[2] While the Secretary does not expressly challenge standing, she appears to conflate standing with *Anderson-Burdick's* burden inquiry. *See* ECF No. 115, at 13. They are not the same. *See Bond v. United States*, 546 U.S. 211, 217-18 (2011); 13A Fed. Prac. & Proc. Juris. § 3531 (3d ed.).

A. Plaintiffs Have Suffered an Injury in Fact

The injury-in-fact element is meant "to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973). This element "is 'very generous' to claimants, demanding only that the claimant 'allege[] some specific, identifiable trifle of injury.'" *Cotrrell v. Alcorn Labs*., 874 F.3d 154, 162 (3d Cir. 2017) (quoting *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982)) (citations omitted). "It is not Mount Everest." *Id*. (citation and quotation marks omitted).

Furthermore, it is well established that only one plaintiff need have standing for a case to proceed. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006). Here, all nine Plaintiffs have established concrete and particularized injuries-in-fact. Each individual Plaintiff is a registered Democrat and Party activist, who has consistently voted for Democrats in Florida. *See* ECF No. 140-1 [**Ex. 1**], at ¶¶ 2-6; ECF No. 140-2 [**Ex. 2**], at ¶¶ 2-7; ECF No. 140-3 [**Ex. 3**], at ¶¶ 2-7. Their votes have been diluted relative to Republican voters because the Statute has artificially inflated the Republican vote share. *See McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (finding ballot order statute operated at "expense of . . . voters" who support candidates disadvantaged by statute); *Graves v. McElderry*, 946 F. Supp. 1569, 1579 (W.D. Okla. 1996) (finding ballot order statute's vote-dilution effect injured voters); *see also Gould v. Grubb*, 14 Cal. 3d 661, 670 (1975) (finding statute conferring top position to "a particular class of

candidates inevitably dilutes the weight of the vote of all those electors who cast their ballots for a candidate" who is not in that class).

The Statute also burdens Plaintiffs' efforts to elect Democratic candidates by putting a thumb on the scale; they must invest significantly more time, effort, and resources to elect Democrats than if elections were on a level playing field. *See* ECF No. 140-1, at ¶ 6; ECF No. 140-2, at ¶ 7; ECF No. 140-3, at ¶ 7. The expenditure of resources to respond to laws adverse to a party's interests constitutes an injury-in-fact. *See Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008).

The organizational Plaintiffs suffer similar injuries. Priorities USA, the DGA, and the DLCC are dedicated to electing Democratic candidates across the country, including in Florida. *See* ECF No. 140-4 [**Ex. 4**], at ¶ 12; ECF No. 140-5 [**Ex. 5**], at 18:6-21, 19:1-11; ECF No. 140-6 [**Ex. 6**], at 7:25, 8:2-5, 8:14-22, 13:7-17; ECF No. 140-7 [**Ex. 7**], at 9:18-23, 10:3-12, 12:20-23. The Statute frustrates their mission by giving an unfair and artificial advantage to Republican candidates. Each must expend additional resources to counteract the Statute's effects. *See* ECF No. 140-4, at ¶ 8; ECF No. 140-6, at 21:4-20, 22:7-15; ECF No. 140-5, at 32:2-15. The DNC, DSCC, and DCCC are recognized by law as the national, senatorial, and congressional committees of the Democratic Party. *See* ECF No. 140-10 [**Ex. 10**], at 8:22-25, 13:6-22; ECF No. 140-8 [**Ex. 8**], at 8:19-21, 16:6-25, 17:2-7; ECF No. 140-9 [**Ex. 9**], at 7:16-20, 12:6-10. The Statute severely injures each by making it more difficult to elect Democrats in Florida, requiring the diversion of resources to counteract position bias, and diluting the votes of the Party's members. *See* ECF

No. 140-10 [Ex. 10], at 13:6-22, 17:8-25, 29:24-25, 30:2-21; ECF No. 140-8, at 16:6-25, 17:2-7, 17:8-25, 18:2-4; ECF No. 140-9, at 12:6-10, 12:20-25, 14:13-16, 16:15-25, 17:2-11, 24:6-9. Organizations plainly have standing to sue for these sorts of injuries. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("[T]he new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote."); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1336-38 (N.D. Ga. 2018) (finding state Democratic party and organization supporting party's gubernatorial candidate had standing to challenge voting laws requiring diversion of resources and that would likely affect at least one party member).

Intervenors' arguments to the contrary are meritless. Relying solely on *Gill v. Whitford*, 138 S. Ct. 1916 (2018), they argue "Plaintiffs must demonstrate that the Florida Ballot Order Statute has injured each voter individually." ECF No. 117, at 7. But *Gill*, a partisan gerrymandering case, is entirely inapposite. In partisan gerrymandering, vote dilution "arises from the particular composition of the voter's own district." *Gill*, 138 S. Ct. at 1931. Thus, a voter must show that *his district* has been gerrymandered; allegations about *other* districts are insufficient. *See id.* at 1930-31. The focus on district-specific harm has no application here, where Plaintiffs' votes are diluted by *ballot order* (not district manipulation), irrespective of district. *See id.* at 1930 ("[W]hen the harm alleged is not district specific, the proof needed for standing should not be district specific either."). In any event, because ballot order effect has diluted Plaintiffs' votes in election after

election—including most recently in 2018—the Statute has harmed each individually. *See* ECF No. 140-1, at ¶ 3; ECF No. 140-2, at ¶ 3; ECF No. 140-3, at ¶ 3.

Further, Plaintiffs here include Democratic Party entities, in addition to voters, and assert harms in addition to vote dilution—specifically, that the Statute imposes burdens on their efforts to recruit and elect Democratic candidates, subjects them to differential treatment in elections, and requires them to divert resources to combat its effects. "[B]urden[ing] the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects" is an associational harm that afflicts individual party members and the party itself. *Gill*, 138 S. Ct. at 1938-39 (Kagan, J. concurring).[3] Similarly, disadvantaging one political party in favor of a similarly-situated party clearly harms the disadvantaged party and its supporters. *See, e.g.*, *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 695 (6th Cir. 2015); *Nat. Law Party of U.S. v. Fed. Elec. Comm'n*, 111 F. Supp. 2d 33, 44, 47 (D.D.C. 2000).[4]

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[3] In *Gill* itself, plaintiffs resolved the standing issue by filing a new action that included a state political entity as a plaintiff. *See* Compl., *The Wis. Assembly Democratic Campaign Comm. v. Gill*, No. 3:18-cv-763-JPD (W.D. Wis. Sept. 14, 2018).

[4] That Democrats have served as Governor and might do so again, (ECF No. 117, at 8), does not undermine the injury Plaintiffs presently suffer. *See Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) ("Article III standing must be determined as of the time at which the plaintiff's complaint is filed.") (collecting cases). Nor does the large number of Democrats in Florida render those injuries a "generalized grievance." *See Spokeo*, 136 S. Ct. at 1548, n.7 ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance."); *Bishop*

B. Plaintiffs' Injuries Result from the Statute

Plaintiffs more than demonstrate that their injuries are traceable to the Secretary's enforcement of the Statute's state-mandated favoritism of a single party in race after race, election after election, in a State where less than a single percentage point decides elections. *See* ECF No. 116, at 1-4. The detailed analyses of Plaintiffs' experts, moreover, prove that the Statute has caused—and absent Court intervention, will continue to cause—significant injury to Plaintiffs. *See infra* III.C. Any argument to the contrary is easily rejected. *See McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988) (finding voter plaintiff had standing based on injury that was fairly traceable to ballot access law).

C. Plaintiffs' Injuries Are Redressable

Intervenors concede that the Court has "the power to declare [the] Statute unconstitutional, and to enjoin its enforcement." ECF No. 117, at 10. That is all that is required to satisfy Article III's redressability element. While the Court could order a specific remedy, *see infra* III.E, Plaintiffs' standing does not hinge on the details of the Court's ultimate remedy.

Moreover, Intervenors are incorrect to argue that the Court "lacks . . . authority" to grant specific relief. ECF No. 117, at 9. "[O]nce a plaintiff has established the violation of a constitutional . . . right . . . courts have broad and

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v. Bartlett, 575 F.3d 419, 424-25 (4th Cir. 2009) (plaintiff establishes injury-in-fact even if "concrete harm" of interference with voting rights is "widely shared"). Likewise, the fact that Democrats might hold the pivotal office in *other states* that have laws "that determine ballot order based on winning a prior election," ECF No. 117, at 9, is irrelevant to whether the Statute has harmed *these Plaintiffs* in *Florida*.

flexible equitable powers to fashion a remedy that will fully correct past wrongs." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016) (quotation marks and alterations omitted). While the Court may not order the State to enact legislation, *cf. Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 797 (6th Cir. 1996), it can specify the elements of a constitutionally adequate remedy. *See, e.g.*, *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846 (6th Cir. 1999) ("[A] court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in a particular case."); *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1032-33 (N.D. Fla. 2018) (holding statutory scheme for curing ballots was applied unconstitutionally and ordering Secretary to direct supervisors to allow voters to cure ballots); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016) (ordering Secretary to direct supervisors to extend voter registration deadline); *see also Kautenburger v. Jackson*, 85 Ariz. 128, 130 (1958) (affirming judgment declaring ballot-order statute unconstitutional and "directing the names of candidates be rotated on the voting machines in the most practicable and fair way possible"); *Elliott v. Sec'y of State*, 295 Mich. 245, 250 (1940) ("[I]t is clearly the duty of the defendants in this case, acting as election officials, to rotate on the non-partisan ballots the names of candidates for the office of Supreme Court Justice[.]"). The Court could also declare the Statute unconstitutional and direct the State to devise a remedy. *See, e.g.*, *Graves*, 946 F. Supp. at 1582. The burden would then "rest[] on the State to prove that its proposed remedy completely cures the harm." *McCrory*, 831 F.3d at 240.

Intervenors also miss the mark in asserting that precinct-by-precinct ballot-order rotation is impracticable because it would require implementation by third parties. *See* ECF No. 117, at 11-12.[5] The Secretary is Florida's "chief election officer." Fla. Stat. § 97.012. "This statutory job description is not window dressing." *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1276 (N.D. Fla. 2018). The Secretary must "[o]btain and maintain uniformity in the interpretation and implementation of" and promulgate rules for the "proper and equitable interpretation and implementation" of election laws. Fla. Stat. § 97.012(1). The Secretary is "vested with the power to issue orders directing compliance with the election code or prohibiting violations thereof," *Scott*, 215 F. Supp. 3d at 1255, which county officials must implement. *See Lacasa v. Townsley*, No. 12-22432-CIV, 2012 WL 13069990, at *2 (S.D. Fla. July 13, 2012). The Secretary thus has not only the authority, but the *obligation*, to direct whatever is necessary to comply with the Court's order, including upgrades to voting equipment. ECF No. 140-11 [**Ex. 11**], at 9:10-14, 48:4-7 (supervisors must follow state law and rules issued by Secretary); ECF No. 140-12 [**Ex. 12**], at 146:18-19 ("[T]he State lays out ground rules that vendors have to adhere to.").

II. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

The Court should reject Intervenors' argument that this case lacks a judicially manageable standard. Courts have adjudicated ballot-order claims without difficulty for decades. *See* ECF No. 116, at 13-19. Such claims are now

[5] As discussed *infra* III.E.1, county-by-county rotation, could presently be implemented with minimal effort. *See also* ECF No. 116, at 9, 24-25.

judged using the familiar *Anderson-Burdick* standard, which weighs the injury to plaintiffs' rights wrought by the law against the interests the State puts forward to justify the injury. *See id.* at 11-12.

Intervenors' reliance on partisan gerrymandering cases is misplaced. The difficulties of adjudicating such claims arise from factors unique to that context. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 287-88 (2004). More apt are the everyday challenges to voting laws of all stripes, all evaluated under *Anderson-Burdick*. *See, e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 432 (6th Cir. 2012); *Democratic Exec. Comm. of Fla.*, 347 F. Supp. 3d at 1029-30; *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *5-7 (N.D. Fla. Oct. 16, 2016). In each case, one could ask (as Intervenors do here), how much of a burden is too much? That this question may be present hardly renders a case nonjusticiable. *See Crawford*, 553 U.S. at 190 (rejecting "any 'litmus test' that would neatly separate valid from invalid restrictions" under *Anderson-Burdick* and requiring courts to "make the 'hard judgment' that our adversary system demands"). And the more recent federal court decisions to consider ballot order cases have applied *Anderson-Burdick* seemingly without problem; indeed, Intervenors fail to cite a single one finding the question "non-justiciable."

III. PLAINTIFFS' CLAIMS ARE COGNIZABLE

Defendants' Motions attack Plaintiffs' claims in slightly different ways, but both approaches are unsustainable and should be rejected. The Secretary frames the argument as one of cognizability, arguing Plaintiffs fail to state a claim, *see* ECF No. 115, at 9-12, while Intervenors argue Plaintiffs cannot proceed because

the Statute, they contend, is "facially neutral," imposes only "minimal burdens," and advances the State's "legitimate interests." ECF No. 117, at 4, 16-20, 25-27. Both are incorrect as a matter of law. Indeed, the Court rejected near-identical arguments when it denied Defendants' motions to dismiss. ECF No. 71. The Motions provide no reason to reconsider its earlier conclusion that Plaintiffs' claims are cognizable. Moreover, in arguing that the Court should rule in Defendants' favor, both raise clearly disputed issues of material fact, inappropriate for resolution on summary judgment.

A. Any "Consensus" Among the Courts Is that Laws Like Florida's Are Unconstitutional

The Secretary's assertion that there is "an emerging consensus among the federal courts" that ballot order challenges are not of "constitutional concern,'" ECF No. 115, at 3, is incorrect. In support, the Secretary cites two cases—*Libertarian Party of Virginia v. Alcorn*, 826 F. 3d 708, 718 (4th Cir. 2016), and *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282 (S.D.N.Y. 1994). *New Alliance Party* is a quarter-century old, so hardly "emergent." Moreover, neither case involved claims analogous to those here. In fact, as discussed in Plaintiffs' Motion for Summary Judgment, the universal judgment of courts in analogous circumstances is that these types of ballot order statutes are unconstitutional. *See* ECF No. 116, at 14-19.[6]

[6] To take two cases from the past 25 years and call that an "emerging consensus" is misleading for yet another reason. As the Secretary admits, statutes like Florida's are unusual in contemporary America. By the Secretary's own count, there are only six that are "nearly identical" and four that are "very similar." ECF No. 115,

When the case law is viewed as a whole, it becomes clear that courts are less likely to grant relief to minor party-affiliated or write-in candidates who seek to be treated as major party candidates, and for good reason: they are not similarly situated. Furthermore, because such candidates generally have significantly less support than major party candidates, they are often unable to demonstrate that they are disadvantaged because of ballot position. Thus, the burden that such plaintiffs can show (if any) is generally quite slight and may be outweighed by state interests in election administration and avoiding voter confusion that are present and legitimate *precisely because of the difference* between major and minor party candidates. *See, e.g.*, *Sarvis v. Judd*, 80 F. Supp. 3d 692, 706 (E.D. Va. 2015); *Meyer v. Tex.*, No. H-10-3860, 2011 WL 180524, at *18 (S.D. Tex. May 11, 2011). The Supreme Court has explicitly found that states may constitutionally "enact reasonable election regulations that may, in practice, favor the traditional two-party system," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997); it has *not*, however, reached the same conclusion about regulations that favor one similarly-situated major political party over another, much less systemically and repeatedly, in race after race, election after election. And major parties are in a better position to prove (as Plaintiffs do, here) that they are injured directly and

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at 1-2; *see also id.* at 7. There used to be more, but courts struck down similar laws in North Dakota, Oklahoma, Illinois, and California as unconstitutional. *See McLain*, 637 F.2d at 1166; *Graves*, 946 F. Supp. at 1576; *Netsch v. Lewis*, 344 F. Supp. 1280, 1280 (N.D. Ill. 1972); *Gould*, 14 Cal. 3d at 664. Of the eleven (including Florida) that remain, none have successfully weathered a challenge analogous to this one.

severely by ballot order statutes. Accordingly, courts that have considered analogous challenges have universally found those statutes unconstitutional. *See* ECF No. 116, at 14-17.

All of the cases Defendants cite to the contrary were brought by plaintiffs not similarly situated to the candidates or parties with whom they sought parity of treatment. This is true of *Alcorn*, where a third-party candidate challenged Virginia's tiered ballot order system, which placed the major political parties (*i.e.*, Democrats and Republicans) in the first tier, but did not "automatically elevate" any one party "to the top of the ballot"; in fact, "[w]ithin the first two ballot tiers, party order [was] determined by lot." *Alcorn*, 826 F.3d at 720. Moreover, even in the third-party candidate context, the court in *Alcorn* still found that the statute imposed a "modest burden" on the plaintiff's rights and weighed that burden based on the precise nature of the claims and evidence before it, as appropriate under *Anderson-Burdick*, finding that the state's interests justified organizing parties on the ballot in tiers. *Id.* at 719. Those interests do not similarly apply here, where the Statute does "automatically elevate" the political party of the last-elected Governor "to the top of the ballot," to the consistent disadvantage of the nearly identically situated major party.[7]

Similarly, the plaintiff in *New Alliance Party* was a minor political party that "tendered no empirical evidence in support of its claims," but still sought to be

[7] Another case cited by the Secretary—*Sarvis v. Judd*, 80 F. Supp. 3d 692 (E.D. Va. 2015)—is simply the district-court opinion considering the statute in *Alcorn*.

placed in the "first tier" of candidates on ballots, a position reserved for political parties that could obtain over 50,000 votes in a gubernatorial election (equivalent to 1% of the State's registered voters). 861 F. Supp. at 287, 295. The court relied upon the state's interest in orderly elections administration to justify the differential treatment between minor and major party candidates, *id.* at 298, and also noted the low bar to attain "first tier" status, *id.* at 297 (examining burden imposed in light of "lenient" 50,000 vote threshold to become a major party, which five political parties had been able to surmount).[8]

In fabricating a non-existent "consensus" of decisions finding ballot order challenges to be of no "constitutional concern," the Secretary gives short shrift to

[8] Although the Secretary does not cite them in support of her "consensus" theory, Defendants' reliance elsewhere on *Green Party of Tennessee v. Hargett*, No. 3:11-CV-692, 2016 WL 4379150 (M.D. Tenn. Aug. 17, 2016), *Meyer v. Texas*, No. H–10–3860, 2011 WL 1806524 (S.D. Tex. May 11, 2011), and *Democratic-Republican Organization of New Jersey v. Guadagno*, 900 F. Supp. 2d 447 (D.N.J. 2012), is also misplaced. Each, again, involved claims by candidates or parties who were not similarly situated to those listed at the top of the ballot. *See, e.g.*, *Meyer*, 2011 WL 1806524, at *6 (dismissing write-in candidate's challenge to tiered ballot order system, finding write-in candidate "not similarly situated to party candidates"); *Guadagno*, 900 F. Supp. 2d 447 at 458 (rejecting unaffiliated candidates' challenge to statute placing major party candidates in first two columns, noting "it is well established that states may treat candidates affiliated with political parties differently than unaffiliated candidates"). Repeatedly, the plaintiffs in those cases failed to present *any* evidence to support their claims. *See Hargett*, 2016 WL 4379150, at *3, *38-40 (rejecting minor parties' claim after trial in which they "presented no competent statistical evidence or expert testimony demonstrating that a party's position on the ballot affects its performance in an election, much less the extent of any such effects"); *Guadagno*, 900 F. Supp. 2d at 448 (finding plaintiffs failed to present any evidence "demonstrating a benefit and/or burden that stems from ballot placement").

the vast majority of cases going the other way, *see* ECF No. 115, at 25-28—and Defendants twist themselves in knots attempting to distinguish them. For instance, Defendants attempt to distinguish *Graves v. McElderry*, which held unconstitutional a ballot order system that prioritized one major political party over the other, 946 F. Supp. at 1580-81, as unpersuasive, asserting that the Florida Statute does not "[o]n its face . . . favor[] a political party." ECF No. 115, at 1, 26, 27 n.6; *see also* ECF No. 117, at 16-20 (arguing the Statute is "facially neutral").[9] But the Secretary admits that, *on its face*, the Statute favors "all candidates of the last successful gubernatorial candidate's party." ECF No. 115, at 1. *Graves* does not suggest that a statute is only unconstitutional if it expressly entrenches a party *by name*. Rather, the court held that "no legitimate State interest . . . can possibly be served by the selection of *one particular party's* candidates for priority position on every General Election ballot." *Graves*, 946 at 1590 (emphasis added).

Graves is just one of many cases in which courts have found equal protection violations where, as here, the challenged ballot order statute automatically favors certain types of candidates based on past electoral success. Notably, Defendants fail to engage in any meaningful discussion of *McLain*, in which the Eighth Circuit invalidated a statute that was strikingly similar to Florida's. The only difference was that it reserved the first position on the ballot for the party that received the most votes in the last congressional election, rather than the gubernatorial. 637 F.2d at 1166. Nor are *Graves* and *McLain* outliers; they

[9] Intervenors made this argument in their unsuccessful motion to dismiss. *See* ECF No. 37, at 12; ECF Nos. 69-72.

are consistent with every single decision that has considered an analogous challenge. *See, e.g.*, *Mann v. Powell*, 398 U.S. 955 (1970) (summarily affirming lower court order striking down preferential ballot order for incumbents); *Netsch*, 344 F. Supp. at 1281 (holding unconstitutional statute prescribing ballot order by past electoral success); *Gould*, 14 Cal. 3d at 664, 669-70 (finding unconstitutional procedure that automatically afforded "an incumbent, seeking reelection, a top position" on ballot "establishe[d] two classifications of candidates for public office," imposing "a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process'"); *Holtzman v. Power*, 62 Misc. 2d 1020, 1024 (N.Y. Sup. Ct. 1970) (holding unconstitutional system requiring incumbent in first position, finding such favoritism over all other candidates "so disparate as to raise the possibility of invalidity on this basis alone"); *see also Sangmeister v. Woodard*, 565 F.2d 460, 468 (7th Cir. 1977) ("This court will not accept a procedure that invariably awards the first position on the ballot to . . . the incumbent's party.") (citation omitted). The reason those statutes were invalidated applies equally here: they granted top ballot placement, and thus electoral advantage, to one class of candidates, burdening the candidates and supporters of another similarly situated class.

The Secretary's attempts to distinguish incumbent-first statutes and statutes that give officials discretion to determine ballot order (ECF No. 115, at 25-26) similarly fall flat. Indeed, if, as the Secretary implicitly concedes, incumbent-first statutes *cannot* be constitutionally justified, the Statute cannot possibly survive. While incumbency-first statutes advantage specific candidates for whom voters

have already expressed a preference, Florida's Statute puts a thumb on the scale, consistently favoring *all* candidates associated with the last-elected Governor's party based entirely on the results of that single election, no matter how unrelated the seat. *See* Fla. Stat. § 101.151(3)(a). That advantage persists into the next Governor's election, giving the entrenched party and *all* of its candidates an advantage yet again. And, arguably, a statute allowing discretion on ballot placement provides more opportunity for candidates to obtain the top position by ingratiating themselves to the officials with the discretion. In contrast, once a Governor is elected, no matter how slim the margin, Florida's Statute provides *no* opportunity for candidates in the disadvantaged major party to obtain the first position, for at a minimum, the next four years.

If the injuries imposed by ballot order were "minimal" or inconsequential, there would be no line of cases invalidating laws that award top position to incumbents or anyone else. It is only because the top position confers an *advantage* that these schemes are unconstitutional. In short, in her attempt to distinguish the raft of cases that support Plaintiffs' position, the Secretary only concedes the Statute's invalidity.

For Intervenors' part, rather than confront these cases, they quote a case that does *not* involve ballot order for the proposition that "'equality of opportunity—not equality of outcomes—is the linchpin of what the Constitution requires.'" ECF No. 117, at 20 (quoting *Gill v. Rhode Island*, 933 F. Supp. 151, 155 (D.R.I.

1996)).[10] But this argument relies on the false factual premise that "candidates from all parties have an equal opportunity to achieve the top position on the ballot." *Id*. Plaintiffs have provided evidence that under the operation of the Statute, which has conferred on average a 5.35-point advantage to the Republican in every partisan race in Florida for 20 years, Democrats have *not* had an equal opportunity to achieve the top position by winning the last gubernatorial election. *See* ECF No. 112-1, at 3. Moreover, Intervenors' focus on the ability to win the Governor's election takes an inappropriately narrow view of "equal opportunity." A system that entrenches one political party in the top spot in every race for years at a time does not offer candidates from other similarly situated parties "equal opportunity" to do the same.

B. Plaintiffs' Claims Are Cognizable Under *Anderson-Burdick*

Plaintiffs' claims are cognizable under *Anderson-Burdick*, and Defendants' arguments to the contrary are meritless. Quoting Justice Scalia's concurring opinion in a voter identification case, the Secretary argues that *Anderson-Burdick* applies only to laws *denying* the right to vote or erecting *barriers* impeding the *ability* to vote. ECF No. 115, at 10. According to the Secretary, "[u]ndue burdens on the *right to vote* and outright *vote denial* are distinct from *vote dilution*," and Plaintiffs cannot sustain their claims because they allege only vote dilution. ECF No. 115, at 10-11. The Secretary's argument is flawed on multiple levels.

[10] Intervenors made this same argument about equality of opportunity in their unsuccessful motion to dismiss. ECF No. 37, at 1, 12-13.

As an initial matter, Justice Scalia's concurring opinion is not binding precedent. *See Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997). In any event, even the language that the Secretary relies upon from that concurrence is not so limiting; Justice Scalia does *not* say that *Anderson-Burdick* applies "only" to laws denying the right to or erecting barriers impeding the ability to vote, but that it is employed to "evaluate a law *respecting* the right to vote—whether it governs voter qualifications, candidate selection, or the *voting process*." *Crawford*, 553 U.S. at 204 (Scalia, J., concurring) (emphasis added). Indeed, the very premise of *Anderson-Burdick* is that *all* "[e]lection laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). "Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The same is true of the Statute at issue here. *Anderson-Burdick* applies, and the relevant question is simply the "character and magnitude" of the asserted injury. *See id.*

In addition, vote dilution is not the only harm alleged. Plaintiffs also allege associational and equal protection harms under the First and Fourteenth Amendments: disparate and unfavorable treatment of the Democratic Party that burdens Plaintiffs' ability to elect their preferred candidates and support the Party. *See supra* I.A. Even if *Anderson-Burdick* were inapplicable to vote dilution clams (it is not), these other injuries provide further reason to apply that framework. *See*

Obama for Am., 697 F.3d at 430 ("[W]hen a state regulation is found to treat voters differently in a way that burdens the fundamental right to vote, the *Anderson–Burdick* standard applies."); *Ass'n of Cmty. Orgs. for Reform Now v. Cox*, No. 1:06-CV-1891-JTC, 2006 WL 6866680, at *5 (N.D. Ga. Sept. 28, 2006) (applying *Anderson-Burdick* to enjoin provision regulating manner in which private parties conduct voter registration drives); *Devine v. Rhode Island*, 827 F. Supp. 852, 862 (D.R.I. 1993) (applying *Anderson-Burdick* in holding "practice in presidential election years of placing independent candidates for state offices underneath bold column headings identifying presidential political parties or principles wholly unrelated to those candidates, violates the First and Fourteenth Amendments").

Finally, vote dilution claims *are* cognizable outside of redistricting and the Voting Rights Act. As the Supreme Court has explained,

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. It must be remembered that the right of suffrage can be denied by a debasement or *dilution* of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Bush v. Gore, 531 U.S. 98, 104-05 (2000) (citation and quotation marks omitted) (emphasis added). Thus, the Court held in *Bush* that manual recounts without specific standards were "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter" to have his vote counted equally. *Id.* at 109.

Similarly, a district court in the Eleventh Circuit recently held that Georgia's reliance on outdated voting systems "pose[d] a concrete risk of alteration of ballot counts that would impact [plaintiffs'] votes." *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1324 (N.D. Ga. 2018). The plaintiffs demonstrated a burden on their Fourteenth Amendment rights to due process and equal protection because the "State's continued reliance on the use of [the] machines in public elections likely results in a debasement or dilution of the weight of Plaintiffs' votes, even if such conduct does not completely deny Plaintiffs the right to vote." *Id.* at 1322 (alterations and quotation marks omitted).

Courts have also recognized vote dilution claims in ballot order cases specifically, holding that statutes favoring one class of candidates violate equal protection by diluting votes cast in favor of the disadvantaged candidate. *See Gould*, 14 Cal. 3d at 670 (striking down incumbent-first statute under Equal Protection Clause because it "dilut[ed] the weight of the vote of all those electors who cast their ballots for a candidate who is not included within the favored class"); *see also McLain*, 637 F.2d at 1167. More recently, *Anderson-Burdick* has been applied to evaluate such claims. *See, e.g.*, *Graves*, 946 F. Supp. at 1579. The Court should apply the same approach here.

Applying *Anderson-Burdick* comports with common sense. A "burden" on the "right to vote" cannot only mean that the state has "created a barrier to" individual voters "exercising their right to vote," ECF No. 115, at 3—it must also reach the present circumstances, where the State enforces an unlevel playing field, such that voters who affiliate with the disadvantaged party must turn out in higher

numbers than those who support the similarly situated advantaged party to elect their candidates. Under the Secretary's theory, Democratic voters would have no claim if a state were to announce that the vote share would be adjusted to give the candidates affiliated with the Governor's party an extra percentage point when the ballots were counted. But that would clearly be unconstitutional and, under current jurisprudence, would be evaluated using *Anderson-Burdick*'s balancing test.

The Secretary's argument that Plaintiffs fail to state a standalone equal protection claim because they do not allege any discriminatory intent is similarly unfounded. *See* ECF No. 115, at 28-30. In fact, the Eleventh Circuit was recently clear: "[U]nder *Anderson-Burdick*, it is not necessary for a plaintiff to show discriminatory intent to make out a claim that the state has unconstitutionally burdened the right to vote." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 n.9 (11th Cir. 2019); *see also id.* at 1319 ("To establish an undue burden on the right to vote under the *Anderson-Burdick* test, Plaintiffs need not demonstrate discriminatory intent . . . because we are considering the constitutionality of a generalized burden on the fundamental right to vote, for which we apply the *Anderson-Burdick* balancing test instead of a traditional equal-protection inquiry."); *see also Anderson*, 460 U.S. at 806 (holding, without proof of discriminatory intent, state's early filing deadline imposed unconstitutional burden since it was insufficiently justified by state interests); *Obama for Am.*, 697 F.3d at 429-30 (rejecting argument it should apply "a straightforward equal protection analysis" and explaining "when a state regulation is found to treat voters differently in a way that burdens the fundamental right to vote, the *Anderson-*

Burdick standard applies"). This is consistent with longstanding jurisprudence establishing that plaintiffs need not allege "intentional or purposeful discrimination" where, as here, a law expressly creates classifications of similarly situated parties that it subjects to differential treatment, or a state's differential treatment implicates fundamental rights. *See E & T Realty v. Strickland*, 830 F.2d 1107, 1112 n.5 (11th Cir. 1987).[11]

C. The Statute Imposes Cognizable Burdens on Plaintiffs

Plaintiffs' evidence demonstrates that the Statute severely burdens their fundamental rights. Defendants, in contrast, repeatedly mischaracterize evidence and raise material issues of fact that cannot be resolved on summary judgment. *See Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1299 (11th Cir.

[11] Plaintiffs are not asking the Court (as the Secretary argues) to "cast aspersions upon citizens who expressed their civic right to participate in an election and made a choice of their own will." ECF No. 115, at 11 (quotation marks omitted). Rather, Plaintiffs advance only their right to fair and equal treatment with similarly situated parties, which the Statute denies. Plaintiffs do not seek to invalidate any votes, but to level the playing field. In any event, it is not an "aspersion" to recognize a universal phenomenon of the human psyche (the existence of which Defendants do not even try to dispute) that manifests in everything from consumer decisions to voting. ECF No. 140-16 [**Ex. 16**], at 36-39. Nor is it an "aspersion" to recognize that voters are more likely to make proximity errors that favor the first-listed candidate. ECF No. 140-20 [**Ex. 20**], at 3. For similar reasons, Defendants are wrong to characterize Plaintiffs as seeking a "wholly rational election." ECF No. 117, at 21; *see also* ECF No. 115, at 11. "A fair scheme of ballot placement does not increase the rationality of any particular voter's vote; voters are still free to vote for the first-listed candidate." James A. Gardner, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 902 (1984). "[A] random distribution of irrational votes" simply "depriv[es] certain candidates of the systematic benefits of irrationality." *Id*.

1983). Indeed, Defendants raise precisely the "type of battle of the experts . . . which must be reserved for trial (but not a summary judgment)." *Martins v. Royal Caribbean Cruises Ltd.*, 216 F. Supp. 3d 1347, 1365 (S.D. Fla. 2016).

Each of Plaintiffs' experts—Drs. Krosnick and Rodden of Stanford and Dr. Herrnson of the University of Connecticut—are uniquely qualified to offer their opinions and conclude, based on reliable methods and analyses, that the Statute's ballot order effect significantly impacts Florida elections to the severe injury of Plaintiffs. In response to the overwhelming evidence that this effect is increasingly consequential (and detrimental to Plaintiffs), Defendants have offered no serious counterpoint. In fact, the Secretary does not offer any experts to counter Plaintiffs' at all. Instead she relies on Intervenors' hired witnesses—Drs. Klick and Barber. *See* ECF No. 140-17 [**Ex. 17**], at 17-18; ECF No. 140-26 [**Ex. 26**], at 2. Neither, however, conducted his own analysis, or offers any opinion, as to whether (or to what extent) ballot order effect impacts elections in Florida or elsewhere. ECF No. 112-3, at 23:13-20, 38:3-43:5, 44:6-9, 182:15-19; ECF No. 112-2 at 72:1-73:1, 77:19-78:1. Their sole function is to nitpick the work of Plaintiffs' experts, attempting to cast doubt on the reliability of their conclusions. But the critiques lack credible basis, and even when indulged, do not change the ultimate, compelling conclusions of Plaintiffs' experts.

The first of Plaintiffs' three experts, Dr. Krosnick, is indisputably one of this country's most well-respected—and most cited—political scientists who has studied the impact of ballot order for decades. ECF No. 140-16, at 5-8; ECF No. 112-3, at 168-69; ECF No. 112-2, at 68:22-69:1-6. As previously noted, he

concludes that: "In partisan races for federal and high-profile state races, Florida Republican candidates have gained 5.35 percentage points on average by being listed first on the ballot, and Florida Democratic candidates have gained 4.57 percentage points on average by being listed first." ECF No. 112-1, at 3.

Analysis by Dr. Rodden, another a highly respected political scientist, *see* ECF No. 140-25, at 117-19, confirms that the Statute has a significant impact on Florida elections. Dr. Rodden finds that, relative to other Democrats on the ballot, down-ballot Democrats suffered disadvantages of about 5 percentage points when Republicans were listed first from 1988 to 1990, and about 3 percentage points when Republicans were listed first from 2000 to 2018. ECF No. 140-23 [**Ex. 23**], at 4-5. Likewise, relative to other Republican candidates, down-ballot Republicans suffered disadvantages of about 4 percentage points when Democrats were listed first from 1978 to 1986, and almost 6 percentage points when Democrats were listed first from 1992 to 1998. *Id*. at 5. "The fact that the partisan direction of the down-ballot disadvantage switches back and forth when the ballot order changes indicates that ballot order effects are an important part of the explanation for recent under-performance of statewide Democratic candidates relative to the party's overall performance." *Id.*[12]

[12] Intervenors' assertion that "[c]ourts have discredited Rodden's analysis" (ECF No. 117, at 23 n.3) is highly disingenuous. In fact, even in the two cases Intervenors cite, courts praised Dr. Rodden's work. *See DNC v. Reagan*, 329 F. Supp. 3d 824, 835 (D. Ariz. 2018) (finding Dr. Rodden's "use of a combination of individual-level and aggregate data analyses, both of which have been accepted in previous cases analyzing questions under the VRA, to be valid and generally trustworthy, and afford[ing] them great weight"); *id.* at 871 (finding "Dr. Rodden's

Much of Defendants' critique of Drs. Krosnick and Rodden is that their analyses did not address certain variables (so-called "omitted variable bias"). However, in depositions, Intervenors' experts acknowledged this was pure speculation. Dr. Klick admitted repeatedly that omitted variable bias was "a goose chase," and that he was simply suggesting variables that he imagined *might* possibly be relevant, without any basis to make such a conclusion. *See* ECF No. 112-3 at, 246:20-247:16 (explaining "we can come up with stories as to why those differences could be relevant," but admitting he has no basis for believing they are relevant); *see also* ECF No. 140-17, at 188:12-195:1, 227:8-13, 267:9-268:17, 302:9-303:5; ECF No. 112-3, at 247:9-16, 272:15-273:16, 371:12-372:17.

Similarly, although Dr. Barber quibbles with some choices made by Plaintiffs' experts, he also admitted that his critiques were speculative. For example, after critiquing Dr. Krosnick's analysis because it did not control for such factors, Dr. Barber admitted to not knowing whether Hispanic voters, individuals who live in ethnically diverse areas, older voters, voters with higher income, or who live in metropolitan areas would be differently susceptible to position bias.

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analysis is credible"); *id.* at 871 n.18 (rejecting opposing expert's critique of Dr. Rodden's work); *id.* at 835-36 (finding Dr. Rodden's work "provided useful insight"); *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 598 (E.D. Va. 2016) (finding Dr. Rodden is "a well-respected professor at Stanford University" and receiving him "as an expert in political science"); *id.* at 606 (finding "Dr. Rodden undoubtedly based his calculations on the best available data and employed widely accepted methodology"). This Court, as well, has previously found Dr. Rodden "credible" and "[h]is methodology sound." *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1217 n.11 (N.D. Fla. 2018).

See ECF No. 140-25 [**Ex. 25**], at 85:1-5, 89:17-22; 90:1-4, 90:5-10, 93:3-9, 95:4-7. And although he critiqued Dr. Rodden for not controlling for "candidate quality," Dr. Barber admitted that he did not always consider candidate quality in his own work. *See id.* at 119:11-12. He further admitted that he has no reason to believe that the fundraising abilities of candidates down-ballot are any greater than top-ballot candidates, which is the only way the variable would be relevant in Dr. Rodden's analysis. *Id.* at 131:5-9. And although he suggested that Dr. Rodden should have controlled for increased campaign spending, ECF No. 140-26, at 3-4, Dr. Barber similarly admitted that the literature is mixed on whether increased spending, which could include an increased get-out-the-vote effort, garners more votes. ECF No. 140-25, at 128:16-21.

In any event, none of these criticisms impact Plaintiffs' experts' ultimate conclusions. When they test Dr. Klick's "stories" as to other variables that "could" be relevant, their conclusions remain substantially unchanged. *See* ECF No. 140-18 [**Ex. 18**], at 31, 37-38, 41-50; ECF No. 140-24 [**Ex. 24**], at 5-18.[13] And while Dr. Krosnick explains that certain demographic differences between Florida and other states highlighted by Dr. Barber are unrelated to the size of ballot order effect, "the primacy effect in Florida is statistically significant even among the most Hispanic voters and among the most metropolitan voters." ECF No. 140-18, at 4-5.

[13] Even Dr. Klick's own report concludes that, after adding additional variables that he suggests a researcher could "imagine" might be relevant, position bias favoring Republicans in Florida remains evident, albeit to a lesser degree than Dr. Krosnick finds. ECF No. 112-5, at 9.

Similarly, when Dr. Krosnick weights counties by size, as Dr. Barber suggests he might have, he still finds statistically significant evidence of a primacy effect greater than 3 points. *See* ECF No. 112-1 at 10; ECF No. 112-1, at 74.[14]

Similarly, the Secretary's assertion that ballot order "effect is demonstrably less for both parties when one weights the regression estimates based on county population or density," ECF No. 115, at 13-14, fails to explain why county population or density matters in this context, or acknowledge that, while smaller, the estimates remain large and highly significant even when those variables are accounted for, resulting in over 3 points for both Democrats and Republicans. ECF No. 111, at 143. And the Secretary's argument that the Court should disregard Dr. Rodden's analysis for omitting candidate gender as a variable is entirely baseless. The fact that three women over a 25-year period won elections when their party was not listed first plainly does not undermine Dr. Rodden's analysis. He does not argue that position bias always prevents candidates of the party listed second from winning an election; in fact, he explicitly points to the 2018 success of Nikki Fried as an example of someone who overcame position bias in his report, finding that a down-ballot disadvantage did in fact exist in the race. *See* ECF No. 140-24, at 32-33.

[14] As for Dr. Barber's critique that Dr. Krosnick's discussion of his Ohio analysis "misleads by referring to the 'largest' primacy effects observed and emphasizing that 'the vast majority' of observations were positive," ECF No. 115, at 14-15, Dr. Krosnick's observations were accurate. And even Dr. Barber acknowledges that "on average the estimated effect of ballot ordering in Ohio is between .68 and 1 percentage point," a sizable effect. ECF No. 140-26, at 14.

The Secretary stumbles again in relying upon Dr. Klick to argue that "Krosnick's analysis of ballot order effect in the 2016 Presidential Election is careless and misleading because it relies on one-tailed statistical 'p-value' tests to suggest statistical significance, rather than two-tailed tests," asserting that this "gives the impression that the results . . . are statistically significant when . . . they are not." ECF No. 115, at 14. In fact, statisticians now recognize that this view of p-values and what they mean about the significance of results is completely wrong-headed, resting on an arbitrary and false assumption that results that fall below the 95% confidence level—even by a few percentage points—are not reliable. Addressing this very issue, the American Statistical Association took the highly unusual step of issuing a statement in 2016 to make clear that "p-values do not measure the probability that the studied hypothesis is true," the size of the p-value does not measure the size of an effect or the importance of a result, and by itself, a p-value does not provide a good measure of evidence regarding a model or hypothesis. *See* Ronald Wasserstein et al., *Statement on Statistical Significance and P-Values*, AMERICAN STATISTICAL ASSOCIATION (2010), https://www.amstat.org/asa/files/pdfs/P-ValueStatement.pdf. Not surprisingly, in deposition Dr. Klick disavowed intending to suggest that the use of a one-tailed test made Dr. Krosnick's results not statistically significant, and explained he was merely concerned that this Court may have a less sophisticated understanding of statistics than he, and not understand that different tests are likely to produce different p-values. *See* ECF No. 140-17 [Ex. 17], at 203:12-213:18. This concern plainly does not render Dr. Krosnick's report "unreliable," as the Secretary argues.

The Secretary's assertion that Dr. Krosnick "cannot tell us what the advantage is or whether it even matters," ECF No. 115, at 13, is also flatly incorrect. In an attempt to support this statement, the Secretary observes that Dr. Krosnick's most recent estimate of the advantage conferred by the Statute is higher than in his initial report, prepared at the preliminary injunction stage. But Dr. Krosnick's report clearly explains the reason for that difference—he has since obtained more data. ECF No. 140-16, at 3 n.1; *see also* ECF No. 140-19 [**Ex. 19**], at 20:7-21:5.[15] Even worse, the Secretary relies on a fragment of a quote that, in context, does not support her proposition: "Krosnick now says the effect of the 'windfall vote' 'is not . . . extremely important in this litigation.'" ECF No. 115, at 14. But Dr. Krosnick actually said:

> [T]he value of the additional analyses is what we scientists call robustness checking. In other words, if we make slight changes in how we do the analysis, is the conclusion basically the same? And whether the primacy effect is estimated on average to be 5.2 percentage points or 4.1 percentage points or 3.7 percentage points is not extremely important for me and I suspect is not especially extremely important in this litigation.

[15] Dr. Krosnick uses that additional data in formulating a revised estimate of the number of Florida elections that would have flipped if name order had been reversed. *See* ECF No. 112, at 83-84. Dr. Krosnick clearly explains his methodology in calculating his new estimate.

ECF No. 111, at 330-31. In other words, even Dr. Krosnick's most conservative estimates still found a primacy effect of over 3 points, far greater than the margin of victory in many recent Florida elections.[16]

Plaintiffs also offer an expert report from Dr. Herrnson, another respected political science professor who has researched and taught about American politics for over thirty years, and who provides further insight into why ballot order impacts elections. ECF No. 140-20, at 4. Dr. Herrnson's prior work and his reports prepared in this case discuss "proximity error," which occurs "when a voter inadvertently selects a candidate listed immediately above or below the candidate the voter intended to vote for." *Id*. at 2. First-listed candidates benefit from proximity errors because "the only proximity error a voter who intends to support the first-listed candidate can make is to vote for the second candidate (because no candidate is listed before the first-listed candidate), while a voter who intends to

[16] The Secretary repeats a similar trick by selectively quoting from Dr. Krosnick's very first article on ballot order published over 20 years ago, which theorized that its effects "have probably done little to undermine the democratic process." ECF No. 115, at 14. He has since published dozens of articles on ballot order, and the Secretary ignores that even that very first article found a ballot-order effect and concluded that, "there is more than a slim chance that name order could affect the outcome of a close election." ECF No. 140-17, at 177:8-182-11. Since then, Dr. Krosnick (and many others) have concluded that this has in fact occurred several times over, including in Florida. *See* ECF No. 112-1, at 127-134; *see also* Eric Chen et al., *The impact of candidate name order on election outcomes in North Dakota*, 35 *Electoral Studies* 115-122 (2004).

support the second-listed candidate can err in either direction (because there are candidates listed both before and after the preferred candidate)." *Id*. at 11.[17]

The Secretary's Motion does not mention Dr. Herrnson at all. As for Intervenors' argument that Dr. Herrnson "does not have evidence to support his assertion that 'proximity error' generally benefits the candidate at the top of the ballot," ECF No. 117, at 25, it is refuted by his report, which cites to studies showing exactly that. *See* ECF No. 140-20, at 12-13. Intervenors also assert that a field study that Dr. Herrnson conducted and upon which he relied "contained too small of a sample size and . . . was not representative of Florida's population," ECF No. 117, at 25. Dr. Herrnson disputes that characterization, but in any event, that argument goes to the weight of his testimony at trial; it is not grounds to reject his analysis on summary judgment.

Finally, although Plaintiffs need not demonstrate that the Statute flips elections to prevail, *see McLain*, 637 F.2d at 1159 (holding ballot order system unconstitutional where plaintiff candidate received only 1.5% of the vote); *see also Graves*, 946 F. Supp. at 1579-81, given the slim margins that have decided many recent Florida elections, it is extremely likely that it has tipped elections and, unless enjoined, will do so in the future. *See Akins v. Sec'y of State*, 154 N.H. 67, 73 (2006) (noting even if "primacy effect's influence on the outcome of elections is small, . . . elections are often decided by narrow margins, and even a small

[17] Dr. Barber described a large-scale study that Dr. Herrnson oversaw on this issue as "excellent" and "well-executed." ECF No. 140-26, at 21.

degree of influence carries the potential to change the result of an election"); *Gould*, 536 P.2d at 1343 (same).

D. The State's Identified Interests in the Statute Cannot Sustain Summary Judgment

The Secretary's argument that Florida has "compelling interests" in maintaining the unlevel playing field mandated by the Statute that outweigh "whatever" injury it causes to Plaintiffs, ECF No. 115, at 2, is legally and factually incorrect. The Secretary has *admitted* the State has no interest in favoring the political party of the last-elected governor. ECF No. 112-7, at 162:11-19; *see also Graves*, 946 F. Supp. at 1580-81 ("Political patronage is not a legitimate state interest which may be served by a state's decision to classify or discriminate in the manner in which election ballots are configured as to the position of candidates on the ballot."). As a result, the Secretary is left to assert a litany of vague and diffuse interests, none of which justifies the burdens imposed by the Statute.[18]

[18] Intervenors simply argue that the State's interests are "legitimate," ECF No. 117, at 25-27, but cite no basis to claim interests on behalf of the State. *Cf. U.S. S.E.C. v. Quest Energy Mgmt. Grp., Inc.*, 768 F.3d 1106, 1109 (11th Cir. 2014) ("To establish standing, a litigant ordinarily 'must assert his own legal rights and interests' and cannot assert the rights or interests of someone else."). Moreover, Intervenors incorrectly assume it is enough for the state to show a "legitimate" interest. Under *Anderson-Burdick*, the burden a law has on plaintiffs' rights dictates the level of scrutiny. ECF No. 116, at 11-12. Because Plaintiffs can show the burden is severe, ECF No. 30, at 15-23, the Statute warrants more exacting scrutiny. But even if the Court were to find that the standard of review was less demanding, for the reasons set forth in Plaintiffs' motion for summary judgment, the Statute's ballot-ordering system cannot be justified by even a *legitimate* interest. *See* ECF No. 116, at 21-31.

1. The State's Interest in Defending the Constitutionality of Its Laws Cannot Justify the Statute

The Secretary's argument that the State has a compelling interest in defending the constitutionality of the Statute would effectively doom every *Anderson-Burdick* claim before it began. None of the cases the Secretary cites support this radical proposition. Moreover, it is well-established that states do not have even a legitimate interest in enforcing unconstitutional laws. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *see also Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

2. The State's Interest in "Upholding Its Policy of Ballot Uniformity" Cannot Justify the Statute

The Secretary cites no case law suggesting a State's general interest in "upholding its policy of ballot uniformity" could justify a law consistently placing its thumb on the scale in favor of one political party in all elections. *See* ECF No. 115, at 23. Moreover, contrary to the Secretary's suggestion, *Bush v. Gore* did not mandate that ballots be uniform across Florida. The Court made clear that its ruling did *not* implicate "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Bush*, 531 U.S. at 109. Rather, the Court simply required the formulation of uniform rules to determine voter intent in conducting manual recounts. *Id.* at 106.

Additionally, the State's so-called policy of ballot uniformity is belied by its current proliferation of multiple ballot styles within a single election. *See* ECF No. 115, at 18 ("While most counties in Florida design and print their ballots on a precinct-by-precinct basis, Miami-Dade designs and prints its ballots on a by-style

basis."); ECF No. 111, at 1297 (acknowledging "there [are] already multiple ballot styles being used" in Florida); ECF No. 140-22 [**Ex. 22**], at 31:2-11 (noting there are even multiple ballot styles within precincts). Indeed, the only cites the Secretary musters in support of the State's "policy of ballot uniformity" are from two elections officials who speculate that any ballot dissimilarity could cause voter confusion and increase administrative burdens. *See* ECF No. 111, at 1649, 1655, 1651, 1668-71, 1462-63. *But see United States v. Sec'y, Fla. Dep't of Corr.*, No. 12-22958-CIV-SEITZ, 2015 WL 1977795, at *6 (S.D. Fla. Apr. 20, 2015) ("[S]peculation cannot create a compelling state interest.") (citation omitted). Not only is this purported interest insufficient to justify the burdens the Statute imposes, it suffers from circular logic: the State has an interest in ballot uniformity because of potential voter confusion, which leads to alleged administrative burden. Thus, each alleged interest relies on at least one other alleged interest, but all lack a foundation in a demonstrable reality.

3. The State's Interest in Elections Integrity Cannot Justify the Statute

The Secretary's generalized interest in "the integrity of the elections process," ECF No. 115, at 23, is also insufficient. Like many of the other interests that the Secretary asserts, it is exceedingly vague. And, rather than explain why it is "compelling," the Secretary only demonstrates why it is not. For example, the Secretary states that "any kind of rotation, without adequate voter education, and right before a presidential election year, would inject uncertainty and confusion into the process." *Id.* But there is no evidence the State currently "educates" voters

about ballot order at all. Moreover, the State admits it would not have "educated" voters about changes in ballot order had Andrew Gillum won the last Governor's election. *See* ECF No. 140-11, at 78:21-22; ECF No. 112-6, at 79:1-2. Moreover, the presidential election is not "imminent." The Secretary admits that any rotation system would only apply in the general election, nearly a year and a half away. *See* ECF No. 140-13 [**Ex. 13**], at 188:15-23. Even the most reticent of the Secretary's witnesses was unwilling to say that it would not be possible to implement a new rotation system by then. *See id.* at 132:15-19.

The Secretary's speculation that voters might "find it more difficult to use their sample ballots as reference guides when casting votes" if ballot order were rotated, ECF No. 115, at 23, is also not well founded. Several supervisors testified that even though they typically have multiple ballot styles even within a single precinct, each county mails a single, composite sample ballot that lists races that some voters may not see on their ballot. *See* ECF No. 112-6, at 94:19-95:13; ECF No. 112-8, at 90:11-14, 95:9-16; ECF No. 112-9, at 92:9-93:17. Thus, voters already regularly are presented with sample ballots that do not match the ballots they encounter when they actually vote.

The Secretary's assertion that the Court should find the Statute constitutional because of her rank speculation that "[v]oters residing in multi-county metro-areas such as Orlando might raise concerns about election irregularities if their neighbors have different ballots," ECF No. 115, at 24, cannot justify maintaining a patently unfair system. And even though the ballots in different counties already feature different races, the Secretary provides no evidence that any voters have raised

concerns about election irregularities because their ballot did not exactly match that of their neighbor. *Cf.* ECF No. 111, at 1438-39.

Intervenors' arguments regarding "the integrity of Florida's election[s]" fare no better. Intervenors contend that the Statute "maintains the integrity of Florida's election[s] since the tabulation software with the State allows the various counties to upload their election results seamlessly." ECF No. 117, at 26. This is an odd—and unsustainable—assertion for a number of reasons. *First*, the Statute does not dictate that the State use a particular form of tabulation software at all. *Second*, the testimony that Intervenors cite for this proposition merely says that the tabulation software currently works as conceived, not that a rotation system would make the software any less effective. *See* ECF No. 113-11, at 84-88; ECF No. 113-7, at 14, 52, 58. Moreover, the same witnesses also testified that the State assigns each candidate statewide a unique candidate identification number. ECF No. 140-12, at 55:3-56:12, 145:1-146:7; ECF No. 140-13, at 122:12-124:2; *see id.* at Ex. J. This number would continue to be reported to the State along with the candidate vote total, regardless of the candidate's ballot position; thus, it is implausible that rotation would have a significant effect on statewide tabulation. Indeed, it may not require any change to the state tabulation procedure at all. ECF No. 140-12, at 145:21-146:7.

Finally, while ballot rotation could require the reconfiguration and testing of software to ensure that individual votes are properly transferred to the state level, such routine administrative burdens cannot justify a constitutional violation. *See,*

e.g., *Obama for Am.*, 697 F.3d at 434; *Fla. Democratic Party*, 2016 WL 6090943, at *7; *Gould*, 14 Cal. 3d at 675.

4. The State's Interest in Reducing Voter Confusion and Speeding the Voting Process Cannot Justify the Statute

For similar reasons, the State's interest in "reducing voter confusion and speeding the voting process," ECF No. 115, at 24, cannot sustain the Statute. The Secretary's claim that the Statute's ballot-order system is necessary to prevent voter confusion has always strained credulity. Plaintiffs do not challenge the part of the law that requires that ballots clearly designate candidates' party affiliations. *See* Fla. Stat. § 101.151(3)(a) (providing that "[t]he names of the candidates" be listed "together with an appropriate abbreviation of the party name"). Nor do Plaintiffs seek wholesale random rotation; rather, consistent with Florida's tiered system, the major parties would still be listed first, and their relative order would remain consistent down the ballot of any particular voter. Voters could find and select candidates from their preferred party all the way down the ticket, as easily as now.

The only voter who might conceivably be "confused" is one committed to voting for candidates with the same party affiliation as the last-elected Governor, who does not know what party that is, yet is acutely aware that the Statute requires that those candidates be listed first. It is inconceivable such a voter exists, much less that their highly unusual perspective could justify maintaining the Statute. Indeed, Plaintiffs pointed this out at the outset of this case, *see* ECF No. 38, at 14,

and nearly a year later, Defendants have not identified even a single voter fitting this profile.

All told, Plaintiffs have deposed five fact witnesses offered by Defendants, and none could cogently explain why or how voters would be confused by a change in Florida's ballot order. *See, e.g.*, ECF No. 112-4, at 120:17-20. The Miami-Dade Supervisor testified that she could not recall any instance in which a voter questioned or was confused by the order of candidates on a ballot, including when Democrats and Republicans traded places after an election pursuant to the Statute. ECF No. 112-6, at 79:3-19, 97:4-22.[19] Similarly, Palm Beach County Republican Party Chairman Barnett testified that he had no facts to support his earlier claim that voters would be confused if the ballot order changed. ECF No. 112-4, at 120:17-20.

The evidence from states that rotate ballot order confirms the obvious—voters are not confused. As of 2010, "twelve states use[d] some form of rotation, either in practice or by statute." Laura Miller, Election by Lottery: *Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 373, 380 (2010). Jessica Burns, the Executive Director of the nonpartisan League of Women Voters in New Jersey, has never heard of voter confusion resulting from that state's ballot order system, which determines ballot order for each county by

[19] The only evidence the Secretary cites in support of her voter confusion claims is an excerpt from the deposition of the Miami-Dade Supervisor positing that voters might be confused if the "punch numbers" next to candidates' name were non-sequential. *See* ECF No. 111, at 1295-96, 1310-11. But the same supervisor acknowledged no voter has ever actually raised a concern about those numbers. *Id*.

lottery. *See* ECF No. 112-14 at 13:20-17:2; N.J. Stat. Ann. § 19:14-12 (West 1999 & Supp. 2009). And although the Florida Statute contemplates a wholesale change in ballot order whenever the Governor is elected from a different party, not a single supervisor recalled any voter confusion resulting from that change in the past. *See* ECF No. 32, ¶ 11; ECF No. 112-6, at 97:4-22.

As for the theory that rotating ballot order may slow the voting process, this is again nothing but speculation. Indeed, this assertion by the Secretary rests entirely on *Alcorn*, 826 F.3d 708, in which the plaintiffs sought to "move ballot ordering among parties and candidates to a more purely random system" from a tiered system that treated major and minor party candidates differently. *Id.* at 719. But that is not what Plaintiffs seek here, and risks that might arise if ballot order was completely randomized are simply not present.

E. Should the Court Find the Statute Unconstitutional, the Court May Choose from Any Number of Feasible Remedies

Although Defendants attack two available remedies the Court may order if it finds the Statute unconstitutional, none of their arguments can sustain summary judgment in their favor. First, as a matter of law, the Court has the discretion to choose from any number of remedies, ranging from a declaratory judgment that the Statute is unconstitutional (requiring the State to propose a constitutional remedy), to affirmatively ordering some form of rotation, ensuring that a remedy is in place by the 2020 election. Defendants' arguments that a certain remedy might be somehow problematic are not valid reasons to reject Plaintiffs' claims. Moreover, Defendants' challenges to the feasibility of the two remedies that they address—

county-by-county and precinct-by-precinct rotation—are also not supported by the record.[20]

1. County-By-County Rotation Is Not "Constitutionally Infeasible"

The Secretary implicitly concedes that county-by-county rotation is *technologically* feasible, arguing only that it is "constitutionally infeasible." ECF No. 115, at 18. While she does not elaborate, the Secretary appears to argue that county-by-county rotation would be constitutionally problematic because some down-ballot races would still be affected by position bias. However, there is no requirement that the Court or State choose the *most fair* remedy—only that the constitutional violation be remedied by constitutional means. *See McLain*, 637 F.2d at 1169-1170 (ordering remedy that "eliminated [position bias] as much as is possible" under the circumstances, but declining to adopt "the fairest remedy for a constitutionally defective placement of candidates" where election was one month away); *Penn. v. Trump*, 351 F. Supp. 3d 791, 834 (E.D. Penn. 2019) ("[T]he Court must exercise 'discretion and judgment,' [] in balancing the competing risks and uncertainties with either a potentially under-or-over inclusive remedy, bearing in

[20] Defendants' myopic focus on these remedies leaves the impression that they are the only two available. But myriad other options are possible, including a form of hybrid rotation. As will be discussed, it is undisputable that, in the 49 counties that use Elections System & Software ("ES&S") systems, precinct-by-precinct rotation could be achieved virtually immediately, and in the remaining 18 counties it could be achieved with a software revision. The Court could direct that, in counties where it is immediately feasible, ballot order be rotated by precinct, while leaving the option to the State to either require the remaining counties to update their software or alternate ballot order county-by-county.

mind the maxim that '[w]e should not allow the infeasible perfect to oust the feasible good.'") (citing *Resorts Int'l Hotel Casino v. NLRB*, 996 F.2d 1553, 1558 (3d Cir. 1993)).

The Secretary cites no case law to sustain summary judgment where plaintiffs submit evidence of several possible remedies within the court's discretion to order. *See United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607–08 (1957) ("The District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.'").

2. Other Potential Remedies Are Not "Technologically Infeasible"

If the Court rejects the Secretary's argument regarding "constitutional infeasibility," it need not consider the Secretary's remaining arguments about remedy. However, the Secretary's argument that "other potential remedies are technologically infeasible," ECF No. 115, at 18, significantly mischaracterizes what the evidence will show. Implementing precinct-by-precinct rotation, for example, would be simple in the vast majority of counties that use ES&S as their voting-system vendor.[21] And even in the remaining 18 counties using Dominion

[21] *See* ECF No. 140-15 [**Ex. 15**], at ¶ 22 ("ES&S' voting systems 'rotate candidates' on the ballots of a number of states" and "could do the same thing in Florida"); ECF No. 140-21 [**Ex. 21**], at 45:8-47:22 (agreeing ES&S already provides the hardware and software to implement precinct-by-precinct rotation in Florida, which is activated by checking a box).

Voting Systems, precinct-by-precinct rotation would require at most a software update.[22]

All of the potential obstacles the Secretary identifies in relation to precinct-by-precinct rotation are exaggerated. *First*, the Secretary argues that "State certification of election management systems will likely be required for rotation by precinct or by style 'even if the software written by [election management system vendors] and used in other states has the potential to [rotate candidates].'" ECF No. 115, at 19. But the State certification process is entirely within the Secretary's control. *Second*, the Secretary's argument that "[t]he introduction of precinct or by-style rotation would result in 'a much bigger proofing process,'" *id.* at 20, is incorrect. If ballot order remained consistent within each precinct (as under Plaintiffs' proposed precinct-by-precinct remedy), the number of ballot styles would remain the same. *See* ECF No. 140-14 [**Ex. 14**], at 40-42, 47-48. *Third*, the Secretary's assertion that "[r]otating candidates would mean that for the logic and accuracy testing required prior to every election the 'test deck design gets much more complicated,'" ECF No. 115, at 20, is contrary to the evidence. Indeed, for county-by-county rotation, it is simply false. *See* ECF No. 140-12, at 32:17-33:4, 46:2-46:16 (explaining the testing process and timeline is the same after party of Governor changes). Precinct-by-precinct rotation, meanwhile, would add, at most, "a couple days" to the proofing process, *Id.* at 84:4-84:25, and it is not clear what

[22] *See* ECF No. 140-22, at 41:11-22 (Dominion systems capable of reading multiple ballot styles); *id.* at 60:16-61:16 (describing process of upgrading software); *id.* at 74:1-15 (same).

else, if anything, would be added to the testing process. *Fourth*, the record also does not support the Secretary's argument that rotation could add complexity to the sample-ballot process. ECF No. 115, at 20. The sample ballots published by each county list *all* the races in that county—they are not individualized for each precinct. *See* ECF No. 112-6, at 94:19-95:13; ECF No. 112-8, at 90:11-14, 95:9-16; ECF No. 112-9, at 92:9-93:17. There is no reason why the State would suddenly be required to create individualized sample ballots when it does not do so now. *Fifth*, as already explained, the claims that precinct-by-precinct rotation could complicate tabulation and state-level aggregation and reporting are not supported by the actual facts. ECF No. 115, at 21. *See supra* III.D.3.

Lastly, the Secretary's baseless claims that variations in ballot order would complicate recounts are again betrayed by the record. Supervisor White conceded rotation would not complicate a recount, ECF No. 140-11, at 107:11-108:2, and Division of Elections Director Maria Matthews' detailed description of Florida's recount process explains why this is true. The first step, the machine recount, is "just feeding in the ballots again through the machine," ECF No. 140-13, at 87:18-19, recreating the general election process. If the vote is close enough to trigger a manual recount, "[t]hen the county does their manual recount, which really is just a manual review for determination of voter intent of the overvoted and undervoted ballots, which were outstacked during the machine recount process." ECF No. 112-7 at 88:13-17. There is no basis for asserting (and the Secretary has not asserted) that a variation in ballot order would lead to more overvoted or undervoted ballots.

Even if implementing precinct-by-precinct rotation would present some logistical or administrative hurdles, that is not reason to find—particularly on summary judgment—that Plaintiffs cannot proceed and succeed on their claims. *See supra* III.D.3.[23]

IV. THE STATUTE OF LIMITATIONS DOES NOT BAR THIS ACTION

The Secretary's failure to assert the statute of limitations in her motion to dismiss, preliminary injunction opposition, or answer, waives the argument, *see American Nat'l Bank of Jacksonville v. Fed. Deposit Ins. Corp.*, 710 F.2d 1528, 1537 (11th Cir. 1983), and belies its utter baselessness.

Moreover, the Secretary misstates when the statute of limitations in this type of case begins to accrue. The Secretary relies on *Hillcrest Property, LLC v. Pasco County*, 754 F.3d 1279, 1282 (11th Cir. 2014), for the proposition that "[w]here 'the harm occurs immediately upon, and because of, the statute's enactment,' [Florida's] 4-year state of limitations begins to run from the date of enactment." ECF No. 115, at 32 (quoting *Hillcrest*, 754 F.3d at 1282). *Hillcrest*, however, was a facial takings claim, an important distinction that the Eleventh Circuit emphasized in the very sentence that the Secretary selectively quotes (omitting the

[23] The Secretary implies that Plaintiffs' attorneys have somehow dissuaded their experts and witnesses from advocating for a fairer remedial option. *See* ECF No. 115, at 16. This is factually incorrect. But even if Plaintiffs' witnesses disagreed about the fairest remedial option, it would be legally irrelevant. Having found a constitutional violation, crafting an appropriate remedy is the sole province of the Court. Plaintiffs have provided a robust factual record to give this Court insight into various remedial options available, while the Secretary continues to attack each remedial option to justify the unconstitutional status quo.

italicized language): "The Ninth Circuit reasoned in *Levald* [*Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993),] that *in the context of a facial takings claim*, the harm occurs immediately upon, and because of, the statute's enactment . . . ." *Id.* (emphasis added). The Eleventh Circuit was clear that there is a "difference[] between a statute that effects a taking and a statute that inflicts some other kind of harm. In other contexts, the harm inflicted by the statute is continuing, or does not occur until the statute is enforced—in other words, until it is applied." *Id*. at 1282 (quoting *Levald*, 998 F.2d at 688).[24]

Whether due to continuing or recurrent harms inflicted by the Statute, Plaintiffs' claims easily come within the statute of limitations. In seeking to cast aside the continuing violations doctrine here, the Secretary asks this Court to undo nearly seventy years of civil rights law and find that the continued enforcement of an unconstitutional statute can be insulated from review by the statute of limitations. *But see Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483, 486–88 (1954) (permitting plaintiffs to challenge ongoing violation of equal protection rights under state laws that had existed for decades); *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989) (citations omitted) (holding where an unconstitutional law causes ongoing harm, "continuous enforcement of [the] unconstitutional statute cannot be insulated by the statute of limitations").

[24] *Hillcrest* also forestalls the Secretary's reliance on when the individual and institutional Plaintiffs knew or should have known of the Statute's ill effects: "This Court has yet to determine whether this 'know or should know of an injury' accrual rule applies to a facial constitutional challenge to an ordinance or a statute pursuant to § 1983." *Id*. at 1281.

Further, each time the Statute is enforced to arrange ballot order in an unlawful manner, the limitations period begins anew. The applicability of the continuing violations doctrine in this manner is perhaps best articulated in *Palmer v. Board of Education*, 46 F.3d 682 (7th Cir. 1995). There, the plaintiffs, African-American parents and children living in a Chicago-area neighborhood, alleged the school district closed a school for discriminatory reasons. *Id*. at 683. The court framed the issue before it as:

> whether the suits that produced *Brown v. Board of Education*, 347 U.S. 483, should have been dismissed as untimely rather than decided on the merits. Some of the states whose laws were at issue had segregated their schools by race since the nineteenth century, but the plaintiffs did not file suit until 1950. If the claim accrued when the discriminatory assignment system came into being, then the suit was far too late.

Id. at 683. The court found, unsurprisingly, that *Brown* had been timely: "Every fall the school board decides which buildings to use and which children shall be assigned to which schools. If, as plaintiffs believe, the school board's explanation for closing [the school] is a pretext for discrimination, then each year's decision to leave the building shuttered is a new violation." *Id*. at 686.

Similarly, in the instant case, every two years the ballot order in Florida is set based on the unconstitutional Statute, constituting a new violation and restarting the statute of limitations. *Cf. Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 800 (11th Cir. 1988) (embracing continuing violation doctrine based on a series of discrete acts in employment discrimination context). And while the harm from enforcing the Statute in previous elections cannot be undone, Plaintiffs seek

to ensure that it does not inflict harm in future elections. *Cf. Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) ("But while the 1968 election is over, the burden which *MacDougall v. Green*, supra, allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935.").

Each case Defendants cite to avoid application of the continuing violation theory is inapposite, because they all involve litigation that was significantly factually different from the circumstances here. In *Lovett v. Ray*, 327 F.3d 1181 (11th Cir. 2003), a prisoner brought a challenge claiming that the defendants violated his right against *ex post facto* laws by changing his parole consideration. *Id*. at 1182. The prisoner was informed in 1998 that his parole would not be revisited until 2006 and did not bring an action until the limitations period had expired. Both the as-applied nature of this challenge and the fact that it flowed from a single decision—rather than continued enforcement actions—distinguish it here. Like *Lovett*, *Meggison v. Bailey* involved an as-applied challenge, this time to Florida forcing the plaintiff to register as a sex offender. 575 F. App'x 865, 866 (11th Cir. 2014). This again was a one-time act that, unlike here, did not involve continued enforcement actions. *Id*. at 867. *National Parks & Conservation Association v. Tennessee Valley Authority* is even further afield—it did not involve a constitutional challenge at all, but instead a 2001 suit on allegations that the Tennessee Valley Authority violated the Clean Air Act for work it performed on a coal boiler at a power plant in 1982. 502 F.3d 1316, 1318, 1320 (11th Cir. 2007). The Secretary's emphasis on the continued consequences of these one-time actions

is of no moment here, where the State continues to enforce the Statute with every new election.

V. THIS ACTION IS NOT BARRED BY LACHES

At the dismissal stage, the Court rejected the Secretary's laches argument. ECF No. 71; *see also* ECF No. 21, at 8-10. While the Secretary has properly not raised that argument again, Intervenors now take up the mantle. *See* ECF No. 117, at 27-34. None of their arguments provide grounds for the Court reverse its earlier ruling.

A. Laches Does Not Bar Claims for Prospective Relief

As the Court already held, laches "does not apply where, as here, Plaintiffs seek prospective relief." ECF No. 71, at 1. Plaintiffs seek prospective injunctive relief to protect their rights in *future* elections, and it is well-established, including by binding Eleventh Circuit authority, that laches cannot bar such an action. *See Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters.*, 533 F.3d 1287, 1321 (11th Cir. 2008) ("[L]aches . . . bar[s] only . . . the recovery of retrospective damages, not to prospective relief."); *see also Envt'l Def. Fund v. Marsh*, 651 F.2d 983, 1005, n.32 (5th Cir. 1981); *Lyons Partnership v. Morris Costumes*, Inc., 243 F.3d 789 (4th Cir. 2001). Thus, courts have not applied laches in voting rights cases where plaintiffs seek prospective relief to address "ongoing" injury. *See Garza v. Cty. of L.A.*, 918 F.2d 763, 772 (9th Cir. 1990); *Smith v. Clinton*, 687 F. Supp. 1310, 1312-13 (E.D. Ark. 1988); *Hershcopf v. Lomenzo*, 350 F. Supp. 156, 159 (S.D.N.Y. 1972) (holding "the right to vote is too fundamental in the democratic process to be denied" on basis of laches).

The cases cited by Intervenors are not to the contrary. Three of them—*Benisek v. Lamone*, 138 S. Ct. 1944 (2018) (per curiam), *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008), and *Block v. North Dakota*, 461 U.S. 273 (1983)—do not involve laches at all. One involved claims for *retroactive* relief. *See Perry v. Judd*, 471 F. App'x 219, 224-25 (4th Cir. 2012) (unpublished op.). And one is entirely inapposite. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (suit was governed by the federal doctrine that, where a plaintiff has been injured by fraud, the statute of limitations does not begin to run until fraud is discovered). The remaining cases are all clearly factually distinguishable. *See Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (applying laches based entirely on *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), in which court applied laches to a claim challenging a redistricting plan "after the last election" under the plan and where "judicial relief ma[de] no sense" and "would be completely gratuitous[]"); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 908-09 (D. Ariz. 2005) (suit seeking to undo redistricting plan in federal court that plaintiffs had already successfully challenged and enjoined in state court where new federal claim was "a transparent attempt to gain a federal jurisdictional foothold" and plaintiffs "waited until just weeks before critical election deadlines to file suit"); *Maxwell v. Foster*, No. CIV.A.98-1378, 1999 WL 33507675, at *1 (W.D. La. Nov. 24, 1999) (applying laches to redistricting challenge where doing so would "not erect some form of permanent barrier between Plaintiffs and the remedy they seek" because plaintiffs could reassert their claim after upcoming redistricting cycle).

B. Intervenors Fail to Establish the Essential Elements of Laches

Even if laches *could* apply, Intervenors have not established the requisite elements. Laches is only available as a defense when the party seeking to avoid liability can show: (1) a delay in asserting a right or claim, which (2) was not excusable, and (3) caused undue prejudice to the party against whom the claim is asserted. *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1546 (11th Cir. 1986). The burden of establishing each essential requirement is on Intervenors, and they fail to carry it. *See Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1516 (11th Cir. 1984).

1. Plaintiffs Did Not Inexcusably Delay

Intervenors' assertion that Plaintiffs "inexcusably delayed" rests on a false premise and misinterprets the law. The individual Plaintiffs have affirmed that they were unaware of the Statute and its impact until recently. *See* ECF No. 140-1, at ¶ 4; ECF No. 140-2, at ¶ 4; ECF No. 140-3, at ¶ 4. The Court must assess the extent and reasonableness of each Plaintiff's purported delay in bringing suit and may not impute knowledge of voting rights violations from one plaintiff to another. *See Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 579 n.2 (S.D.W.Va. 2000) (holding a candidate's and political party's delay in asserting First Amendment challenge to ballot access laws did not apply to registered-voter co-plaintiffs). Individual voters "should not be forced to anticipate and predict possible constitutional violations." *Nader*, 112 F. Supp. 2d at 579 n.2. Indeed, courts have not hesitated to allow individual plaintiffs to challenge the constitutionality of state laws that have been in place for decades. *See, e.g.*, *Brown*, 347 U.S. 483.

Moreover, the Eleventh Circuit has repeatedly rejected broad interpretations of laches that would require plaintiffs to "sue first and ask questions later." *Kason Indus., Inc. v. Component Hardware Grp., Inc.*, 120 F.3d 1199, 1206 (11th Cir. 1997). Here, an accumulating body of research has played a critical role in creating an evidentiary record, establishing the very real impact that position bias has on elections, and the specific and substantial irreparable harms inflicted by the Statute in particular.[25] Those injuries have significantly worsened in recent years by a streak of close elections. With only one exception, the margin of victory enjoyed by the winners in Florida gubernatorial elections between 1978 to 2006 was never less than 9.2 percentage points (and reached as high as 29.4 in 1982); in contrast, the 2014 and 2018 races were decided by 1.0 and 0.4 percentage points, respectively. Under the circumstances, it cannot fairly be concluded that any of the Plaintiffs inexcusably delayed in bringing this suit.

2. Defendants Have Not Suffered Prejudice

Intervenors also fail to establish prejudice. "Laches depends on more than inexcusable delay in asserting a claim; it depends on inexcusable delay causing undue prejudice to the party against whom the claim is asserted." *Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98, 101 (5th Cir. 1978).

[25] The organizational plaintiffs had not learned of the specific impact of position bias in Florida until experts were commissioned to conduct the research. *See, e.g.*, ECF No. 140-4, at ¶ 4; ECF No. 140-5, at 21:15-21, 22:1-5; ECF No. 140-10, at 23:12-25.

The party against whom Plaintiffs' claims are asserted is the Secretary, not Intervenors, who inserted themselves in this action over Plaintiffs' objections. *See* ECF No. 33. The Secretary's Motion does not raise laches at all, and thus does not argue that she has suffered prejudice from any delay in bringing the suit. Intervenors provide no argument for why they may argue prejudice on the Secretary's behalf. *Cf. Quest Energy Mgmt. Grp.*, 768 F.3d at 1109. But even if they could properly do so, "the mere passage of time does not constitute laches unless the passage of time is shown to have lulled Defendant into actions in reliance thereon." *Gen. Conf. Corp. of Seventh-Day Adventists v. Perez*, 97 F. Supp. 2d 1154, 1162 (S.D. Fla. 2000). Thus, laches is traditionally only appropriate "when witnesses have died or evidence has gone stale." *Trustees for Alaska Laborers Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512, 518 (9th Cir. 1987).

Apparently recognizing this legal hurdle, Intervenors argue that "evidentiary prejudices . . . flow from Plaintiffs' delay" because "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." ECF No. 117, at 32. But legislators' memories are entirely irrelevant because none of Plaintiffs' claims turn on legislative intent. And with respect to evidence that is actually relevant—the existence and magnitude of position bias—the passage of time has allowed for a more robust evidentiary record and the development of a body of scholarship that will only aid in understanding and adjudicating the merits.

Further, any costs in remedying the Statute are the routine consequence of an adverse merits ruling, insufficient to establish laches. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1286 (11th Cir. 2015) (prejudice "must stem specifically from [] delay in bringing suit, rather than from the consequences of an adverse decision on the merits"). Intervenors cannot rely on such (theoretical) costs to establish prejudice.

VI. THIS ACTION IS NOT BARRED BY CONSTITUTIONAL ESTOPPEL

Finally, the Secretary seeks summary judgment based on constitutional estoppel by relying on out-of-context quotations from two inapposite D.C. Circuit cases, while ignoring Eleventh Circuit and Supreme Court case law counseling against its application in this very context. The Secretary also emphasizes that Plaintiffs have not simultaneously challenged similar ballot order statutes nationwide. But neither fact has any legal relevance to the Court's inquiry. While it is true that Plaintiffs have not undertaken the costly and resource-intensive task of simultaneously challenging every similar ballot order statute nationwide, that fact—like the doctrine of constitutional estoppel itself—has no bearing on Plaintiffs' entitlement to relief here.

First, both cases the Secretary cites are inapposite because they involved individuals seeking to protect interests that existed only as a result of the entities whose constitutionality they sought to challenge, the sole situation in which the doctrine of constitutional estoppel is applicable. In *Robertson v. Federal Election Commission*, 45 F.3d 486, 490 (D.C. Cir. 1995), a presidential candidate who

received matching funds from the Federal Election Commission ("FEC") challenged the constitutionality of the FEC's composition when it sought repayment of some of those funds. The court held his claim was barred by constitutional estoppel because the candidate sought a "categorical, structural change unrelated to the funds he [] received," only "after having taken the money." *Id.* Similarly, in *Wilkinson v. Legal Services Corporation*, 80 F.3d 535, 537 (D.C. Cir. 1996), the Inspector General of the defendant corporation challenged the nonrenewal of his contract on the grounds that the board of directors that refused to renew his contract was unconstitutionally composed. The court found him constitutionally estopped because he was "employed and compensated for much of the time by the same allegedly illegal Board" and waited until after his employment was terminated to bring suit. *Id.* at 538. In contrast, the fundamental rights that Plaintiffs seek to vindicate are not a function of the Statute, nor do Plaintiffs seek to maintain any advantage they may receive from the Statute while avoiding its disadvantages.

The Secretary claims that the only case in which the Eleventh Circuit considered the doctrine, *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991), is inapposite and relegates it to a footnote. *See* ECF No. 115, at 38 n.8. But this does not fairly characterize the case. In fact, the court's determination that constitutional estoppel was inapplicable, and its discussion of Supreme Court precedent in making that determination, is not only directly relevant to the question of whether the Court can or should apply it in the instant case, it demonstrates that it may not.

In *S.J. Groves*, the court considered a constitutional challenge to the county's minority business enterprise resolution by an unsuccessful bidder on an airport project. *Id.* at 754-55. The county raised the defense of constitutional estoppel, and the court rejected it, noting the Supreme Court's admonition in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456–57 (1988), against overapplication of the doctrine: "Appellants obviously are not creatures of any statute, and we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it." 920 F.2d at 769 (quoting *Kadrmas*, 487 U.S. at 456–57) (internal quotation marks omitted).

Finally, the Secretary's repeated assertions that Democrats in general may benefit from similar statutes in other states, *see* ECF No. 115, at 40-41, have no legitimate bearing on the application of the doctrine of constitutional estoppel, the constitutionality of the Statute, or, indeed, any aspect of this case. The suggestion that to obtain a judgment in a case such as this challenging the constitutionality of a specific state statute, a plaintiff must also simultaneously mount a judicial challenge against any similar law from which persons with whom the plaintiff shares a political affinity gain some benefit, is beyond absurd.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment should be denied.

LOCAL RULE 7.1(C) CERTIFICATION

Pursuant to Local Rule 7.1(C), Plaintiffs' counsel confirm that they complied with the attorney-conference requirement of Local Rule 7.1(B), and that

counsel for Defendant and for Defendant-Intervenors have confirmed that their clients oppose the relief requested.

LOCAL RULE 7.1(F) CERTIFICATION

Counsel for Plaintiffs, Fritz Wermuth, Esquire, certifies that this motion contains 15,965 words, excluding the caption, Table of Contents, Table of Authorities, and Certificate of Service.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Respectfully submitted,

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