UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

Plaintiffs,

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

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

Defendant.
_____/

SECRETARY'S REPLY IN SUPPORT OF
HER MOTION FOR SUMMARY JUDGMENT

I. Introduction: the Democrats' many problems.

Democrats accuse the Secretary of "fabricating . . . a 'consensus,'" ECF 142 at 26, "trick[ery]," *id.* at 43, placing a "thumb on the scale," *id.* at 46, and otherwise being "absurd." *Id.* at 68. Hyperbole aside, Democrats ignore the very real problems with their case. They cannot carry *their* burden of establishing Article III standing because they do not provide specific facts establishing an injury-in-fact or redressability. They cannot state an *Anderson-Burdick* claim because *Anderson-Burdick's* framework cannot apply when, as here, the state law being challenged is silent on the voting process. They cannot distinguish the cases the Secretary cites by simply stating that the cases involved minor parties because, as explained below, the distinction collapses under the weight of the Democrats' theory that there is a

constitutional right to a fair share of the windfall vote effect. The cases they cite, however, are distinguishable because Florida neither gives bureaucrats an opportunity to play favorites, *nor* entrenches incumbents atop the ballot. Faced with a facially neutral statute and in a misguided effort to sidestep the statute of limitations, Democrats attempt but fail to equate themselves to the plaintiffs in *Brown v. Board of Education*, 347 U.S. 483 (1954) who sought to remedy blatant discrimination. They claim that constitutional estoppel cannot apply when they—decades-long voters and national Democratic organizations—challenge a statute that has benefited Democrats more often than Republicans in Florida and is nearly identical or similar to statutes in other states where Democrats continue to benefit.

II. Article III Standing: a progressively increasing burden requiring "specific facts."

Lujan v. Defenders of Wildlife made clear that the plaintiff's burden to produce evidence supporting Article III standing progressively increases as litigation proceeds from the motion to dismiss stage to the summary judgment stage and eventually to trial. 504 U.S. 555, 560-62 (1992). While general factual allegations might do at the pleading stage, at the summary judgment stage *the plaintiff* bears the burden of presenting "specific facts," which "will be taken as true," for "each element" of Article III standing. *Id.* at 561. Democrats do not allege "specific facts" sufficient for the injury-in-fact and redressability elements. *Id*.

A. ***Injury-in-fact*****:** What Democrats are and are not alleging brings injury-in-fact into stark relief. Democrats are *not* alleging that state law prevents voters from registering to vote, casting ballots in a language they understand, casting ballots at a convenient in-person location, or curing their absentee ballots. Rather, they allege that Democratic voters are less likely to *elect* Democratic candidates because the candidates are not listed first on the ballot and suffer from the ensuing windfall vote effect that accrues to the first-listed candidates. Electoral *outcomes* affected by the windfall vote effect—not the voting process itself—are the injury.

Their expert Professor Krosnick says that there is a windfall vote effect. Professor Rodden tells us that the effect is more pronounced in down-ballot races that do not receive as much media or public attention. Professor Herrnson offers one possible explanation for *why* there is such a thing as a windfall vote effect: proximity error. Notably, none tells us that the outcome of a single Florida election—a single electoral outcome—would have been different but for the effect.

Importantly, for summary judgment purposes, we must then ask whether Democrats have provided sufficient, "specific facts" to establish that the effect matters enough to cause an injury-in-fact, i.e., that it has kept Democratic voters from *electing* Democratic candidates as the Democrats allege in their Complaint. *Lujan*, 504 U.S. at 561. They have not.

Yes, Democrats seem to have picked one of many numbers from Professor Krosnick for the *average* windfall vote effect that allegedly keeps the Democrats in Florida from electing Democratic candidates, although Professor Rodden still provides other numbers for the factfinder to choose. ECF 142 at 37. But averages tell us nothing about any given election. Democrats and their experts remain silent on the critical issue. We are then simply left with the inference that *any* windfall vote effect is impermissible, which cannot be right,[1] and the inference that *any* such an effect could have been outcome determinative. ECF 142 at 44. Inferences at the summary judgment stage are not enough especially when stacked against a history of Democrats and Republicans winning their share of close elections in Florida. ECF 111 at 459. Democrats have failed to provide "specific facts" concerning an injury-in-fact—specific instances where the effect mattered and prevented Democrats from electing the candidate of their choice. *Lujan*, 504 U.S. at 561.[2]

B. Redressability: Redressability poses an even more glaring problem. The material and undisputed facts show that county-by-county rotation cannot randomly equalize Florida's population, does nothing for any down-ballot windfall

[1] The windfall vote effect, assuming it exists, cannot be completely eliminated. That would require each candidate in each election to be listed first on a near-equal number of ballots. Whether rotating by-precinct, by-county or by-style, the State cannot achieve that result. There has also been no suggestion that the effect must be eliminated in its entirety. So we cannot conclude that *any* such effect is actionable.
[2] If there exists no Article III injury-in-fact, then there cannot be a burden on the right to vote under *Anderson-Burdick*.

vote effect, poses problems for state-level reporting, and could spawn at least 104 separate lawsuits by down-ballot candidates seeking their share of the windfall vote. ECF 115 at 22-23. Precinct-by-precinct rotation is extraordinarily burdensome for all supervisors of elections but especially for Supervisor White in Miami-Dade County, because she simply cannot implement it. *Id.* at 23-24. By-style rotation suffers from many of the same problems as county-by-county rotation. *Id.* at 24. And we know from elections officials that any kind of ballot rotation must be preceded by voter education to avoid voter confusion and uphold the integrity of the State's elections. *Id.* at 28-29.[3] Democrats respond that this Court should just strike down Florida's Ballot Order Statute and cobble together something better. ECF 142 at 19-20 (this Court has "broad and flexible equitable powers to fashion a remedy"); *id.* at 53-57 (suggesting an imperfect remedy for statewide races, counties with ES&S equipment, and assuming, for example, that *hand* recounts would remain unaffected when rotating by-style or by-precinct in the counties).

First, Democrats fail to mention that this Court's equitable powers to shape a remedy are in tension with the plain text of Article I, Section 4, Clause 1 and Article

[3] Democrats cite a New Jersey League of Women Voters employee for the proposition that voter education is not necessary. ECF 142 at 51-52. They neglect to mention that the same employee noted that New Jersey had been doing candidate rotation for more than 12 years and that she did not know what approach New Jersey previously used. Thus, she could not speak to the need for voter education before introducing candidate rotation. ECF 112-14 at 18-20.

II, Section 1, Clause 2 of the U.S. Constitution. These provisions provide plenary authority to the legislative branch when it comes to establishing the time, manner, and place of elections. An invitation for this Court to write, rewrite, or otherwise step in the shoes of the Florida Legislature or Congress would be unconstitutional. *See Bush v. Gore*, 531 U.S. 98, 113-15 (2000) (Rehnquist, C.J., concurring).

Second, even if this Court had the constitutional footing to fine-tune and then implement the elections code at the state, county and precinct level, Democrats still propose only half-measures as remedies for the windfall vote effect. Their county-by-county approach does nothing for down-ballot races. Their by-style approach, among other things, cannot equitably divide the State's population and thus cannot undo the windfall vote effect they complain of in this case. Their precinct-by-precinct approach is rife with technical and practical difficulties as the elections official depositions *and* Dominion representative's deposition make clear.[4] And because Democrats insist on rotating only the major party candidates, as discussed in greater detail below, they all but guarantee lawsuits by minor party or independent candidates pining for a share of the windfall vote.

Democrats thus fail provide "specific facts" showing that it is "'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable

[4] ECF 115 at 22-27; ECF112-13 at 44-45; 55-58; 60-62; 65; 67; 72-76.

decision." *Lujan*, 504 U.S. at 561. Especially so for down-ballot races where the alleged injury is more acute according to Professor Rodden.

III. *Anderson-Burdick* test: it is not a constitutional catch-all.

Assuming Democrats have standing, they still do not state a claim under *Anderson-Burdick*. The test, while flexible, is not a catch-all for anything related to election law. The Secretary agrees with Democrats that the test applies when judging burdens on the "registration and qualification of candidates, the selection and eligibility of candidates, or the voting process itself." ECF 142 at 31 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). But preferred ballot placement does not fall into any of these categories. It has nothing to do with registration and qualification or selection and eligibility of candidates. The voting process involves registering to vote, choosing a method of voting, casting a vote, and then having the State count that vote. Ballot order affects none of these processes or indeed the fundamental right to vote. It is alleged to affect electoral outcomes.

Thus, it makes little sense to cram Democrats' claims into the *Anderson-Burdick* framework. Holding otherwise would mean that *Anderson-Burdick* has no limiting principle test and, by this faulty logic, *every* vote dilution claim should also be decided under this framework, which clearly does not happen. In short, the Southern District of New York got it right in *New Alliance Party v. New York State*

Board of Elections, 861 F. Supp. 282, 295 n.15 (S.D.N.Y. 1994), when recognizing that "there are election law regulations which do not burden constitutional rights and as such render the *Anderson*[*-Burdick*] test superfluous." (Citing *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 222 (1989)). Florida's Ballot Order Statute is one such regulation.

IV. Distinguishing Cases: the Democrats' distinction does not matter.

Democrats also attempt to distinguish cases the Secretary cites. While every federal case decided since the advent of the *Anderson-Burdick* test has gone one way, the Secretary's way, Democrats refuse to call this an emerging consensus. Fine. But it not enough to distinguish the Secretary's cases by claiming that the cases involve minor parties and independents. ECF 142 at 24. Consider the faulty logic: (1) there is a windfall vote effect; (2) the effect matters to the outcome of elections; (3) Democrats and Republicans, and their affiliated organizations, should have a near equal share of the benefits from this effect; but (4) the minor parties and independents should *never* benefit from the windfall vote effect.

While it is true that the U.S. Supreme Court allows states to "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), this does not mean that minor parties and independents can be subjected to a systematic, intentional, discriminatory and perpetual denial of a share of a *new* constitutional

right to the windfall vote effect. After all, both *Anderson* and *Burdick* vindicated the rights of independent candidates.

V. Distinguishing Cases: the Secretary's distinctions matter.

The distinctions offered by the Secretary, on the other hand, explain the different outcomes among the cases. Democrats' cases stand apart because they were either decided before the U.S. Supreme Court created the *Anderson-Burdick* test, which the Democrats seem to think applies, involved instances where election officials chose their favorite candidate, or simply put incumbents first, forever and always. These distinctions matter.

Discretion can be abused. Discretion was abused in *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), and *Sangmeister v. Woodard*, 565 F.2d 460, 468-69 (7th Cir. 1977). Florida's Ballot Order Statute is immune from such abuse precisely because there is no room for the exercise of discretion. And, unlike *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996), there is no suggestion by Democrats that the Democratic-led Florida Legislature (with three Republican members) enacted Florida's Ballot Order Statute for illegitimate purposes that were "entirely political" and the result of "political patronage." *Id.* at 1580-81.

Florida's Ballot Order Statute is also *not* an incumbent first statute. The undisputed facts prove as much. ECF 115 at 44-45. Like the Tennessee law upheld in *Green Party v. Hargett*, 2016 U.S. Dist. LEXIS 109161, at *122 (M.D. Tenn.

Aug. 17, 2016), Florida "does not entrench particular political parties in favorable positions." If the political party of the winning gubernatorial candidate "changes, as it has in the past, the order in which parties appear on the ballot also changes." *Id.* As the Southern District of New York explained, incumbent first statutes are unconstitutional, in part, because they place additional burdens on voters:

> Statutes that link a party to a given column or row on a ballot should not be confused with incumbent first formats, in which first place is allotted in every race to the incumbent, regardless of party affiliation. Incumbent first statutes do not produce a symmetrical ballot. Even were all incumbents to be from the same party, there is no guarantee that the remaining parties would be listed in a parallel order. A voter who rationally casts his votes by allegiance to party will have a more burdensome task of finding his candidates of choice under the incumbent first method than on a format which allots a particular column on the ballot to each party. It could be reasonably argued, if position bias does exist on a ballot, that incumbent first statutes are really intended to suppress opposition by freezing the status quo, not to prevent voter confusion.

New Alliance Party, 861 F. Supp. at 298.

Accordingly, the Democrats' cases fail to support their argument. And, to the extent Democrats contend that *Anderson-Burdick* applies, they fail to explain why the cases cited by the Secretary, decided after *Anderson-Burdick*, should not control.

VI. Statute of Limitations: it applies and bars the claims.

The statute of limitations bars Democrats from challenging a 68-year old statute that the Democratic-led Florida Legislature enacted.

First, the Secretary has not waived the statute of limitations defense. Under the circumstances, where timeliness has been a problem for Democrats since the preliminary injunction stage, it is appropriate for the Secretary to raise the statute of limitations as a defense in her Motion for Summary Judgment. The Eleventh Circuit said so in *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797-98 (11th Cir. 1989). Democrats make no attempt to distinguish *Grant*.

Second, Democrats are not "minors" who "seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis." *Brown*, 347 U.S. at 487. They are political partisans who waited decades to file a lawsuit for political advantage—unlike the schoolchildren who sued *when* it was time for them to go to nonsegregated schools and thus would have been well within any applicable statute of limitations and would have benefited from the capable-of-repetition-yet-evading-review exception to mootness until a resolution.

Third, stripped to its essence, the statute of limitations argument turns on whether the continuing violation exception applies. The issue before this Court is thus whether each election held under Florida's Ballot Order Statute is a *separate, discrete but unlawful act* or whether each election simply represents the *continuing ill effects from the original unlawful act*, i.e., Florida's decision to adopt the current ballot order scheme in 1951 or, more generously, when the Democrats knew or should have known about the scheme in 1970 or 1998. ECF 115 at 40-41 (collecting

cases). If it is the former, then Democrats have a reprieve. If it is the latter, then the statute of limitations bars the claims.

At issue here are the ill-effects from the original, allegedly unlawful act and so the narrow continuing violations exception is inapplicable. Florida's decision to order candidates in the manner outlined in its Ballot Order Statute is the allegedly unlawful act. Every election, the State officials simply carry out their ministerial task of complying with this original, allegedly unlawful act. This ministerial compliance is only the ill-effect because it involves no "independent consideration" by the State to discriminate against the Democrats anew. *Knox v. Davis*, 260 F.3d 1009, 1014 (9th Cir. 2001). Stated differently, each election represents the "continuing impact" from the original, allegedly unlawful act, and so the State's 4-year statute of limitations applies. *Id.* at 1015 (finding exception inapplicable and applying statute of limitations to bar § 1983 claim concerning prison visitation); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007) ("A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.").

VII. Constitution estoppel: a means of preventing constitutional gamesmanship.

Finally, we are told that "the Secretary's repeated assertions that Democrats in general may benefit from [statutes similar to Florida's Ballot Order Statute] have no legitimate bearing on the application of the doctrine of constitutional estoppel, the constitutionality of [Florida's Ballot Order] Statute, or, indeed any aspect of this case." ECF 142 at 68. Why not? If Priorities USA, the Democratic National Committee, Democratic Senatorial Committee, Democratic Congressional Campaign Committee, Democratic Governors Association, and the Democratic Legislative Campaign Committee believe Florida's Ballot Order Statute to be an unconstitutional burden on the rights of Democratic voters and candidates, then it is fair to ask why these *national* organizations are content with benefiting from similar statutes elsewhere. It is also fair to ask why Democrats waited to challenge a statute until *after* they had accrued its benefit over the preceding decades.

Questions like these were at the heart of the D.C. Circuit's decisions in *Robertson v. Federal Election Commission*, 45 F.3d 486 (D.C. Cir. 1995), and *Wilkinson v. Legal Services Corporation*, 80 F.3d 535 (D.C. Cir. 1996). Constitutional estoppel provided the D.C. Circuit the means of answering these questions and keeping litigants from playing games with the U.S. Constitution. Similarly, if the windfall vote effect exists, per the Democrats' experts, then Democrats benefited from it in Florida and continue to benefit from it elsewhere.

Estoppel applies. *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991), does not require a contrary result.

VIII. Conclusion: the Secretary is entitled to summary judgment.

This Court should grant the Secretary's Motion for Summary Judgment for the reasons outlined in her Motion, ECF 115, and this Reply.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned further certifies that this filing complies with the size, font, and formatting requirements of Local Rule 5.1(C), and that this filing complies with the word limit in Local Rule 7.1(F) because it contains 3133 words, excluding the case style, signature block, and certificates.

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Respectfully submitted by:

BRADLEY R. MCVAY (FBN 79034)
General Counsel
brad.mcvay@dos.myflorida.com
ASHLEY E. DAVIS (FBN 48032)
Deputy General Counsel
ashley.davis@dos.myflorida.com
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building Suite, 100
500 South Bronough Street
Tallahassee, Florida 32399-0250
(850) 245-6536 / (850) 245-6127 (fax)

/s/ Mohammad O. Jazil

MOHAMMAD O. JAZIL (FBN 72556)
mjazil@hgslaw.com
GARY V. PERKO (FBN 855898)
gperko@hgslaw.com
JOSEPH A. BROWN (FBN 25765)
josephb@hgslaw.com
KRISTEN C. DIOT (FBN 118625)
kdiot@hgslaw.com
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
Phone: (850) 222-7500
Fax: (850) 224-8551

Dated: May 7, 2019

Counsel for the Secretary of State

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail to the following on this 7th day of May, 2019:

Frederick S. Wermuth
KING, BLACKWELL, ZEHNDER &WERMUTH, P.A.
P.O. Box 1631
Orlando, FL 32802-1631
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
fwermuth@kbzwlaw.com

Marc E. Elias
Elisabeth C. Frost*
Amanda Callais*
Jacki L. Anderson*
John M. Geise*
Alexi M. Velez*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@perkinscoie.com
efrost@perkinscoie.com
acallais@perkinscoie.com
jackianderson@perkinscoie.com
jgeise@perkinscoie.com
avelez@perkinscoie.com

Abha Khanna*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
akhanna@perkinscoie.com

Counsel for the Plaintiffs
**Admitted Pro Hac Vice*

Jason Torchinsky
Phillip M. Gordon
Shawn T. Sheehy
45 North Hill Drive, Suite 100
Warrenton, VA 20106
P: (540) 341-8808
F: (540) 341-8809
JTorchinsky@hvjt.law
pgordon@hvjt.law
ssheehy@hvjt.law
Counsel for Defendant-Intervenors

/s/ Mohammad O. Jazil

Attorney