UNITED STATES DISTRICT
COURT NORTHERN DISTRICT
OF FLORIDA TALLAHASSEE
DIVISION

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

INTERVENORS-DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

Democratic Plaintiffs' arguments rely upon the simple, yet fundamentally flawed, premise that the Ballot Order Statute ("Statute") acts to benefit Republicans to the detriment of Democrats. The Statute does nothing of the sort. It is the voters of Florida that are the cause of Plaintiffs' complaints and it is the voters of Florida that should decide this matter: just as they have done for the past 68 years. The Statute merely directs election officials as to how candidates are ordered on the ballot. It does this by relying on the voters to tell the Secretary, by way of their votes every four years, which political party is listed first, then second on the ballot. Democratic Plaintiffs' real issue is not with the Statute, but with the voters.

As if it were not bad enough that Democratic Plaintiffs come to this Court in search of a judicial fix to a political problem, they do so without any requested remedy. Democratic Plaintiffs essentially invite the federal judiciary to make, what is fundamentally, a policy decision without even firmly suggesting a remedy. This Court should reject this invitation. The only proper course is to recognize that Florida's facially neutral statute does not violate the constitution and to dismiss this case.

[1] Some of the arguments contained herein assume, *arguendo*, that a Ballot Order Effect exists in Florida. This assumption is not an admission. Intervenor-Defendants contest both the existence and size of any Ballot Order Effect.

ARGUMENT

I. DEMOCRATIC PLAINTIFFS' THEORY OF THIS CASE IS FLAWED.

Democratic Plaintiffs' theory of harm is fundamentally flawed from its inception. Democratic Plaintiffs state some version of the following repeatedly: the Ballot Order Statute is "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, e.g.,* (ECF 142 at 19). This recasting of what the statute does undermines their case. Plaintiffs' confusion as to their own harm naturally results in incoherence on their requested remedy.

a. Plaintiffs' Claims are Nonjusticiable.

Democratic Plaintiffs attempt to sidestep justiciability in their response. *See* (ECF 142 at § II). In doing so, Plaintiffs misconstrue the relevant law. In this case, the *sin qua non* of the justiciability question is how much Ballot Order Effect is *too much*? Democratic Plaintiffs, while conceding the fundamental question, do nothing to answer it. *See* (ECF 142 at 22). Plaintiffs instead merely disregard any "litmus test" in voting rights cases.

By its very nature, the political question doctrine is a litmus test insofar as it is jurisdictional. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) ("The existence of a political question deprives a court of jurisdiction.") (citing *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319

(11th Cir. 2001)). If a case presents a political question, the court cannot review the merits question. *See, e.g., Colegrove v. Green*, 328 U.S. 549, 552 (1946) ("[D]ue regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."). Accordingly, voting rights cases that present a nonjusticiable political question are not analyzed under *Anderson/Burdick* because the court lacks jurisdiction to do so.

The authorities Plaintiffs rely upon almost universally involve cases, contrary to the case at bar, where *any* infringement is potentially suspect under the constitution. *See, e.g., Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Ok. 1996) (always listing Democrats on the ballot first by statute); *Obama for Am. v. Husted*, 697 F.3d 423, 427, 431 (6th Cir. 2012) (granting a class of voters three extra days of early voting). The case at bar is inapposite for multiple reasons. First, any determination here, contrary to Plaintiffs' authority, requires the judiciary to "move beyond areas of judicial expertise." *See Goldwater v. Carter,* 444 U.S. 996, 998 (1979) (Powell, J. concurring); *see also* (ECF 117 at 21). This Court must determine, in a "principled, rational, and . . . reasoned" way, how much Ballot Order Effect is too much.[2] *See Vieth*, 541 U.S. at 278. Plaintiffs have not provided any manner to

[2] Even if this Court felt this question of fundamental state policy was "manageable," Democratic Plaintiffs have given no reasons as to why any specific amount of effect is too much. This academic debate has simmered for years without definitive resolution and is not amenable to resolution at trial.

do so, therefore their claim must fail. *LULAC v. Perry*, 548 U.S. 399, 419-420 (2006) (stating that a plaintiff must provide the Court with a reliable standard to determine how much partisanship is too much).

b. Plaintiffs Suffered no Injury-in-Fact that is Redressable.

i. Plaintiffs Have Not Shown Individualized Harm.

Democratic Plaintiffs have not shown individualized harm.[3] "[A] person's right to vote is 'individual and personal in nature.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (unanimous op.) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). Therefore, only "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Gill*, 138 S. Ct. at 1930 (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)).

Democratic Plaintiffs incorrectly exclaim that *Gill* "is entirely inapposite," *see* (ECF 142 at 17), when, in fact, *Gill* is precisely on point. First, Plaintiffs attempt to distinguish *Gill* as a partisan gerrymandering case.[4] *See id.* at 17. While this is

[3] According to Democratic Plaintiffs, harm exists because of Florida's "[e]xceedingly close elections . . . ." *See, e.g.,* (ECF 142 at 14). Democratic Plaintiffs seemingly take the position that their constitutional rights increase based on the closeness of an election. *See* (ECF 142 at 30, 36). (calling the Ballot Order Effect "increasingly consequential (and detrimental to Plaintiffs)"). Besides its facial absurdity, this Court should reject Democratic Plaintiffs' proposition that constitutional rights are wholly dependent on the outcome of an equation. At the very least, this alleged harm underlies this case's lack of justiciability. *See infra* at 3-5.

[4] Democratic Plaintiffs also rely, in part, on Justice Kagan's concurrence in *Gill* for their associational standing claims. (ECF 142 at 18). Nothing in the *Gill* concurrence

superficially true, the alleged harm—vote dilution—is identical. *Compare Gill*, 138 S. Ct. at 1930 (explaining vote dilution as a harm where a vote "carr[ies] less weight" than it otherwise would) *with* Comp. (ECF 1 at 33) (Plaintiffs' harm is the "dilut[ion] [of] their vote relative to the votes for the favored political party candidate listed first on the ballot.") *and* (ECF 142 at 15) (describing every plaintiffs' vote as being "diluted"). *Gill* is precisely on point because the dilutionary harms alleged are identical.

Furthermore, attempting to distinguish *Gill* on the basis of the district specificity required in the gerrymandering context is also of no moment. Plaintiffs confuse their alleged injury, vote dilution, with the means of proving that injury in *Gill*, district specificity. *Compare Gill*, 138 S. Ct. at 1929 ("[V]oters who allege facts showing disadvantage to themselves *as individuals* have standing . . . . (emphasis added)) *with id.* at 1930 ("To the extent the plaintiffs' alleged harm is the dilution of their votes, *that injury* is district specific." (emphasis added)). It is the lack of Plaintiffs' individualized injury which precipitates their lack of standing.

Democratic Plaintiffs' "evidence" for their vote dilution theory is that their candidates lost elections. *See, e.g.,* (ECF 140-1 at ¶3) ("I have voted for and supported many Democratic Party candidates who have lost to the Republican

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is binding on this Court. *Maryland v. Wilson*, 519 U.S. 408, 412 (1997). Furthermore, *all* of the concurring Justices signed the *Gill* majority opinion, which does, in fact, bind this Court.

candidate by much less than 5.35 percentage points . . .”). This is insufficient for two primary but non-exhaustive reasons. First, the constitution “guarantees the right to participate in the political process; it does not guarantee political success.” *Badham v. March Wong Eu*, 604 F. Supp. 664, 675 (N.D. Cal. 1988) *sum. aff.* 488 U.S. 1024 (1989) (specifically referring to the First Amendment). Second, Democratic Plaintiffs, like many candidates of all political persuasions, lose elections, both close and not so close, because of the choices of voters, and not because of the Statute. *See supra* at 10-12; *see also* (ECF 117 at 15-16); (ECF 141 at 15-17, 38-39).

This “Court is not responsible for vindicating generalized partisan preferences” and is instead “to vindicate the individual rights of the people appearing before it.” *Gill*, 138 S. Ct. at 1933. Therefore, summary judgment should be granted against Democratic Plaintiffs, whose claims abound with both factual and legal infirmities.

ii. Democratic Plaintiffs Lack of Remedy Deprives them of Standing.

Finally, Democratic Plaintiffs’ lack of position on remedy firmly reinforces the speciousness of their claims. Astonishingly[5], Democratic Plaintiffs invite this Court to “choose any number of remedies.” *See, e.g.,* (ECF 142 at 36); *see also id.* at 42 n.20. Plaintiffs’ idea of remedy is akin to making a meal with a *prix fixe* menu:

[5] As a basic principle of fairness, Defendants should not have to speculate as to the remedy Plaintiffs seek.

cobble something together and it is bound to be pretty good. The standing requirement articulated under *Lujan* and its progeny, however, stands for the proposition that the redressability requirement is contingent upon Plaintiffs' "requested relief" not upon the possibility that a district court can craft some as of yet identified relief. *See Gill*, 138 S. Ct. at 1934 ("'[S]tanding is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." Furthermore, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court . . . ." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Nothing the Democratic Plaintiffs' have put forward on remedy—such as it is—can "bootstrap" standing for Democratic Plaintiffs.

It appears that out of the "myriad [of] other options" there are three possible remedies Plaintiffs seek: (1) precinct-by-precinct; (2) county-by-county; and (3) a hybrid solution. *See* (ECF 142 at 53 n.20). Each of these remedies are at best infeasible or at worst will result in constitutional infirmities of their own. The county-by-county approach suffers such infirmities and it is less a remedy and more an invitation to ceaseless litigation. *See* (ECF 141 at 17-22). Alternatively, a precinct-by-precinct remedy is undoubtedly infeasible by 2020 (or perhaps any other election in the near future) and, if possible at all, enormously burdensome and costly to the State of Florida and each County Supervisor of Elections. *See, e.g.,* (ECF 117

at 19). A hybrid remedy fares no better as it presents the worst of each of the other two.

In any event, Plaintiffs have not carried even their minimal summary judgment burden that a feasible and workable remedy exists. As they have not done so, they deprive themselves of standing. *Lujan*, 504 ("[I]t must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." (quotation marks omitted)).

II. DEMOCRATIC PLAINTIFFS' CLAIMS ARE SUBJECT TO RATIONAL BASIS REVIEW.

Florida is vested with the constitutional authority to enact elections regulations. *See* U.S. Const. art. I, § 4; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Burdick v. Takushi*, 504 U.S. 428, 433, 441 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Therefore, the Supreme Court has recognized that a state's election code will "inevitably affect[] – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. Even what would appear to be a quintessentially severe burden, such as limiting the choices of voters, is not necessarily subject to strict scrutiny. *See Burdick*, 504 U.S. at 434. Minimal scrutiny (*i.e.* rational basis) applies to "reasonable, non-discriminatory restrictions" on voting rights. *Burdick*, 504 U.S. at 434. Crucially, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id*. at 434.

Democratic Plaintiffs' attempt to distract this Court from the minimal scrutiny under which Florida's Statute should be adjudged. They attempt to accomplish this by repeatedly referring to the "burden" on their rights as "severe," *see, e.g.,* (ECF 142 at 45 n. 18)[6], as if saying something enough times makes it true. The truth is, in fact, much more banal.

The truth of the matter is that all votes cast under Florida's Statute are valid votes. The Statute favors no one and nothing. Instead, the Statute merely organizes ballots. It is the *voters*, not Republicans and not Democrats, who determine both who wins gubernatorial elections and consequently—by way of their vote for governor—who is listed first on the ballot. The mere fact that voters *may* choose to vote for the first listed candidate more than other candidates does not change the fact that the voter has still made a valid choice..[7] *See New Alliance Party v. New York Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994). In other words, "an irrational vote is just as much of a vote as a rational one." *Id*. at 297. In essence then, Plaintiffs are merely requesting access to half of Florida's alleged "windfall" vote, which is "not

[6] Democratic Plaintiffs also take issue with bringing arguments that "claim interests on behalf of the state." *See* (ECF 142 at 45 n.18). First, Plaintiffs' proffered authority is for standing, which is not at issue here. Second, Intervenors, as party defendants, may make *any* argument in support of a claim or defense. *Cf. Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) ("Once a federal claim is properly presented, a party can make any argument in support of that claim . . .").

[7] By the logic of Democratic Plaintiffs' claims, an incumbent should never be permitted to seek reelection because it is well studied that incumbents receive consistently higher vote totals than non-incumbents.

a constitutional concern" in the first instance. *Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708, 718-19 (4th Cir. 2016) *cert denied sub nom. Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017). Consequently, the State's Statute is subject to rational basis review and Florida's regulatory interests are sufficient. *See Burdick*, 504 U.S. at 434.

a. Democratic Plaintiffs' Authority Is Inapposite.

Democratic Plaintiffs primarily rely upon *Graves*, 946 F. Supp. 1569 and *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980) for all manner of contentions. Both of these cases, far from the lynchpin Plaintiffs seek, involve either foundationally different facts or law and are therefore minimally informative to this case.

First, *Graves* is easily distinguishable as the statute in that case was fundamentally different from Florida's. The Oklahoma statute mandated that the Democrat *always* be placed in the top position. *Compare* Fla. Stat. § 101.151(4) (placing the party of the candidate who won the previous gubernatorial election at the top of the ballot) *with Graves,* 946 F. Supp. at 1571 (Oklahoma statute always placing Democratic candidates at the top of the ballot). However, even the *Graves* court found the burden to voters to be slight. *Id*. at 1571. It was Oklahoma's justification—political patronage—that was an impermissible state interest. The State has relied upon no such interest here.

Second, *McLain* is similarly easily distinguishable. In *McLain,* the United States Court of Appeals for the Eighth Circuit found that the State's interest—voter

convenience—was insufficient under, just as in *Graves*, rational basis review.[8] *McLain*, 637 F.2d at 1167. However, this conclusion is in direct conflict with *Anderson/Burdick* where the Supreme Court held that "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S at 434. This apparent contradiction is in fact no contradiction at all because *McLain* predates the *Anderson/Burdick* line of cases. *Compare McLain*, 637 F.2d 1159 (decided 1980) *with Anderson*, 460 U.S. 780 (decided 1983) *and Burdick*, 504 U.S. 428 (decided 1992). Therefore, while "voter convenience" may have been insufficient to justify a statute in 1980, it is most certainly sufficient under *Anderson/Burdick* today. *See, e.g., Burdick*, 504 U.S at 434 (generalized regulatory interests are sufficient to overcome minimal scrutiny).

III. LACHES BARS DEMOCRATIC PLAINTIFFS' CLAIMS.

Prospective relief is no bar to a laches claim.[9] Plaintiffs' authority on this point is distinguishable. Plaintiffs' purported "binding" Eleventh Circuit authority is an

[8] The fact that *McLain* was decided under rational basis review coupled with the holding in *Anderson/Burdick* that the State's interests are sufficient to survive rational basis review presents persuasive authority directly contrary to Plaintiffs assertions.

[9] Democratic Plaintiffs' assertions that they "did not inexcusably delay" in waiting 68 years to bring their suit is absurd on its face. *See* (ECF 142 at 63). This is not a situation where the speed of legislative machinery would require anyone to "sue first and ask questions later." *See Kason Indus., Inc. v. Component Hardware Grp., Inc.*, 120 F.3d 1199, 1206 (11th Cir. 1997). This is a Statute that has organized Florida ballots for 68 years—20 if one calculates harm form the time the last Democrat held

intellectual property case, which the Circuit itself distinguished as such. *See Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters.*, 533 F.3d 1287, 1319 n.38 (11th Cir. 2008) ("[T]he question of whether laches is available in the *context of a copyright infringement case* is a pure question of law . . ." (emphasis added)). In any event, the Court of Appeals for the Eleventh Circuit must still follow the United States Supreme Court, which has stated unequivocally that a "constitutional claim can become time-barred just as any other claim can." *United States v. Clintwood Elkhorn Mining, Co.*, 553 U.S. 1, 9 (2008) (claims based on a constitutional violation can become time barred).

Furthermore, *Benisek* is more directly on point than Plaintiffs care to admit. *See* (ECF 142 at 62) (dismissing case as not specifically involving laches). In *Benisek*, the Supreme Court found that a claim for prospective relief, in this case a preliminary injunction, failed because the plaintiffs in that case failed to exercise "reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). The *Benisek* plaintiffs were not "reasonabl[y] diligen[t]" because they waited "six years, and three election cycles" to bring their claims. *Id*. While not laches, *per se*, *Benisek* is an example of applying fundamental principles of equity to an alleged constitutional violation for prospective relief. Laches is simply the equitable

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the Governor's office. At the very least, Plaintiffs' delay underscores their partisan, rather than altruistic, motivations.

counterpart to statute of limitations. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep Redistricting Comm'n*, 366 F. Supp. 2d 887, 909 (Ariz. D.C. 2005). It is also the case that "equitable considerations can and do factor into equal protection challenges, in particular voting rights cases, even when the challenged plan is found unconstitutional." *Maxwell v. Foster,* 1999 U.S. Dist. LEXIS 23447, *6-7 (W.D. La 1994) (three-judge court) (dismissing racial gerrymandering and VRA claims based on laches). Laches bars Plaintiffs' claims.

CONCLUSION

For the aforementioned reasons, as well as the reasons stated in Intervenor-Defendants' Motion for Summary Judgement, (ECF 117), and Response to Plaintiffs' Motion for Summary Judgment, (ECF 141), summary judgment should be granted for Defendants.

Respectfully Submitted, DATED: May 7, 2019

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

The foregoing Reply Memorandum complies with Local Rule 7.1(F) because it contains 3197 words, exclusive of the required certificates, case style, and signature blocs.

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2019 the foregoing was filed with the Clerk via the CM/ECF system that sent a Notice of Electronic Filing to all counsel of record.

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