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 *PROPOSED* POST-TRIAL ORDER
ENTERING FINAL JUDGMENT FOR DEFENDANT

I.

At issue in this case is the constitutionality of Florida's Ballot Order Statute. § 101.151(3)(a), Fla. Stat. The Statute requires that "[t]he names of the candidates of the party that received the highest number of votes for Governor in the last election in which a Governor was elected shall be placed first for each [partisan] office on the general election ballot, together with an appropriate abbreviation of the party name." *Id.* Republicans are currently listed first. Democrats are listed second. Three Democratic voters, a Democratic Super-PAC,[1] and several national Democratic organizations now sue under 42 U.S.C. § 1983.

[1] Priorities USA is a Super-PAC, an independent political committee that may raise unlimited sums of money from corporations, unions, and individuals consistent

Democrats allege that first listed candidates receive an advantage—a ballot order or name order bump—such that the "weight and impact" of Democratic votes is diluted. *E.g.*, ECF 1 at ¶¶ 3, 5, 13-15, 17, 32, 52.[2] This vote dilution, Democrats argue, places an undue burden on the right to vote in contravention of the First and Fourteenth Amendments to the U.S. Constitution, ECF 1 at ¶¶ 50-52, and separately violates the Fourteenth Amendment's Equal Protection Clause. *Id.* at ¶¶ 56-59. Democrats seek some remedy—without specifying that remedy—from this Court for the vote dilution they attribute to Florida's Ballot Order Statute.

Laurel M. Lee, the Secretary of State, defends the constitutionality of Florida's Ballot Order Statute. She raises threshold issues including: justiciability, which is especially relevant because of the U.S. Supreme Court's June 27, 2019, opinion in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); Article III standing particularly the injury and redressability prongs; statute of limitations; and constitutional estoppel. She also states that ballot order (or name order) claims are

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with the U.S. Supreme Court's Decision in *Citizens United v. FEC*, 558 U.S. 310 (2010) and the D.C. Circuit's decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). *See* Stmt. of Organization filed with FEC (Apr. 28, 2011) available at https://docquery.fec.gov/pdf/773/11030601773/11030601773.pdf.

[2] References to electronically filed documents before this Court begin with "ECF" followed by the document number and appropriate pin citations. References to Exhibits begin with "Pl.," "Def.," or "Int." respectively followed by the appropriate exhibit number and pin citations. References to the transcript at trial begin with "Tr." followed by the page number and line numbers.

not constitutionally cognizable. Finally, to the extent the *Anderson*[3]*-Burdick*[4] test or traditional equal protection test applies, the Secretary contends that Florida's Ballot Order Statute passes these tests. Republicans, intervenors in this case, agree with the Secretary.

This Court held a 3-day bench trial to assess disputed issues of fact. Disputed issues of fact centered on what, if any, advantage or disadvantage ballot order confers; the appropriateness of any remedies for the ballot order (or name order) effect; the burdens otherwise imposed by Florida's Ballot Order Statute on the right to vote; and the State's interests served by the Ballot Order Statute.

As discussed in greater detail below, the case is *not* properly before this Court and, even if it was, Florida's Ballot Order Statute is constitutional. Part II of this Order provides factual findings adduced through the trial. Part III discusses the threshold legal issues of justiciability, standing, statute of limitations, and constitutional estoppel. Part III also includes a discussion of *Rucho*, and the inappropriateness of reflexively applying the *Anderson-Burdick* test. While the case is *not* properly before this Court, Part IV nevertheless applies the *Anderson-Burdick* test to judge Count I of Democrats' claim, and the traditional equal

[3] *Anderson v. Celebrezze*, 460 U.S. 780 (1983).
[4] *Burdick v. Takushi*, 504 U.S. 429 (1992).

protection test to judge Count II of Democrats' claim. Florida's Ballot Order Statute passes both constitutional tests.

II.

Part II of this Order sets forth the facts of the case after careful consideration of the evidence submitted at trial. Subpart A begins with a discussion of Florida's Ballot Order Statute, placing the Statute in historical and national context, describing what the Statute does and does not do, and noting the State interests it serves. Subpart B provides discussion and findings regarding the existence, extent and potential impact of ballot (or name) order effect in Florida elections. Subpart C concludes with factual findings regarding the remedies discussed at trial.

A.

A Democratic-controlled Florida Legislature enacted Florida's Ballot Order Statute in 1951 when the Legislature included only three Republican members. *See* Ch. 26870, s. 5, Laws of Fla. (1951) (originally codified at Fla. Stat. § 101.151(4) (1952)); Tr. 771:7-12. Over its 68-year history, the Statute has resulted in candidates for the Democratic and Republican Parties being listed first in 20 and 14 statewide elections respectively. Def. Exh.3. Because Republican candidates have received the highest number of votes for Governor since the 1998 election, Republicans have been listed first for the past 10 elections. *Id.*

Florida's Ballot Order Statute is by no means unique. It is nearly identical to the ballot order statutes in 6 other states,[5] and it is very similar to the ballot order statutes in 4 other states.[6] Of these 10 states, 5 list Democrats first because a Democrat currently holds the office referenced in the statute, and 5 list Republicans first because a Republican currently holds the pertinent office. *See* Def. Exh.4. Democrats have not challenged the ballot order statutes in any of these other states. *E.g.*, Tr. 97:10-25; Tr. 100:22-23.

To assess the impact of Florida's Ballot Order Statute, this Court must also assess what the Statute does *not* do. As Director Maria Matthews of Florida's Division of Elections testified, the Statute does *not* impose any requirements on a person's ability to register to vote; it does *not* impose any requirements on a

[5] As in Florida, the ballot order statutes of Connecticut, Georgia, Nebraska, New York, Pennsylvania and Texas provide that the first spot on the ballot goes to candidates of the party whose candidate received highest number of votes in the last gubernatorial election. *See* Def. Exh.14 (Conn. Gen. Stat. § 9-249a); Def.15 (O.G.C.A. § 21-2-285(c)); Def. Exh.16 (R.R.S. Neb. § 32-815(1)); and Def. Exh.17 (N.Y. C.L.S. Elec. § 7-116); Def. Exh.18 (25 P.S. § 2963(f)); and, Def. Exh.19 (Tex. Elec. Code § 52.091(b)).

[6] In Indiana and Michigan, the candidate whose party received the highest number of votes for Secretary of State is listed first. *See* Def. Exh.20 (Burns Ind. Code Ann. § 3-11-2-6)(a)); and Def. Exh.21 (M.C.L.S. § 168.703). In Wisconsin, ballot order is determined based on the number of votes received by each party's candidate for President or Governor in the last general election. *See* Def. Exh.22 (Wis. Stat. § 5.64(1)(b)). In Wyoming, ballot order is determined based on the number of votes received by each party in the last congressional election. *See* Def. Exh.23 (Wyo. Stat. § 22-6-121(a)).

person's preferred method of voting, whether absentee, early, or in-person election day; it does *not* dictate a language in which a person must vote; it does *not* state that Republicans or Democrats always be listed first; and it does *not* require that incumbents always be listed first. Tr. 767:15-25; Tr. 768:1-8.

Director Matthews further explained that the Florida's Ballot Order Statute serves the State's interests. State interests include upholding the policy choices of Florida's duly-elected representatives; preventing voter confusion, as Florida's Ballot Order Statute allows voters to more quickly find their preferred candidate for a given office; assisting with the election administration process because the Statute promotes uniformity and helps limit errors in ballot layout and tabulation across Florida's 67 counties, over 6,000 precincts, spread across two time zones; and, ultimately, promoting voter confidence in the integrity of elections administration process because people know that their ballot is being arranged consistent with the choices their elected officials made, in a manner that makes it easy to find candidates of their choice on the ballot, in a manner that is uniform throughout the State, and in a manner that allows for accurate vote tabulation consistent with timelines set by the Florida Constitution and Florida Statutes. Tr. 773:4-25; Tr. 774:1-25; Tr. 775:1-4; Tr. 780:5-25; Pl. Exh.73 at 2 (interrogatory response); Joint Exh.1; ECF 198 at 293 (FSASE listing of precincts).

As a Florida voter, Director Matthews testified about her personal voting experience to put a finer point on the State's interests. Director Matthews explained that she pre-marks a sample ballot after researching candidates and issues appearing on the ballot. Tr. 784:3-4. This is important to her because Florida ballots are long with several federal and statewide races, statewide ballot initiatives, and local races and issues. Tr. 784:5. The pre-marked sample ballot allows Director Matthews to "just look at [her] sample ballot and then put [her] choices on the [actual] ballot." Tr. 784:6-8. This, in turn, saves time at the ballot box; it allows Director Matthews "to get in there and get out." Tr. 784:11-12.

Director Matthews "expect[s] a certain order" for candidates in partisan races. Tr. 784:10-11. Changing that order, especially without adequate voter education, could lead to voter confusion and undermine the integrity of Florida elections. "[P]eople talk to each other, whether it's family, friends, colleagues," and ask about their respective voting experience. Tr. 784:21-24. When that experience is not the same, voters "start getting nervous, and then they call the voter assistance hotline [that Director Matthews answers together with her team], or send [her] an e-mail about why is this ballot looking like this, or that there is a candidate missing, when it's really maybe the candidate is listed somewhere else." Tr. 784:25; Tr. 785:1-4; *see also* Tr. 764:23-25 (Director Matthews answers voter hotline). Similarly, Supervisor Earley of Leon County testified that voters "tweet"

and use "Facebook," and that "[t]here's a lot of social media and a lot of social media misinformation that we are always trying to monitor and set straight so that [voters] understand the official message as opposed to speculation." Tr. 503:7-11

In sum, the evidence establishes that Florida's long-standing method of ordering candidates in partisan races has resulted in both Democrats and Republicans being listed first in partisan races. Florida's method is not unique with at least 10 states using a similar method. Florida's method does not affect the voting process. And Florida's method serves several important State interests.

B.

Democrats retort, however, that their claims are premised on their *current* position behind Republicans. Democrats argue this second position creates a "primacy effect," also known as a "name order" or "ballot order" effect that benefits Republicans. ECF 116 at 8. They claim that this effect dilutes Democratic votes, thereby burdening their right to vote, their right to associate, and otherwise violating the Fourteenth Amendment's Equal Protection Clause. ECF 1 at ¶¶ 3, 5, 13-15, 17, 32, 52.

As to the existence of such a "primacy effect," Democrats presented the expert testimony of Dr. Jon A. Krosnick, a professor of communications, political science and psychology at Stanford University, who has studied the name order effect on voting over the past 28 years. Tr. 279:17-18; Tr. 283:21-24. For this

case, Krosnick conducted a review of the political science literature and performed a "meta-analysis" by which he concluded that 84% of the reported tests of name order effect were "in the direction of primacy." Tr. 302:20-310:2; Pl. Exh.1, 15-39. He summarized his analysis of name order effect in four states—California, New Hampshire, North Dakota and Ohio—that have adopted some form of ballot rotation; and he discussed how the demographics of those states compare to Florida's demographics. Tr. 326:27-342:6; Pl. Exh.1, 55-62. Using data from Ohio as a control variable, he also performed a regression analysis to estimate the average effect of name order in Florida elections for federal offices and highly "publicized state offices."[7] Tr. 299:12-301:17, 342:14-358:14; Pl. Exh.1, 62-67.

At trial, Dr. Krosnick testified that his regression analysis suggested that Florida candidates have gained an average of 5% as a result of being listed first on the ballot. Tr. 299:14-16. This "rough estimate" (Tr. 300:5-7) is just one of many estimates of name order effect in Florida that Dr. Krosnick has presented over the course of this litigation. It also happens to be the highest of his estimates. As noted in his trial report, Dr. Krosnick's 5% estimate is larger than—indeed double—the estimate he provided in support of Plaintiffs' motion for preliminary injunction one year ago. Pl. Exh.1, 3n.1; Tr. 369; Def. Exh.25, 3. Dr. Krosnick

[7] Dr. Krosnick did not analyze name order effects in more "down ballot" races in Florida, and his research in Ohio indicates that those down-ballot are at least susceptible, if not more susceptible, to name order effects. Tr. 299:24-300:4.

explained that the updated analyses presented in his trial report incorporates additional party registration data, an omitted variable, that was not available for his earlier analyses. Pl. Exh.1, 3n.1. But the updated 5% estimate is still a full percentage point (or more) higher than the updated estimates presented in his trial report when he weighted Florida election data by population (~4%) and by population density (~3.5%) and when he collapsed the data over a county (~3.6%). Tr. 370-71; Pl. Exh.1, 16-17 (Tables 14 and 15). Dr. Krosnick's 5% estimate for Florida is also almost double the 3% average ballot order effect he calculated for Ohio based on his analysis of 1992 Ohio election data, which ranged from 1% to 5% (Tr. 312:3-6); and it is five times the 1% average of the complete dataset he analyzed from Ohio for the 1992, 2000 and 2004 elections, which ranged from -2% to 6%. Tr. 645:5; Int. Exh.11, 15 (Fig. 5); and Pl. Exh.1, 11. Dr. Krosnick provided no explanation for why average name order effect would be five times higher in Florida than in Ohio. Tr. 646:15-18.

Democrats also presented the expert testimony of Dr. Jonathan Rodden, a professor of political science at Stanford University and a senior fellow at the Hoover Institution. Based upon his analysis of statewide elections in Florida from 1978 to 2018, Dr. Rodden generally opined that the party listed second does significantly worse in down-ballot races than in higher profile top-ballot races. Tr. 144:16-145:10; Pl. Exh.5, 17-41. Based on his analyses of data following a recent

change in North Carolina's ballot order regime, Dr. Rodden also opined that ballot primacy advantages the first-listed party, which dissipates when the advantage is withdrawn. Pl. Exh.5, 41-48. But Dr. Rodden did not attempt to quantify the effect of name order in any Florida elections; nor did he analyze the potential ameliorative effect of precinct-by-precinct or county-by-county rotation in Florida, as Democrats have proposed at various stages of this litigation. Dr. Rodden even conceded that "in any given election there are strong and weak candidates," "scandals and newspaper coverage," "external events for which candidates are rewarded," and so "by no means [s]hould we expect the down-ballot [primacy] disadvantage to be present in every single race." Tr. 192:2-24.

Finally, Democrats presented the expert testimony of Dr. Paul Herrnson, a political science professor at the University of Connecticut. Dr. Herrnson testified about "proximity error" which results when voters unintentionally select a candidate before or after the candidate they hoped to select. Tr. 412:13-19. Dr. Hernnson opined that proximity error primarily advantages the first-listed candidate and disadvantages the second-listed candidate (Tr. 413:14-17), but he did not attempt to quantify the effect of proximity error or any advantage it may provide to first-listed candidates in Florida. Tr. 434:15-19; Int. Exh.2, 21. Nor did he provide any conclusion as to whether all the different types of mistakes voters can make disproportionately favor the candidate listed first on the ballot. Pl.

Exh.14, 2. Dr. Hernnson's testimony thus stands for the unremarkable proposition that there is no such thing as a perfect election. Tr. 435:19-25.

Republicans presented the expert testimony of Dr. Michael Barber, a political science professor at Brigham Young University, who critiqued the analyses presented by Drs. Krosnick, Rodden and Hernnson. Dr. Barber pointed out demographic differences between Florida and the other states that lead him to question Dr. Krosnick's use of Ohio data to extrapolate ballot order effect in Florida. Tr. 619:5-644:4; Pl. Exh.2, 11-14. He also criticized Krosnick's use of counties, rather than elections, as a unit of observation, which Dr. Barber opined may have had the effect of overweighting rural counties, which tend to span more counties than urban district (and are thus overcounted) and tend to support Republican candidates in recent years, as compared to urban counties. Tr. 653:14-661:5; Pl. Exh.2, 16-20. Dr. Barber's primary criticism of Dr. Rodden was that his analyses did not take into account several "omitted" variables—such as candidate quality, fundraising, gender and race—that might have affected the results. Tr. 673:24-697:2; Int. Exh.2, 3-10. Ultimately, Dr. Barber opined that, based on the analyses presented by Plaintiffs' experts, one cannot conclude that there is a ballot order effect (or not) in Florida and that, if such an effect exists in Florida, it cannot be quantified. Tr. 669:11-16.

It is important to note that while some of the "omitted" variables might be difficult to assess—to include as control variables in an effort to make the regression analysis more accurate—others like gender are not. *See generally* Tr. 192:19-22 (Dr. Rodden discussing control variables). Actual election results also make plain that gender is an important variable for which any expert analysis must control.[8] Commissioner of Agriculture Nikki Fried, for example, outperformed top-of-ballot Democratic candidates in her race in 2018. Tr. 193:5-25. Attorney General Ashley Moody outperformed top-of-ballot Republican candidates in 2018. Tr. 194:11-18. Chief Financial Officer Alex Sink outperformed top-of-ballot Democratic candidates in 2006. Tr. 194:1-7. Secretary of State Sandra Mortham outperformed top-of-ballot Republican candidates in 1994. Tr. 194:8-10. But Democrats' experts did not control for this essential variable.

In sum, based on the totality of evidence submitted at trial, there may very well be a "name order" or "ballot order" or "primacy effect" in Florida elections while Florida's Ballot Order Statute has been in effect, but on this record, this Court cannot quantify what any such effect was in any particular Florida election or, by extension, what it may be in the future. Dr. Krosnick testified that because the statistical "p-value" associated with his estimate of average name order effect in Florida is 0.00, there is a 99% chance that the effect is "real." Tr. 357:20-23.

[8] The parties stipulated to consideration of election results. ECF 162 at 10-11.

As he further explained, however, that is not to say that there is a 99% chance that the actual number is 5%. Tr. 372:21–373:11. It simply means there is a 99% chance that his estimate is not wholly explained by chance or, in other words, there is a 99% chance that his 5% estimate is not actually zero. Tr. 373:12-18. Thus, the average name order or "primacy effect" in Florida is likely somewhere between 0% and 5%, but the Court cannot say where. Furthermore, there is no basis to expect the same name order effect to be present in every race. *See*, Tr. 192:10-12 (Rodden); Pl. Exh.2, 11 (quoting Miller and Krosnick, 1998). The effect will be lower than average in some elections; and higher than average in others. Tr. 344:19-44; Tr. 382:6-9 (Krosnick). As such, the Court is unable to quantify the effect of name order in any specific Florida election or find that name order effect was outcome-determinative in any specific Florida election.

C.

This Court heard from Director Matthews, Supervisor of Elections Christina White, Supervisor of Elections Mark Earley, and Supervisor of Elections Paul Lux concerning possible remedies. Deposition designations from election management system manufacturers, ES&S and Dominion were also considered.

Director Matthews and the Supervisors all agreed that rotating the names of Democratic and Republican candidates from precinct-to-precinct within a county is unworkable. Tr. 441:6-16; Tr. 497:1-498:15; Tr. 776:12-779:18; Tr. 572:7-13; Tr.

256:15-257:4. Precinct-by-precinct rotation presents technical challenges concerning testing and certification of county-level systems, and the State's XML Schema used to tabulate election results. Tr. 497:1-498:15; Tr. 778:12-779:8. The corporate representative for Dominion, one of the two election management system vendors in Florida, testified that he does not know whether Dominion's machines can rotate only Democratic and Republican candidates, and it could take up to a year for Dominion to take the steps necessary for such rotation. ECF 196 at 101-104. The Supervisors also testified that such rotation would increase the time needed to prepare and proofread ballots, cause voter confusion, increase error rates for hand recounts, and, because precincts vary significantly in the number of registered voters,[9] equitably dividing precincts between the two major parties is difficult. Tr. 441:2-18; Tr. 446: 5-20; Tr. 496:22-497:15; Tr. 506:8-19; Tr. 783:20-785:4. The problems are particularly acute for Florida's most populous county, Miami-Dade, where the size and complexity of the elections administration process makes precinct-by-precinct rotation simply impossible. Tr. 441:18-442:19.[10]

Rotating the names of Democratic and Republican candidates from county-to-county—with the counties placed into two groups by population and

[9] Leon County, for example, has precincts with fewer than 10 registered voters and as many as 7,000 registered voters. Tr. 495:22-26; Tr. 496:1-4.

[10] Rotation ballot-style-by-ballot-style suffers from much the same problems. Tr. 457:22-458:6; Tr. 507:4-508:6; Tr. 788: 1-15.

apportioned among the two major parties—presents different challenges. While the individual counties would not need to re-certify and test their election management systems because a ballot is "static" within an individual county, Tr. 570:11-23, the State would need to ensure that its statewide XML Schema can accommodate such rotation. Tr. 783:3-15. Here there are some known unknowns. Technological changes are seldom as easy to make as they seem. The XML Schema, for example, was expected to take a few months to create and implement; the task took years. Tr. 508:12-25; Tr. 779:1-18. Mandating that the State change, test, and then utilize the XML Schema with county-by-county rotation for the first time during the 2020 Presidential Election would be irresponsible for security reasons among others. *See generally* Tr. 782:13-17 (questioning Maria Matthews, Q. "Is one of the reasons why you have the XML schema system [] for security reasons . . . you're doing it that way as opposed to somebody manually, for example, delivering or faxing numbers[?]" A. "That's correct.").

County-by-county rotation would also make no difference for districts contained wholly within a county. Florida has 4 Congressional districts wholly contained within one county, 85 State House districts wholly contained within one county, and 15 State Senate districts wholly contained within one county. Tr. 785:17-25; Tr. 786:1-5. There would thus be *no* rotation from the perspective of voters *or* candidates in *any* of these 104 districts, Tr. 786:6-11, many (or perhaps

all) of which Dr. Rodden considers down-ballot races where he asserts the alleged harm from the name order effect is greatest. *See supra* Subpart B.

County-by-county rotation presents a problem for split districts as well. As grouped by Democrats in their demonstrative exhibits, an unequal number of Florida voters would be in Group 1 or 2; the split is 53% to 47% for Florida House districts and 63% to 37% for Florida Senate districts. Demonstrative Comp. Exh.1. Consider House District 7, for example, which is spread across 10 counties in North Florida. Tr. 506:3-15. Some of these counties would be grouped such that Democrats are listed first and some such that Republicans are listed first. Tr. 506:10-507:1. One party's candidate would appear first on *more* ballots. *Id.*

The Democrats' grouping method for county-by-county rotation reveals another problem. Of the 14 House districts races where the most recent election results were within 5%—Dr. Krosnick's average name order effect—only 2 would see any rotation whatsoever. Joint Exh.1; Demonstrative Comp. Exh.1.; Def. Exh.12; Tr. 116:10-19. None of the 4 Senate districts within 5% would see any rotation. Joint Exh.1; Demonstrative Comp. Exh.1; Def. Exh.13; Tr. 118:10-16. In short, the grouping would provide no remedy at all for most of the competitive down-ballot races.

In a county-by-county rotational scheme, simply listing Democrats first in Group 1 counties for one election cycle and then listing them first in Group 2

counties for the next election cycle would also provide little relief. Deciding whether Democrats or Republicans should receive favorable positioning during a midterm election or Presidential election cycle would present a challenge. From an individual candidate's perspective, assuming there is a constitutionally cognizable name order effect, one election cycle might prove the difference between a successful political future or no political future.

So, in a county-by-county rotation system, assuming there is a constitutional right to preferred name order, candidates on the wrong side in 104 wholly contained districts might sue. Candidates on the wrong side in split districts might sue. Candidates on the wrong side in the wrong year might sue. Down-ballot candidates might even hire Dr. Krosnick as an expert just as a mayoral candidate did in *Bradley v. Perrodin*, 06 Cal. App. 4th 1153, 1159 n.2 (Cal. App. 2003). *See* Tr. 388:1-16; Pl. Exh.1, at 6 n.3. The Secretary and the Division of Elections would spend their time defending lawsuits rather than helping run elections.

In sum, the ballot order alternatives explored through discovery and at trial by the parties are either technologically or practically infeasible. Other alternatives explored for the first time at trial, such as alphabetical ordering, lack sufficient record support to mandate statewide. While supervisors might technologically be capable of implementing alphabetical rotation, *e.g.*, Tr. 445:1-6, Director Matthews could not assure this Court that the entire State of Florida could implement such a

rotational scheme. Tr. 801:17-22. This Court cannot answer the question either. Without testimony from policymakers who have considered the consequences of such a rotational system, this Court is left to wonder, for example, whether the alphabetical remedy in partisan elections would disproportionately impact one ethnic group over another or result in widespread gamesmanship for a preferred ballot position. *See, e.g.*, Barry C. Edwards, Race, Ethnicity, and Alphabetically Ordered Ballots, 13 Election Law J. No. 3 (Sept. 5, 2014) (arguing that alphabetical ordering by last name disadvantages specific minority populations); *Donoho v. Allen-Rosner*, 254 So. 3d 472, 473 (Fla. 4th DCA 2018) (affirming trial court's denial of emergency relief to a candidate for circuit court judge where candidate sought to prevent an opponent from "hyphenating his middle and last name to take advantage of alphabetical placement on the ballot").

III.

Part III discusses threshold legal issues this Court must resolve before proceeding any further. Subpart A explains why the U.S. Supreme Court's recent decision in *Rucho* controls and renders Democrats' vote dilution claim nonjusticiable. Subpart B builds on the discussion and explains why Democrats have failed to satisfy the requirements for Article III standing. Subpart C discusses other issues such as statute of limitations and constitutional estoppel.

A.

Rucho, like this case, concerned partisan vote dilution. 139 S. Ct. 2492-93. But the U.S. Supreme Court held that partisan vote dilution claims posed a nonjusticiable political question because "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id*. at2507. The lack of standards in *Rucho* thus fell into two separate categories: a lack of standards to judge a constitutional violation, and a lack of standards to remedy any constitutional violation. *Id.* at 2499-2502; 2502-2506. Notably, the U.S. Supreme Court did not reflexively apply the *Anderson-Burdick* test. *Rucho* controls here and bars Democrats from challenging Florida's Ballot Order Statute based on a theory of partisan vote dilution.

1.

In *Rucho*, Democrats challenged North Carolina's redistricting plan, *id.* at 2491, and Republicans challenged Maryland's redistricting plan. *Id.* at 2493. Democrats argued that partisan gerrymandering by Republicans diluted the strength of Democratic voters thereby violating the First Amendment and the Fourteenth Amendment's Equal Protection Clause. *Id.* at2492. Republicans argued that partisan gerrymandering by Democrats diluted the strength of Republican voters thereby violating the First Amendment and the Fourteenth

Amendment's Equal Protection Clause. *Id.* at 2493; *see also id.* at 2513 (Kagan, J., dissenting) ("Partisan gerrymandering operates though vote dilution").

The District Courts attempted to fashion standards for when partisan vote dilution rises to the level of First and Fourteenth Amendment violations. The U.S. Supreme Court rejected these standards as unmanageable.

In particular, for equal protection claims under the Fourteenth Amendment, the North Carolina District Court required the plaintiffs to (1) "prove that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to subordinate adherents of one political party and entrench a rival party in power," and then (2) "show[] that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." *Id.* at 2502 (citations omitted). "[A]fter a prima facie showing of vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are attributable to a legitimate state interest or other neutral explanation." *Id.* (citations omitted).

The U.S. Supreme Court noted that the "predominance" prong inappropriately borrowed from the law of racial gerrymandering. *Id.* "If district lines were drawn for the purpose of separating racial groups, then they are subject

to strict scrutiny because race-based discrimination is inherently suspect." *Id.* (citations omitted). In race-based cases the goal is "elimination of a racial classification" and not divvying of "political power and influence." *Id.* Unlike race-based cases, in partisan vote dilution cases, the Court explained that "securing partisan advantage" is the goal; this goal is permissible and cannot become unconstitutional because it predominates—especially when it is difficult to identify *when* the goal predominates. *Id.* at 2503.

The U.S. Supreme Court similarly rejected the "likely to persist" prong. The Court feared that the prong asked federal judges to "strike down apportionment plans on the basis of their prognostications as to the outcome of future elections"—a guess as to *when* vote dilution becomes so stark that "elected representatives will feel free to ignore the concerns of the supporters of the minority party." *Id.* (citations omitted). This especially troubled the Court because judges would not only have to forecast an electoral outcome but also the margin of victory—to forecast the result and "beat the point spread." *Id.* The Court went on to note that even the past, sophisticated projections by esteemed social scientists proved wrong when it came to electoral projections. *Id.* The Court added that voter preferences, voter behavior, voter demographics, and voter priorities are ever-changing; voters also vote for all sorts of reasons. *Id.*

Thus, the U.S. Supreme Court held that any equal protection test for partisan vote dilution would risk "basing constitutional holdings on unstable ground outside judicial expertise." *Id.* at 2503-04.

For associational rights claims under the First Amendment, the North Carolina and Maryland District Courts "coalesce[ed] around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden." *Id.* at 2504. Evidence included "difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues [the] Plaintiffs sought to advance." *Id.* Evidence also concerned "a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion." *Id.* And the District Court considered "burden[s] in fundraising, attracting volunteers, campaigning, and generating interest in voting." *Id.*

The U.S. Supreme Court rejected the First Amendment test and found "the slight anecdotal evidence" insufficient "for separating constitutional from unconstitutional" claims. *Id.* "To begin," the Court concluded that redistricting imposed "no restrictions on speech, association, or any other First Amendment activities." *Id.* There was no claim for viewpoint discrimination either because there was "no standard for determining when partisan activity goes too far." *Id.*

The Court emphasized the point by asking the following: "How much of a decline in voter engagement is enough to constitute a First Amendment burden?" *Id.* "How many doors must go unanswered?" *Id.* "How many petitions unsigned?" *Id.* "How many calls for volunteers unheeded." *Id.*

Thus, the U.S. Supreme Court held that any associational rights claim for partisan vote dilution would offer no clear or manageable standards. *Id.* at 2505.

2.

The lack of manageable remedial standards for vote dilution also featured prominently in *Rucho*. The U.S. Supreme Court explained that the U.S. Constitution's Elections Clause in Article I, § 4, cl. 1, reserved for the judiciary a narrow band within which federal judicial power should touch on the time, place, and manner of elections. *Id.* at 2495-96. The Court explained that remedying "one-person, one-vote and racial gerrymandering" fell within that narrow band. *Id.* Vote dilution caused by partisan gerrymandering did not. *Id.* at 2494-96.

The U.S. Supreme Court further noted that asking the federal courts to undo partisan vote dilution "inevitably ask[s] the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters." *Id.* at 2499 (emphasis in original). This would make "fairness" the crucial but ill-defined and unmanageable remedy sought from the federal courts. *Id.* "Deciding among . . . different visions of

fairness . . . [would] pose basic questions that are political, not legal." *Id.* at 2500. And so, the political branches should remedy the partisan vote dilution.

The U.S. Supreme Court went on to dismiss the argument that if the federal courts "can adjudicate one-person, one-vote claims, [the courts] can also assess partisan gerrymandering claims." *Id.* at 2488. Here the Court said that "the one-person, one-vote rule is relatively easy to administer as a matter of math" because it is grounded in the notion that "each representative must be accountable to (approximately) the same number of constituents." *Id.* Remedying vote dilution through some fairness standard does not lend itself to the same mathematical precision. *Id.* One-person, one-vote is also rooted in the principle that "each person must have an equal say in the election of representatives," while partisan gerrymandering is rooted in the notion that each person or each political party should receive support commensurate to some partisan share. *Id.* at 2501. But federal courts are "not responsible for vindicating generalized partisan preferences," *id.*, or "allocat[ing] political power." *Id.* at 2508.

Thus, the U.S. Supreme Court held that federal courts are ill-equipped to remedy any constitutional violation (if they can find one in the first instance).

3.

Rucho is notable for what the U.S. Supreme Court did not do: The Court did not apply the *Anderson-Burdick* test to judge the plaintiffs' associational rights

allegations under the First Amendment or equal protection allegations under the Fourteenth Amendment. While *Anderson-Burdick* provides a flexible framework where federal courts "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,'" the test is not a constitutional catchall that subsumes claims concerning partisan vote dilution. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). *Anderson-Burdick* applies only applies when "evaluat[ing] a law respecting the right to vote—whether [the challenged law] governs voter qualifications, candidate selection, or the voting process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring). Undue burdens on the *right to vote* and outright *vote denial* are distinct from partisan *vote dilution*. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994).

In fact, without explicitly mentioning *Anderson-Burdick*, the U.S. Supreme Court signaled in *Rucho* that the test is a poor fit for partisan vote dilution claims. The Court recognized that partisan vote dilution imposes "no restrictions [or undue burdens] on speech, association, or any other First Amendment activities" generally protected through *Anderson-Burdick*. *Rucho*, 139 S. Ct. at 2504. Nor

does partisan vote dilution impose burdens on activities associated with the voting process such as petition gathering, canvassing, or voting. *See id.*

4.

Ultimately, this Court, like the U.S. Supreme Court in *Rucho*, lacks standards to decide when partisan vote dilution becomes a constitutional violation—when ballot or name order dilutes Democratic votes to such an extent that judicial interference becomes constitutionally necessary. None of the experts at trial could say that the name order effect was outcome determinative in any given election. None of the experts could say that they controlled for the many reasons why people vote the way they do so that they could isolate the alleged harm from the name order effect. In fact, the experts could not even control for important and easily identifiable reasons such as gender. At best, and after several attempts, Dr. Krosnick testified that his statistical analysis suggested that Florida candidates have gained an average of 5% as a result of being listed first on the ballot. Tr. 299:14-16. That too only means that there is a 99% chance that his estimate is not wholly explained by chance or, in other words, there is a 99% chance that his 5% estimate is not actually zero. Tr. 373:12-18.

Thus, as in *Rucho*, this Court is being asked to make political prognostications—both the outcome and spread of elections affected by the name order effect—based on the work of social scientists who themselves refuse to make

prognostications in this instance. Stated differently, this Court is being tasked with determining when partisan vote dilution attributed to the name order effect becomes too much and therefore unconstitutional. This Court must decline to answer such political questions.

Again, like *Rucho*, this Court also lacks the standards to remedy any constitutional violation. The U.S. Constitution's Elections Clause constrains this Court from mandating a "fairer" ballot order regime to remedy partisan vote dilution caused by Florida's Ballot Order Statute, just as it did the U.S. Supreme Court from mandating a "fairer" system for partisan vote dilution caused by gerrymandering. Even if this Court could mandate a fairer system, the evidence adduced at trial shows that each potential remedy suffers from technological problems, logical problems, or both. Some remedies cannot be implemented. Others cannot actually remedy the alleged name order effect in down-ballot races where it is alleged to have the most acute effect.

Thus, this Court is again confronted with a nonjusticiable political question—a "fairness" problem centered on the remedy. This "fairness" problem is compounded by practical problems (technological and logical). A wise refrain becomes applicable then: "Sometimes doing nothing leads to the very best of something." A.A. Milne, *The Pooh Book of Quotations*, 51 (US ed. 1991).

Finally, the *Anderson-Burdick* test offers no reprieve. The test does not apply when, as in *Rucho*, partisan vote dilution is concerned. Partisan vote dilution—allegedly caused by Florida's Ballot Order Statute—does not prevent or burden a single person's ability to register to vote, force a person to forego a preferred method of voting (absentee, early, or in-person election day), or otherwise affect the voting process in any way. Tr. 767:15-25; Tr. 768:1-8. Plaintiff, Jacobson, even testified that Florida's Ballot Order statute has never prevented her from phone banking, donating, and otherwise supporting her favored candidate; nor has the Statute once prevented her from casting a vote for the candidate of her choice. Tr. 58:3-5; Tr. 58:17-19; Tr. 59: 8-10; Tr. 59:14-16; Tr. 59:20-22.

Thus, just as the U.S. Supreme Court declined to apply *Anderson-Burdick* when searching for a standard to judge a partisan vote dilution claim, so too must this Court. Neither *Anderson-Burdick* nor any other test provides this Court with judicially manageable standards to judge the case. The case must be dismissed.

B.

The case must also be dismissed on Article III standing grounds. *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).

Democrats cannot satisfy Article III's injury-in-fact requirement because they cannot show that Florida's Ballot Order Statute affected the rights of a single voter—whether through some impediment placed on the act of voting or through partisan dilution that would have proved outcome determinative in any given election. Evidence at trial showed there was no impediment on the act of voting. Just as the harm from partisan vote dilution through gerrymandering in *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018), had to be "district specific," the harm here must be election-specific. But the evidence at trial showed that Democrats' own experts refused to say whether the name order effect—the source of any partisan dilution—was outcome determinative in any election.

Democrats cannot satisfy Article III's redressability requirement either. Democrats failed at trial to put forward remedies to the alleged name order effect that actually remedy the effect for down-ballot races where Democrats claim the effect is most acute. Democrats' county-by-county rotation approach rotates no candidates in 104 districts wholly contained within a county. Split districts fare no better because the splits are unequal; an unequal number of voters see Democrats first on their ballots versus Republicans thereby perpetuating the effect. And with two exceptions, in competitive down-ballot races, there is no rotation at all.

Thus, based on the evidence adduced at trial, Democrats lack Article III standing. This case must be dismissed.

C.

Two other thresholds issues bar Democrats' claims. First, Florida's 4-year statute of limitations applies to claims brought under 42 U.S.C. § 1983. *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 872 (11th Cir. 2017) (citing *Wallace v. Kato*, 549 U.S. 384, 387 (2007)); *Burton v. Cty of Belle Glade*, 178 F.3d 1175, 1188 (11th Cir. 1999); § 95.11, Fla. Stat. Regardless of when the 4-year statute of limitation clock began to run in this case, Democrats have run out of time.

Florida enacted its Ballot Order Statute in 1951 and Democrats have known about the alleged harms from this Statute for decades. In the very first paragraph of their Complaint, Democrats admit that the they knew of harm from Florida's Ballot Order Statute as early as 1970 and the goal of this litigation was to seek to undo an advantage that has existed for two decades. ECF 1 at ¶¶ 1, 2. Likewise, corporate representatives from the Plaintiff organizations testified that they been aware of the alleged harm for as long as they have been in politics. ECF 198, at 33:22-34:6; 75:16-76:12; 141:21-142:9; 248:21-249:4.[11] The individually named Plaintiffs have all been registered to vote since 1998 or earlier. ECF 1 at ¶¶ 13-15; Tr. 62:5-6. All

[11] Deposition designations of the 30(b)(6) corporate representatives who did not testify at trial were entered into evidence.

claim to be heavily engaged in promoting Democratic candidates and causes and have "meaningfully and thoughtfully cast vote[s] for Democratic Party candidates." ECF 1 at ¶¶ 13-15; Tr. 62:5-6. Plaintiff, Ms. Jacobson, testified at trial that she has been active in the Democratic Party since 2000 and the earliest statewide election she worked for in Florida was in 2002. Tr. 46:18-19; Tr. 48:2-4. She stated that she first became aware of a potential advantage to being listed first on the ballot "in the earlier stages of her [political] involvement," and has known for over a decade that "candidates thought there was an advantage to being first on the ballot." Tr. 52:18-22; Tr. 61:12-15. Yet Democrats took no action. Tr. 61:16-17. Thus, the statute of limitations has now run and bars Democrats' claims.[12]

Second, constitutional estoppel applies. Evidence adduced at trial shows that Democrats enacted Florida's Ballot Order Statute, have benefitted from Florida's Ballot Order Statute more often than Republicans, continue to benefit from similar ballot order statutes in 5 other states, and have not filed a lawsuit challenging the ballot order statute in the 5 other states where they continue to

[12] The continuing violation theory did not pause the clock. It is from the one enactment of Florida's Ballot Order statute that the allegedly unlawful name order effect flows election after election. The continuing violation theory, therefore, cannot apply to extend the statute of limitations. *See e.g.*, *Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322-23 (11th Cir. 2007) (violations of the Clean Air Act are one-time unlawful acts despite the alleged ongoing ill effects); *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003) (statutory changes to parole are a "one time act with continued consequences").

benefit. Democrats cannot take with one hand (money from the FEC, recess appointments, or the benefit of name order), only to sue with the other. *See Wilkinson v. Legal Services Corporation*, 80 F.3d 535, 538 (D.C. Cir. 1996); *Robertson v. Federal Election Commission*, 45 F.3d 486, 490 (D.C. Cir. 1995). Thus, constitutional estoppel applies and bars Democrats' claims.

IV.

While the case is *not* properly before this Court because of threshold legal shortcomings, Part IV nevertheless applies the *Anderson-Burdick* test to judge Count I of Democrats' claim, and the traditional equal protection test to judge Count II of Democrats' claim. Subpart A provides the *Anderson-Burdick* analysis. Subpart B provides the equal protection analysis. Florida's Ballot Order Statute passes both constitutional tests.

A.

The *Anderson-Burdick* test requires courts to weigh burdens imposed against the State's interests. The undisputed evidence shows that Florida's Ballot Order Statute does not impose any burden on an individual's right to vote; if anything, it causes vote dilution. Yet, at trial, the Democrats' three experts tried but failed to specifically quantify what effect if any the name order effect has had on Florida's elections generally or on any particular election. At best, Democrats could only

establish an average effect of 5%, which has a 99% chance of not actually being zero. Tr. 373:12-18. This is a minimal burden, if a burden at all.

The State of Florida, however, has several compelling interests. First, is the State's interest in upholding the policy choices of Florida's duly-elected representatives. Second, is the State's interest in preventing voter confusion—allowing voters to more quickly find their preferred candidate for a given office, thereby decreasing wait times on election day. Third, is the State's interest in promoting uniformity to reduce errors in ballot layout and vote tabulation, and reduce voter confusion. Fourth, is the State's interest in promoting voter confidence in the integrity of the elections administration process. Confidence increases when people know that their ballot is being arranged consistent with the choices their elected officials made, in a manner that makes it easy to find candidates of their choice on the ballot, in a manner that is uniform throughout the State, and in a manner that allows for accurate vote tabulation consistent with timelines set by the Florida Constitution and Florida Statutes. Tr. 773:4-25; Tr. 774:1-25; Tr. 775:1-4; Tr. 780:5-25; Pl. Exh.73 at 2 (interrogatory response); Joint Exh.1; ECF 198 at 293 (FSASE listing of precincts).

"[U]nder *Anderson/Burdick*, th[is] Court must 'identify and evaluate the *precise* interests put forward by the State,' but precision does not equate to

empiricism." *Sarvis v. Judd*, 80 F. Supp. 3d 692, 705 (E.D. Va. 2015) (emphasis in original). The State has appropriately stated its interests.

Thus, as one court concluded when it upheld the constitutionality of New York's similar ballot order statute, any minimal burden imposed by Florida's Ballot Order Statute is outweighed by "the State's compelling need to construct and order a manageable ballot and prevent voter confusion." *New Alliance Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 297 (S.D.N.Y. 1994). Florida's Ballot Order Statute passes the *Anderson-Burdick* test, assuming it applies.

B.

As Justice Ginsburg explained, "[t]he Equal Protection Clause . . . prohibits only intentional discrimination; it does not have a disparate-impact component." *Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting) (citing *Pers. Adm. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) and *Washington v. Davis*, 426 U.S. 229, 239 (1976)); *see also Coleman v. Ct. of App. of Md*, 566 U.S. 30, 42 (2012) ("Although disparate impact may be relevant evidence . . . such evidence alone is insufficient [to prove a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny."); *Bd. of Election v. Libertarian Party of Ill.*, 591 F.2d 22, 24-25 (7th Cir. 1979) (explaining that ballot placement claim under the equal protection clause requires a showing of "an intentional or purposeful discrimination"); *Republican Party of N.C. v. Martin*, 980 F.2d 943,

955 (4th Cir. 1992) (explaining that equal protection claim involving voting rights requires allegation of "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group").

But Democrats offered no evidence at trial to establish discriminatory intent. Nor could they. Democrats' alleged harm stems from a statute enacted by a *Democratic-controlled* Florida Legislature. The statute has been consistently applied by Democratic *and* Republican gubernatorial administrations over 68 years. At best, Democrats then allege some disparate impact on Democratic voters whenever a Democrat fails to win the gubernatorial race. Even if true, this is not enough for purposes of the Equal Protection Clause.

Thus, Florida's Ballot Order Statute passes the equal protection test.

V.

WHEREFORE, for the foregoing reasons, this Court DISMISSES the case and directs the clerk to enter judgment for the DEFENDANT.

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