UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NANCY CAROLA JACOBSON, *et al.*, Plaintiffs, v. LAUREL M. LEE, *et al.,* Defendants.	Case No. 4:18-cv-00262-MW-CAS

PROPOSED OPINION AND ORDER

Pursuant to this Court's Order that the parties produce written proposed orders in lieu of traditional post-trial briefing, *see* Trial Tr., 530:25-531:2, 537:21-539:5; Minute Entry (ECF No. 192 at 5), Defendant-Intervenors, the National Republican Senatorial Committee ("NRSC") and Republican Governors Association ("RGA") submit the following Proposed Opinion and Order for the Court's consideration.

Furthermore, while this Proposed Opinion and Order is stylistically from the Court's perspective, the following arguments represent Intervenor-Defendants' position on the issues presented in this case.

I. Factual and Procedural Background.

This case involves a challenge to Florida's statute for organizing candidates for partisan general elections. *See* Fla. Stat. § 101.151 *et seq*.[1] Individual Plaintiffs Nancy Jacobson, Terence Fleming, and Susan Botcher along with Democratic Party affiliated organizations Priorities USA, the Democratic National Committee ("DNC"), the Democratic Senatorial Campaign Committee ("DSCC"), the Democratic Congressional Campaign Committee ("DCCC"), the Democratic Governors Association ("DGA"), and the Democratic Legislative Campaign Committee ("DLCC")[2] brought suit in 2018 against Florida Secretary of State Kenneth Detzner[3] in his official capacity alleging that the statute organizing Florida's partisan elections is a violation of Plaintiffs' rights under the First and Fourteenth Amendments. Specifically, Plaintiffs allege that the current Ballot Order Statute discriminates against Democrats in favor of Republicans in contravention of the rights of Democrats.

Plaintiffs requested both preliminary and permanent injunctive relief enjoining the use of the current Ballot Order Statute as well as declaratory relief

[1] The statute found at Fla. Stat. § 101.151 shall be referred to throughout this Opinion and Order as either the "Ballot Order Statute" or "the Statute."

[2] It should be noted that each one of the Plaintiffs, individual and organizational, are Democratic actors. Therefore, any inference of political motivation this Court could draw against the Intervenor-Defendants would be just as applicable to the Democratic Plaintiffs. *See, e.g.,* Ms. Jacobson, Trial Tr. at 45:18-46:3 (stating she has consistently voted for Democrats and been a member of the Democratic party since 1984).

[3] Subsequent to the filing on the Complaint, a new Florida Secretary of State was appointed. Pursuant to Fed. R. Civ. P. 25(d), Ms. Laurel M. Lee, being the new Secretary of State of Florida, was substituted as the named party Defendant. *See* Notice of Substitution of Party (ECF No. 93).

holding the statute unconstitutional. Shortly thereafter, two Republican Party organizations, the National Republican Senatorial Committee ("NRSC") and the Republican Governors Association ("RGA") moved to intervene, which was granted by this Court. *See* Mot. to Intervene (ECF No. 23); Order Granting Intervention (ECF No. 36). After motions practice and a hearing on the Motion for Preliminary Injunction, this Court denied the "extraordinary and drastic remedy" of preliminary injunctive relief because Plaintiffs did not show they would be irreparably harmed absent such relief. *See United States v. Jefferson Cty.*, 720 F.2d 1511, 1519 (11th Cir. 1983); Order Denying Preliminary Injunction (ECF No. 70). The case was subsequently held in abeyance pending the outcome of the 2018 gubernatorial elections. *See* Order Granting Motion to Hold Case in Abeyance (ECF No. 81).

The Ballot Order Statute was originally passed by a Democratic controlled state legislature sixty-eight years ago in 1951. *See* Ch. 26870, s. 5, Laws of Florida (1951); Ms. Mathews, Trial Tr. at 768:12-14. In pertinent part, the Statute states that:

> The 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 office on the general election ballot, together with an appropriate abbreviation of the party name; the names of the candidates of the party that received the second highest vote for Governor shall be placed second for each office, together with an appropriate abbreviation of the party name.

Fla. Stat. § 101.151(3)(a). The law goes on to specify, as it pertains to minor party candidates, that:

> Minor political party candidates shall have their names appear on the general election ballot following the names of recognized political parties, in the same order as they were qualified, followed by the names of candidates with no party affiliation, in the order as they were qualified.

Fla. Stat. § 101.151(3)(b). In effect, the Ballot Order Statute grants to the political party of the winner of the last gubernatorial election, through the votes of the people of Florida, the first position on the ballot for all partisan general elections for the duration of the Governor's term.

In this case, I find that Plaintiffs' claims fail because: (1) the claims present a non-justiciable political question not within the power of the federal judiciary; (2) Plaintiffs lack standing; (3) Plaintiffs have not proven their alleged harm is redressable by the Court; (4) Plaintiffs have failed to prove their claims on the merits; and (5) the equitable doctrine of laches bars Plaintiffs' claims.

II. Plaintiffs' Claims Present Non-Justiciable Political Questions.

Where partisan politics, representation, and voting are involved, the Supreme Court's latest pronouncements in *Rucho v. Common Cause* counsel that this specific type of case presents a non-justiciable political question.[4] "Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies.'" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493 (2019); *see also DaimlerChrysler Corp.*

[4] While *Rucho* is undeniably a partisan redistricting case, the language the Court used is almost as equally applicable to the present context. The message of the Court is clear that the federal judiciary must be wary of any case that would call upon them to "allocate political power and influence." *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). This decision is the first from a district court called on to address the impact of *Rucho* in other partisan disputes.

v. Cuno, 547 U.S. 332, 353 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."). Before this Court embarks upon "decid[ing] an important question of constitutional law . . . [I] must find that the question is presented in a case or controversy that is . . . of a Judiciary Nature." *Rucho*, 139 S. Ct. at 2494 (internal quotations omitted). A "political question" exists when a "claim of unlawfulness" involves a question that "is entrusted to one of the political branches or involves no judicially enforceable rights." *Id*. (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004)). The lack of judicially manageable standards is the most important "independent test[] for the existence of a political question." *Vieth*, 541 U.S. at 277-78.

The basic premise of the political question doctrine is that "judicial action must be governed by *standard*, by *rule*, and must be principled, rational, and based upon reasoned distinctions found in the constitution or laws." *Rucho*, 547 U.S. at 2507 (internal quotation marks omitted) (citing *Vieth*, 541 U.S. at 278). The standard for resolving claims of excessive partisanship "must be grounded in a limited and precise rationale and be clear, manageable, and politically neutral." *Id*. at 2498. This case, even if we assume everything Plaintiffs say as true—which is certainly not the evidentiary standard at trial—is similar to claims of partisan gerrymandering in that "the question" presented to this Court "is one of degree: How to provide a standard

for deciding how much partisan dominance is too much." *Id.* (internal quotations and alterations omitted) (citing *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006) (hereinafter, *LULAC*)).

There is no "standard" or "rule" which can assist this Court with deciding what remedy to choose. Certainly nothing in the constitution guarantees strict randomization, which is not possible in Florida as a practical matter. *See, e.g.,* Ms. White, Trial Tr. at 441:2-4, 441:18-442:23 (explaining that precinct-by-precinct rotation is a practical and technical impossibility in Miami-Dade County). And, it is well established that "not all restrictions . . . impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). If the rule were that any primacy effect is too much, then a ballot ordering system that had a candidate appearing first on a ballot more than another candidate—even once or twice more—would be constitutionally suspect. A rule of this type would result in a constitutional right to pure ballot order randomization: something that no court has ever found and that would conflict with the ballot order statutes in numerous states. In any event, none of the workable standards proposed by Plaintiffs would result in anything close to strict randomization, which inevitably puts this Court in the position of choosing winners and losers in a partisan setting, and addressing what are fundamental claims of unconstitutional partisan unfairness – precisely what was presented to the Supreme

Court in *Rucho*. *See generally Rucho*, 139 S. Ct. at 2499-502 (explaining why "fairness" is not a judicially manageable standard).

a. The Supreme Court's Recent Pronouncements in *Rucho v. Common Cause* are Applicable here.

In *Rucho*,[5] the Supreme Court dispensed with many of the same purported arguments advanced by Plaintiffs in this case.[6] As an initial matter it is important to highlight the similarities and differences of these cases. In *Rucho* a three-judge federal district court found that North Carolina's congressional maps were impermissible partisan gerrymanders under, *inter alia*, the First and Fourteenth Amendments to the constitution. 139 S. Ct. at 2491. In *Rucho,* the district court found there was evidence of invidious intent on behalf of the North Carolina Legislature to favor Republicans at the expense of Democrats by attempting to ensure the election of a congressional delegation that was 10 Republicans to 3 Democrats. *Id*. Sure enough, that is exactly what happened in 2016. *Id*. In finding against the State of North Carolina, the district court found that the "Plan violated the First Amendment by diminishing [plaintiffs'] ability to elect their candidate of choice because of their party affiliation and voting history and by burdening their associational rights." *Id*. at 2403. The Supreme Court reversed the district court and

[5] *Rucho v. Common Cause* was decided with *Lamone v. Benisek*, No. 18-726 (2019). These cases are largely identical with the key difference being that in *Rucho* Republicans drew the maps at issue and in *Benisek* Democrats drew the map at issue. *See Rucho*, 139 S. Ct. at 2493.

[6] For the purpose of this section, partisan intent and effect is assumed. Even under such an assumption, Plaintiffs' claims must fail.

determined that Plaintiffs claims presented a non-justiciable political question. *Id*. at 2508.

The claims brought by Plaintiffs are rather tame by comparison. There is no evidence of "partisan intent" and even less evidence of objective harms—*i.e.* partisan effect—in this case than were proven in *Rucho*. *Compare id.* at 2504 (detailing a "lack of enthusiasm," "indifference to voting," "difficulty raising money," and "mobilizing voters") *with* Ms. Jacobson, Trial Tr. at 57-59 (detailing her ability to vote for, volunteer for, campaign for, and donate to Democratic candidates); *and* Ms. Williams, Trial Tr. at 97, 99 (discussing shifting funds—that she was unable to actually quantify—in response to the ballot order effect). The only partisan intent present here is that of Plaintiffs. The DLCC admitted that the only reason they pursued litigation in Florida, as opposed to Pennsylvania, was in pursuit of partisan benefit. Ms. Williams (DLCC), Trial Tr. at 100:16:21.

The harm that everyone was focused on at trial is nearly identical to the harm allegedly suffered in *Rucho*: The (in)ability to translate votes into seats and a claim of unfair treatment by a political party. *See Rucho*, 139 S. Ct. at 2505; Complaint at ¶¶ 52, 58 (ECF No. 1); Ms. Williams, Trial Tr. at 81:19-22. This, in turn, requires the Court to ask the same fundamental question undergirding both *Rucho* and this case: How much partisan "unfairness" is too much? *See Rucho*, 139 S. Ct. at 2505

("[T]he original unanswerable question [is:] How much political motivation and effect is too much?" (internal alterations omitted)).

It is uncontradicted in the *Rucho* record that North Carolina Republicans constructed a map that helped elect a super-majority of Republicans to Congress from North Carolina. However, the Supreme Court determined that it was outside judicial competence to decide because they "have no commission to allocate political power and influence absent a constitutional directive or *legal standards* to guide [them] in the exercise of such authority." *Rucho*, 139 S. Ct. at 2508 (emphasis added). It is the Court's analysis of the lack of judicially manageable legal standards—which must be "grounded in limited and precise rationale and be clear, manageable, and politically neutral"—that are most instructive and most applicable to the case at bar. *See id*. at 2488 (internal quotations omitted).

i. "Partisan Fairness" is not a Judicially Manageable Standard.

Plaintiffs have oft relied upon general principles of "partisan fairness" throughout this litigation. *See, e.g.,* Pls' Opening, Trial Tr. at 26 ("At the close of plaintiffs' case, plaintiffs will have established that position bias . . . . unfairly impacts Florida's elections"); Complaint (ECF No. 1 at 30) ("Courts have consistently recognized that [precinct rotation] is the fairest."). "[P]laintiffs inevitably ask the courts to make their own political judgment about how much representation particular parties *deserve*—based on the votes of their supporters . . .

." *Rucho*, 139 S. Ct. at 2499 (emphasis in original). "But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." *Id*. To put it more simply, "fairness" is not a judicially manageable standard. *See id*. at 2499-2500 (quoting *Veith*, 541 U.S. at 291).

"The initial difficulty in settling on a 'clear, manageable, and politically neutral' test for fairness is that it is not even clear what fairness looks like in this context." *Rucho*, 139 S. Ct. at 2500. Just as in the partisan gerrymandering context, it is impossible to know what partisan fairness looks like here, especially since there is no constitutional 'right' to the alleged ballot order effect or "windfall vote." *See Sarvis v. Alcorn*, 826 F.3d 708, 718-719 (4th Cir. 2016).

ii. Vote Dilution Claims are Limited.

Plaintiffs' claims, especially their undue burden claim, are effectively disguised claims of partisan vote dilution.[7] If *Rucho* teaches anything in cases outside the partisan gerrymandering context it teaches the following: Claims of "vote dilution" are only applicable in the one-person, one-vote and racial gerrymandering contexts.

> More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same

[7] It is impossible for this Court to conclude any other way. A claim of an "undue burden" on the right to vote in this context is meaningless as there is no evidence that any voters vote was ever burdened. *See infra*.

> number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, "this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018); *see also Davis v. Bandemer*, 478 U.S. 109, 150 (1986) (opinion of O'Connor, J.) ("[T]he Court has not accepted the argument that an 'asserted entitlement to group representation' . . . can be traced to the one person, one vote principle." (quoting *Mobile v. Bolden*, 446 U. S. 55, 77 (1980)).

Rucho, 139 S. Ct. at 2501 (internal citations modified). Vote dilution claims, therefore, are applicable only where representation by the same number of *constituents* is at issue. Similarly, racial discrimination has always elicited the "strictest scrutiny." *Id*. at 2502. Further, "racial gerrymandering claim[s] do not ask for a fair share of political power and influence . . . ." *Id*. This case does not involve any one person, one vote or racial discrimination claims.

Even under Plaintiffs' theory, there is no evidence that any vote was actually diluted in any specific election and claims of partisan vote dilution are not cognizable here. The people of Florida were able to vote, there are no claims of any racial animus, intent, or impact, and there is no claim of malapportionment. As such, any claim of "partisan vote dilution"—insofar as it is an alleged "undue burden" on the right to vote—is non-justiciable here.[8]

[8] It is the same under the Equal Protection clause of the Fourteenth Amendment, which "does not require proportional representation as an imperative of political organization." *See Rucho*, 139 S. Ct. at 2499 (quoting *Bolden*, 446 U.S. at 75-76).

iii. Relying on Social Science "Prognostications" With Respect to Future Political Outcomes is Outside the Judicial Expertise.

A key feature of Plaintiffs' claims is their reliance on social science research and expert testimony to make predictions using estimates and averages. Even under the most favorable light, the resulting conclusions are simply not enough to warrant judicial intervention. Dr. Krosnick testified that the *average* ballot order effect—which there are several reasons to doubt the accuracy of—in favor of Republicans is 5.35%. Dr. Krosnick, Trial Tr. at 343:9-12. This is a number that is trumpeted over and over as the keystone, lynchpin, or north star of Plaintiffs' claims such that any election falling within that number was determined because of ballot order effect. *See, e.g.,* Ms. Williams, Trial Tr. at 76:20-24; Priorities USA (Henry Cecil), Dep. Tr. 55:17-56:3 (ECF No. 195-2).

However, the 5.35% figure merely represents Dr. Krosnick's "prognostication as to the outcome of future elections . . . ." *Cf. Rucho*, 139 S. Ct. at 2503 ("To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." (quoting *Bandemer*, 478 U. S. at 160 (opinion of O'Connor, J.)); *see also Rucho*, 139 S. Ct. at 2503 ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." (quoting *LULAC*, 548 U. S. at 420 (opinion of Kennedy, J.)).

Plaintiffs have done nothing more and nothing less than present an average and ask this Court to apply that average to every past and future election all while disclaiming this average number's applicability to any individual election. *Gill*, 138 S. Ct. at 1933 ("The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens."). Federal judges are not seers, nor are political scientists. As such, it is wholly inappropriate to apply an average figure to any or all future or past elections to make a determination of constitutional dimension. This would be a prognostication in the truest sense. As Chief Justice Roberts so aptly put it: For this Court to properly decide this case with the evidence in front of it, I "not only have to pick the winner—[I] have to beat the point spread." *Rucho*, 139 S. Ct. at 2503. This is something this Court is neither prepared, nor has the power, to do.

III. Plaintiffs Lack Standing.[9]

It is long established "that the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). For this Court to entertain a claim for relief, each and every plaintiff must satisfy these three elements and show: (1) they have suffered an injury in fact that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or

[9] Mr. Fleming and Ms. Botcher were not produced for trial nor were they produced for *de bene esse* depositions. There is no record testimony or evidence from Plaintiffs Mr. Fleming and Ms. Bottcher. Therefore, the claims of these two Plaintiffs are dismissed with prejudice for lack of standing. *See Gill*, 138 S. Ct. at 1931 ("The facts necessary to establish standing . . . must not only be alleged at the pleading stage, but also proved at trial.").

hypothetical"; (2) "the injury must be fairly traceable to the challenged action of the defendant"; and (3) "it must be likely . . . that the injury will be redressed by a favorable decision." *Id*. at 560-61 (internal citations and quotations omitted); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Ultimately, it is Plaintiffs' burden to establish standing in federal court. *See ACLU of Fla. v. Dixie Cty.*, 690 F.3d 1244, 1247 (11th Cir. 2012) ("Standing is a jurisdictional inquiry, and a party invoking federal jurisdiction bears the burden of establishing that he has standing to sue." (internal quotations omitted)). And "[b]ecause standing is not merely a pleading requirement, each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id*. (internal quotations and alterations omitted). "The facts necessary to establish standing . . . must not only be alleged at the pleading stage, but also proved at trial." *Gill*, 138 S. Ct. at 1931.

a. Plaintiffs have Not Suffered an Injury-In-Fact.

"[A] plaintiff may not invoke federal-court jurisdiction unless he can show 'a personal stake in the outcome of the controversy.'" *Gill,* 138 S. Ct. at 1929 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In order that this Court not become "a forum for generalized grievances" a plaintiff must prove an injury in fact, which is "a plaintiff's pleading and proof that he has suffered the invasion of a legally

protected interest that is concrete and particularized[.]" *Gill*, 138 S. Ct. at 1929 (internal quotations omitted). Because "a person's right to vote is individual and personal in nature," a voter must prove that they suffered a "disadvantage to themselves as individuals [to] have standing to sue to remedy that disadvantage." *Id.* (internal quotations and citations omitted).

The above analysis is critical, of course, because the federal judiciary "is not responsible for vindicating generalized partisan preferences" and should instead "vindicate the individual rights of the people appearing before it." *Rucho*, 139 S. Ct. at 2501 (quoting *Gill*, 138 S. Ct. at 1933). At base, all Plaintiffs—in so far as they provided any record testimony at all—failed to allege anything other than the type of generalized grievance about the working of government not countenanced in federal courts. *See Gill*, 138 S. Ct. at 1923.

i. Individual Plaintiff Nancy Jacobson.[10]

Ms. Jacobson's "right to vote is individual and personal in nature." *Gill*, 138 S. Ct. at 1929. Therefore, Ms. Jacobson must prove "facts showing disadvantage to [herself] as [an] individual" in order to "have standing to sue to remedy that disadvantage." *Id*. (internal quotations omitted).

[10] Based on the live testimony of the only individual Plaintiff, she presents as essentially the doppelganger of the role played by Dr. Whitford in *Gill*. Her claimed harms really are about the impact on her co-partisans in other portions of Florida. On a unanimous vote, the Supreme Court concluded Dr. Whitford did not have standing, and this Court must conclude that Ms. Jacobson lacks standing. As outlined below, none of the Democratic party and allied organizations before this Court have any better claim to assert standing here, and the expert testimony presented does not bolster any of the Plaintiffs' position with respect to standing.

There is no record evidence of any individualized harm to Ms. Jacobson. She has been able to cast a vote, including for Secretary Clinton in 2016 and Andrew Gillum in 2018. Ms. Jacobson, Trial Tr., 57:7-9, 57:23-25, 58:1-2. The order of ballots had no impact on her ability to vote for any candidate of her choice. *Id*. at 58:3-5, 61:25-62:2. Her ability to campaign, volunteer, and advocate for her preferred candidates has not been hampered in any way. *See, e.g., id.* at 58:17-19, 59:7-10, 59:14-16, 59:20-22. In fact, her complaint about the Ballot Order Statute revolved around the weight of her vote and a vague and unsubstantiated claim of her "voice" being "suppressed." *See* 54:19-22. However, this claim was directly rebutted by her own testimony that none of her activities as a voter or supporter of Democrats has been impacted by the Ballot Order Statute. *See, e.g., id.* at 58:17-19, 59:7-10, 59:14-16, 59:20-22.

In fact, Ms. Jacobson testified that her legislative district is wholly contained within her county. Ms. Jacobson, Trial Tr. at 62:12-22. She goes on to testify that if a county-by-county ballot rotation system were implemented it would, in her view, still be worthwhile because it would benefit her co-partisans elsewhere in the state. *See id*. at 66:16-67:2. This is nearly a parallel claim to that advanced by Dr. Whitford. *See Gill*, 138 S. Ct. at 1924-25. Ms. Jacobson simply lacks standing under controlling precedent.

ii. Democratic Plaintiff Organizations.

None of the Democratic Plaintiff organizations prove harm sufficient to invoke this Court's jurisdiction. Essentially, each of the Plaintiff organizations claimed that they expended additional resources as a result of the Ballot Order Statute, but not a single one presented any evidence that any particular decision to allocate or not allocate resources to any particular election were directed or controlled by their views on the impact of the Ballot Order Statute. Furthermore, partisanship, which forms the basis of all their harms, is simply not cognizable in federal courts. *See Gill*, 138 S. Ct. at 1933 (the Court "is not responsible for vindicating generalized partisan preferences."); *Rucho*, 139 S. Ct. at 2504-05.

1. Priorities USA

Priorities USA is a political organization that "work[s] to support Democrats running for office around the Country, at state and federal levels." Dep. Tr. of Priorities USA at 18:11-13 (ECF No. 195-2 at 37); *see also id*. at 22:9-10. Priorities USA only attempts to articulate two harms. First, is the harm to the voters. *See id.* at 37:2 ("I think it has a harmful effect on voters."). However, Priorities USA is not a voter and they do not represent voters as an organization. Even if the organizations mission to elect Democrats is impeded, the federal courts are "not responsible for vindicating generalized partisan preferences." *Gill*, 138 S. Ct. at 1933.

The second harm they attempt to articulate is the expenditure of extra resources to elect Democrats in Florida. *See* Dep. Tr. of Priorities USA at 32:2-15; *see also id*. at 55:20-56:1-3 ("[W]e would have to, then, invest more resources into that state, in order to compensate for - - for that difference, between the two major parties.").[11] Priorities USA cannot simply rely on the naked assertion that additional resources need to be spent due to the ballot order effect. They have provided no evidence as to any additional amount that was spent in Florida or other activities that were required to be conducted. Accordingly, they have failed to carry their burden to prove any "concrete" or "particularized" harm sufficient to invoke Article III standing.

2. DNC, DGA, DSCC, and DCCC

The DNC, DGA, DCCC and DSCC each testified through 30(b)(6) depositions that were, in the interest of efficiency, admitted into the record as *de bene esse* depositions. Each of these organizations has, as their primary mission, electing Democrats to various levels of partisan offices. *See, e.g.,* Dep. Tr. of Mr. Kazin (DCCC) at 12:8-10 (ECF No. 195-3) None articulated any harm specific to the Ballot Order Statute sufficient to justify standing.

[11] There is no evidence or testimony that Priorities USA was aware of its claimed 5.35% harm before reviewing the expert report of Dr. Krosnick in this case.

The DCCC asserts that they "need to spend additional resources in the target districts that we have." *Id*. at 17:2-4; *see also id*. at 24:4-9. The DCCC pointed to no specific race where they spent or withheld resources as a result of the ballot order statute. Similarly, the DGA articulated no harm whatsoever outside of the fact that it is their belief that the "primacy effect injures Democrats who aren't listed first." Dep. Tr. of Ms. Wallace (DGA) at 26:7-11 (ECF No. 195-5). The DSCC's representative testified that "[b]ecause our focus is on electing Democrats to the U.S. Senate . . . we have an interest in changing" the Ballot Order Statute. Dep. Tr. of Ms. Barber (DSCC) at 13:14-22 (ECF No. 195-1). This is not a cognizable harm. *See Gill*, 138 S. Ct. at 1933. There was no other testimony of direct harm to the DSCC. The DNC's testimony essentially claims a harm to Democratic voters generally. Dep. Tr. of Ms. Martin (DNC) at 17:21-18:2 (ECF No. 195-4). The DNC also claims that they have had to devote more "efforts to overcome that hurdle" of ballot order effect. *Id*. at 60:4-6. The DNC failed to substantiate their threadbare allegation with any evidence showing they did anything differently pursuant to the ballot order effect.

Even assuming evidence exists that any of these committees made specific spending decisions as a result of the Ballot Order Statute (of which there was no testimony), there is no constitutional right to electoral success. *Badham v. March*

Wong Eu, 694 F. Supp. 664, 675 (N.D. Cal. 1988) *sum. aff.* 488 U.S. 1024 (1989) (specifically referring to the First Amendment); *see also Gill*, 138 S. Ct. at 1933.

3. DLCC

A representative of the DLCC testified at trial. The DLCC's mission is to elect more Democratic legislators. *See* Ms. Williams (DLCC) Trial Tr. at 120:23-25. The DLCC only articulated two harms. First, it makes the oft repeated assertion that they are "having to spend more resources on winning elections in the state." *See id*. at 80:18-23. However, the DLCC testified at trial that it has never actually shifted resources due to the ballot order effect because their spending decisions are forward looking not backward looking. *See id.* at 97:12-21. The DLCC was also unable to articulate spending due to typical election related reasons and those attributable to the primacy effect. *Id*. at 98:12-14; *see also id*. at 98:22-99:3. In fact, the DLCC was unable to articulate any quantifiable amount of resources that were shifted due to the primacy effect. *Id*. at 99:7-9.

Second, the DLCC asserts that its members are harmed if they are in competitive races within Dr. Krosnick's asserted 5.35% margin. *See, e.g., id.* at 81:19-22. As discussed *supra*, there is no evidence that any specific individual legislator was harmed, or any election impacted, by the ballot order effect. *See, e.g.,* Dr. Rodden, Trial Tr. at 192:10-12 (testifying that down ballot disadvantage does not occur in every single race). The DLCC representative also testified that prior to

receiving Dr. Krosnick's report in this case, there was no quantifiable assessment in the DLCC's possession of any specific ballot order effect beyond a general belief in a primacy effect. *See* Ms. Williams, Trial Tr. at 74:24-77:10, 121:21-122:7.

Even if evidence of resource shifting in response to the perceived ballot order "harm" existed, there is no constitutional right to electoral success. *Badham*, 694 F. Supp. at 675; *see also Gill*, 138 S. Ct. at 1933.

iii. Expert Testimony Does Not Rescue Plaintiffs' Standing.

The expert testimony presented in this case does nothing to rescue the Plaintiffs on the question of standing. The expert testimony was extraordinary for the lack of any evidence of individual harms to any individual voter, specific party organization, or election. There was no testimony by *any* expert or a finding in *any* expert report that *any* ballot order effect, no matter the size, actually changed the results of *any* election in the State of Florida. *See, e.g.* Dr. Krosnick, Trial Tr. at 384:18-25. Consequently, there was no evidence produced, *none at all*, that any future election will be determined by the alleged ballot order effect. *See, e.g., id.* at 387:17-25.

For instance, Dr. Krosnick testified that his estimate for ballot order effect, even taken at face value, is not a number that is applicable to any individual election. *See id*. at 387:17-25. Dr. Krosnick further testified that any assertion he made about the differences in previous electoral results was simply a "counter factual." *See id.*

at 383:10-384:6; *but cf. Rucho*, 139 S. Ct. at 2503 ("We are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs."). Dr. Hernson's report is not applicable to the question of ballot order effects in Florida. Dr. Barber, Trial Tr. 698:8-13. Dr. Rodden never "analyzed or opined" on if the order of the ballot was outcome determinative in any election. *See* Dr. Rodden, Trial Tr. 191:22-192:1; Dr. Barber, Trial Tr. at 670:2-16; *id*. at 668:11-14; *see also id*. at 694:21:24.

b. Plaintiffs' Harm is Not Redressable.

The burden of proof is on Plaintiffs "to establish that the requested relief would redress the alleged injury." *Federal Deposit Ins. Corp. v. Morley*, 867 F.2d 1381, 1389 (11th Cir. 1989). The Plaintiffs "must show that relief from the alleged injury will 'likely' follow a favorable judicial decision." *Id*. (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). With regards to redressability, "[s]tanding is not dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill*, 138 S. Ct. at 1934 (internal quotations omitted). "Relief 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). Plaintiffs have not shown relief is likely for their stated claims.

Since the inception of this case, Plaintiffs have advanced various possible remedies. Each remedy involves a rotation scheme either at the precinct level, the

county level, or some combination thereof.[12] At trial it was clear that, while not completely abandoning precinct-by-precinct rotation as a remedy, Plaintiffs preferred a county-by-county rotation system as most testimony focused on that system.[13] *See e.g.,* Opening Statement, Trial Tr. at 29:17-30:4 (stating that "all purported State interests fail" with a county-by-county remedy); Ms. Williams, Trial Tr. at 90:5-21. In fact, the rotation scheme being advanced by Plaintiffs would be unique across the country. Neither the parties nor this Court have identified a single state that has—either legislatively or by court order—adopted a system of ballot ordering advanced by Plaintiffs in this case.

In light of this background, a key requirement of standing is that "it must be *likely*, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotations omitted) (emphasis added). The evidence is clear that a county-by-county remedy will not actually

[12] States across the country use various ballot ordering systems. These vary from rotation, to alphabetical, to lottery, or to systems driven by a particular election result. *See generally* Laura Miller, *Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. Legis. & Pub. Pol'y 2 (2010). In fact, there are eleven states that currently use the last Governor's or Secretary of State's election to set the ballot order for the next four years. Ariz. Rev. Stat. § 16-502; Ga. Code § 21-2-285(c); Mo. Rev. Stat. § 168.703; Tex. Elec. Code § 52.091(b); Wis. Stat. § 5.64(1)(es); Conn. Gen. Stat. §§ 9-249a, 9-453r; N.Y. Elec. Law § 7-116; 25 Pa. Stat. § 2963; P.R. Laws. tit. 16 § 4152; Ind. Code §3-11-14-3.5; Mich. Comp. Laws § 168.703. Of those eleven states, five of the "determination" seats are currently held by Democrats (CT, MI, NY, PA, and WI) and five by Republicans (AZ, GA, IN, MO, and TX).

[13] The Plaintiffs likely switched to county rotation because, by all accounts, it appears that, even with significant time to implement such a remedy, precinct-by-precinct rotation is a practical impossibility in Florida. *See, e.g.,* Ms. White, Trial Tr. at 441:2-4, 441:18-442:23 (explaining that precinct-by-precinct rotation is a practical and technical impossibility in Miami-Dade County). This is primarily because of the large number of tasks that need to be completed by Supervisors of Elections throughout the state between the end of the primary elections and when federal law requires the mailing of absentee ballots to overseas voters. *See id.* Therefore, the Court's focus is on Plaintiffs' county-by-county rotation remedy. Furthermore, Plaintiffs never advanced, and therefore this Court will not entertain, any other possible remedy, including the listing of candidates alphabetically.

remedy anything and will in fact exacerbate certain harms. *See, e.g.,* Ms. Jacobson, Trial Tr. at 62:15-22; Ms. White, Trial Tr. at 465:5-15.

The only individual Plaintiff to testify in this case stated that county-by-county rotation would not remedy her harms because her legislative district is wholly contained within a single county. Ms. Jacobson, Trial Tr. at 62:20-21, 63:1-3, 66:7-8. The same principle applies to all the plaintiffs. In fact, how much the county-by-county rotation system would ameliorate any alleged harms is entirely dependent on if a district is wholly contained within a county. *See, e.g.,* Ms. Jacobson, Trial Tr. at 66:21-67:2 (stating that how much the county rotation scheme would remedy peoples harm is dependent on how much of a district is in a specific county); Ms. Williams, Trial Tr. at 91:7 (stating that county rotation would only "lessen" the harm). Even for statewide races, the county-by-county rotation system would only alleviate harms to "a certain extent." *See, e.g.,* Ms. Jacobson, Trial Tr. at 67:23-68:4; Ms. Williams, Trial Tr. at 91:7; Ms. Williams, Trial Tr. at 107:7 ("We're not looking for perfection, no."). The rotational scheme requested by Plaintiffs would, under Plaintiffs theory of harm, result in an equal protection violation for every second-listed candidate wholly contained within a single county.

i. This Court Lacks the Authority to Implement Any Remedy.

This Court's duty is to "say what the law is" and to declare laws unconstitutional. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also Rucho*,

139 S. Ct. at 2494. The requested relief has the effect of enacting legislation that is within the Florida legislature's constitutionally vested authority. *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3 781, 797 (6th Cir. 1996) (stating that the district court exceeded its authority when it ordered the City to pass the Court's amendment and stating that "[t]he choice of how to comply with this opinion by accommodating the elderly disabled rests with the City Council, not the Court."). Moreover, Plaintiffs' requested relief violates principles of federalism. *Rizzo v. Goode*, 423 U.S. 362, 380 (1976). This is particularly true when an injunction is sought from a federal court to enjoin a state executive branch agency. *Id*.

While this Court may have the power to declare Florida's Ballot Order Statute unconstitutional, and to enjoin its enforcement, this Court does not have the authority to order Plaintiffs' ballot scheme. That is for the Florida legislature to decide. *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) (holding plaintiffs lacked standing on redressability grounds because the alternative remedy sought—making certain funds available to abortion agencies—was one that the legislature would not have passed). Any ballot ordering scheme represents inherent policy choices (if not political choices) that are the province of the Florida State Legislature. *See* U.S. Const. art. I, § IV. In fact, as noted above, there is not a single state in the country that uses the system Plaintiffs are asking this Court to impose on the State of Florida.

The ability to enact election regulations and apportionment both derive themselves from the direct grant of authority under the U.S. Constitution's Election Clause. As such, even if this Court were to enjoin the current Ballot Order Statute, this Court must permit the Florida Legislature the first chance to make their own constitutional election laws. *Cf. Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.").

IV. Plaintiffs' Claims Fail on the Merits.

Even if this Court were to find that Plaintiffs had standing and that their claims were justiciable in the federal courts, this Court would be forced, in any event, to find that the Plaintiffs have failed to prove their case on the merits. The evidence presented in the form of fact and expert testimony tells this Court very little about what the actual impacts of ballot order are in Florida.

a. Florida's Ballot Order Statute is Subject to Minimal Scrutiny.

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*, 460 U.S. at 788. 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.[14]

In this case, the state need only have a rational basis—*i.e.* meet minimal scrutiny—to justify its voting regulation. *See George v. Hargett*, 879 F.3d 711, 726 (6th Cir. 2018) (rational basis review is appropriate even if the state treats similarly situated voters differently); *Estill v. Cool*, 320 Fed. Appx. 309, 310 (6th Cir. 2008) (reasonable non-discriminatory restrictions that impose only "incidental burden[s]" are subject to rational basis review). 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."[15] *Id*. at 434. The State's asserted interests in this case are more than sufficient to overcome the minimal scrutiny required here.

[14] In fact, it is questionable if the *Anderson-Burdick* standard is even applicable in this context. First, *Rucho* instructs that, for a First Amendment claim to be cognizable in the electoral context, there must be a *restriction* on speech or some other First Amendment activity. *See Rucho*, 139 S. Ct. at 2504. If Plaintiffs are "free to engage" in "speech, association, or any other First Amendment activities" then there is no harm under the First Amendment. *See Rucho,* 139 S. Ct. at 2504; *see also Badham*, 694 F. Supp. at 670. In fact, the record in *Rucho* is filled with burdens that go far beyond anything shown in this case. *See supra*. Second, "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern." *Sarvis v. Alcorn*, 826 F.3d 708, 717 (4th Cir. 2016). If an election regulation does not burden constitutional rights, then the "*Anderson* test [is] superfluous." *New Alliance Party v. N.Y. Bd. of Elections*, 861 F. Supp. 282, 295 n.15 (S.D.N.Y. 1994) Because "mere ballot order denies neither the right to vote, nor the right to appear on the ballot, nor the right to form or associate in a political organization" it is not a constitutional concern. *See Sarvis*, 826 F.3d at 717. As such, *Anderson-Burdick* is likely not implicated here. However, in light of this Court's ruling at the Summary Judgment stage of this case, the *Anderson-Burdick* analysis will be conducted.

[15] Plaintiffs have heavily relied upon the case *Graves v. McElderry*. 946 F. Supp. 1569 (W.D. Ok. 1996). First, the *Graves* case is materially distinguishable from this case in that the Oklahoma statute at issue mandated that Democrats *always* occupy this first position on the ballot. *Id*. at 1573. Second, even assuming that the facts presented here and in *Graves* are substantially similar, the *Graves* court still found the burdens to be "slight." *Id*. at 1579. The *Graves* court took issue with the state's justification of "political patronage," which is not implicated here. *See id*. at 1581.

b. Plaintiffs Produced No Evidence of Burden or Disparate Treatment as to any Voter or Candidate for Elected Office in Florida.

After a three-day trial on the merits, there is no record evidence that any specific election was impacted by the Ballot Order Statute as currently constructed. Consequently, there is no evidence that any specific Republican has won—or Democrat has lost—an election due to the ballot order effect. Even if this Court were to construe the Plaintiffs experts' generalized assertions as evidence, there is certainly not enough "evidence" to meet any preponderance standard.

i. Plaintiffs Experts only Put Forward Estimates that are Inapplicable to any Specific Election.

What is absolutely clear from the expert testimony in this case is, even if we take it as true, there is no evidence that: (1) any specific election was ever determined by the ballot order effect; or (2) any specific election will ever be determined in the future by the ballot order effect. Without evidence of either burden or disparate impact, Plaintiffs' claims must necessarily fail.

Dr. Krosnick testified at length to the inapplicability of his estimated 5.35% ballot order effect to any specific Florida election. His testimony, in fact, directly contradicts the Plaintiffs' continued use of the 5.35% figure as something that has been determinative in any specific election. Dr. Krosnick specifically stated that he "is not making an assumption about what happened" in any individual election. Dr. Krosnick, Trial Tr. at 381:20-382:2. He testified that some elections would see a

greater impact, and some would see a lesser impact. *See id*. at 382:6-9. He couched his discussion of any applicability of his average to actual Florida elections as a "counter factual." *Id*. at 383:10-384:2. Dr. Krosnick made clear, however, that the "counter factual" was largely an academic exercise that applied to no specific elections. *See, e.g., id*. at 384:18-25, 387:14-25. He even testified that "election outcomes . . . are the result of many factors . . . ." *Id*. at 386:10-12, 20. Similarly, Dr. Rodden testified that none of his analyses are applicable to the question of if ballot order was outcome determinative in any specific election. Dr. Rodden, Trial Tr. at 191:22-192:1.

Dr. Barber reinforced the inapplicability of Dr. Krosnick's estimates to specific elections. *See* Dr. Barber, Trial Tr. at 668:11-17 ("Q. . . . What is the true effect of ballot order? A. Unknown. It's very difficult to know what . . . the impact of ballot order is in Florida . . . .").

ii. Plaintiffs Key Evidentiary Failure is the Lack of Florida Specific Studies on Florida Ballot Order Effects.

The figures used by Drs. Rodden and Krosnick are all extrapolated from states other than Florida. Dr. Rodden relied on North Carolina and Dr. Krosnick relied upon both Ohio and California. There are numerous reasons to doubt the applicability of these exogenous studies. Dr. Barber testified that one "can't fairly extrapolate anything from [other states] because they're so different" from Florida. Dr. Barber, Trail Tr. at 640:19-22.

iii. Plaintiffs Expert Testimony is Ultimately Unpersuasive.

1. Dr. Krosnick

The 5.35% ballot order effect figure presented by Dr. Krosnick was heavily disputed at trial. What is not disputed is that the 5.35% figure is an average that is not applicable in any specific election. Dr. Krosnick, Trial Tr. at 372:6-19 (discussing that the possibility that there is *some* effect is 99%); *but see id*. at Dr. Krosnick, Trial Tr. at 381:20-382:2 (explaining that his 5.35% estimate is an average); *id.* at 383:4-384:6 (explaining that the elections that would change in his counter factual was simply applying his average figure to those election); *id*. at 384:18-385:4 (further explaining that his Table 19 does not determine what would have happened had there been ballot rotation); *id*. at 387:14-25 (testifying that specific candidates and elections were impacted by any ballot order effect).

Dr. Krosnick utilized, *inter alia*, California[16] and Ohio elections systems to extrapolate data for Florida. *See generally* Krosnick First Expert Report (Trial Exhibit X). These states are sufficiently different from Florida to make any extrapolation to Florida highly suspect. *See, e.g.,* Dr. Barber, Trial Tr. at 640:14-22, 641:3-6 (agreeing that one "can't fairly extrapolate anything from [the other states]

[16] Stunningly, Dr. Krosnick was unfamiliar with California's open primary system. Dr. Krosnick, Trial Tr. at 393:7-24. This is remarkable considering that he lives in California, teaches undergraduate political science at Stanford University in California, and is a supposed expert on California's election systems. The facts of California's "blanket" primary, adopted in 1996, where only the top two candidates of any party advance to the general elections are a well-known fact of political experience in California. *See California Democratic Party v. Jones*, 530 U.S. 567 (2000).

because they are so different . . . ."); *id.* at 640:24-641:6 (explaining that the "heterogeneity across these" different states makes applying any analysis to Florida uncertain); *id*. at 630:21-638:7 (detailing the failure of Dr. Krosnick to take into account demographic differences between Ohio, California, and Florida which necessarily impacted his results).

Dr. Krosnick's most stunning, and unbelievable statistical maneuver, was to use votes for the Ohio State House of Representatives as a predictor for every voter in every election in Florida. *See* Dr. Krosnick, Trial Tr. at 348:17-25; Dr. Barber, Trial Tr. at 723:17-20. This type of statistical analysis – using election results from one state to calculate hypothetical results in another state – appears to be outside the mainstream of political science. Dr. Barber, Trial Tr. at 641:17-21. None of the other three experts presented at trial in this case performed any sort of analysis like this, and not a single published study the Court reviewed cited by any expert in this case appears to have used this method of analysis. In fact, Dr. Barber was aware of no of "ballot primacy effect" literature that has ever even utilized such analysis. *See* Dr. Barber, Trial Tr. 641:17-21. Dr. Krosnick failed to highlight or note any instance outside this trial where out of state vote was used as a predictor of another state. In light of the Supreme Court's admonition to the federal courts in *Rucho* about reliance on predictive social science in analyzing and predicting election outcomes, this

Court has serious concerns about the credibility of Dr. Krosnick's expert report and live testimony.

Most stunningly, Dr. Krosnick never accounted for nor explained why his estimate of Florida's ballot order effect is *five times* higher than his own research showed in Ohio. *See* Dr. Barber, Trial Tr. at 646:15-18. In any event, based on the information available in this case it is impossible to tell if there is a ballot order effect in Florida and, if there is, what the size of any such effect is. *See id.* at 669:3-670:15. While not doubting that there is substantial evidence of the existence of a ballot order effect in political science literature and that a ballot order effect probably occurs to some unquantifiable degree in Florida, this Court expressly declines to adopt Dr. Krosnick's conclusion that there is an average 5.35% ballot order effect in Florida.

2. Dr. Rodden

Dr. Rodden testified regarding the effect of ballot order had on down-ballot elections. *See* Dr. Rodden, Trial Tr. at 141:18-23. However, Dr. Rodden failed to include numerous variables that would have had a material effect on his results. *See id*. at 189:1-25. He did not look at any elections where Democrats were listed first on the ballot. *Id*. at 190:2-8. He did not include gender in any of his analyses. *Id*. at 192:23-24. This is especially perplexing because the examples of down-ballot elections that disprove his analyses were won by women. *See id*. at 193:14-194:18. In fact, nearly all of the statewide "down ballot" candidates who seem to have defied

the "trend" Dr. Rodden identified all appear to have been women. *Id*. This is a significant omitted variable that was not appropriately explored.

In any event, "there is very little evidence of a dramatic down-ballot disadvantage." *Id*. at 759:7-11; *see also* Dr. Barber Expert Report at 7 (Intervenors' Exhibit 2) (Feb. 11, 2019 Report (ECF 113-12). Dr. Rodden's review of the recent experience in North Carolina is also not persuasive to the Court for two reasons. First, North Carolina and Florida are very different states. *See* Dr. Rodden, Trial Tr. at 190:9-191:7. Second, the two elections Dr. Rodden reviewed were subject to very different political environments. In 2016, Republicans did substantially well - winning the Presidency and retaining control of the U.S. House and U.S. Senate. In 2018, Dr. Rodden's single comparison year, North Carolina has no statewide elections on the ballot, and Democratic vote shares were substantially different that two years earlier even in the same state. *Id*. at 191:14-16. Both Dr. Barber and Dr. Krosnick testified that ballot order effects need to be studied over time, and a single election is essentially not enough to make a predictive determination. *See* Dr. Krosnick, Trial Tr. at 337:6-12; Dr. Barber, Trial Tr. at 636:15-637:3. As a result, this Court places little weight on Dr. Rodden's single election analysis of change in the ballot order statute in North Carolina.

3. Dr. Herrnson

Dr. Herrnson's report and testimony are uninformative and irrelevant to the questions presented in this case. Dr. Herrnson's report discusses "an interesting study on voter error." Dr. Barber, Trial Tr. at 698:10-13. "[H]owever, it is [Dr. Barber's] view that that study does not speak to anything about ballot order effects." This Court places little weight on Dr. Herrnson's testimony.

V. Plaintiffs' Claims Are Barred by the Equitable Defense of Laches.

The "[d]octrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). "To state the defense of laches, a party must show: (1) A delay in asserting a right or claim; (2) That the delay was not excusable; and (3) That the delay caused the party 'undue' prejudice." *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (citing *Citibank N.A. v. Citibanc Group, Inc.*, 724 F.2d 1540, 1546 (11th Cir. 1984)), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000).

a. Plaintiffs' Inexcusably Delayed in Bringing Their Claim.

"[D]elay is to be measured from the time at which the plaintiff knows or should know she has a provable claim . . ." *Karson Indus. v. Component Hardware Grp., Inc.*, 120 F.3d 1199, 1206 (11th Cir. 1997). It is plain from the record that Plaintiffs' knew—or at least assumed, and therefore should have known—that there is a ballot order effect attributed with being listed first on the ballot. *See, e.g.*, Ms.

Jacobson, Trial Tr. 61:12-20 (explaining how she knew there was a ballot order effect for over a decade and did nothing); Ms. Williams, Trial Tr. at 96:23-97-2 (the DLCC knew of the ballot order effect as early as 2005).

b. Plaintiffs' Delay Has Prejudiced the Defendants.

"Prejudice may be established by showing a disadvantage to the Defendants in asserting or establishing a claim, or some other harm caused by detrimental reliance upon the Plaintiffs' conduct." *Fouts*, 88 F. Supp. 2d at 1354; *see also White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). The State of Florida's entire election system is based upon the current ballot order statute, which the State has relied on for the last 68 years. *See* Ms. Matthews, Trial Tr. at 768:12-14; *see generally, e.g.,* Ms. Matthews, Trial Tr. at 774:3-23. Any change is law will inevitably result in increased costs in time and manpower, and cost, to the state and the counties. These increased costs—due to the State's reliance—are prejudicial as a matter of law. *See Fouts*, 88 F. Supp. 2d at 1354.

VI. Conclusion and Order.

THERFORE, this Court finds, for the foregoing reasons, that:

I. Plaintiffs' claims are dismissed with prejudice; and

II. This Court shall retain jurisdiction for the purposes of determining attorney's fees for Defendants and Intervenors to the extent permitted by law.

IT IS SO ORDERED,

_____
Judge Mark Walker
United States District Court
Northern District of Florida

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CERTIFICATE OF SERVICE

I HERE BY CERTIFY that a true and accurate copy of the foregoing was served through the Court's CM/ECF system to all counsel of record on this 31st day of July 2019.

/s/Jason Torchinsky
Jason Torchinsky