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 MOTION FOR STAY PENDING APPEAL AND INCORPORATED MEMORANDUM OF LAW

The Secretary moves for a stay pending appeal of this Court's Final Order Following Bench Trial or, in the alternative, to toll the deadlines in the Final Order so that they will begin to run only after the Secretary has exhausted her right to seek a stay in the Eleventh Circuit. ECF 202; *see also* ECF 203. Rule 8(a)(1)(A) of the Federal Rules of Appellate Procedure provides that "[a] party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal." In deciding whether to grant a stay, courts consider "(1) whether the stay applicant has made a strong showing that [s]he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in

the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotation omitted). While the first two factors are the "most critical," all four factors support issuance of a stay here. *Id.*

1. Likelihood for Success on Merits

A. Prior Consideration of Arguments

In the 74-page Final Order, this Court has considered and rejected the Secretary's arguments. *See, e.g.,* ECF 202 at 4, 8, 31. As support, the Final Order cites this Court's prior decisions. *Id.* at 4; *see also Madera v. Detzner*, 325 F. Supp. 3d 1269, 1273 (N.D. Fla. 2018); *League of Women Voters of Fla., Inc.*, *v. Detzner*, 314 F. Supp. 3d 1205, 1213 n.6, 1218 (N.D. Fla. 2018).

The Secretary will not cover ground already tread in the Final Order or in prior decisions of this Court. This Court is familiar with the Secretary's positions, which she adopts here, and which she intends to press for the first time on appeal. *See generally* ECF 199 (Secretary's proposed order).

B. Southern District of New York's Decision

The Secretary writes separately to note the import of *New Alliance Party v. New York State Board of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994). While the case featured prominently in the Secretary's papers and in the Secretary's arguments from the preliminary injunction proceeding through trial, the Final Order makes no mention of the case.

Briefly, the district court in *New Alliance Party* upheld New York's ballot order statute, which operated like Florida's statute at issue here. The district court held that "[w]hile access to ballot may, at times, be afforded constitutional protection, 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." *Id.* at 295 (emphasis added). The district court further explained:

> Indeed, it should not be. The Constitution does not protect a plaintiff from the inadequacies or the irrationality of the voting public; it only affords protection from state deprivation of a constitutional right. Voters have no constitutional right to a wholly rational election, based solely on a reasoned consideration of the issues and the candidates' positions, and free from other "irrational" considerations as a candidate's ethnic affiliation, sex, or home town.

Id. at 295 (quotation omitted).

The district court went on to expressly disagree with the Eighth Circuit's analysis of a similar North Dakota law in *McLain v. Meier*, 637 F.2d. 1159 (8th Cir. 1980), because *McLain* failed to recognize that the North Dakota law did *not* impose an "incumbent-first" ballot order and "simply overlooked" that "prevention of voter confusion is not merely a legitimate but a compelling state interest, which need not be supported by particularized evidence." *New Alliance Party,* 861 F. Supp. at 298.

New Alliance Party is also significant because, unlike *McLain* and *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *New Alliance Party* was decided after the U.S. Supreme Court established the *Anderson-Burdick* test. The district

court in *New Alliance Party* went on to say this about the *Anderson-Burdick* test: "As the instant case indicates, however, there are election law regulations which do not burden constitutional rights and as such render the *Anderson*[-*Burdick*] test superfluous." *New Alliance Party*, 861 F. Supp. at 295 n.15 (citing *Eu v. San Francisco Cty. Democratic Cent. Comm.,* 489 U.S. 214, 222 (1989)).

2. Irreparable Harm to the State

A. Enjoining Existing State Policy

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox, Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers); *Veasey v. Perry*, 769 F.3d 890, 895–96 (5th Cir. 2014). The principle applies here where the State has now been enjoined from implementing a nearly 70-year-old statute that has benefited the Plaintiffs and their party more often than their principal opposition party. *See* ECF 202 at 71–72.

B. Directing New State Policy

Recognizing that ballots must be ordered in some way, the Final Order goes on to effectively direct the Florida Legislature to adopt a replacement ballot order scheme during its next session or the Secretary to adopt some temporary scheme

with notice to this Court. ECF 202 at 73; *see also* Art. III, § 1, Fla. Const.[1] Given the Final Order's timing, directing such action results in denial of an effective appeal and excessive entanglements in policymaking functions of the State.

The State filed a notice of appeal from this Court's Final Order on November 15, 2019, the very day this Court issued the Final Order. The median time between filing of a notice of appeal and a decision from the Eleventh Circuit is approximately 9 months.[2] The median suggests that the State should expect a decision in August 2020; however, the Florida Legislature only convenes from January 20, 2020 until March 20, 2020. *See* Art. III, § 3(b), Fla. Const. Absent a special session during an election year, the Legislature will not know whether section 101.151(3)(a) of the Florida Statutes has withstood appellate scrutiny until *after* its regular session. The Legislature must then decide whether to enact a remedial statute early next year, thereby mooting the appeal and insulating the Final Order from further review, or do nothing until mere weeks before supervisors of elections begin mailing overseas

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[1] The Florida Legislature enacted Florida's ballot order statute. Article III, section 1 of the Florida Constitution vests the Florida Legislature with the exclusive power to enact any remedial statute.

[2] *See, e.g.,* U.S. Court of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on by the Merits, by Circuit, During 12-month Period Ending Sept. 30, 2018, U.S. Cts., available at https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2018.pdf (last visited Nov. 15, 2019); Kevin Golembiewski & Jessica A. Ettinger, *Advocacy Before the Eleventh Circuit: A Clerk's Perspective*, 73 U. Miami L. Rev. 1221, 1225–26 (2019).

ballots for the 2020 General Election. *See* § 101.62(4)(a), Fla. Stat. (2019) ("No later than 45 days before each . . . general election, the supervisor of elections shall send a vote-by-mail ballot . . . to each absent uniformed services voter and to each overseas voter who has requested a vote-by-mail ballot.").

Fix the issue and effectively waive appellate review. Do nothing and risk contempt and chaos. These are the options presented.

Expecting the Secretary to adopt an interim measure absent legislative action presents still more problems. Any agency action would likely have to comply with Florida's Administrative Procedure Act. *See* Ch. 120, Fla. Stat. (2019).[3] The Florida APA provides for robust judicial review before state courts not bound by this Court's conclusions regarding the constitutionality of section 101.151(3)(a). *See* § 120.68, Fla. Stat. (2019); *State v. Taylor*, 120 So. 3d 540, 552 (Fla. 2013). The Secretary remains bound by this Court's decision concerning the state statute's constitutionality. *See* ECF 202 at 71–73. The Secretary would also be bound by

[3] More specifically, such action might well constitute an agency rule. *See* § 120.56(4)(a), Fla. Stat. (2019) ("Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a)."); *id.* § 120.54(1) ("Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."); *Jenkins v. State*, 855 So. 2d 1219, 1225 (Fla. 1st DCA 2003) (discussing how policies become rules when they require compliance, create certain rights while adversely affecting other rights, or otherwise have the direct and consistent effect of law).

any state court's decision concerning the same statute.[4] It is thus possible for the Secretary to be stuck between two competing holdings concerning the constitutionality of the same state statute as she seeks to comply with this Court's Final Order.

In sum, the Final Order's timing effectively directs the Florida Legislature to enact a remedial statute to replace a nearly 70-year-old ballot order scheme and waive the State's right to appeal the Final Order, or directs the Secretary to enact some interim remedial measure while hoping that she does not run afoul of the Florida APA or is otherwise caught between competing federal and state court orders. A federal court order directing state officials to enact new state policies

[4] There is certainly room for competing conclusions regarding the constitutionality of section 101.151(3)(a) if a state court were to consider the propriety of any remedial agency action with the statute. *Compare* ECF 202, *with New Alliance Party*, 861 F. Supp. at 295 (upholding New York ballot order statute); *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 718 (4th Cir. 2016) (concluding that challenges concerning ballot order put the courts in the position of casting "aspersions upon citizens who expressed their civic right to participate in an election and made a choice of their own free will" albeit for reasons that might not appear rational to all and asking "[w]ho are [the courts] to demean [the voters'] decision?"); *Green Party v. Hargett*, 2016 U.S. Dist. LEXIS 109161, at *126 (M.D. Tenn. Aug. 17, 2016), *aff'd Green Party of Tenn. v. Hagrett*, 2017 U.S. App. LEXIS 18270, *16 (6th Cir. May 11, 2017) (upholding Tennessee statute requiring the candidate of the party in the majority in the combined houses of the general assembly to be listed first); *Sarvis v. Judd*, 80 F. Supp. 3d 692, 709 (E.D. Va. 2015) (upholding Virginia's three-tiered ballot order statute); *Meyer v. Texas*, 2011 U.S. Dist. LEXIS 50325, at *22–23 (S.D. Tex. May 11, 2011) (upholding Texas statute that arranges party candidates in descending order beginning with party whose last gubernatorial candidate received the most votes).

impinges on the sovereignty and autonomy of the State. That constitutional injury is particularly acute where, as here, the State must act on a truncated timeline. *See FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (explaining that the authority to make fundamental policy decisions "is perhaps the quintessential attribute of sovereignty" because "having the power to make decisions and to set policy is what gives the State its sovereign nature"); *see also Alden v. Maine*, 527 U.S. 706, 751 (1999).

3. Injury to Other Interested Parties

This Court has found that "section 101.151(3)(a) has impacted Plaintiffs' First and Fourteenth Amendment rights by systematically allocating [a] small but statistically significant advantage to Republican candidates in elections where the last-elected governor was a Republican, just as it awarded that advantage to Democrats in elections when Florida's last-elected governor was a Democrat." ECF 202 at 45–46. Yet neither this Court nor the Plaintiffs' experts in this case have attributed a precise percentage to any given election or concluded that the effects of section 101.151(3)(a) proved outcome determinative in any given election. *Id.*; *see also* Tr. 372:21–373:11 and 373:12–18;[5] Tr. 192:10–12. There are also no definitive

[5] Dr. Krosnick testified, for example, that there is a 99% chance that his 5% estimate of the "candidate name order effect" is not wholly explained by chance or, in other words, there is a 99% chance that his 5% estimate is not actually zero.

prognostications concerning the impact of a small but statistically significant effect on the 2020 General Election.

Thus, there is no evidence that a stay of the Final Order pending appeal would impair the rights of other interested parties in a close future election because of a small but statistically significant effect. Indeed, a stay pending appeal might spur all parties to resolve the appeal on an expedited basis to avoid the possibility of a small but statistically significant effect in a close future election.

4. The Public Interest

As discussed above, a stay of the Final Order pending appeal would serve several compelling public interests: allowing continued effectuation of longstanding state policy concerning the ordering of ballots; ensuring proper consultation and careful deliberation concerning appeals and remedial state policy; and, ultimately, preserving the autonomy of the states in our federal system. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey*, 769 F.3d at 895 (quotation omitted). And when "fundamental questions of federalism" are at stake, "considerations of comity [should] prevent this Court from determining that the interests of the State of Florida are either outweighed by any threatened harm to [private litigants], or are inconsistent with 'public policy.'" *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1390 (S.D. Fla. 1988).

5. Conclusion

This Court's Final Order should be stayed pending appeal. In the alternative, this Court should toll the deadlines in the Final Order so that they will begin to run only after the Secretary has exhausted her right to seek a stay in the Eleventh Circuit.

Respectfully submitted by:

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Dated: November 18, 2019

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this filing complies with the size, font and word requirements in the local rules; it contains 2,308 words. The undersigned also conferred with counsel for the Plaintiffs and Intervenors regarding this Motion for Stay. The Plaintiffs oppose. The Intervenors do not object.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served through the Court's CM/ECF system to all counsel of record on this 18th day of November 2019.

/s/ Mohammad O. Jazil

Attorney