UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NANCY CAROLA JACOBSON, TERENCE FLEMING, SUSAN BOTTCHER, PRIORITIES USA, DNC SERVICES CORPORATION / DEMOCRATIC NATIONAL COMMITTEE, DSCC a/k/a DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, DCCC a/k/a DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, DEMOCRATIC GOVERNORS ASSOCIATION, and DEMOCRATIC LEGISLATIVE CAMPAIGN COMMITTEE,

Plaintiffs,

v.

KENNETH DETZNER, in his official capacity as the Florida Secretary of State,

Defendant.

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

RULE 12(B)(6) MOTION TO DISMISS WITH INCORPORATED MEMORANDUM OF LAW

I. Introduction

Enacted over *six decades ago*, Florida's Ballot Order Statute provides that the candidates of the major political party whose candidate won the last gubernatorial election are listed first on the next election's ballot. Over the 33 statewide elections held in Florida since the enactment of the Ballot Order Statute, from 1952 through 2016, candidates of the Democratic Party have been listed first

on the ballot 20 times; candidates of the Republican Party have been listed first on the ballot 13 times. Despite this historical breakdown, Plaintiffs—six organizations and three individuals who support candidates of the Democratic Party (the "Democrats")—contend that the Ballot Order Statute, *written and enacted by a legislature controlled by the Democratic Party in 1951*, violates the First and Fourteenth Amendments to the United States Constitution because it allegedly provides an unfair advantage to candidates of the Republican Party. The Complaint should be dismissed, either for failure to state a claim for relief or under the equitable doctrine of laches.

As an initial matter, the doctrine of laches applies. The Plaintiffs have inexcusably delayed asserting their claims for years (if not decades). By waiting until only weeks before ballots for the next election must be approved and printed, the Plaintiffs have prejudiced the Secretary who is responsible for the administration and implementation of election laws in Florida, including the Ballot Order Statute, in addition to the 67 county supervisors of elections (non-parties to this case) who are responsible for designing, ordering, and printing ballots within their respective jurisdictions.

Separately, this Court should dismiss the case because Plaintiffs fail to state a claim upon which relief can be granted because the burdens allegedly imposed by

the Ballot Order Statute do not give rise to constitutional deprivation and Plaintiffs cannot establish discriminatory intent or effect.

II. Statement of Case and Facts

The challenged Ballot Order Statute provides 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 office on the general election ballot, together with an appropriate abbreviation of the party name[.]" Fla. Stat. § 101.151(3)(a) (2017).

This provision was originally enacted by the 1951 Florida Legislature with an effective date of September 1, 1951. *See* Ch. 26870, s. 5, Laws of Fla. (1951) (originally codified at 101.151(4), Fla. Stat.). This Court can take judicial notice of the identities and political party registrations of the elected Governors of Florida since 1951[1] and determine that, of the 33 elections held while the challenged statutory provision has been in effect, (from 1952-2016), Democratic candidates

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[1] *See* Fed. R. Evid. 201(b) (allowing courts to take judicial notice of facts "not subject to reasonable dispute" because they are "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). Specifically, the following have served as duly elected Governors of Florida since 1952: Daniel McCarty (Democrat, January 6 to September 28, 1953, shortened term due to death); Leroy Collins (Democrat, 1955-1961); Farris Bryant (Democrat, 1961-1965); Haydon Burns (Democrat,1965-1967); Claude Kirk (Republican, 1969-1971); Reubin Askew (Democrat, 1971-1979); Bob Graham (Democrat, 1979-1987); Bob Martinez (Republican, 1987-1991); Lawton Chiles (Democrat, 1991-1998); Jeb Bush (Republican, 1999-2007); Charlie Crist (Republican, 2007-2011); and Rick Scott (Republican, 2011-present).

have been listed first in 20 elections, while Republican candidates have been listed first in 13 elections.

Citing various studies from 1998 through 2015, the Democrats allege that the candidate whose name is listed first on the ballot receives an advantage. ECF 1 at ¶¶ 23-24. The Democrats claim that such "[p]osition bias in the context of election occurs most often when voters (1) lack information about candidates, or (2) are ambivalent towards candidates, despite having information about them." *Id*. at ¶25.

As to the effect of such "position bias," the Democrats allege that "[i]n Florida, the first-listed candidates in partisan elections receive the following average percentage point 'bump' due to position bias: (1) Republican candidates gain a 2.70 percentage point advantage by being listed first on the ballot; and (2) Democratic candidates receive a 1.96 percentage point advantage by being listed first." *Id*. at ¶26. The Democrats further allege that "position bias" also disadvantages later-listed candidates. *Id*. The Democrats contend that this "second part of [the] equation can be difficult in elections involving more than two candidates, but at least in two-candidate elections, the total effect is roughly double the advantage to the first-listed candidate." *Id*. "Thus," the Democrats allege, "the overall percentage point gap due to position bias in Florida's two-party, two-candidate elections is calculated to be as high as 5.40 percentage points when

Republican Party candidates are listed first, and 3.92 percentage points when Democratic Party candidates are listed first." *Id.*

Based on this alleged "position bias" and the fact that some Republican candidates have been elected "in very close elections" in recent years, *id.* at ¶34, *see also id.* at ¶¶35-36, 38-43, the Democrats allege that "[u]nless the Ballot Order Statute is enjoined, the Republican Party, its candidates, and the voters who support them, will continue to enjoy the arbitrary and unfair advantage that the Statute confers on them in the 2018 election, for no other reason than that the current Governor of Florida, Rick Scott, is a Republican." *Id*. at ¶37.

Ultimately, the Democrats contend in Count I of their Complaint that "the burdens imposed by the Statute on the fundamental right to vote outweigh any alleged benefits of the law," *id*. at ¶54, so as to violate the First and Fourteenth Amendments to the U.S. Constitution. In Count II, the Democrats further contend that "Florida's Ballot Order Statute treats one major political party [i.e., the Democrats] – and its candidates and the voters and organizations who support it – . . . differently from other similarly situated major parties and their candidates and supporters, giving one a consistent, unfair and arbitrary electoral advantage, based solely on the performance of that party's candidate in the last gubernatorial election, in violation of the Equal Protection Clause of the Fourteenth Amendment." *Id*. at ¶58.

III. <u>Standard for Motion to Dismiss</u>

Florida's ballot order law, as with other State election laws, is entitled to a "strong presumption of validity." *See Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 547 (4th Cir. 2013) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-09 (1969); *New All. Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 292 (S.D.N.Y. 1994) ("New York's election statutes, as with other state legislative enactments, have been afforded a strong presumption of constitutionality."). Plaintiffs Complaint suggests the 67-year-old law is unconstitutional but Plaintiffs Complaint does not come close to overcoming the strong presumption that the law is valid. The Complaint should be dismissed.

To dismiss a complaint for failure to state a claim upon which relief may be granted under Rule 12(b)(6), Fed. R. Civ. P., it must "appear [ ] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). A court evaluating a motion to dismiss for failure to state a claim upon which relief can be granted must focus its analysis on the face of the complaint, but it may also consider any attachments to the complaint, matters of public record, orders, and items appearing in the record. *See Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1535 n.1 (S.D. Fla. 1993), *aff'd mem.*, 84 F.3d 438 (11th Cir. 1996).

Courts should grant motions to dismiss "when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). Dismissal is also appropriate when the complaint fails to provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see also Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009). "[C]onclusory allegations, unwarranted deductions of fact, or legal conclusions masquerading as facts will not insulate a complaint from dismissal." *Oates v. Jackson Cty. Sheriff's Office*, 2010 U.S. Dist. LEXIS 19436, *3 (N.D. Fla. Mar. 4, 2010) (internal citations omitted).

In this action, Plaintiffs are unable to prove any set of facts which would support the claims alleged and dismissal with prejudice is proper. *See, e.g.*, *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 711–12 (4th Cir. 2016) (dismissing challenge to Virginia's three-tiered ballot order law for failure to state a claim under Fed. R. Civ. P. 12(b)(6)), *cert. denied sub nom. Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017); *Schaefer v. Lamone*, 248 F. App'x 484, 485 (4th Cir. 2007) (affirming district court order granting defendants motion to dismiss complaint alleging Election Law requiring alphabetical listing of candidates' names on ballots violated the Equal Protection Clause); *New All. Party*, 861 F. Supp. at 287

(plaintiff's ballot order challenge dismissed as it was unable to prove any set of facts which would support the claims it has alleged).

IV. Argument

This Court should dismiss the Complaint for two separate reasons. First, the doctrine of laches applies and bars the Democrats from challenging the constitutionality of the Ballot Order Statute at this late stage in the election cycle. Second, the Democrats fail to state a claim for under relief because they cannot show a violation of the First or Fourteenth Amendments.

A. Laches applies and bars the Plaintiffs from challenging the State's nearly 67-year old Ballot Order Statute this close to an election.

The equitable doctrine of laches will bar a claim when three elements are present: "(1) a delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." *Venus Lines Agency, Inc. v. CVG Int'l Am., Inc.*, 234 F.3d 1225, 1230 (11th Cir. 2000) (quoting *Kason Indus., Inc. v. Component Hardware Grp., Inc.,* 120 F.3d 1199, 1203 (11th Cir.1997)). The doctrine of laches has been applied to preclude late-filed challenges to election laws. *See*, *e.g.*, *Perry v. Judd*, 471 F. App'x 219, 224-25 (4th Cir. 2012) (affirming district court's application of laches defense where plaintiff filed an "eleventh hour" constitutional challenge to a petition-circulator residency requirement that had been in place for "over a

decade"). "Delay and prejudice are a complimentary ratio: the more delay demonstrated, the less prejudice need be shown." *Marshall v. Meadows*, 921 F. Supp 1490, 1494 (E.D. Va. 1996); *see also id*. (concluding that laches defense appropriate for resolution on motion to dismiss where plaintiffs delayed for "months" before bringing suit).

In this case, Florida's Ballot Order Statute was enacted over six decades ago, the election results cited in the Complaint have been a matter of public record for years, if not decades, and the most recent studies of "position bias" cited in the Complaint were published three years ago. Yet Plaintiffs inexcusably delayed in asserting their claims until just weeks before ballots for the 2018 election must be designed, ordered, printed, and mailed to domestic and overseas military voters by supervisors of elections throughout Florida.

"Diligence in the compressed timeframe applicable to elections is measured differently from how it might be measured in other contexts." *Voters Organized for the Integrity of Elections v. Baltimore City Elections Bd.*, 214 F. Supp. 3d 448, 454 (D. Md. 2016). Yet Plaintiffs offer no excuse for their decades-long delay in asserting the claims set forth in the Complaint. And in doing so, Plaintiffs have prejudiced the Secretary, who is responsible for the administration of election laws, by creating uncertainty in the application of those laws. Plaintiffs have also prejudiced candidates and voting members of the public, who face the potential

confusion of eleventh-hour changes to longstanding election laws. And Florida's 67 county supervisors of elections (non-parties to this case), who are responsible for designing, ordering, and printing ballots within their respective jurisdictions, have also been prejudiced by Plaintiffs' unjustified delay in asserting their claims. Moreover, because Plaintiffs asserted their claims well after the close of the last session of the Florida Legislature before the 2018 election, they have asked this Court to decide how the 2018 ballot should be ordered, ECF 1 at p. 39, thereby transferring what is properly a state legislative decision to the federal judiciary. *See Clough v. Guzzi*, 416 F. Supp. 1057, 1068 (D. Mass. 1976) (upholding ballot order statute against Fourteenth Amendment challenge and noting that selection of particular statutory scheme "is properly a legislative consideration").

The Plaintiffs' claims are barred and should be dismissed under the equitable doctrine of laches.

B. Plaintiffs fail to state a claim for relief under any theory of liability.

<u>Standard of review</u>

Although Plaintiffs' Complaint suggests strict scrutiny applies to their claims (ECF 1 at p. 32), the Eleventh Circuit has held that in this circuit, "constitutional challenges to state ballot access laws—whether based on the equal protection clause or the First Amendment—are to be considered under the 'less rigorous' *Anderson* test rather than under the strict scrutiny test. *U.S. Taxpayers*

Party of Florida v. Smith, 871 F. Supp. 426, 430–31 (N.D. Fla. 1993) (citing *Fulani v. Krivanek,* 973 F.2d 1539 (11th Cir.1992)), *aff'd*, 51 F.3d 241 (11th Cir. 1995); *see also*, *Green v. Mortham*, 155 F.3d 1332, 1337 (11th Cir. 1998) ("After this review, we conclude that the *Anderson* balancing test still controls challenges to ballot access requirements and proceed to apply that test in the manner instructed in *Burdick*."). Although this case concerns ballot *order* and not ballot *access*, the same analysis applies. *Democratic-Republican Org. of N.J. v. Guadagno*, 900 F. Supp. 2d 447, 455–56 (D.N.J. 2012) (noting the alleged benefit of positional bias places a lesser burden on the right to vote than ballot access, thus analyzing ballot placement claim by analogy to ballot access challenge) *aff'd*, 700 F.3d 130 (3d Cir. 2012) (noting district court correctly applied *Anderson* balancing test in ballot placement challenge). Indeed, most courts have applied the rational basis test to ballot order statutes. *McLain v. Meier,* 637 F.2d 1159, 1167 (8th Cir. 1980) (noting that "most courts have applied the rational basis test"); *New All. Party,* 861 F. Supp. at 297 ("Inasmuch as Section 116 imposes no restrictions or only reasonable ones, if any all-on NAP's First and Fourteenth Amendment rights, it is subject to minimal scrutiny."); *see also Libertarian Party of Colo. v. Buckley,* 938 F. Supp. 687, 693 (D. Colo. 1996) (rejecting argument that ballot placement challenge involves fundamental rights or requires strict scrutiny analysis).

Under the *Anderson–Burdick* balancing test for a constitutional challenge to state election law, courts must weigh the character and magnitude of an asserted injury to rights protected by the constitution against the precise interests put forward by State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden plaintiff's rights. *See, e.g.*, *Green Party of Ga. v. Georgia*, 551 F. App'x 982, 983 (11th Cir. 2014). "[W]hen [voting] rights are subjected to 'severe' restrictions, the regulation at issue must be 'narrowly drawn to advance a compelling importance.'" *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). If the right to vote is not burdened at all, however, then rational basis review applies. *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012). When applying rational basis review, "[t]he Court does not require elaborate, empirical verification that the States interest is a weighty one or that the regulation chosen advances that interest." *Sarvis v. Judd*, 80 F. Supp. 3d 692, 706 (E.D. Va. 2015), *aff'd sub nom., Libertarian Party of Va.. v. Alcorn,* 826 F. 3d 708 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1093 (2017); *see also*, *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 364 (1997).

Applying the appropriate framework here demonstrates Florida's ballot order law does not impose a restriction on constitutional rights and that State

interests support Florida's approach. As such, there are no set of facts that could be alleged by Plaintiffs entitling them to relief. This Court should dismiss the Complaint.

1. *Florida's ballot order law does not severely burden any constitutional rights.*

Even accepting contentions of position bias, which is a suspect premise,[2] this Court should not find that Florida's Ballot Order Statute is invalid. This is because to establish the constitutional claims alleged in their Complaint, Plaintiffs would need to show beyond a reasonable doubt either that Florida's ballot order law severely burdens a substantial constitutional voting right or that it distinguishes between the parties and the independent bodies in contravention of the Equal Protection Clause. Florida's law does neither.

Count I: Plaintiffs fail to state a claim for relief on an "undue burden" theory under the First and Fourteenth Amendments – *First*, the ballot order law does not implicate either the First nor Fourteenth amendments. "[A]ccess to a preferred position on the ballot so that one has an equal chance of attracting the

[2] "The existence and degree of the 'windfall-vote phenomenon' that underlies the asserted 'positional advantage' theory is highly debated and subject to a multitude of confounding variables." *Sarvis*, 80 F. Supp. 3d at 700 (citing *Clough,* 416 F. Supp. at 1063 ("A number of written studies ... purpor[t] to demonstrate the effects of the designation of first position on the outcome of elections. Some of them support, and some contradict, plaintiff's factual premise.") *affd sub nom., Libertarian Party of Va.. v. Alcorn*, 826 F.3d 708 (4th Cir. 2016); *New All. Party,* 861 F. Supp. at 288–90 (discussing the effect of incumbency, party affiliation, and race visibility on positional bias).

windfall vote is not a constitutional concern." *Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708, 718–19 (4th Cir. 2016), *cert. denied sub nom. Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017) (noting the windfall vote theory fails to raise an inference of any cognizable constitutional burden on First or Fourteenth Amendment rights), *citing New All. Party*, 861 F. Supp. at 295; *see also Clough*, 416 F. Supp. at 1067 (noting there is 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 considerations).

In *Clough*, a political candidate challenged Massachusetts law that provided ballots shall list incumbents first, follow by other candidates in alphabetical order, arguing the law violated his Fourteenth Amendment rights. *Id.* at 1058-59. Even agreeing with plaintiff that the Massachusetts law accorded some advantage to incumbents, the court found the laws did not violate the Fourteenth Amendment. *Id.* at 1066. Thus, the court concluded that even assuming some positional advantage, the voters right to choose their representatives was not sufficiently infringed as to warrant strict scrutiny of the Massachusetts statute and underlying legislative purpose. *Id.* at 1067.

Similarly, Plaintiffs have suffered no injury to their constitutional rights. Plaintiffs do not claim Florida's law excludes them or their preferred candidates from the ballot, unfairly impedes access to the ballot, or somehow prevents

supporters from voting for the candidates of their choice. To the contrary, all Plaintiffs really allege is that their opportunity to capture the windfall vote or "donkey vote" has been impeded. ECF 1 at p.2, n. 1. Yet "while *access to* ballot may, at times, be afforded constitutional protection, access to a *preferred position* on the ballot … is not a constitutional concern." *New All. Party*, 861 F. Supp. at 295. Such "position bias," even if it exists, simply does not constitute an undue burden on Plaintiffs' constitutional rights.

Count II: Plaintiffs fail to state a claim for relief on a "disparate treatment" theory under the Equal Protection Clause **–** *Second*, Plaintiffs' arguments fare no better when cast in the terms of a "disparate treatment" challenge under the Equal Protection Clause of the Fourteenth Amendment. To state an equal protection claim, plaintiff must allege the existence of an intentional or purposeful discrimination by authorities in which one class is favored over another. *Bd. of Election v. Libertarian Party,* 591 F.2d 22, 24-25 (7th Cir. 1979) (ballot placement claim under the equal protection clause requires a showing of "an intentional or purposeful discrimination"); *c.f., Republican Party of N.C. v. Martin,* 980 F.2d 943, 955 (4th Cir. 1992) (equal protection claim involving voting rights requires allegation of "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group") (internal citation omitted). Thus, Plaintiffs must demonstrate here that top placement on the ballot is

an advantage in an election, that it favored the Republicans and that *intentional* denial of this spot worked a discrimination on them. *See Bohus v. Bd. of Election Comm'rs*, 447 F.2d 821, 822 (7th Cir. 1971).

This is where Plaintiffs' claims fail. Plaintiffs do not and cannot allege that Florida's Ballot Order Statute, *written and enacted by a 1951 Florida legislature controlled by the Democratic Party*, intentionally or purposefully discriminates against the Democratic Party or its members and supporting organizations. That is because the statute, on its face, does not favor candidates of one political party over another. Even assuming for purposes of this Motion that some "positional advantage" exists, the record of history shows that it has operated to benefit the Democratic Party in 20 of the last 33 elections held while Florida's Ballot Order Statute has been in effect. Regardless, the Ballot Order Statute does not "value one person's vote over another" as argued by Plaintiffs. ECF 1 at p.36. And Plaintiffs do not even allege that the Ballot Order Statute affects the tabulation or weight to be given to any ballot cast by a single voter.

Instead, by its terms, Florida's Ballot Access Statute places all the major political parties on equal footing and does not entrench any particular party in a favored position. If the political party whose gubernatorial candidate received the most votes in the last election changes, as it has in the past, the order in which parties appear on the ballot also changes. *Cf., Green Party v. Hargett,* No. 3:11-

cv-692, 2016 U.S. Dist. LEXIS 109161, at *122 (M.D. Tenn. Aug. 17, 2016). Likewise, regardless of any alleged "position bias," Plaintiffs cannot establish any discriminatory effect in light of the indisputable fact that the Democratic Party's candidates have been listed first in the great majority of the statewide elections held since the enactment of the Ballot Order Statute in 1951.

Nor does Florida's Ballot Order Statute operate in a manner similar to that of the laws struck down in the few cases cited by the Complaint. The Ballot Order Statute does not authorize elections officials to employ personal favoritism and discrimination in determining the ballot order. *Cf., Mann v. Powell*, 333 F. Supp 1261, 1264 (N.D. Ill. 1969). Florida's law does not invariably grant priority on the ballot in each separate race based upon incumbency and seniority. *Cf., Netsch v. Lewis*, 344 F. Supp 1280 (N.D. Ill. 1972). Ballot order in Florida is determined uniformly statewide based upon objective criteria and is not subject to the unbridled discretion of each county's elections officials. *Cf., Sangmeister v. Woodard*, 565 F. 2d 460, 464 (7th Cir. 1977).

In short, Plaintiffs fail to state a claim for relief on a "disparate treatment" theory. The Plaintiff have thus failed to state a claim and cannot state a claim upon which relief can be granted under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Accordingly, Count II of Plaintiffs'

Complaint must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. Florida's ballot order law serves State interests.

Because Plaintiffs' constitutional rights have not been impaired, this Court need not engage in a balancing inquiry. *See, e.g., New All. Party*, 861 F. Supp. at 295 ("Because no constitutional right has been impaired, the Court need not balance any alleged injury against the States interest…"). Nevertheless, assuming arguendo some constitutional impairment is implicated, Plaintiffs' claims still fail. That is because when a state election law provision imposes only "'reasonable, nondiscriminatory restrictions' ... 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson,* 460 U.S. at 788); *see also Schulz v. Williams,* 44 F.3d 48, 56 (2d Cir.1994) and *Libertarian Party of Colo.,* 938 F. Supp. at 693 ("While the State offered little in the way of evidence to support its justifications for enacting its ballot position plan, its recognized interest in regulating elections is sufficient to outweigh any 'position bias' claimed by Plaintiffs.").

Indeed, each of the federal district courts called upon to review ballot order statutes similar to Florida's over the past 10 years have held that any burden due to "position bias" is outweighed by the state's important regulatory interests. *See Green Party v. Hargett*, No. 3:11-cv-692, 2016 U.S. Dist. LEXIS 109161 (M.D.

Tenn. Aug. 17, 2016) (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*, 80 F. Supp. 3d 692 (upholding Virginia's three-tiered ballot order statute); *Meyer v. Texas*, No. H-10-3860, 2011 U.S. Dist. LEXIS 50325, 2011 WL 1806524 (S.D. Tex. May 11, 2011) (upholding Texas statute which, like Florida, arranges party candidates in descending order beginning with party whose last gubernatorial candidate received the most votes).

In *Sarvis,* for example, the U.S. District Court for the Eastern District of Virginia granted the Commonwealth's Rule 12(b)(6) motion to dismiss a "position bias" challenge of Virginia's three-tiered ballot order statute brought under First and Fourteenth Amendments. In doing so, the Court concluded that any burden imposed as a result of position bias was outweighed by compelling interests identified by the Commonwealth: (1) developing comprehensible ballots to avoid voter confusion;[3] and (2) streamlining the ability for voters to engage in "straight party voting" and thereby speed up the election process and help avoid voter confusion.[4] On appeal, the Fourth Circuit affirmed, holding that "even if there is a

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[3] *See Sarvis*, 80 F. Supp. at 706 (citing *Schaefer v. Lamone*, No. L-06-896, 2006 U.S. Dist. LEXIS 96855, *12 (D. Md. Nov. 30, 2006) and *New All. Party*, 861 F. Supp. at 296, for the proposition that "[d]eveloping and ordering ballots in a comprehensible and logical fashion helps prevent voter confusion and constitutes a compelling interest").

[4] *Id*. at 706-07 (citing *Meyer*, 2011 U.S. Dist. LEXIS 50325, 2011 WL 1806524, *5, and *New All. Party*, 861 F. Supp. at 296, for the proposition that the interests

windfall vote, [the] complaint would still fail to raise the 'reasonable inference' that Virginia's ballot ordering law creates constitutionally significant burdens." *Libertarian Party of Va. v. Alcorn*, 826 F. 3d at 718-19.

Florida shares the same important interests discussed in *Sarvis* and those same interests are served by Florida's Ballot Order Statute. Moreover, as the Fourth Circuit recognized in *Sarvis*, the type of "windfall vote" alleged by the Plaintiffs − even assuming for purposes of this Motion that it exists − does not raise a reasonable inference that Florida's Ballot Order Statute creates constitutionally significant burdens. Plaintiffs have thus failed to state a claim and cannot state a claim upon which relief can be granted. Plaintiffs' Complaint must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

V. <u>Conclusion</u>

For the foregoing reasons, the Secretary respectfully moves this Court to dismiss the Democrats' Complaint for Declaratory and Injunctive Relief with prejudice.

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served by "straight party voting" are compelling).

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that this Motion complies with the size, font, and formatting requirements of Local Rule 5.1(C). The undersigned further certifies that this Motion complies with the word limit in Local Rule 7.1(F); this Motion contains 4,983 words, excluding the case style, signature block, and certificates.

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Dated: June 19, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via transmission of a Notice of Electronic Filing through the Court's CM/ECF system to the following on this 19th day of June, 2018:

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