UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NANCY CAROLA JACOBSON, et al.,

***Plaintiffs*,**

v. **DISTRICT COURT CASE NO.:**

4:18cv262-MW/CAS

LAUREL M. LEE, et al.,

***Defendant/Intervenors*.**
_____/

RESPONSE TO DEFENDANT LEE'S MOTION TO STAY PENDING APPEAL AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Fed. R. App. P. 8(a)(1)(A), Intervenor-Defendants, National Republican Senatorial Committee ("NRSC") and the Republican Governors Association ("RGA"), hereby file this response to Defendant Secretary of State's Motion for Stay Pending Appeal and support the motion to stay this Court's Final Order Following Bench Trial and Judgment, Doc. 202 and Doc. 203, pending appeal.

STANDARD OF REVIEW

In determining whether to grant a stay, courts consider the following factors:

> (1) whether the stay applicant has made a strong showing that 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). In balancing these factors, the "first two factors of the traditional standard are the most critical." *Id*.

ARGUMENT

The NRSC and RGA adopt and join the arguments advanced by the Defendant Secretary of State. The Intervenor-Defendants advance the following arguments in addition to the Secretary's arguments. Furthermore, the NRSC and RGA also respectfully refer this Court to the arguments in their proposed order. *See generally* Doc. 200 (*filed* July 31, 2019).

I. INTERVENOR-DEFENDANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL.

This Court lacks jurisdiction because Plaintiffs' claims present non-justiciable political questions. The U.S. Supreme Court in *Rucho v. Common Cause* held that federal courts did not have the competency to rule in cases involving the mirepoix of politics, representation, and voting. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). The Court held that the federal courts "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." *Id*. at 2508 (emphasis added).

Despite these pronouncements, this Court does precisely what the Supreme Court cautioned it should not do. The precise claim Plaintiffs brought, and the evidence purporting to support that claim are that Plaintiffs are unable to translate votes into seats and that, Democrats writ large are unfairly treated. Compl. ¶¶ 52, 58 (ECF No. 1); Ms. Williams, Trial Tr. at 81:19-22. This is identical to the complaint and evidence brought in *Rucho v. Common Cause*. *Rucho*, 139 S. Ct. at 2505. Furthermore, the evidence of purported harm in *Rucho* was far greater than the evidence of purported harm here. *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 actually unable to quantify—in response to the ballot order effect).

The precise question presented to the Court here is how much partisan dominance is too much. *See Rucho*, 139 S. Ct. 2484, 2505. The Court's holding that the ballot order statute is unconstitutional because it allocates too much power to one political party is outside this Court's purview. *Compare Rucho* 139 S. Ct. at 2508 *with* Mem. Op. at 45 ("[T]his Court finds [the Florida Ballot Order Statute] has impacted Plaintiffs' First and

Fourteenth Amendment rights by *systematically allocating* that small but statistically significant advantage to Republican candidates in elections where the last elected governor was Republican, just as it awarded that advantage to Democrats in elections when Florida's last-election governor was a Democrat."). Accordingly, this Court does not, and did not, have jurisdiction to answer the non-justiciable political question of how much partisan dominance is too much.

The Court's reliance on *Mann v. Powell* for the proposition that its summary affirmance "alone" compels "the conclusion that Plaintiffs' claims are justiciable" is mistaken. *See* Mem. Op. at 5-6. Nor does this argument ask the Court to "dramatically limit" prior Supreme Court authority *sub silentio*. *See* Mem. Op. at 9 n. 7.

First, it is a bedrock principle of *stare decisis* that just because *Mann v. Powell*, 314 F. Supp. 677, (N.D. Ill. 1969) was summarily affirmed by the U.S. Supreme Court, 398 U.S. 988 (1970), does not similarly confer jurisdiction on all federal courts that hear subsequent ballot order cases. This is because "[t]he jurisdiction of [the Supreme] Court was challenged in none of these [previous] actions, and therefore the question is an open one before us." *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions

of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*."); *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1231 (11th Cir. 2007) ("[I]t is well-established circuit law that we are not bound by a prior decision's *sub silentio* treatment of a jurisdictional question. There is, in other words, an exception to the prior panel precedent rule for implicit jurisdictional holdings. If jurisdictional holdings are explicit, they must be followed, not so if they are only implicit.") (quotation marks and citations omitted).[1]

The precise jurisdictional question, whether the federal courts have the competency to adjudicate cases involving the purported allocation of political power, has not previously been before this Court or the U.S. Court of Appeals for the Eleventh Circuit. Accordingly, this Court's reliance on

[1] These quotations are taken from *In re Bradford*, 830 F.3d 1273, 1278 (11th Cir. 2016).

Mann and *Williams v. Rhodes*, 393 U.S. 23 (1968) (Mem. Op. at 8) as requiring a finding of justiciability are misplaced.

Second, Plaintiffs' claims are precisely those that should crash upon the shoals of *Rucho* and to say so is not a "solemn mockery." (Mem. Op. at 9). Rather following *Rucho* respects the solemn separation of powers principles that the Framers so deliberately crafted. *See Rucho*, 139 S. Ct. at 2494-95 (delineating the deliberate balance of power struck in article I, section 4 of the Constitution). And, although the federal courts have exercised their authority in adjudicating cases under the Fourteenth Amendment's Equal Protection Clause, namely, racial gerrymandering cases, racial vote dilution cases, and "one person, one vote cases," those are the exceptions, not the rule. *Id*. at 2495-96 (rejecting appellants' contention that all cases brought challenging statutes enacted under authority delegated from the Time, Place, or Manner Clause, are outside the federal court's competency and identifying racial gerrymandering cases and one person, one vote cases as exceptions). Viewing these two types of cases as exceptions to the general rule reinforces the notion that race, unlike politics or mutable political affiliation, is a suspect classification. *Id*. at 2502-03.

That is the distinction that drives the exceptions. It is not that the *Rucho* Court held all voting rights cases are justiciable except partisan

gerrymandering claims; it held that racial gerrymandering claims and "one person, one vote claims are the exception to an otherwise general rule that cases involving the allocation of political power, both real and imagined, are non-justiciable." *Id*. at 2501. As the Court's opinion demonstrates, this case is not about race, it is about the purported allocation of political power.

The NRSC and the RGA have raised a substantial and novel issue of law that no other Court has yet to rule upon. The NRSC and RGA have therefore satisfied the first prong of the stay analysis. *Garcia-Mir v. Meese*, 781 F. 2d 1450, 1453 (11th Cir. 1986) (presenting a substantial case on the merits favors granting a stay); *Gonzalez v. Reno*, 2000 U.S. App. LEXIS 6766, *2 (11th Cir. 2000) (a movant "need not necessarily show that he probably will succeed on the merits of his appeal; instead [he] need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay."); *Jet Networks FC Holding Corp. v. Goldberg*, 2009 U.S. Dist. LEXIS 53593, *6 n.4 (S.D. Fla. 2009) ("A likelihood of success is shown when the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate inquiry."); *In re Any & All Funds Or Other Assets in Brown Bros. Harriman & Co*., No. 08-mc-0807, 2009 U.S.

Dist. LEXIS 18277, *2 (D.D.C. March 10, 2009) (stating that because the court was the first to interpret the statute at issue, the proper interpretation of that statute presented a "fair ground for litigation" and therefore the first prong of the stay analysis was satisfied).

II. THE NRSC AND RGA WILL BE IRREPARABLY HARMED ABSENT A STAY.

The NRSC and the RGA agree with the Secretary's arguments concerning irreparable harm. Intervenor-Defendants add that under the Court's timeline, there is a substantial risk of confusion heading into an election year. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). This is especially true here where there is a fast approaching election and, if this Court does not grant a stay and Florida's election machinery begins in compliance with this Court's order and without a replacement in place far enough in advance of the election to be efficiently and effectively implemented, Florida, and the candidates and members of the NRSC and RGA, will endure the confusion should the Eleventh Circuit overrule this Court. *Id*. at 4-5. This confusion causes people not to go to the polls, *id*. at 4-5, which impacts the right to an orderly election. *See Burdick v. Takushi,* 504 U.S. 428, 441 (1992). Therefore, this Court should grant a stay to avoid the confusion that potentially conflicting orders will cause.

III. THE ISSUANCE OF A STAY WILL NOT SUBSTANTIALLY INJURE THE PLAINTIFFS.

The NRSC and the RGA agree with the Secretary's arguments concerning harm to other parties if a stay is granted. The NRSC and RGA do not have anything additional to add.

IV. THE PUBLIC INTEREST LIES IN UPHOLDING THE STATUTE.

The NRSC and the RGA agree with the Secretary's arguments that it is in the public interest to grant the stay.. The NRSC and RGA do not have anything additional to add.

CONCLUSION

For the foregoing reasons, as well as the reasons articulated by the Florida Secretary of State, this Court should grant the requested stay.

Respectfully submitted,

Dated: November 21, 2019

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed using the CM/ECF system which instantaneously sent a Notice of Electronic Filing (NEF) to all counsel required to be served.

/s/ Jason Torchinsky
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