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.

LAUREL M. LEE, in her official capacity as the Florida Secretary of State,

Defendant,

and

NATIONAL REPUBLICAN SENATE COMMITTEE, and REPUBLICAN GOVERNORS ASSOCIATION,

Defendant-Intervenors.

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE SECRETARY OF STATE'S MOTION FOR STAY PENDING DECISION FROM ELEVENTH CIRCUIT

The Secretary previously sought—and was denied—a stay pending appeal from both this Court, ECF No. 220, and the Eleventh Circuit, ECF No. 226. The Secretary now asks this Court to revisit its order, but she fails to satisfy the legal standard for either a motion for reconsideration or a motion for stay in the first instance. For this reason alone, the Secretary's renewed motion for stay, ECF No. 232 ("Mot."), should be denied.

Nothing has changed such that any of the considerations mandating a stay now tip in the Secretary's favor. Instead, the Secretary postulates that a decision from the Eleventh Circuit is "imminent" and that the Eleventh Circuit may clarify the Secretary's power to mandate a new ballot ordering scheme. But there is no guarantee that the Eleventh Circuit decides this matter this week, this month, or in the next two months. Nor is the Secretary's power to adopt a new ballot ordering scheme a question the Secretary raised on appeal. Finally, the Secretary's request for further delay is particularly troubling given her repeated contention over the course of this litigation that any change to Florida's ballot ordering system must be commenced as soon as possible. Because the Secretary cannot meet the heavy burden she bears in seeking extraordinary relief from this Court, her motion should be denied. While the Secretary may prefer a wait-and-see approach to address the constitutional violation found by this Court, Plaintiffs—and Florida's electorate writ large—are entitled to a timely resolution to ensure that general election ballots in November 2020 employ an appropriate ballot ordering scheme. Plaintiffs therefore request that the Court order an appropriate interim remedy.

RELEVANT BACKGROUND

On November 15, 2019, this Court entered a judgment declaring Florida's ballot order statute (the "Ballot Order Statute") unconstitutional and enjoining its enforcement. ECF No. 202. The Secretary subsequently moved for a stay pending appeal, ECF No. 207, and this Court held a telephonic hearing on the motion one week later, ECF No. 217. On November 26, this Court denied the Secretary's motion for a stay pending appeal, holding that the Secretary failed to meet any of the four requirements necessary for such relief. ECF No. 220 at 2-5. At the same time, the Court granted the Secretary's request for additional time "to evaluate her options" depending on whether and how the Florida Legislature "has chosen to proceed" on a new ballot ordering system in the 2020 legislative session. The Court ordered the Secretary to file a notice "informing this Court how she intends to proceed" on or before March 20, 2020—a date coinciding with the end of the legislative session. *Id.* at 6-8; *see also* ECF No. 219 at 19:3-8 (Secretary's counsel requesting seven days after end of legislative session "to assess her position and file a notice with the Court accordingly . . . about what her plans are"). Ten days later, the Secretary moved the Eleventh Circuit for a stay pending appeal, and on December 20, that motion was also denied. ECF No. 226 at 2 (finding Secretary "has not made the requisite showing").

The Florida Legislature convened on January 14, 2020, for its regular session and adjourned on March 19. During that time, it failed to enact a constitutional replacement for Florida's Ballot Order Statute. On March 20, the Secretary requested a seven-day extension of the deadline requiring her to file a

notice advising the Court of her next steps based on the fact that the legislative session had concluded six days later than anticipated, ECF No. 230, which this Court granted, ECF No. 231. On March 27, the Secretary filed the instant Motion. ECF No. 232. In contravention of this Court's November 26 Order, ECF No. 220 at 8, the Secretary failed to provide the Court with any notice "informing [it] how she intends to proceed" based on the Legislature's failure to act.

LEGAL STANDARD

However stylized, the Secretary's motion amounts to a request that this Court reconsider its previous denial of the Secretary's first Motion for Stay Pending Appeal. *See* ECF Nos. 207, 220. But reconsideration "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Navelski v. Int'l Paper Co.*, 261 F. Supp. 3d 1212, 1214 (N.D. Fla. 2017) (quoting *Wendy's Int'l, Inc. v. Nu–Cape Const., Inc.*, 169 F.R.D. 680, 685 (M.D. Fla. 1996)) (quotation marks omitted). There are only three grounds that justify reconsideration, none of which are present here: (1) an intervening change in controlling law; (2) discovery of new evidence that was not available when the original motion was decided; or (3) the need to correct clear error or prevent manifest injustice. *Id.*; *see also Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Reconsideration may not be used "to raise new arguments which should have been raised in previous briefing, or to vent dissatisfaction with the [c]ourt's reasoning." *Navelski*, 261 F. Supp. 3d at 1214.

As to the stay itself, the party seeking it must demonstrate each of the following: (1) a strong likelihood of prevailing on the merits on appeal; (2) the

movant will suffer irreparable injury absent a stay; (3) no substantial harm will follow to other interested persons if the stay is granted; and (4) the stay will not result in any harm to the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). A stay pending appeal "is an intrusion into the ordinary process of administration and judicial review," *id.* at 427 (quotation omitted), and accordingly is considered "extraordinary relief" for which the moving party bears a "heavy burden." *Winston-Salem/Forsyth Cty. Bd. of Ed. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers). The Secretary's motion should be rejected for failure to meet the standard for either reconsideration or a stay pending appeal.

ARGUMENT

I. The Secretary makes no argument for why this Court should reconsider its previous ruling.

The Secretary offers no reason for this Court to employ the "extraordinary remedy" of reconsidering its previous ruling denying her motion for a stay. Indeed, she does not even address the standards that could compel the Court towards reconsideration. *See Navelski*, 261 F. Supp. 3d at 1214. This amounts to an abandonment of any such argument. *Cf. Sepulveda v. U.S. Attorney Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005) ("When an appellant fails to offer argument on an issue, that issue is abandoned."); *United States v. Day*, 405 F.3d 1293, 1294 n.1 (11th Cir. 2005) ("This court has a well-established rule that issues and contentions not timely raised in the initial brief are deemed waived or abandoned."). The Secretary instead bases her request on her assertion that a decision from the Eleventh Circuit "appears imminent," Mot. at 3, and that such a decision might

further clarify the Secretary's powers regarding implementing a new ballot order scheme. *Id.* at 4. But both assertions are conjecture, and neither provides reason for this Court to reconsider its previous ruling.

First, it is not at all certain that an opinion from the Eleventh Circuit is "imminent." *Id*. While the appellate court expedited briefing and argument in this case, it has provided no indication as to when it will issue its decision. Additionally, since this matter was argued nearly seven weeks ago, a global pandemic has led to significant disruptions of daily life and the judicial system, including in the Eleventh Circuit. *See, e.g.*, General Order Nos. 44-45, *available at* http://www.ca11.uscourts.gov. As this Court previously observed, even in ordinary times appellate rulings can take a significant amount of time to be issued, ECF No. 219 at 9:6-9, and these are hardly ordinary times. The Secretary has no special insight into when a ruling will issue, and there is no basis to stay the case in the hopes of an "imminent" ruling.

Second, it is puzzling that the Secretary thinks the Eleventh Circuit's "exposition of [her] powers" in any such ruling would provide further clarity regarding this Court's remedy, as the question of the Secretary's power to implement specific remedies is not before the Eleventh Circuit. Not only did the Secretary fail to raise any argument on appeal regarding her authority over a remedial ballot ordering scheme, *see* Br. of Appellant Sec'y Laurel M. Lee, *Jacobson v. Lee*, No. 19-14552 (11th Cir. Jan. 7, 2020), her counsel acknowledged at oral argument that the Eleventh Circuit's holding in *Democratic Executive Committee of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019), likely forecloses

any argument that she is not the proper defendant for this litigation. Oral Argument at 2:43-5:33, *Jacobson v. Lee*, No. 19-14552 (11th Cir. Feb. 12, 2020). Even if the Eleventh Circuit were to opine on whether the Secretary is the proper defendant, presumably it would either vacate this Court's ruling on that basis or affirm; it is unclear how it would clarify the Secretary's power to adopt an interim remedy.

Neither of the Secretary's arguments merit reconsideration of the Court's previous ruling, and the Secretary's motion should be denied.

II. The Secretary fails to meet her burden for a stay pending appeal.

This Court and the Eleventh Circuit have already rejected the Secretary's motions to stay, *see* ECF Nos. 220, 226, and the Secretary offers no new argument or evidence to justify her renewed request for a stay pending appeal. In fact, the Secretary's motion is devoid of any mention of the four factors required for a stay pending appeal, each of which she has the burden of proving. *Nken*, 556 U.S. at 434. Because she fails to present any argument or facts that would entitle her to such a stay, the Secretary cannot meet her burden for a stay pending appeal. *Cf. Sepulveda*, 401 F.3d at 1228 n.2; *Day*, 405 F.3d at 1294 n.1. While the motion should be denied for this reason alone, Plaintiffs briefly address why the Secretary cannot meet any of these four factors.[1]

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[1] Plaintiffs incorporate by reference the arguments contained in their opposition to the Secretary's previous motion for a stay pending appeal, ECF No. 216.

A. The Secretary has not shown a likelihood of success on the merits.

The Secretary cannot possibly demonstrate a likelihood of success on the merits where she presents no new evidence or argument to strengthen her position. This Court's conclusion that Florida's ballot order statute is unconstitutional is consistent with long-standing authority from the U.S. Supreme Court, federal appellate courts, federal district courts, and state courts, all striking down similar statutes that arbitrarily favored a certain category of candidates over similarly-situated opponents. *See Mann v. Powell*, 398 U.S. 955 (1970), *summarily aff'g* 314 F. Supp. 677 (N.D. Ill. 1969); *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980); *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977); *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996); *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972); *Akins v. Sec'y of State*, 904 A.2d 702 (N.H. 2006); *Gould v. Grubb*, 536 P.2d 1337 (Cal. 1975); *Holtzman v. Power*, 313 N.Y.S.2d 904 (N.Y. Sup. Ct. 1970), *aff'd*, 311 N.Y.S.2d 824 (1970); *Kautenburger v. Jackson*, 333 P.2d 293 (Ariz. 1958). Indeed, the Secretary's primary argument on appeal—that ballot order disputes are nonjusticiable political questions, *see* Br. of Appellant Sec'y Laurel M. Lee, *Jacobson v. Lee*, No. 19-14552, at 28-39 (11th Cir. Jan. 7, 2020)—was expressly raised by the defendant in *Mann* on appeal to the Supreme Court, *see* Jurisdictional Statement, *Mann v. Powell*, 398 U.S. 955 (1970), 1970 WL 155703 at *6 (posing as "[q]uestion[] [p]resented" whether "the 'political question doctrine' permit[s] federal judicial cognizance of political cases, involving inter- or intra-party election disputes") (citation omitted), and soundly

rejected by the Supreme Court's summary affirmance of the district court's finding of unconstitutionality.

And this Court's decision is supported by even more authority now than when it was first issued. The Southern District of West Virginia recently held that a statute that prioritized candidates of the presidential candidate who received the most votes in the last election "is not politically neutral or nondiscriminatory and thus creates a constitutionally *significant* burden on the plaintiffs' First and Fourteenth Amendment rights." *Nelson v. Warner*, No. 3:19-0898, 2020 WL 1312882, at *3 (S.D. W. Va. Mar. 17, 2020) (emphasis added). The court thus denied the defendant's motion to dismiss and concluded that "the plaintiffs sufficiently allege an imminent injury in fact based on the Ballot Order Statute's burdening of their First and Fourteenth Amendment rights." *Id.* at *4.

For these reasons, and the ones set forth in Plaintiffs' previous briefing before both this Court and the Eleventh Circuit, *see* ECF No. 216 at 3-7; Br. for Appellees, *Jacobson v. Lee*, No. 19-14552, at 22-66 (11th Cir. Jan. 21, 2020), the Secretary has failed to establish a strong likelihood of prevailing on the merits of her appeal.

B. The Secretary will not be irreparably harmed if the Court denies her motion for stay pending appeal.

The Secretary has also failed to demonstrate that she will be irreparably harmed if a stay is not issued while the Eleventh Circuit decides the appeal. In her motion, the Secretary only alleges injury involving: (1) performing the potentially "unnecessary" administrative work of adopting or implementing a proposed new

ballot order system; and (2) her subjective "concerns with utilizing the rulemaking procedure" in this situation, which she speculates the Eleventh Circuit *may* address in a future opinion. Mot. at 3-4. Tellingly, the Secretary does not—and cannot—call these injuries irreparable.

First, any administrative burden associated with implementing a new ballot order system—a process which current software systems make as simple as a few mouse clicks, *see* Trial Tr. at 591-92—is both extremely slight and does not constitute irreparable harm to the Secretary. If anything, proceeding to act on an appropriate remedy now, rather than at least two months from now, should lessen any purported administrative burden, as it will give elections officials time to appropriately implement any remedy in a less rushed manner, a concern which the Secretary has (up until this point) repeatedly expressed in this litigation. *See infra* Section II.C. Courts have repeatedly held that the fact that burdens undertaken may later be deemed unnecessary as a result of appellate court reversal does not constitute irreparable harm sufficient for a stay. *See, e.g.*, *Fish v. Kobach*, No. 16-2105-JAR, 2016 WL 3000356, at *3 (D. Kan. May 25, 2016) ("The Court disagrees that the administrative burdens on the State [in reviewing voter registration forms and sending notices] constitute irreparable harm."); *see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. State*, No. S-04-2265 FCD KJM, 2009 WL 2971547, at *5 (E.D. Cal. Sept. 11, 2009) ("[T]he court cannot find that defendants' 'administrative burden' [of issuing licenses that could potentially be revoked] is an injury sufficient to justify imposition of a stay."). The same is true here.

Second, the Secretary's subjective discomfort with using her emergency rulemaking powers does not rise to the level of irreparable harm. *See, e.g.*, *Meo v. Wall*, No. CA No. 01-467 T, 2002 WL 1889138 at *1 (D.R.I. July 18, 2002) (finding "subjective apprehensions and predictions cannot establish an immediate threat of irreparable harm") (citation omitted). Not only have the Secretary's concerns about her ability to implement a remedy been previously been rejected by this Court, ECF No. 220 at 4-5, the Secretary's decision to take no action to adopt a remedial ballot ordering scheme—whether based on "her concerns with utilizing the rulemaking procedure" or on her belief that an "imminent" decision from the Eleven Circuit will moot the issue, Mot. at 4—is not a reason to deny Plaintiffs relief. This Court has already indicated that should the Legislature and the Secretary demur, the Court will devise "an interim solution." ECF No. 219 at 23:4-7.

During this Court's hearing on the Secretary's prior motion for a stay, the Secretary's counsel appeared to concede that all she required to alleviate any purported concerns about her rulemaking authority was "a little breathing space" to determine her preferred course of action in light of what the Legislature decided to do. ECF No. 219 at 24:20-24; *see also id.* at 24:25-25:5 (noting Secretary is "in the process of putting a bow" on a rule that would "dictate how the ballots are ordered"). The Court provided just that; as the Secretary requested, it allowed her seven days after the end of the legislative session to inform the Court "how she intends to proceed," at which time "[t]he element of forecasting what third parties may do will . . . be, if not eliminated, then at least much reduced." ECF No. 220 at

6-8. Rather than advising the Court of how she intends to proceed as requested, the Secretary instead seeks further delay without any demonstration of how, in the absence of a stay, she would suffer irreparable harm.

C. The issuance of a stay would substantially injure Plaintiffs.

There can be no serious question that Plaintiffs would be substantially injured if the motion to stay were granted, as this Court has already concluded. *See* ECF No. 220 at 5 ("Plaintiffs would suffer substantial harm if Florida conducted further elections employing the ballot order scheme at issue in this case."); *see also* ECF No. 216 at 11-12. This Court has already found that the Ballot Order Statute "imposes a burden on Plaintiffs' First and Fourteenth Amendment rights" and that Plaintiffs face "a real and immediate threat that, absent equitable relief from this Court, they will be wronged again." ECF No. 202, at 63, 65-66.

The chance that Plaintiffs would be harmed by the Ballot Order Statute in yet another election would be amplified by any delay resulting from a stay, particularly in light of the Secretary's repeated concerns about the time needed to implement a new ballot ordering scheme in advance of an election. For instance, in the Secretary's Motion to Dismiss, filed on June 19, 2018, the Secretary admonished Plaintiffs for filing this lawsuit on May 24, 2018, "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." ECF No. 21 at 9; *see also* ECF No. 44 at 28 (arguing the effort required to implement a change in ballot order on Plaintiffs' requested timeline would bring "[t]he possibility of 'catastrophic failure'"). Yet now the Secretary claims that a

delay in mandating a new ballot ordering scheme until at least June 1, 2020 "should not prejudice the parties." Mot. at 4. The Secretary cannot have it both ways. If, as the Secretary previously argued, a delay until May 24, 2018 put the implementation of a new ballot ordering scheme in peril for the November 2018 election, then by her logic a delay until at least June 1, 2020 would do the same for the November 2020 election. Given the Secretary's previous concerns about delay, there is no good cause for the Court to wait any longer to order the Secretary to begin implementing a ballot ordering scheme that can be in place for the November 2020 election.

There is no reason why Plaintiffs should have to wait to have their constitutional injuries addressed and face the prospect that the Secretary will once more claim that delay has made the implementation of a remedy administratively impossible.

D. The public interest lies in denying the motion for stay.

Finally, the public interest also supports denying the Secretary's motion to stay. As this Court has already concluded, "the public's interest is clearly served by holding elections which conform with the Constitution and is just as clearly disserved by holding elections which do not conform with the Constitution." ECF No. 220 at 5. The Secretary's motion to stay threatens yet another election that compromises the democratic ideals fundamental to the public interest.

III. Given the Legislature's and the Secretary's failure to act, this Court should order implementation of an interim ballot ordering scheme for the November 2020 election.

Given the failure of the Legislature to implement a new ballot ordering

scheme in its regular session and of the Secretary to put forth any plan for how she wishes to proceed, it is appropriate for the Court to step in and provide for an interim ballot ordering scheme to fill the void in order that elections can be conducted. It is beyond dispute that this Court has authority to order an interim remedy for the unconstitutional Ballot Order Statute in time for the November 2020 election. Indeed, courts have previously ordered the implementation of specific remedial schemes so that elections can be conducted, in both the ballot order context and elsewhere. *See, e.g.*, *United States v. Brown*, 561 F.3d 420, 436 (5th Cir. 2009) (holding where political party's county executive committee engaged in racially motivated manipulation of the electoral process, district court did not abuse its discretion in appointing a referee-administrator to organize party's county primary elections and limiting defendants' role in supervising future primary elections); *Obama for Am. v. Husted*, No. 2:12-CV-636, 2014 WL 2611316, at *5 (S.D. Ohio June 11, 2014) (ordering Secretary of State to set uniform and suitable in-person early voting hours for all eligible voters for the three days preceding all future elections); *United States v. Berks Cty., Pennsylvania*, 277 F. Supp. 2d 570, 582 (E.D. Pa. 2003) (prohibiting English-only elections in the City of Reading, ordering defendants to recruit and train persons to serve as bilingual poll officials or interpreters, and authorizing the appointment of federal examiners to serve through 2007); *Culliton v. Bd. of Election Com'rs of DuPage County*, 419 F. Supp. 126, 129 (N.D. Ill. 1976) (ordering drawing of lots to determine candidate order for the November 2, 1976 election).

In short, the Secretary cannot both sit on her hands and insist the Court's

hands are tied. A ballot ordering scheme must be in place for the upcoming election, and this Court must step in where both the Legislature and the Secretary have failed to act. Plaintiffs therefore request that the Court order an appropriate ballot order system to be used in the upcoming 2020 election.

CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that the Court deny Defendant's motion for stay pending a decision by the Eleventh Circuit. In addition, Plaintiffs request that, given the failure of the Legislature to act to implement a new ballot ordering scheme and the Secretary to offer any other path forward, the Court order an interim ballot ordering scheme for use in the November 2020 general election.

LOCAL RULE 7.1(F) CERTIFICATION

Counsel for Plaintiffs, Fritz Wermuth, Esquire, certifies that this motion contains 3,769 words, excluding the caption and Certificate of Service.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 31, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated this 31st day of March, 2020.   Respectfully submitted,

/s/ *Frederick S. Wermuth*

Frederick S. Wermuth
Florida Bar No.: 0184111
KING, BLACKWELL, ZEHNDER &
WERMUTH, P.A.
P.O. Box 1631
Orlando, FL 32802-1631
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
fwermuth@kbzwlaw.com

Marc E. Elias
Elisabeth C. Frost*
Jacki L. Anderson*
John M. Geise*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@perkinscoie.com
efrost@perkinscoie.com
jackianderson@perkinscoie.com
jgeise@perkinscoie.com

Abha Khanna*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
akhanna@perkinscoie.com

Counsel for the Plaintiffs
**Admitted Pro Hac Vice*