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

Defendant.

Case No. 4:18-cv-00262 (MW/CAS)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. BACKGROUND 5

A. Position Bias 5

B. Florida's Ballot Order Statute 7

C. Past and Projected Impact on Florida Elections 9

III. ARGUMENT 12

A. Plaintiffs Are Likely to Succeed on the Merits 13

1. Legal Standard 14

2. The Ballot Order Statute Unconstitutionally Treats the Similarly Situated Major Parties Differently, Significantly Burdening Plaintiffs 15

3. The Burdens the Ballot Order Statute Imposes Cannot Be Justified by a Legitimate, Much Less Compelling, State Interest 23

B. Plaintiffs Will Suffer Irreparable Injury Absent an Injunction 29

C. The Balance of the Equities and the Public Interest Favor an Injunction 30

IV. CONCLUSION 32

TABLE OF AUTHORITIES

Akins v. Sec'y of State,
154 N.H. 67 (N.H. 2006) 6, 20, 21

Anderson v. Celebrezze,
460 U.S. 780 (1983).....15

Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany,
No. 03-CV-502 (NAM/DRH), 2003 WL 21524820, at *3
(N.D.N.Y. July 7, 2003).....30

Burdick v. Takushi,
504 U.S. 428 (1992).....15

Carillon Importers, Ltd. v. Frank Pesce Int'l Grp., Ltd.,
112 F.3d 1125 (11th Cir. 1997) 12

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008).....15

Day v. Robinwood W. Cmty. Improvement Dist.,
No. 4:08CV01888 ERW, 2009 WL 1161655, at *3
(E.D. Mo. Apr. 28, 2009).....30

Elliott v. Sec'y of State,
295 Mich. 245 (Mich. 1940) 6

Fla. Democratic Party,
2016 WL 6090942, at *8; *LOWV*, 769 F.3d at 248 31

Fla. Democratic Party,
2016 WL 6090943, at *8; OFA, 697 F.3d at 436 .....27, 30

Fla. Democratic Party v. Detzner,
No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *7
(N.D. Fla. Oct. 16, 2016) 27

Fla. Democratic Party v. Scott,
215 F. Supp. 3d 1250 (N.D. Fla. 2016) 14

Gould v. Grubb,
14 Cal. 3d 661 (Cal. 1975)..... 4, 6, 16, 20, 21, 23, 25, 27, 28

Graves v. McElderry,
946 F. Supp. 1569 (W.D. Okla. 1996).....14, 16, 20, 21, 23

Green Party v. Hargett,
No. 3:11-cv-692, 2016 WL 4379150 (M.D. Tenn. Aug. 17, 2016) 26

Hand v. Scott,
285 F. Supp. 3d 1289 (N.D. Fla. 2018) 14

Holtzman v. Power,
63 Misc. 2d 1020 (N.Y. Sup. Ct. 1970).....6, 23, 26

Holtzman v. Power,
313 N.Y.S.2d 904 (N.Y. Sup. Ct. 1970) *aff'd*, 311 N.Y.S.2d 824 (1970) ...18, 21

Kautenburger v. Jackson,
85 Ariz. 128 (Ariz. 1958).....6

League of Women Voters of Fla. v. Browning,
863 F. Supp. 2d 1155 (N.D. Fla. 2012) 31

League of Women Voters of N.C. v. N.C.,
769 F.3d 224 (4th Cir. 2014) 29

Libertarian Party of Va. v. Alcorn,
826 F.3d 708 (4th Cir. 2016) 26

Mann v. Powell,
314 F. Supp. 677 (N.D. Ill. 1969) *aff'd* 398 U.S. 955 (1970) 3, 7, 13, 17

Mann v. Powell,
333 F. Supp. 1261 (N.D. Ill. 1969).....13, 17, 21, 29

McLain v. Meier,
637 F.2d 1159 (8th Cir. 1980) 6, 17, 19, 20, 22, 25, 28

Meyer v. Tex.,
No. H-10-3860, 2011 WL 1806524 (S.D. Tex. May 11, 2011) 26

Netsch v. Lewis,
344 F. Supp. 1280 (N.D. Ill. 1972) 18, 29

New Alliance Party v. N.Y. State Bd. of Elecs.,
861 F. Supp. 282 (S.D.N.Y. 1994) 26

Norman v. Reed,
502 U.S. 279 (1992) 15

Obama for Am. v. Husted ("*OFA*"),
697 F.3d 423 (6th Cir. 2012) 27

Reynolds v. Sims,
377 U.S. 533 (1964) 22

Rubenstein v. Fla. Bar,
72 F. Supp. 3d 1298 (S.D. Fla. 2014) 31

Rutan v. Republican Party of Ill.,
497 U.S. 62 (1990) 16

San Antonio Sch. Dist. v. Rodriguez,
411 U.S. 1, 35 n.78 (1973) 22

Sangmeister v. Woodard,
565 F.2d 460 (7th Cir. 1977) 17, 23, 26

Sarvis v. Alcorn,
137 S. Ct. 1093 (2017) 26

Sarvis v. Judd,
80 F. Supp. 3d 692 (E.D. Va. 2015) 26

Schaefer v. Lamone,
248 F. App'x 484 (4th Cir. 2017) 27

Taylor v. La.,
419 U.S. 522 (1975).....30

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997).....27

Statutes and Other Authority

Fla. Const., art. IV, § 5(b).....8

Fla. Stat. 101.151 (2017).....1, 7, 15, 24, 25

I. INTRODUCTION

This is a case about the constitutionality of a Florida law that grants, to the political party whose candidate won the last Governor's election, an artificial and unfair advantage to that party's candidates in every single partisan general election thereafter, until another party's candidate wins a subsequent Governor's race. *See* Fla. Stat. § 101.151(3)(a) (2017) (the "Ballot Order Statute"). The advantage conferred by the Statute is the result of a phenomenon known as "position bias," or the "primacy effect." Because a Republican has won each of Florida's last five gubernatorial elections, Republican candidates have enjoyed a significant advantage up and down the ticket in Florida's partisan elections, unabated, for the last 20 years. On average, the Ballot Order Statute confers an artificial advantage of 2.7 electoral percentage points to Republican candidates—more than the difference between the winner and loser in multiple recent elections, including the last gubernatorial elections in 2010 and 2014.

Unless the Ballot Order Statute is enjoined prior to the November election, the members of and Democratic candidates nominated and supported by Plaintiffs, the Democratic National Committee (the "DNC"), the DSCC, the DCCC, the Democratic Governors Association, the Democratic Legislative Campaign Committee (collectively, "Democratic Party Plaintiffs"), and Priorities USA (together with Democratic Party Plaintiffs, "Organizational Plaintiffs"), will again

have to compete on an unlevel playing field, their candidates subject to a meaningful disadvantage from the outset in every single race, for no other reason than, in 2014, the Republican candidate for Governor obtained 1% more of the vote share than his Democratic opponent.

Plaintiffs thus seek a preliminary injunction prohibiting the Defendant, Florida Secretary of State Kenneth Detzner, who is sued here in his official capacity (the "Secretary"), from implementing or enforcing the unconstitutional Ballot Order Statute. To ensure that the injury to Plaintiffs is remedied in the coming election, Plaintiffs request that the Secretary be required to issue a directive to Florida's supervisors of elections ("SOEs"), advising them that: (a) administration of the Ballot Order Statute is unconstitutional; and (b) in light of the Court's Order, in preparing ballots for the November 6, 2018 election, SOEs must rotate the ordering of major political party candidates by precinct, so that the candidates of each are listed first in all races for which they have a candidate on an approximately equal number of ballots throughout each county.[1]

[1] Plaintiffs use the term "major political party" to describe the Democratic and Republican Parties, as the Secretary does. *See* Political Party Information, FLA. SEC'Y OF STATE, http://dos.myflorida.com/elections/candidates-committees/political-parties/ (describing Democratic Party and Republican Party as "major political parties"). As exhibited by many close election results in recent years, discussed throughout this memorandum, the Florida Democratic Party and Republican Party are similarly situated.

Plaintiffs are highly likely to succeed on the merits. Indeed, in the only case in which the U.S. Supreme Court has considered a challenge to a state practice that would have given certain types of candidates an artificial, electoral advantage of the sort that results from the operation of the Ballot Order Statute, the Court summarily affirmed a preliminary injunction that required that candidates have an equal opportunity to be placed first on the ballot. *See Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969) ("*Mann I*"), *aff'd* 398 U.S. 955 (1970). The instant case presents a statutory scheme that is even *less* justifiable than the preference enjoined in *Mann*, where the advantage was largely conferred upon candidates that voters had previously endorsed.

Here, in contrast, the Ballot Order Statute confers a substantial advantage on *any* candidate running in *any* partisan race, based on nothing more than their affiliation with the same political party as the last-elected Governor. In the present day, that advantage is based entirely on a *single*, *unrelated* election, that occurred *four years ago*, when Republican candidate Rick Scott won over Democratic candidate Charlie Crist, with a share of 48.1% of the vote, as compared to Crist's 47.1%.[2]

[2] All election results cited in this memorandum are publicly available at the General Election Official Results pages of the Florida Department of State's website, at https://results.elections.myflorida.com/Index.asp?.

There is no state interest sufficient to justify the irreparable injury suffered by Plaintiffs as a result of the Ballot Order Statute's arbitrary and unfair favoritism of the Governor's party. Further, both the balance of the equities and the public interest clearly favor an injunction that will ensure that, in the upcoming election, Plaintiffs are not subject to continued disparate treatment, and Florida voters have the opportunity to vote in elections where the thumb is not heavily on the scale in favor of the outgoing Governor's political party, to the marked, unfair, and unconstitutional dilution of the voting rights of Floridians who cast their ballots for Democrats, including the individual voter Plaintiffs. And it will help ensure that election results actually reflect "the free and pure expression of the voters' choice of candidates . . . [,] untainted by extraneous artificial advantages imposed by weighted procedures of the electoral process," an aim that all should view as no less than one of the most "fundamental goal[s] of a democratic society." *Gould v. Grubb*, 14 Cal. 3d 661, 677 (Cal. 1975).

Accordingly, Plaintiffs respectfully request that the Court issue an order enjoining the Ballot Order Statute as unconstitutional in advance of the November 2018 election and requiring the Secretary to direct the SOEs to rotate major-party candidate order by precinct so as to equitably distribute the effects of position bias among the same.

II. BACKGROUND

A. Position Bias

It is a well-studied and consistently demonstrated phenomenon that a notable percentage of people manifest bias toward selecting the first in a set of visually-presented options, as with candidate names on election ballots. Expert Report of Dr. Jon A. Krosnick ("Krosnick Rep.") at 31. This "position bias" or "primacy effect" strongly influences decisions in areas ranging from consumer behavior to students taking multiple-choice tests. *Id*. at 31-33. Indeed, the evidence of position bias in other areas is so significant that "it would be surprising if we did not observe primacy effects in the political arena," and, in fact, "studies of voting almost universally have found similar primacy effects." *Id*. at 33; *see also id.* at 2, ("Candidate name order effects have been studied extensively in different electoral settings for many decades, and the body of accumulated evidence is especially compelling and consistent with the conclusion that candidates listed first on a ballot have an electoral advantage solely as a result of their position on the ballot."); *id*. at 15-31 (discussing prior studies of name order effects in elections).

The size of these effects is not limited to the advantage gained by the first-listed candidate solely due to her position on the ballot; they also reflect the later-listed candidate's lost vote share solely due to her later ballot position. *Id*. at 14. This total impact of the name order effect on the margin of victory in a race in

which one candidate is listed first on all ballots is referred to as the "gap change." *Id*. "In a two-candidate race, the gap change is the difference between the percent of votes gained by the candidate listed first due to name order *and* the percent of votes lost by the other candidate due to name order." *Id*.

This is not fringe science. Federal and state courts alike have repeatedly found that position bias impacts elections. *See, e.g.*, *McLain v. Meier*, 637 F.2d 1159, 1166 (8th Cir. 1980) (affirming "finding of ballot advantage in the first position"); *Akins v. Sec'y of State*, 154 N.H. 67, 71 (N.H. 2006) (affirming finding that "the primacy effect confers an advantage in elections"); *Gould*, 14 Cal. 3d at 664 (describing finding of position bias as "consistent with parallel findings rendered in similar litigation throughout the country"); *Kautenburger v. Jackson*, 85 Ariz. 128, 130-131 (Ariz. 1958) ("[I]t is a commonly known and accepted fact that where there are a number of candidates for the same office, the names appearing at the head of the list have a distinct advantage."); *Elliott v. Sec'y of State*, 295 Mich. 245, 249 (Mich. 1940) (same); *Holtzman v. Power*, 63 Misc. 2d 1020, 1023 (N.Y. Sup. Ct. 1970) (noting that belief "that there is a distinct advantage to the candidate whose name appears first on a ballot . . . appears to be so widespread and so universally accepted as to make it almost a matter of public knowledge").

Indeed, in the only case in which the Supreme Court has had the opportunity to consider position bias in an election, the Court summarily affirmed the lower court's preliminary injunction of a practice that favored listing incumbents first on the ballot. *See Powell v. Mann*, 398 U.S. 955 (1970). The injunction directed the state to adopt a process that ensured that candidates had an equal opportunity to be placed first on the ballot. *See Mann v. Powell*, 314 F. Supp. at 697, *aff'd* 398 U.S. 955 (1970).

B. Florida's Ballot Order Statute

Florida's Ballot Order Statute mandates that candidates of the political party that won the last election for Governor be listed first on the ballot. Specifically, the Statute provides:

> 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) (2017).[3] Thus, *all* candidates associated with the party that won the last Governor's election are listed first on the ballot in *every* partisan

[3] A separate provision of Fla. Stat. § 101.151, which is not at issue in this litigation, provides that major political party candidates are followed on the general election ballot by candidates of minor political parties, who are then followed by

general election that follows—until another party's candidate wins the Governor's election. At the same time, *none* of the candidates associated with the party that received the second highest number of votes for Governor will ever be listed first on the ballot in any partisan general election that follows.

The present effect of the Ballot Order Statute is to list Republicans first in every partisan race in Florida, based on a difference of 1% of the vote in an election that occurred nearly four years ago. In 2014, Governor Scott, who serves a four-year term, *see* Fla. Const., art. IV, § 5(a), won with 48.1% of the vote; the second highest vote getter was Democratic candidate Charlie Crist, with 47.1% of the vote.

This is no glitch. Rather, it is how the Ballot Order Statute is designed to function: the candidates of the Governor's party enjoy the benefits of position bias in partisan general elections, for federal and state offices, and on down to county elections, for four years at a time, including the next Governor's election. Because Florida prohibits its governors from serving more than two four-year terms, at a minimum, every eight years (including in 2018), the slate of candidates for Governor will not include the incumbent whose prior election success triggered the Ballot Order Statute's favorable treatment. *See* Fla. Const., art. IV, § 5(b). But

---

candidates who do not affiliate with any political party, organized in the order in which they qualified. Fla. Stat. § 101.151(3)(b).

even then, the Statute puts a thumb on the scale for the candidate who shares her political party with the vacating officeholder.

C. Past and Projected Impact on Florida Elections

For the last twenty years, Republican Party candidates have consistently been listed first on partisan general election ballots because of the election successes of a total of three candidates in five gubernatorial elections; in the two most recent of those five elections, moreover, those successes have been by razor-thin margins. For example, in 2014, Governor Scott won 48.1% of the vote and the Democrat won 47.1%. In 2010, Governor Scott won 48.9% of the vote and the Democrat won 47.7%. The resulting impacts on Florida elections have been significant and have not been limited to local or low-profile races (although in those cases, the effects are even starker, *see* Krosnick Rep. at 47). In particular, "[i]n partisan races for federal [offices] and high-profile state races, Florida Republican candidates have gained 2.70 percentage points on average by being listed first on the ballot, and Florida Democratic candidates have gained 1.96 percentage points on average by being listed first." *Id*. at 3.[4]

[4] As discussed, the advantage gained by the first-listed candidate solely due to ballot position is only part of the story: the full impact includes the *disadvantage* to later-listed candidates. Krosnick Rep. at 14-15. Calculating the second part of that 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*. at 14-15. Thus, the overall percentage point gap due to position bias in Florida's two-party, two-candidate elections is calculated to be as

In recent years, there have been several high-profile races in Florida that have been decided within the average marginal advantage that the Ballot Order Statute confers upon a first-listed candidate merely because of her position. For example, in 2004, after incumbent Democrat U.S. Senator Bob Graham, who had held the seat since 1987, retired, Republican Mel Martinez won the election with 49.4% of the vote, only 1.1 percentage points more than the 48.3% vote share of his Democratic opponent, Betty Castor. In 2006, after incumbent Republican Katherine Harris chose not to run again in Florida's 13th Congressional District, Vern Buchanan won the seat with 50.1% of the vote, a mere 0.2 percentage points more than the 49.9% his Democratic opponent received. In 2010, Republican Rick Scott won the gubernatorial election, but narrowly, with 48.9% to Democrat Alex Sink's 47.7% of the vote, a difference of only 1.2 percentage points. As discussed, Governor Scott fared even worse in his reelection bid in 2014, retaining his seat by a margin of only one percentage point. In 2016, the Republican candidate for Florida House of Representatives District 36 defeated the Democratic candidate by 1.02%, or a total of 691 votes.[5]

---

high as 5.40 percentage points when Republican candidates are listed first, and 3.92 percentage points when Democratic candidates are listed first. *See id.*

[5] Since 2004 there have been at least 13 additional races in Florida won by a Republican within a 2.70 point margin: (1) in 2014, the Republican won House District 30 with 51.4% of the vote to the Democrat's 48.6%; (2) in 2014, the Republican won House District 49 with 51.0% of the vote to the Democrat's 49.0%; (3) in 2012, the Republican won House District 24 with 49.5% of the vote

Given that Governor Scott's very narrow margin of victory in 2010 and 2014 was within the range solely attributable to position bias, it is reasonable to conclude that, at least in some cases, Republican success in gubernatorial races may be a self-fulfilling prophecy, made possible by the Ballot Order Statute, which then confers significant advantages on every Republican to run in any ensuing partisan general election in Florida, until a Republican is defeated in the race for Governor. *See* Krosnick Rep. at 3 ("Candidate name order, governed by Florida's ballot order statute is extremely likely to have influenced election outcomes . . . and is extremely likely to do so in the future."); *see also id*. at 34-35, 50-55. Thus, unless the Ballot Order Statute is enjoined, all Republican candidates, including the Republican nominee for Governor, will enjoy a substantial electoral advantage going into the November election. If the gubernatorial election is close, the Ballot Order Statute may actually operate to tip the scale, clinching the election for the

---

to the Democrat's 47.2%; (4) in 2012, the Republican won House District 42 with 50.4% of the vote to the Democrat's 49.6%; (5) in 2012, the Republican won House District 59 with 50.8% of the vote to the Democrat's 49.2%; (6) in 2012, the Republican won House District 114 with 51.2% of the vote to the Democrat's 48.8%; (7) in 2010, the Republican won House District 52 with 51.2% of the vote to the Democrat's 48.8%; (8) in 2008, the Republican won Public Defender Circuit 12 with 50.5% of the vote to the Democrat's 49.5%; (9) in 2008, the Republican won House District 48 with 51.0% of the vote to the Democrat's 49.0%; (10) in 2006, the Republican won House District 44 with 50.9% of the vote to the Democrat's 49.1%; (11) in 2006, the Republican won House District 70 with 50.6% of the vote to the Democrat's 49.4%; (12) in 2006, the Republican won House District 83 with 50.6% of the vote to the Democrat's 49.4%; and (13) in 2004, the Republican won House District 97 with 51.2% of the vote to the Democrat's 48.8%.

Republican candidate and restarting this cycle of artificial primacy, until the next gubernatorial election.

III. ARGUMENT

Plaintiffs are entitled to preliminary relief because: (1) they are substantially likely to succeed on the merits; (2) they will suffer irreparable harm in the absence of relief; (3) that harm outweighs any injury the Secretary will suffer because of an injunction; and (4) an injunction is in the public interest. *Carillon Importers, Ltd. v. Frank Pesce Int'l Grp., Ltd.*,112 F.3d 1125, 1126 (11th Cir. 1997); *see Siegel v. LaPore*, 234 F.3d 1163, 1176 & n.9 (11th Cir. 2000) (en banc) (the harm element is met when plaintiffs show a substantial likelihood that they will suffer irreparable injury).

Indeed, in this case, unless the Court issues a preliminary injunction, it is *certain* that Plaintiffs, which include the national Democratic Party committee and the Party's national senatorial and congressional committees, as well as the Democratic Governors Association and the Democratic Legislative Campaign Committee, will suffer irreparable harm. Absent the issuance of an injunction that will give their candidates a fair opportunity to be listed first on the ballot, all will be irreparably harmed by the position bias inherent in the operation of the Ballot Order Statute. Thus, this case presents an even stronger case for an injunction than many of the other ballot order cases in which courts have issued injunctions

mandating a fair process; in *Mann v. Powell*, for example, the court granted first a preliminary and then a permanent injunction, even where it was not pre-ordained that all of the candidates seeking relief would be denied an opportunity to have their names listed first on the ballot. 333 F. Supp. 1261, 1265 (N.D. Ill. 1969) ("*Mann II*"). Here, the systemic advantage conferred upon the candidates and voters of one major political party over another by Florida's Ballot Order Statute is not just likely but certain to irreparably injure Plaintiffs unless the requested relief is issued.

The Statute is not justified by a legitimate (much less, compelling) state interest, and the current ordering system can be easily replaced with a fairer system without disrupting the electoral process or burdening election administrators. There can be little doubt, moreover, that the balance of the equities and public interest both favor a ballot ordering rule that levels the playing field among major political parties and gives Florida voters the opportunity to cast their ballots in an election where the scales are not heavily tipped in the favor of the last-elected Governor's political party. For all of these reasons, Plaintiffs respectfully request that the Court issue the requested preliminary injunction.

D. Plaintiffs Are Likely to Succeed on the Merits

Plaintiffs are likely to prevail on their claims that Florida's Ballot Order Statute violates the First and Fourteenth Amendments to the U.S. Constitution. The

advantages conferred upon the first-listed candidate are real and significant. Under the Ballot Order Statute, moreover, that advantage confers systematically and without exception to the political party of the last-elected Governor. Here, and as has been the case for the last twenty years, that advantage has been given to Republican candidates in every single partisan general election. The resulting harm to the Democratic Party, its candidates, and the voters who support it is irreparable and severe. The State's purported interests in maintaining this discriminatory system cannot outweigh these injuries, which serve to put all Republican candidates on base, before the first pitch is even thrown.

1. Legal Standard

When an election law's classification of candidates or burden on voting rights is challenged on constitutional grounds, courts apply the "*Anderson-Burdick*" standard. *See Graves v. McElderry*, 946 F. Supp. 1569, 1578-79 (W.D. Okla. 1996) (applying test to ballot order statute that favored Democrats and finding it unconstitutional); *see also Hand v. Scott*, 285 F. Supp. 3d 1289, 1308 (N.D. Fla. 2018); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016). That standard requires the Court to "weigh 'the character and magnitude of the asserted injury to the rights . . . the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those

interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). It is a "flexible" sliding scale, where "the rigorousness of [the court's] inquiry . . . depends upon the extent to which [the challenged law] burdens [voting rights]." *Id*. Thus, when voting rights are subject to a "severe" restriction, it "must be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 280 (1992). Less severe burdens remain subject to balancing: "[h]owever slight" the burden on voting rights "may appear," "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quoting *Norman*, 502 U.S. at 288-89).

2. The Ballot Order Statute Unconstitutionally Treats the Similarly Situated Major Parties Differently, Significantly Burdening Plaintiffs

On its face, the Ballot Order Statute treats "the candidates of the party that received the highest number of votes for the Governor in the last election" differently than the similarly situated "candidates of the party that received the second highest vote for Governor," Fla. Stat. § 101.151(3)(a) (2017), to the systemic and universal disadvantage of the latter, as well as the voters who support them. This is because, as discussed, over the last 20 years, the three candidates that have obtained the highest number of votes for Governor (sometimes by very slim

margins) have all run as Republicans. As a result, the advantage conferred by the Ballot Order Statute has consistently accrued in favor of the Republican Party, its candidates, and the voters who support it. *See supra* at II(B)-(C).

Courts that have considered challenges to similar schemes have easily found them unconstitutional. For example, in *Graves v. McElderry*, the court applied the *Anderson-Burdick* test to strike down an Oklahoma law that mandated that Democrats be listed first in each race on every general election ballot, holding that it violated the Equal Protection Clause. 946 F. Supp. 1569. In doing so, the court found that, "no legitimate State interest . . . can possibly be served by the selection of one particular party's candidates for priority position on every General Election ballot." *Id*. at 1580; *see also id*. at 1581 ("Political patronage is not a legitimate state interest which may be served by a state's decision to classify or discriminate in the manner in which election ballots are configured as to the position of candidates on the ballot.") (citing *Rutan v. Republican Party of Ill*., 497 U.S. 62, 69-70 (1990)).

In *Gould v. Grubb*, the California Supreme Court similarly struck down as unconstitutional a procedure that automatically afforded "an incumbent, seeking reelection, a top position on the election ballot." 14 Cal. 3d at 664. As is the case with the Ballot Order Statute, the California scheme "establishe[d] two classifications of candidates for public office," which imposed "a very 'real and

appreciable impact' on the equality, fairness and integrity of the electoral process.'" *Id.* at 669-70. Based on the court's finding "that any procedure which allocates such advantageous positions to a particular class of candidates inevitably discriminates against voters supporting all other candidates, and accordingly can only be sustained if necessary to fulfil a compelling governmental interest," the court applied strict scrutiny and found the statute wanting. *Id*. at 665.

Both of these cases are consistent with *Mann v. Powell*, the only opportunity that the Supreme Court has had to consider the constitutionality of a ballot ordering system that gives one category of candidates a systemic advantage. After the lower court issued a preliminary injunction requiring that ballot order in the upcoming election be determined by "nondiscriminatory means by which each . . . candidate[] shall have an equal opportunity to be placed first on the ballot," 314 F. Supp. at 679, the Supreme Court summarily affirmed that ruling. *Mann*, 398 U.S. at 955.[6]

These cases present just a few examples of courts that have found similar ballot order statutes unconstitutional. *See, e.g.*, *McLain*, 637 F.2d at 1159 (holding statute requiring party of candidate receiving most votes in prior congressional election be listed first unconstitutional); *Sangmeister v. Woodard*, 565 F.2d 460,

[6] The lower court would later issue a permanent injunction. *Mann II*, 333 F. Supp. at 1267; *see also id*. (rejecting argument that "favoring certain candidates on the basis of 'incumbency' or 'seniority' is constitutionally permissible").

468 (7th Cir. 1977) ("This court will not accept a procedure that invariably awards the first position on the ballot to . . . the incumbent's party.") (citation omitted); *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972) (holding statute prescribing ballot order by past electoral success violated equal protection); *Holtzman v. Power*, 313 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1970) (holding system requiring incumbent at top of ballot unconstitutional), *aff'd*, 311 N.Y.S.2d 824 (1970). If anything, the present action presents an easier case than many of the above, because the Ballot Order Statute puts its thumb on the scale, consistently and without exception, for all candidates associated with one political party—the party to last win a Governor's election—no matter by how slim a margin, how unrelated the seat, that it has been years since that election, or that the candidate who won it may be no longer eligible to serve as Governor. Further, that advantage persists into the next Governor's election, giving the entrenched party an advantage yet again.

The adverse impacts of Florida's Ballot Order Statute are strongly demonstrated by the analysis of Dr. Jon A. Krosnick, one of the foremost researchers in the area of ballot order, a Stanford University Professor of Political Science, Psychology, and Communication, a Research Psychologist at the U.S. Census Bureau, and a Research Adviser at the Gallup Organization, who has conducted and published research in leading, peer reviewed academic journals on

the effects of position bias for 25 years. Krosnick Rep. at 5-8. Dr. Krosnick concludes that the first-listed candidates in Florida's elections receive a significant percentage point "bump" due to position bias: Republican candidates gain a 2.70 percentage point advantage when listed first, and Democrats receive a 1.96 percentage point advantage when listed first. *Id*. at 3, 57. Thus, the overall percentage point gap due to position bias in Florida's two-party, two-candidate elections is as high as 5.40 percentage points when Republicans are listed first and 3.92 percentage points when Democrats are listed first. *See id*. at 14-15.[7]

Although Plaintiffs need not demonstrate that the Ballot Order Statute has flipped elections to prevail, *see McLain*, 637 F.2d at 1159 (holding ballot order system unconstitutional where plaintiff candidate received only 1.5% of the vote);

[7] The electoral ramifications of the Statute are all but conceded in both the fact and the content of the motion to intervene filed by the National Republican Senatorial Committee ("NRSC") and the Republican Governors Association ("RGA") (together, "Proposed Intervenors"). *See* ECF No. 23. NRSC and RGA argue that they have a right to participate as "Republican organizations who support Republican candidates nationwide," and seek to intervene to protect the "candidates . . . [who] stand to be harmed by any change to the Florida Ballot Order Statute," including the "Republican on the general election ballot for . . . U.S. Senate . . . , for . . . Governor, and for all three of the other statewide elected offices," and the fifteen Republicans running to fill Florida Senate seats and 97 running to fill Florida House of Representative seats in November. *Id*. at 5-6. The Proposed Intervenors argue that they are "the parties who stand to be *most directly harmed*" by such a ruling. *Id*. at 16 (emphasis added); *see also id*. at 10-11 (alleging "*any* adverse ruling will have a negative impact on [the Republican entities'] Members campaigns") (emphasis added); *id*. at 5 (same). Plaintiffs oppose the Motion to Intervene, but it is telling that the Proposed Intervenors were so quick to try to protect the artificial electoral advantage they have enjoyed under the Ballot Order Statute.

see also Graves, 946 F. Supp. at 1579-81 (finding slight burden on First and Fourteenth Amendment rights of voters due to position bias arising from ballot order unconstitutional because not justified by any legitimate state interest), given its persistent favoritism of a single party and the slim margins by which several candidates of that party have recently prevailed (including in the 2014 gubernatorial election, from which all Republican candidates' favored ballot position currently flows), it is extremely likely that the Statute *has* influenced election outcomes and, unless enjoined, is likely to do so in the future. Krosnick Rep. at 3, 62; *see also supra* n. 5; *Akins*, 154 N.H. at 73 (noting even if "the primacy effect's influence on the outcome of elections is small, . . . elections are often decided by narrow margins, and even a small degree of influence carries the potential to change the result of an election"); *Gould*, 536 P.2d at 1343 (1975) (same).

The injury that this causes to the Democratic Party and Organizational Plaintiffs and the candidates among their membership who they nominate and support is so clear as to be virtually self-evident. On its face, the Ballot Order Statute treats them differently than the similarly situated Republican Party and, in its operation, creates an unlevel playing field, under which Plaintiffs have suffered and (absent an injunction) will continue to suffer a meaningful disadvantage from the outset, up and down the ticket, based entirely upon ballot order. *See McLain*,

637 F.2d at 1166 ("[V]ictory may in fact turn on the windfall vote which accompanies an advantageous ballot position."); *Mann II*, 333 F. Supp. at 1265 (recognizing candidates not listed first suffered injury); *Holtzman*, 313 N.Y.S.2d at 1023-24 (recognizing the "distinct advantage to the candidate whose name appears first on the ballot," which constitutes "favoritism to a candidate merely on the basis of his having been successful at a prior election"). *Cf. Akins*, 154 N.H. at 73 (finding ballot order statute under which candidates of party receiving most votes in last election were listed first, constituted a "severe" restriction on New Hampshire Constitution's "enumerated equal right to be elected").

Further, there is a long line of precedent recognizing that position bias places a severe burden on the right to vote of voters whose preferred candidates consistently appear later on the ballot. For instance, in *Gould v. Grubb*, the court relied on U.S. Supreme Court precedent to find that a statute that automatically placed the incumbent first on the ballot operated to "substantially," and unconstitutionally "dilute[] the weight of votes of those supporting nonincumbent candidates." 14 Cal.3d at 673; *see also id.* at 670-71. In *Graves v. McElderry*, discussed *supra*, the court similarly found that, "the existence of position bias arising from ballot configuration . . . infringes upon the careful and thoughtful voters' rights of free speech and association by negating the weight or impact of those citizens' votes for candidates for public office." 946 F. Supp. at 1579. And,

in *McLain v. Meier*, the Eighth Circuit found that a system that consistently listed first the candidates of the party that received the most votes in the last North Dakota congressional election "burden[ed] the fundamental right to vote possessed by supporters of the last-listed candidates, in violation of the *fourteenth amendment*." 637 F.2d at 1166.

These authorities are consistent with long-standing Supreme Court authority recognizing that voters have the right, "implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters." *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973); *see also Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("[A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of [other] citizens. . . ."). Yet, the practical effect of the Ballot Order Statute directly infringes upon that right: because more Democratic voters must turn out and support their candidates to counteract the inherent and consistent advantage that the Ballot Order Statute confers on Republicans, the power of voters supporting Republican candidates is enhanced, such that one Republican voter has effectively more voting power than one Democratic voter.

For all of these reasons, Plaintiffs are likely to be able to demonstrate that the Ballot Order Statute injures their fundamental rights, and thus may only be

maintained if the Secretary can demonstrate that sufficient state interests justify the imposition of this burden. The Secretary is highly unlikely to be able to make such a showing.

3. The Burdens the Ballot Order Statute Imposes Cannot Be Justified by a Legitimate, Much Less Compelling, State Interest

The Ballot Order Statute cannot be justified by a legitimate, much less compelling, state interest. Given the severity of the burden that it imposes, it must be narrowly tailored to advance a compelling state interest. *See Gould*, 14 Cal. 3d at 675. But even if the Statute were subject to a less stringent level of scrutiny, it would still not survive challenge. *See Graves*, 946 F. Supp. 1569 (finding no legitimate state interest in always placing one major political party first on the ballot); *Holtzman*, 62 Misc. 2d at 1024 (holding no rational basis for "such favoritism to a candidate merely on the basis of his having been successful at a prior election"); *Sangmeister*, 565 F.2d at 467 (holding ballot order system did not further "any substantial state interest").

Neither of the state interests that the Secretary has asserted in the Ballot Order Statute can justify the burdens that it imposes on Plaintiffs. In its Motion to Dismiss (to which Plaintiffs will respond separately), the Secretary claims that the Statute is justified by state interests in: (1) "developing comprehensible ballots to avoid voter confusion"; 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." Def.'s Mot. to Dismiss, ECF No. 21 at 19-20. A brief review of each of these justifications finds them wanting.

First, the Ballot Order Statute is not only *not* necessary to achieve the State's interest in "developing comprehensible ballots to avoid voter confusion," or "streamlining the ability for voters to engage in 'straight party voting,'" the feature of the Statute that is at issue in this litigation—i.e., its consistent favoritism of the political party of the last-elected Governor in every single partisan general election that follows—does not actually further either. To be clear, Plaintiffs do not challenge or seek to enjoin the Statute's requirement that, in every partisan race, each candidate's political party be clearly identified. *See* Fla. Stat. § 101.151(3)(a).[8] Nor would rotating the ballot order between the two major party candidates in all races on a given ballot make it any more difficult for voters to engage in "straight party voting" down the ticket. This lawsuit is squarely addressed at the favoritism that the Statute effects for the last-Governor's party, ensuring that all candidates affiliated with that party are listed first in all of their general election contests.

[8] *See also* Miami-Dade County, Official Sample Ballot General Election Tuesday, November 8, 2016, http://www.miamidade.gov /elections/library/sample-ballots/2016-11-08-general.pdf; Leon County, Official Sample Ballot 2010 General Election Leon County, November 2, 2010, http://www.leoncountyfl.gov/Elect/includes/Voting%20and%20Registration/PDF/NovemberSampleBallotfinal.pdf (sample ballot clearly designating the party of each candidate).

If anything, that favoritism operates to *capitalize* and *enhance* voter confusion to the sole advantage of the favored political party; it does nothing whatsoever to alleviate it.[9] Moreover, it is nonsensical to justify the Ballot Order Statute on the ground that voter confusion might result from changing the order of the major parties on the ballot, because the Statute in fact *requires* such rotation when a candidate from a different party wins the governor's race. *See* Fla. Stat. § 101.151(3)(a) (2017). Finally, as a factual matter, the Secretary's purported concerns about voter confusion are simply not well-founded. *See* Declaration of Ion Sancho ("Sancho Decl.") at ¶¶ 10-11.

It is thus not surprising that courts considering similar schemes have rejected arguments that purported concerns about voter confusion justify their disparate and burdensome impacts. *See, e.g.*, *McLain*, 637 F.2d at 1167 (holding "making the ballot as convenient and intelligible as possible for the great majority of voters" not a legitimate state interest to justify uniform first-listing of candidates of party receiving most votes in last election); *Gould*, 14 Cal. 3d at 675 (rejecting argument

[9] Nor could the Secretary claim that the Statute's ballot ordering system furthers some interest in assisting voters in locating candidates for whom they voted before (i.e., incumbents), because, at most, the Statute would facilitate this in a single race on the ticket once every eight years. The only conceivable voter who might be "assisted" is one committed to voting for candidates who share their party affiliation with the last-elected Governor, but who does not know the Governor's party, and yet somehow is aware that Florida's ballot ordering scheme puts those candidates first in every partisan election. Such an interest would be both absurd and plainly illegitimate to justify the injuries resulting from the Statute's system of favoritism.

that interests in promoting "efficient, unconfused voting" justified incumbent-first ballot order system); *see also Sangmeister*, 565 F.2d at 467 (holding ordering names on ballot based on past electoral success not justified by "the administrative need to avoid confusion and to have a consistent practice so that voters will know in advance where the parties will be on the ballot"); *Holtzman*, 63 Misc. 2d at 1024 (holding an incumbent-first ballot order system "might on the contrary lead to confusion, since the electorate might suppose that each candidate whose name appears first on the ballot for a given position is an incumbent, even though there may be no incumbent").

The cases that the Secretary relies on are distinguishable because they involve differential treatment of minor party or independent candidates, rather than major political parties, who are not similarly situated. *See, e.g.*, *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708 (4th Cir. 2016), *cert. denied sub nom. Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017); *Green Party of Tenn. v. Hargett*, No. 3:11-cv-00692, 2016 WL 4379150 (M.D. Tenn. Aug. 17, 2016); *Sarvis v. Judd*, 80 F. Supp. 3d 692 (E.D. Va. 2015); *Meyer v. Tex.*, No. H-10-3860, 2011 WL 1806524 (S.D. Tex. May 11, 2011); *New Alliance Party v. N.Y. State Bd. of Elecs.*, 861 F. Supp. 282 (S.D.N.Y. 1994). A state's treatment of candidates who are not similarly situated (as Democratic Party candidates clearly are to Republican candidates in Florida) to facilitate election administration and minimize voter confusion is

supported by U.S. Supreme Court precedent. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (allowing states to "enact reasonable election regulations that may, in practice, favor the traditional two-party system"). The same cannot be said about the situation at issue here, where the two major political parties, clearly similarly situated, are subject to disparate treatment that systematically prejudices the unfavored party and the voters that support it.[10]

The favoritism inherent in the Ballot Order Statute also cannot be justified by purported concerns about election administration. First, this argument would fail as a matter of law. *See Gould*, 14 Cal. 3d at 675 ("[N]umerous cases have refused to permit the state to justify discriminatory legislation on the basis of similar 'administrative efficiency' interests."); *Obama for Am. v. Husted* ("*OFA*"), 697 F.3d 423, 434 (6th Cir. 2012) (finding state interest in "smooth election administration" insufficient to justify disparate burden on voters); *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016) (finding administrative inconvenience in allowing voters to cure vote-by-mail ballots insufficient to justify burden on voters). It is also unsustainable as a matter of fact. *See* Sancho Decl. at ¶¶ 3, 8, 10-12 (explaining

[10] Nor does *Schaefer v. Lamone*, 248 F. App'x 484 (4th Cir. 2017) (unpublished), support the Secretary. In *Schaefer*, the court considered a system that prioritized candidates on the ballot alphabetically by last name. *See id*. at 485. Thus, while alphabetical ordering inures to the benefit of candidates whose last initials appear early in the alphabet, *see* Krosnick Rep. at 60-61, no one political party was consistently entrenched in the top spot on the ballot.

that, in every election, each SOE must create multiple different ballots for their county, that rotating the major party candidates in partisan elections across precincts would not "add any significant administrative burden," that SOEs notify voters of differences in ballots that could easily include such changes to the ballot order, and that changing the ballot order following the change in control at the Governor's mansion has not imposed administrative burdens).

Indeed, many other states use rotational ballot order systems and there is no indication that doing so causes voter confusion or adds administrative burdens to elections administration. *See* Krosnick Rep. at 3, 58-59. Courts have consistently found that systems like these are fair and do not impose the constitutional burdens inherent in Florida's Ballot Order Statute. *See McLain*, 637 F.2d at 1169 ("[T]he fairest remedy for a constitutionally defective placement of candidates would appear to be some form of ballot rotation whereby 'first position' votes are shared equitably . . . ."); *Gould*, 14 Cal. 3d at 676 ("[A] number of state courts have specifically ordered election officials to implement a ballot rotation method, thereby largely eliminating the potential distorting effect of positional preference.").

In sum, because the Ballot Order Statute imposes severe burdens that cannot be justified by legitimate, much less compelling interests, Plaintiffs are highly likely to succeed on their claims in this litigation.

E. Plaintiffs Will Suffer Irreparable Injury Absent an Injunction

The thumb that the Ballot Order Statute puts on the scale, up and down the ticket, in favor of the last-elected Governor's Party, for the entirety of a Governor's term, causes severe and irreparable injury to the Democratic Party plaintiffs and the candidates who they nominate, support, and who are among their membership, which the Statute treats disparately as compared to the major opposition party and its candidates. *See supra* at II(B)-(C). That these injuries are the very definition of irreparable should be uncontroversial, as "once the election occurs, there can be no do-over and no redress." *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("*LOWV*"); *see also Netsch*, 344 F. Supp. at 1280-81 (recognizing "[t]he constitutional rights of the plaintiffs, and all persons similarly situated, will be irreparably damaged unless the temporary order sought herein is granted" prohibiting "granting priority to candidates by reason of incumbency and seniority"); *Mann II*, 333 F. Supp. at 1267 (permanently enjoining ballot order system after recognizing "the difficulty of fashioning relief after ballots have been certified").

The individual voter Plaintiffs, as well, will suffer irreparable harm absent an injunction, through the systemic dilution of their voting power. *See supra* at III(D)(2). This is in sharp contrast to the Ballot Order Statute's impact on the voting power of Republican voters, which is substantially enhanced, such that one

Republican voter has effectively more voting power than one Democratic voter. Because these harms—which strike at the very heart of the functioning of a fair and democratic society—cannot be remedied post-election, they are also irreparable. *See Day v. Robinwood W. Cmty. Improvement Dist.*, No. 4:08CV01888 ERW, 2009 WL 1161655, at *3 (E.D. Mo. Apr. 28, 2009); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany*, No. 03-CV-502 (NAM/DRH), 2003 WL 21524820, at *3 (N.D.N.Y. July 7, 2003); *see also Fla. Democratic Party*, 2016 WL 6090943, at *8; *OFA*, 697 F.3d at 436; *LOWV*, 769 F.3d at 247.

F. The Balance of the Equities and the Public Interest Favor an Injunction

This Court has previously held that, "[a]ny potential hardship [to the state] imposed by providing the same opportunity . . . for [] voters pales in comparison to that imposed by unconstitutionally depriving those voters of their right to vote and to have their votes counted," *Fla. Democratic Party*, 2016 WL 6090943, at *8. The same is true here. *See also, e.g., Taylor v. La.*, 419 U.S. 522, 535 (1975) (holding "administrative convenience" cannot justify practices that impinge upon fundamental rights). In weighing the equities, on one side of the scale is the significant burdens imposed on Plaintiffs, who must compete and vote on a starkly uneven playing field under a system that threatens and delegitimizes the very premise of representational government, while on the other side is the State, which, if an injunction is issued, will face little to no additional administrative burdens in

ordering names on a ballot using a more equitable system. *See supra* at III(D)(2); *see also* Sancho Decl. ¶¶ 8, 11, 12. Current software systems make changing the ballot order as simple as a few mouse clicks, and SOEs must already routinely create multiple ballots within their assigned counties. *Id.* at ¶¶ 8-10. SOEs also cannot even begin to prepare a general election ballot until a week after they receive a certified list of general election candidates from the Division of Elections, which will not occur until about a week after August 28, 2018. *Id.* ¶ 8. The equities clearly balance in Plaintiffs' favor and injunctive relief is proper here.

Issuing the requested injunction would also be in the public interest, which is always "served when constitutional rights . . . are vindicated." *Rubenstein v. Fla. Bar*, 72 F. Supp. 3d 1298, 1319 (S.D. Fla. 2014). This includes specifically when the constitutional right at issue is the right to vote. *See League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012); *Fla. Democratic Party*, 2016 WL 6090942, at *8; *LOWV*, 769 F.3d at 248. If the Ballot Order Statute is not enjoined, it will directly interfere with the fundamental right to vote of thousands of Florida voters, including Plaintiffs, as well as the elections of all of the Democratic candidates among the membership of and supported by the Democratic Party and Organizational Plaintiffs who are running in partisan elections in Florida in November. Thus, the public interest, too, strongly favors enjoining the Ballot Order Statute.

III. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court issue the requested preliminary injunction.

LOCAL RULE 7.1(F) CERTIFICATION

Counsel for Plaintiffs, Frederick S. Wermuth, Esquire, certifies that this memorandum contains 7,932 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 29, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: June 29, 2018

By: /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*
Amanda Callais*
Jacki L. Anderson*
John M. Geise*
Alexi Velez*
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
acallais@perkinscoie.com
jackianderson@perkinscoie.com
jgeise@perkinscoie.com
avelez@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*