UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

Plaintiffs,

v.

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

Defendant,

and

NATIONAL REPUBLICAN SENATE COMMITTEE, and REPUBLICAN GOVERNORS ASSOCIATION,

Defendant-Intervenors.

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT FLORIDA SECRETARY OF STATE'S MOTION TO DISMISS

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I. INTRODUCTION

Florida Statute § 101.151(3)(a) (2017) (the "Ballot Order Statute") grants, to the political party whose candidate wins a Governor's election, an artificial advantage in all general elections for partisan office thereafter—unless and until a candidate from another party wins a Governor's race. This is due to the well-studied and almost universally-recognized "position bias" or "primacy effect" phenomenon, whereby a notable percentage of people manifest bias toward selecting the first in a set of visually-presented options, including as with candidates listed on ballots. The Ballot Order Statute *requires* that "[t]he names of the candidates of the party that received the highest number of votes for Governor in the last [Governor's] election . . . *shall be placed first for each office* on the general election ballot." *Id.* (emphasis added). The result is to put a thumb on the scale in favor of the last-elected Governor's party in the next Governor's race, four years later, and in *every* interim election for a partisan office.

Thus, the Ballot Order Statute creates an entrenched party that enjoys an advantage of, on average, 2.7 percentage points in every partisan race, before the first ballot is even cast. Due to the electoral successes of only three Republican politicians in five gubernatorial elections, this advantage has inured exclusively to the Republican Party for twenty years, during which time at least 18 elections have been decided within that margin of artificial advantage. This includes the past two

gubernatorial elections, in which Governor Rick Scott obtained only 1.2% more of the vote than his Democratic opponent in 2010, and only 1% more in 2014.

As a result, the Democratic Party and its candidates have been systematically disadvantaged, and the voters who support them had their voting power diluted, in every partisan election in Florida for the last four years, simply because, in 2014, Governor Scott won 48.1% of the vote to Charlie Crist's 47.1%. Plaintiffs seek to level the playing field and ensure that Florida's election results 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," *Gould v. Grubb*, 536 P.2d 1337, 1348 (Cal. 1975), by seeking: (1) a declaratory judgment that the favoritism that follows from the Ballot Order Statute is unconstitutional, and (2) injunctive relief requiring a fair ballot ordering standard be applied.

In his Motion to Dismiss (the "Motion"), Defendant Florida Secretary of State ("Secretary") attempts to avoid review of the merits of these claims. He argues, first, because the Ballot Order Statute is not new, it does not matter whether it skews Florida's elections, enhancing the voting power of the supporters of one major political party to the systemic detriment of the other. Because it is an old law, he argues, Plaintiffs (and hundreds of thousands of Florida voters) have no choice but to suffer their injuries. But this argument cannot stand. Indeed, because

Plaintiffs seek *prospective* relief, the doctrine of laches is clearly inapplicable. But even were that not so, the Secretary fails to establish that Plaintiffs unreasonably delayed in bringing this action, or that the Secretary has suffered any (much less substantial) resulting prejudice. Further, the Secretary is also wrong to suggest that the ballots for the November election must be prepared in a matter of weeks; to the contrary, that ballot process cannot even begin until *after* the August 28 primary.

The Secretary's alternative argument, that the Complaint fails to state a claim, is also meritless. First, the Secretary assumes that Plaintiffs will not prove their factual allegations that the Statute severely burdens their fundamental rights, turning on its head the requirement that the Court construe the facts in the light most favorable to Plaintiffs. Second, the Secretary ignores a raft of caselaw supporting Plaintiffs' claims, even if the Court were to apply an intermediate or lower scrutiny standard. Indeed, by whatever standard, Plaintiffs have pled more than sufficient facts to sustain their claims that the Statute's unrelenting favoritism of every single candidate who shares their political party with the last-elected Governor imposes burdens on Plaintiffs' fundamental rights that cannot be adequately justified by any State interest. The Motion to Dismiss should be denied.

II. ARGUMENT

A. THE COMPLAINT IS NOT BARRED BY LACHES

The Secretary's argument that the Complaint should be dismissed for laches should be rejected. Because "laches is a *fact-intensive affirmative defense*, some courts consider it an 'unsuitable basis for dismissal at the pleading stage.'" *Spiral Direct, Inc. v. Basic Sports Apparel, Inc.*, 151 F. Supp. 3d 1268, 1280 (M.D. Fla. 2015) (emphasis added) (citation omitted). This is logical, given the highly deferential standard required when reviewing a complaint on a motion to dismiss. *See infra* II(B). Thus, it is *only* where a "complaint on its face shows that . . . laches bars relief" that it may properly be dismissed under Rule 12(b)(6). *Id.* (citations omitted). The Secretary's laches argument, which spans all of two-and-a-half pages, without a single citation to the Complaint, falls far short of meeting these requirements.

1. Laches Does Not Bar Claims For Prospective Relief

As a threshold matter, the Secretary's argument fails because Plaintiffs seek prospective injunctive relief to protect their rights in *future* elections, and it is well-established, including by binding Eleventh Circuit authority, that laches cannot bar such an action. *See Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters.*, 533 F.3d 1287, 1321 (11th Cir. 2008) ("[L]aches . . . bar[s] only . . . the recovery of retrospective damages, not to prospective relief."); *see also Envtl. Def.*

Fund v. Marsh, 651 F.2d 983, 1005, n.32 (5th Cir. 1981).[1] Thus, courts have not applied laches in voting rights cases, like this one, where plaintiffs seek prospective relief to address "ongoing" injury. *Garza v. Cty. of L.A.*, 918 F.2d 763, 772 (9th Cir. 1990) (holding voting rights action not barred by laches "[b]ecause of the ongoing nature of the violation"); *Smith v. Clinton*, 687 F. Supp. 1310, 1312-13 (E.D. Ark. 1988) (finding voting rights action not barred by laches because "the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held").

The Motion does not acknowledge these authorities, instead relying exclusively on inapposite decisions from the Fourth Circuit. *See* Mot. at 8-9. However, in both *Perry v. Judd*, and *Voters Organized for the Integrity of Elections v. Baltimore City Elections Board*, laches was applied to bar claims for *retroactive* relief. *See Perry*, 471 F. App'x 219, 224-25 (4th Cir. 2012) (unpublished op.) (finding claim barred where candidate sought injunction to certify his name for ballot *after* certification deadline passed); *Voters Organized*, 214 F. Supp. 3d 448, 455 (D. Md. 2016) (finding laches prohibited disturbing past

[1] The Eleventh Circuit "adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981." *Bruno v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 445, 445, n.1 (11th Cir. 2012) (citing *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)).

election results, but "did not apply" to claim for federal observers in future elections).

Here, Plaintiffs seek entirely prospective relief. *See* Compl., ECF No. 1, ¶¶ 55, 60 (seeking injunctive and declaratory relief to prevent "serious, concrete, and irreparable injuries to [Plaintiffs'] fundamental right to vote" and "due to disparate treatment . . . in the upcoming general elections to be held on November 6, 2018"); *see also* Pls.' Mot. for Preliminary Injunction, ECF No. 29 ("PI Mot.") at 2 (requesting order enjoining enforcement of Ballot Order Statute and requiring Secretary to issue directive to rotate order of major party candidates by precinct on November election ballots).

The only case that the Secretary cites where laches was applied to a request for prospective relief is a factually distinguishable out-of-circuit district court opinion that likely does not remain good law even in its own jurisdiction. *Marshall v. Meadows*, 921 F. Supp. 1490 (E.D. Va. 1996), was decided in the Eastern District of Virginia four years before the Fourth Circuit decided *Lyons Partnership v. Morris Costumes, Inc.*, 243 F.3d 789 (4th Cir. 2001). *Lyons* clarified that a prospective injunction "is entered only on the basis of current, ongoing conduct that threatens future harm," and that "[i]nherently, such conduct cannot be so remote in time as to justify the application of the doctrine of laches." *Id.* at 799.

Even if *Marshall* could be reconciled with *Lyons*, it would not justify dismissal here. *Marshall* did not hold (as the Secretary argues) that the plaintiffs were not entitled to consideration of their claims because they challenged a law that had been on the books for too long and, by its mere longevity, had become inviolate. *See* Mot. at 8-9. Rather, the court concluded that, in that particular case, the plaintiff lacked standing, and, *in the alternative*, it was too late for the court to effectively issue the relief that the plaintiff sought. *Marshall*, 921 F. Supp. at 1492-94. These are not the circumstances here. Not only does the Secretary *not* challenge standing, there remains ample time to issue the relief Plaintiffs seek—an order requiring the Secretary to apply an evenhanded system for the *November 2018* election ballot. *See* Compl. ¶¶ 55, 60; PI Mot. at 2.[2]

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[2] The Secretary asserts, without explanation or citation, that the Complaint was filed "just weeks before ballots for the 2018 election must be designed, ordered, printed, and mailed." Mot. at 9; *see also id.* at 2. But this is either irrelevant or untrue. The Ballot Order Statute *only* applies to "general election ballot[s]", Fla. Stat. § 101.151(3)(a), and the relief Plaintiffs seek is for the November election, *see* Compl. ¶¶ 55, 60; PI Mot. at 2. Further, as explained in the declaration submitted in support of Plaintiffs' preliminary injunction motion from Ion Sancho, Leon County's supervisor for nearly 30 years, elections officials cannot even begin to prepare ballots for the November election until a week after the August 28 primary. Declaration of Ion Sancho, ECF No. 32 ("Sancho Decl.") ¶¶ 5, 6. Thus, this is not a case in which there does not remain sufficient time to grant the relief Plaintiffs seek. Moreover, as the Sancho Declaration explains, if an injunction is granted, it will be easy to comply with from an elections administration perspective. *Id.* ¶ 12.

2. The Secretary Fails to Establish the Essential Elements of Laches

Even if laches *could* apply (and, as discussed, it cannot), the Court should reject the Secretary's argument that Plaintiffs should be prohibited from pursuing their claims on these grounds. As the Secretary recognizes, laches is *only* available as a defense when the party seeking to avoid liability can establish each of three essential elements: (1) a delay in asserting a right or claim, which (2) was not excusable, and (3) caused undue prejudice to the party against whom the claim is asserted. *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1546 (11th Cir. 1986); *see also* Mot. at 8. The burden of establishing each essential requirement is on the Secretary, and he fails to carry it. *See Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1516 (11th Cir. 1984).

a. *Plaintiffs did not "unreasonably delay"*

The Secretary's assertion that the "unreasonabl[e] delay[]" element is satisfied simply because the Statute has been the law for "decades," Mot. at 9, misinterprets the law and ignores important facts. The Eleventh Circuit has repeatedly rejected broad interpretations of laches that would require plaintiffs to "sue first and ask questions later." *Kason Indus.*, 120 F.3d at 1206 (quoting J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31.19 (4th ed. 1997)). This is because to hold otherwise "would create a powerful and perverse incentive for plaintiffs to file premature and even frivolous suits to

avoid the invocation of laches." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1285 (11th Cir. 2015). And, courts have recognized that election-related claims in particular may often not become clear except upon evidence collected over multiple elections cycles; indeed, they may sometimes be "unavailable unless the [challenged] structure ha[s] been in place for some time." *Smith*, 687 F. Supp. at 1313; *see also id*. at 1312-13 (holding laches inapplicable where "significant developments" since enactment of challenged scheme impacted strength and nature of claims); *Garza*, 918 F.2d at 772 (rejecting laches in voting case because plaintiffs' injury was "ongoing" and "has been getting progressively worse" with each election); *Luna v. Cty. of Kern*, 291 F. Supp. 3d 1088, 1143 (E.D. Cal. 2018) (same); *see also Kansas v. Colorado*, 514 U.S. 673, 688 (1995) (finding no inexcusable delay where evidence took decades to collect).

Here, a gradually accumulating body of research has played a critical role in creating an evidentiary record, establishing the very real impact that position bias has on elections, and the specific and substantial irreparable harms inflicted by the Ballot Order Statute in particular. *See* Compl. ¶¶ 23-25, 28-29. Those injuries have significantly worsened in recent years by a streak of close Florida elections, with results well within the margin of advantage that obtains solely from the Statute's operation. *Id.* ¶¶ 39-43. With only one exception, the margin of

victory enjoyed by the winners in Florida gubernatorial elections between 1978 to 2006 was never less than 9.2 percentage points (and reached as high as 29.4 in 1982); in contrast, the 2010 and 2014 races were decided by 1.2 and 1 percentage point, respectively.[3] Compl. 20, 34; Election Official Results Archive, Florida Dep't of State, https://results.elections.myflorida.com; *see also* Memo. in Support of PI Mot., ECF No. 30 at 15-18. Moreover, a shifting technological landscape has re-shaped election administration so dramatically that, whatever merit a claim of administrative burden might have previously carried to justify a strict statewide ordering system, it is no longer applicable today, where ballots are generated using advanced computer software. Compl. ¶¶ 45, 49; *see also* Sancho Decl. ¶¶ 6, 8, 12.

The Motion makes much of the fact that the Ballot Order Statute was enacted when Florida's Legislature was controlled by Democrats. Mot. at 2, 16. Although the Secretary wisely does not rely on this in arguing laches, it nevertheless reveals another fault line in that argument.[4] The Secretary ignores

[3] The scale and existence of Plaintiffs' injury are highly relevant not only to the merits of their claims, but also to their ability to sue. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548, *as revised* (May 24, 2016) (requiring "particularized" and "concrete" injury for standing).

[4] No legal doctrine immunizes a statute from challenge by parties who share a political party affiliation with those who enacted it. Such a doctrine would be illogical: as any student of political science knows, the philosophies of political parties do not remain static, with sometimes seismic shifts happening over election

that Plaintiffs include *individual Florida voters*, against whom the application of laches would be inappropriate for independent reasons: individuals like Nancy Carola Jacobson, Terence Fleming, and Susan Bottcher "should not be forced to anticipate and predict possible constitutional violations." *Nader 2000 Primary Committee v. Hechler*, 112 F. Supp. 2d 575, 579, n.2 (S.D.W. Va. 2000) (rejecting argument that laches justified dismissal of complaint brought by "[o]rdinary citizens"). Indeed, courts have not hesitated to allow individual plaintiffs to challenge the constitutionality of state laws, even those in place for decades. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (striking down longstanding "separate but equal" doctrine).

b. *The Secretary has not suffered prejudice*

The Secretary also fails to establish prejudice to him from inexcusable delay. *See Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98, 101 (5th Cir. 1978) ("Laches depends on more than inexcusable delay in asserting a claim; it depends on inexcusable delay *causing undue prejudice to the party against whom*

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cycles, not to mention decades. *See* John S. Jackson, THE AMERICAN POLITICAL PARTY SYSTEM: CONTINUITY AND CHANGE OVER TEN PRESIDENTIAL ELECTIONS (2015). It would also be unworkable, requiring courts to determine whether a plaintiff's political proclivities sufficiently align with the politicians that sponsored or voted for a statute, so as to prevent the plaintiff from challenging it. *Cf. Wymbs v. Republican State Exec. Comm. of Fla.*, 719 F.2d 1072, 1084 (11th Cir. 1983) (indicating that a court likely lacks authority to "define the constituency of a national political party").

the claim is asserted.”) (emphasis added). To establish prejudice, a party “must show a delay which has subjected him to a disadvantage in asserting and establishing his claimed right or defense, or other damage caused by his detrimental reliance on his adversary’s conduct.” *Id.* Further, that prejudice must be “substantial.” *In re Legel Braswell Gov’t Sec. Corp.*, 695 F.2d 506, 515 (11th Cir. 1983).[5]

The Secretary’s prejudice argument principally relies on the Ballot Order Statute’s age, but “the mere passage of time does not constitute laches unless the passage of time is shown to have lulled Defendant into actions in reliance thereon.” *Gen. Conference Corp. of Seventh-Day Adventists v. Perez*, 97 F. Supp. 2d 1154, 1162 (S.D. Fla. 2000). Indeed, laches is traditionally *only* appropriate “when witnesses have died or evidence has gone stale.” *Trustees for Alaska Laborers Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512, 518 (9th Cir. 1987). The Secretary has not argued that key evidence has gone stale, nor can he. In fact, the opposite is true: here, the passage of time has allowed for a more

[5] Citing only the out-of-circuit district court decision in *Marshall*, the Secretary wrongly asserts that the Court should apply a “sliding-scale” test for laches, under which the Secretary’s burden of establishing prejudice is lessened the longer the delay, Mot. at 9 (citing 921 F. Supp. at 1494). The “sliding scale” construction appears unique to the Fourth Circuit; the Secretary does not cite (and Plaintiffs have been unable to find) any Eleventh Circuit case endorsing it. In any event, the Secretary fails so profoundly to establish prejudice, that even under a less demanding requirement, laches would still not apply.

robust evidentiary record and the development of a body of scholarship that will only aid in understanding and adjudicating the merits. *See supra* II.A.2.a.

Nor can the Secretary credibly claim detrimental reliance, given that the relief sought relates to the order of candidates on the November ballot, which the supervisors cannot begin to prepare until after the August 28 primary. *See supra* II.A.1., n.2. The Secretary also does not explain why it would be more burdensome to order those ballots consistent with Plaintiffs' requested relief. Indeed, even if some burden might result, it could not be more significant than the burden that the Statute already contemplates whenever the Governorship changes party control.

The Secretary's attempt to rely on prejudice he claims would follow to "candidates and voting members of the public," Mot. 9, is unavailing for several reasons. First, a party invoking laches must demonstrate substantial prejudice that it has *itself* suffered. *See Law*, 578 F.2d at 101. In any event, the Secretary's claim that these third parties would be prejudiced by "potential confusion of eleventh-hour changes to longstanding election laws," Mot. at 9-10, is not further explained and, when considered in context, makes no sense. If Plaintiffs prevail, the voter's experience will be unchanged for all practical purposes. The only difference from their perspective will be that, in roughly half of each county's precincts, voters will receive ballots that consistently list Democrats first, and voters in the other

half will have Republicans listed first, again, consistently down the ticket. *See* PI Mot. at 2, 4.

Plaintiffs do not challenge the part of the law that requires ballots clearly designate candidates' party affiliations. *See* Fla. Stat. § 101.151(3)(a) (providing that "[t]he names of the candidates" be listed "together with an appropriate abbreviation of the party name"). Plaintiffs only challenge the Statute's favoritism of the last-Governor's party, and the narrow relief that they seek would require a minor adjustment to ballot order in half of a county's precincts consistently across all races. *See* PI Mot. at 2, 4. In short, if the Court grants Plaintiffs' requested injunction, it will be no more difficult than it is now for Florida voters who so desire to select only candidates from their preferred party, or to do so up and down the ticket.

The only voter who might conceivably be "confused" is one committed to voting for candidates who have the same party affiliation as the last-elected Governor, but who does not know what political party that is, and yet at the same time is acutely aware that the Ballot Order Statute requires that those candidates be listed first. It is inconceivable that such a voter actually exists, much less that their highly unusual viewpoint could provide a basis for dismissing this action.

The Secretary likewise offers no explanation regarding the purported prejudice that might follow to the candidates, but it seems clear that the only

candidates who could be prejudiced by this litigation are those who stand to lose the artificial advantage that the Ballot Order Statute confers upon them. The Secretary cites no authority that would permit this Court to find that an interest in maintaining a skewed elections system, to the disadvantage of one major political party and all of its candidates and supporters, can justify dismissing this case at the outset. And, once again, none of this "prejudice," whether to voters or candidates, would be any different than what would naturally result from the ordinary operation of the Ballot Order Statute following a change in party control at the Governor's mansion.

Lastly, the Secretary offers a novel (and untenable) theory, arguing he is prejudiced because Plaintiffs brought suit "after the close of the last session of the Florida Legislature before the 2018 election," thereby "transferring what is properly a state legislative decision to the federal judiciary." Mot. at 10.[6] The timing of a lawsuit, however, cannot thwart the Legislature's ability to repair unconstitutional state laws; it is free to do so any time it likes. *See* Fla. Stat. § 11.011 (special legislative sessions may be called at any time by the Governor, or convened by joint proclamation of the President of the Senate and the Speaker of

[6] Plaintiffs do not disagree that enacting legislation is a legislative concern. Reviewing whether those laws comport with constitutional principles, however, is squarely within the province of the federal judiciary. *Marbury v. Madison*, 5 U.S. 137, 148 (1803); *see also Baker v. Carr*, 369 U.S. 186, 199–204 (1962).

the House of Representatives). Plaintiffs are not aware of any authority—and the Secretary cites none—requiring plaintiffs to research and time their lawsuit to the legislative calendar *just in case* the Legislature chooses to address any constitutional infirmities. The Secretary only cites *Clough v. Guzzi*, 416 F. Supp. 1057, 1068 (D. Mass. 1976), which says no such thing; it does not even mention laches at all.

The remainder of what the Secretary describes as "prejudice" is the routine consequence of an adverse merits ruling, insufficient to establish laches. *Black Warrior Riverkeeper*, 781 F.3d at 1286 (prejudice "must stem specifically from [] delay in bringing suit, rather than from the consequences of an adverse decision on the merits"); *see also id.* ("prejudice does not arise merely because one loses what otherwise he would have kept") (quotations and citations omitted). For instance, the Secretary argues that he is prejudiced because this suit "creat[es] uncertainty in the application of [election] laws," Mot. at 9, but does not explain how any unreasonable delay—as opposed to the mere existence of a lawsuit—*caused* the purported uncertainty.

In sum, the Secretary has failed to show either that Plaintiffs unreasonably delayed or that that he is prejudiced by any such delay, much less substantially, and thus cannot meet his burden to demonstrate that laches bars Plaintiffs' claims.

B. PLAINTIFFS HAVE STATED A PLAUSIBLE CLAIM FOR RELIEF

The Secretary's argument that the Complaint should be dismissed for failure to state a claim should also be rejected. As the Secretary recognizes, the standard for dismissal under Rule 12(b)(6) is exceedingly high. *First*, the Court must accept as true the Complaint's factual allegations and evaluate inferences in the light most favorable to Plaintiffs. *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010) (citing *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003)). *Second*, a Complaint may only be dismissed if it appears "*beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." *Id.* at 1380 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)) (emphasis added); *see also* Mot. 6. A plaintiff "need not prove his case on the pleadings," but "must merely provide enough factual material to raise a reasonable inference." *Speaker*, 623 F.3d at 1386.

All of these standards are meant to ensure that courts are careful not "to go too fast too soon," and generally permit the parties to continue "to demonstrate whether the facts, as distinguished from what the lawyers said the facts would be, would bear out a claim and if so to what extent." *Barber v. Motor Vessel "Blue Cat"*, 372 F.2d 626, 629 (5th Cir. 1967). Plaintiffs' allegations well exceed the "threshold of sufficiency that a complaint must meet to survive a motion to

dismiss." *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, S.A., 711 F.2d 989, 995 (11th Cir. 1983).[7]

1. The *Anderson-Burdick* Standard

The Secretary agrees that, under modern Supreme Court jurisprudence, the *Anderson-Burdick* standard applies to both of Plaintiffs' claims: one of which alleges systemic, disparate, prejudicial treatment of the similarly situated (indeed, based on the 2014 gubernatorial election results, where the Republican's vote share was a mere 1% more than the Democrat's, *identically situated*) major political parties, Compl. ¶¶ 56-60; and the other, which alleges that the Statute's favoritism dilutes the voting rights of the voter Plaintiffs who support the disfavored major party. *Id*. ¶¶ 50-55; *see also* Mot. at 10-13.

The Secretary further agrees that the *Anderson-Burdick* standard is flexible, such that "the rigorousness of [the court's] inquiry"—i.e., the level of scrutiny applied to the plaintiffs' claims—"depends upon the extent to which" the challenged law injures the plaintiffs' fundamental rights. *Burdick v. Takushi*, 504 U.S. 428, 424 (1992); *see also* Mot. at 12. Thus, when the plaintiffs' fundamental rights are subject to a "severe" restriction, strict scrutiny applies. Mot. at 12

[7] While irrelevant for the purposes of this Motion, the Secretary also cites to the incorrect burden of proof. Plaintiffs are required to prove their claims by a preponderance of the evidence, not, as the Secretary contends, "beyond a reasonable doubt." *See Underwood v. Hunter*, 730 F.2d 614, 617 (11th Cir. 1984) (applying preponderance standard to voting claim).

(citations omitted). The less significant the plaintiffs' injury, the less stringent the scrutiny applied when balancing the State's justifications for the law against the need to cause the plaintiffs' injuries. *See id.*; *see also Burdick*, 504 U.S. at 434 (explaining courts must "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'") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983)).

But then the Secretary ignores altogether that the severity of the injury imposed by the challenged provision—which determines the appropriate level of scrutiny—is largely a factual question, *see, e.g.*, *Arizona Green Party v. Reagan*, 838 F.3d 983, 989 (9th Cir. 2016), and proceeds as if it is a foregone conclusion that Plaintiffs will be unable to prove that the Statute injures them severely enough to warrant anything higher than rational basis review. *See* Mot. at 12-13. In other words, the Secretary assumes that the facts will be decided in his favor, notwithstanding the need to assume the truth of the Complaint's factual allegations at this stage.

Further, the Secretary's construction of the law ignores the Supreme Court's admonition that "[h]owever slight" the injury to a plaintiff's fundamental rights

"may appear," to survive challenge a law must still "be justified by a relevant and legitimate state interest 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quoting *Norman v. Reed*, 502 U.S. 279, 280 (1992)). There is no "litmus" test under which certain types of laws are immune from scrutiny; in each case, the Court must make the hard judgment our Constitution demands, based on the specific injuries that plaintiffs suffer as a result of the challenged law, the specific justifications offered by the State for the law, and whether the law advances those interests sufficiently to justify the injuries to the plaintiffs' rights. *Id*. at 190.

Here, Plaintiffs have pled sufficient facts that, if proven, would warrant application of strict scrutiny. For that reason alone, the Court should reject the Secretary's arguments, which rest on a false premise. Indeed, as the Secretary acknowledges, to apply rational basis review, the Court would have to find that the Statute does not burden Plaintiffs' fundamental rights *at all*. *See* Mot. at 12 ("If the right to vote is not burdened *at all*, . . . then rational basis review applies.") (emphasis added). But Plaintiffs have clearly pled severe and systemic injuries both to the individual Plaintiffs' voting rights, *see, e.g*., Compl. ¶¶ 13, 14, 15, 17, 52, and to the rights of the Democratic Party entity Plaintiffs and the candidates among their membership, *see, e.g*., *id*. ¶¶ 16, 17, 18, 19, 20, 21, 52. Moreover,

even if the Court were to conclude that rational basis review applied, Plaintiffs have alleged facts that would entitle them to relief under that standard as well.

2. Plaintiffs Have Alleged Cognizable First and Fourteenth Amendment Claims

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" different from similarly situated "candidates of the party that received the second highest vote for Governor," Fla. Stat. § 101.151(3)(a), to the systemic and universal disadvantage of the latter and the voters who support them. *See* Compl. ¶¶ 30, 31, 58. Because, over the last 20 years, the three candidates that have obtained the highest number of votes for Governor have all run as Republicans, for two decades 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 id.* ¶¶ 32, 33.

Courts have easily found such schemes unconstitutional. For example, in *Graves v. McElderry*, the court applied *Anderson-Burdick* to strike down a law mandating that Democrats be listed first, holding that it violated equal protection. 946 F. Supp. 1569, 1579-83 (W.D. Okla. 1996). In doing so, the court found that the statute could not even survive rational basis review: "*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. In

Gould v. Grubb, the California Supreme Court similarly found unconstitutional a procedure that automatically afforded "an incumbent, seeking reelection, a top position" on the ballot. 536 P.2d at 1338. As here, 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 1342-43. The court found "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 further a compelling governmental interest," applied strict scrutiny, and found the statute wanting. *Id*. at 1338-39.

Both of these cases are consistent with *Mann v. Powell*, the only case where the Supreme Court has considered the constitutionality of a ballot ordering system giving one category of candidates a systemic advantage. After the lower court issued an 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. 677, 679 (N.D. Ill. 1969), the Court summarily affirmed. *Mann*, 398 U.S. at 955 (1970).[8]

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[8] These are just a few examples of cases finding ordering schemes similar to the Ballot Order Statute's unconstitutional. *See also, e.g*., *McLain v. Meier*, 637 F.2d 1159, 1159 (8th Cir. 1980) (holding unconstitutional statute requiring first listing of candidates of party receiving most votes in prior election); *Sangmeister v.*

The Secretary is wrong to assert that Plaintiffs fail to allege constitutionally cognizable burdens to their fundamental rights. ***First***, in making this argument, the Secretary ignores Plaintiffs' allegations about the dilutive effect of the Ballot Order Statute on their voting power. *See* Compl. ¶ 52 (alleging "weight and impact of [Plaintiffs'] votes [for Democratic candidates] are consistently decreased—and the weight and impact of the votes for the favored party's candidates, increased—by the windfall votes accruing to the first-listed candidates solely due to their first position on the ballot"); *see also id.* ¶¶ 5, 13, 14, 15, 17, 52. There is, however, a long line of precedent recognizing such injuries as cognizable in ballot order cases. *See, e.g.*, *McLain*, 637 F.2d at 1166 (finding system that consistently listed first candidates of party that received most votes in last election "burden[ed] the fundamental right to vote possessed by supporters of the last-listed candidates, in violation of the fourteenth amendment"); *Graves*, 946 F. Supp. at 1579 (finding "existence of position bias . . . 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"); *Gould*, 536

Woodard, 565 F.2d 460, 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*, 62 Misc. 2d 1020, 1024 (N.Y. Sup. Ct. 1970) (holding system requiring incumbent at top of ballot unconstitutional), *aff'd*, 34 A.D. 2d 917 (N.Y. App. Div. 1970).

P.2d at 1342, 1344 (relying on Supreme Court precedent to find statute that automatically placed incumbent first "substantially," and unconstitutionally, "diluted the weight of votes of those supporting nonincumbent candidates"); *see also Reynolds v. Sims*, 377 U.S. 522, 568 (1964) ("[A]n individual's right to vote for [a particular office] is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of [other] citizens. . . .").

Although *McLain*, *Graves*, and *Gould* were all cited in Plaintiffs' Complaint, Compl. ¶¶ 44, 47, the Secretary makes no effort to distinguish them. Instead, he relies on cases that are both distinguishable and, if anything, support Plaintiffs. For instance, in *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 718-19 (4th Cir. 2016), *cert. denied sub nom. Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017), the court found that even a nondiscriminatory ballot order system that *largely tracks the remedy that Plaintiffs seek in this litigation*, *compare id*. at 712 (describing three-tiered system at issue in *Alcorn*), *with* PI Mot. at 2, must still be supported by "important state interests" to justify its minor burdens on constitutional rights. Moreover, a close read of the opinion *supports* applying a stricter standard here, where the Ballot Order Statute does precisely what the *Alcorn* court was careful to note the statute before it did *not*: namely, "automatically elevate" any one political party "to the top of the ballot." *Id*. at 717.

The other cases upon which the Secretary relies do not support dismissal. In *New Alliance Party v. New York State Board of Elections*, the plaintiff was a minor political party that "tendered no empirical evidence in support of its claims," but nevertheless sought to obtain an order listing it in the "first tier" of candidates on general election ballots, a position reserved for political parties that could obtain over 50,000 votes in a gubernatorial election (equivalent to 1% of the State's registered voters). 861 F. Supp. 282, 287, 295 (S.D.N.Y. 1994). The court in that case not only relied upon the state's interest in orderly elections administration to justify the differential treatment between minor and major party candidates, *id.* at 298; *see infra* II.B.3., but also noted the low bar for minor parties to attain "first tier" status, 861 F. Supp. at 294, 297 (examining the burden imposed in light of the "lenient" 50,000 vote threshold to become a major party in New York, which five political parties had been able to surmount).

Nor can the district court opinion in *Clough v. Guzzi* justify dismissing this case. First, while at first glance it may appear to represent the rare outlier where a court has upheld an "incumbent-first" ballot order statute, in fact the Massachusetts statute at issue was "unique among states": it both put incumbents first and expressly designated them as incumbents. 416 F. Supp. at 1068. Based on the record before it, the court was persuaded that "the designation of incumbency [on the ballot]" conferred "a distinct benefit on the incumbent

candidate," and that the "first ballot position, in combination with the designation of incumbency, sometimes confers some further increment of advantage." *Id.* at 1065-66. However, the court found that the "plaintiff [had] not proved a substantial advantage *inherent in first ballot position alone*." *Id*. at 1066 (emphasis added). Thus, the court in *McLain*, 637 F.2d at 1167, appropriately recognized *Clough* as one of "[t]he few decisions favoring or declining to decide the validity of incumbent first provisions," but upon a record that "involved evidentiary considerations which do not apply here." Moreover, *Clough* did *not* find (as the Secretary argues) that the Massachusetts statute imposed *no* burden on voting rights; it simply found that the evidence before it as to the burdens that statute imposed on "voters' right to choose their representatives is not sufficiently infringed *as to warrant strict scrutiny*." *Id*. at 1066, 1067-68 (emphasis added). Accordingly, the court considered whether the interest in "indicat[ing] in a clear manner who is the candidate for re-election" was sufficient to uphold the statute. *Id*. at 1067-68; *see also id*. (noting plaintiff's expert "conceded, that the most important decision which the voter must make is whether to retain or to replace the incumbent").

Whatever persuasive authority *Clough* might have to a system that consistently advantages incumbents (and, given the Massachusetts' statute's unique features, it may not be much even there), it has none here. The Ballot

Order Statute does not help voters identify any incumbents at all. And it does not help them cast their ballots for any incumbents except the Governor, and even then, it only does so, at most, once every eight years, when a sitting Governor runs for her second (and under Florida's term-limited system, last) term. *See* Fla. Const., art. IV, § 5(b). *Clough* does not support finding that the system at issue in this case does not significantly burden Plaintiffs' rights.

Second, the Secretary is also wrong to assert that the Ballot Order Statute's disparate treatment of the similarly situated major political parties is only cognizable if it results from "intentional or purposeful discrimination." Mot. at 15. Plaintiffs need not allege "intentional or purposeful discrimination" where, as here, the law expressly creates classifications of similarly situated parties that it subjects to differential treatment, or where a state's differential treatment implicates fundamental rights. *See E & T Realty v. Strickland*, 830 F.2d 1107, 1112 n.5 (11th Cir. 1987), *cert. denied* 485 U.S. 961 (1988).

Thus, in *Obama for America v. Husted*, 697 F.3d 423, 428-29 (6th Cir. 2012), in considering whether a state statute that, on its face, created two classes of voters with unequal access to early voting violated equal protection, the court did not require a showing of intentional or purposeful discrimination. Similarly, when this Court considered whether Florida's statutory scheme that, on its face, granted some vote-by-mail voters an opportunity to cure rejected ballots, but

denied the same right to others, violated equal protection, it did not require that the differential treatment of those voters be shown to be purposeful or intentional. *See Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016).

The cases the Secretary cites do not justify a different standard here. The language that the Secretary quotes from *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 955 (4th Cir. 1992), explicitly relates to what a plaintiff must allege to state a claim "of vote dilution brought about by political gerrymandering," and thus is plainly not applicable. *See* Mot. at 15. Moreover, in discussing an equal protection claim outside of the political gerrymandering context, *Martin* refutes, rather than supports, the Secretary's position: "To allege a prima facie equal protection violation, *it is enough that a plaintiff complains of governmental treatment dissimilar to that received by others similarly situated*." 980 F.2d at 953 (emphasis added); *see also id*. at 952 (explaining equal protection clause "keeps governmental decisionmakers from treating differentially persons who are in all relevant respects alike").

The other cases that the Secretary cites involve challenges to practices that either were not the result of an explicit classification, clear on the face of the law, or were brought by parties not similarly situated. *See Bd. of Elections of Comm'rs of Chi. v. Libertarian Party of Ill.*, 591 F.2d 22, 26 (7th Cir. 1979) (explaining, in

challenge to tiered ballot order statute by minor political party, "Supreme Court has recognized the distinctions between major and minor political parties do not necessarily violate the equal protection clause"); *Bohus v. Bd. of Elections Comm'rs*, 447 F.2d 821, 822 (7th Cir. 1971) (evaluating as-applied challenge to law with no facial classifications); *Green Party of Tenn. v. Hargett*, No. 3:11-CV-692, 2016 WL 4379150, at *38 (M.D. Tenn. Aug. 17, 2016) (rejecting equal protection claim of minor party candidate after trial, where plaintiffs "presented no competent statistical evidence or expert testimony demonstrating that a party's position on the ballot affects is performance in an election, much less the extent of any such effects," and making no mention of a requirement that intentional or purposeful discrimination be proven).

3. The Ballot Order Statute is Not Justified by Any Legitimate, Much Less Compelling, State Interest

Finally, the Secretary's assertion that the Court may dismiss the Complaint because he claims the Ballot Order 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' . . . thereby speed[ing] up the election process and help[ing] avoid voter confusion," Mot. at 19-20, should also be rejected.

Initially, the argument fails because Plaintiffs have adequately alleged that the Ballot Order Statute is not justified by a legitimate, much less a compelling,

state interest, let alone one that is narrowly tailored. *See* Compl. ¶¶ 44, 53, 54, 59. Because of the severity of the burden imposed, the Statute must be narrowly tailored to advance a compelling state interest, *see Gould*, 536 P.2d at 1344, and the Secretary does not attempt to argue it can pass this test. But even if the Statute were subject to less stringent scrutiny, it could not survive Plaintiffs' challenge.

The Ballot Order Statute's consistent favoritism of the last-elected Governor's political party is not only *not* necessary to achieve the State's stated interests, it does not actually further either. If anything, it capitalizes and enhances voter confusion to the sole advantage of the favored political party; it does nothing whatsoever to alleviate it. 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, because the Statute *requires* such rotation when a candidate from a different party wins the Governor's race. And the remedy that Plaintiffs' seek, which, as discussed, would work no practical difference from the voter's perspective, *see supra* II.A.2.b, would not make straight ticket voting any more difficult for Florida voters than it currently is.

It is thus not surprising that courts considering similar schemes have rejected arguments that 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*, 536 P.2d at 1344 (rejecting arguments that interests in promoting "efficient, unconfused voting" or "speed in the voting booth" justified incumbent-first system); *Sangmeister*, 565 F.2d at 467 (holding ordering names based on past electoral success not justified by "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*, 62 Misc. 2d at 1024 (holding incumbent-first 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"). Indeed, courts have held similar justifications insufficient to justify ballot ordering statutes like the one here, even under intermediate or rational basis scrutiny. *See Graves*, 946 F. Supp. 1569 (finding no legitimate 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").

The cases that the Secretary relies on are distinguishable, because virtually all involve differential treatment of minor party or independent candidates not

similarly situated, rather than major political parties. *See, e.g.*, *Alcorn*, 826 F.3d at 714; *Hargett*, 2016 WL 4379150, at *14; *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); *Libertarian Party of Colo. v. Buckley*, 938 F. Supp. 687 (D. Colo. 1996); *New Alliance Party*, 861 F. Supp. at 284. A state's differential treatment of candidates who are not similarly situated to facilitate election administration and minimize voter confusion is supported by Supreme Court precedent. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (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 present circumstances, where the two major political parties, clearly similarly situated, are subject to disparate treatment that systematically prejudices the unfavored party, its candidates, and the voters who support it.[9]

For all of these reasons, the Court should reject the Secretary's argument that Plaintiffs have failed to state a claim upon which relief may be granted.

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[9] *Schaefer v. Lamone*, 248 F. App'x 484 (4th Cir. 2017) (unpublished), considered a system that prioritized candidates alphabetically by last name, not one that consistently listed one party at the top in every race. *See id.* at 485. And *Shulz v. Williams*, 44 F.3d 48 (2d Cir. 1994), is not a ballot order case at all.

III. CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied.

LOCAL RULE 7.1(F) CERTIFICATION

Counsel for Plaintiffs, Frederick S. Wermuth, Esquire, certifies that this response contains 7,954 words.

Dated this 3rd day of July, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 3rd, 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 t all counsel of record.

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