IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF FLORIDA – TALLAHASSEE DIVISION

NANCY CAROLA JACOBSON, et al.,

Plaintiffs,

Civil Action No. 18-cv-262 RH/CAS

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

Defendant.

DEFENDANT INTERVENORS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Florida's Ballot Order Statute, Fla. Stat. § 101.151(3)(a), was adopted by Florida's legislature—controlled by the Democratic Party—in 1951. For 66 years, this statute went un-challenged, and Florida has had both Republican and Democratic governors during that time period. Plaintiffs claim they bring this suit now because nearly 4 years since the last gubernatorial election, new and emerging social science research has led them to the conclusion that Florida's Ballot Order Statute is unconstitutional.

Relying on a study that is dubious at best, Plaintiffs urge this Court to impose a mandatory injunction requiring rotation by precinct of the order of

partisan candidates on Florida's general election ballots.[1] Such an action by this Court at this late date would cause significant hardship to the both the State and to the Defendant-Intervenors. Additionally, this would harm the Supervisors of Election throughout Florida who are not party to this case, and who would be required to engage in significant changes to the processes and procedures, and incur significant cost, to comply with the mandatory injunction requested by the Plaintiffs.

Defendant-Intervenors, for the reasons outlined herein, urge this Court to reject the pending Motion for Preliminary Injunction. Plaintiffs propose an erroneous legal standard, and fail to meet the remaining factors required for the issuance of a preliminary injunction.

LEGAL STANDARD

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction." *United States v. Bd. of Educ. of Greene*

[1] Interestingly, Plaintiffs claim to represent Democratic candidates and officials across the country and claim to have developed a sincere belief in the unconstitutionality of Florida's Ballot Order Statute. However, in states nearly wholly controlled by their political party such as New York and Connecticut, which have nearly identical statutes, Democratic party officials in those states have not moved to change those state's ballot order statutes. *See* N.Y. Elec. Law § 7-116; Conn. Gen. Stat. §§ 9-249a, 9-453r.

Cty., *Miss.*, 332 F.2d 40, 45-46 (5th Cir. 1964).[2] Accordingly, "[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to each of the [elements]." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000).

What Plaintiffs seek here is a quintessential mandatory injunction requiring Florida take action whereby the grant of the injunction would provide Plaintiffs all of the requested relief. *See Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996); *Koppell v. N.Y. State Bd. of Elections*, 8 F. Supp. 2d 382, 384 (S.D.N.Y. 1998). Consequently, "[o]nly in rare instances is the issuance of a mandatory preliminary injunction proper." *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979); *Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1474 (11th Cir. 1985). In fact, mandatory injunctions are "particularly disfavored and should not be issued unless the facts and law clearly favor the moving party." *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976). Therefore, to obtain mandatory injunctive relief, Plaintiffs must satisfy an even greater burden. *Exhibitors Poster Exch. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971) ("[W]hen a plaintiff applies for a mandatory preliminary injunction, such relief should not be granted except in

[2] Because this decision was rendered before 1981, it is considered binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

rare instances in which the facts and law are *clearly in favor* of the moving party.") (emphasis added).

Accordingly, a court may grant mandatory injunctive relief only if the Plaintiffs clearly establish their burden of persuasion as to all four elements: (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of injunctive relief; (3) that the harm outweighs the injury an injunction would inflict on the Secretary; and (4) that the injunction, if granted, would not be adverse to the public interest. *Siegel*, 234 F.3d at 1176.

ARGUMENT

Plaintiffs here fail to meet the heightened burden required for their requested relief. First, the factors prescribed by *Anderson v. Celebrezze* for analyzing the constitutionality of state election laws weigh heavily in favor of Defendants. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under that balancing test, the claimed infringement on voting rights imposed by the Ballot Order Statute is minimal, if not non-existent. Because the law, aimed at avoiding voter confusion and facilitating efficient administration of elections, is clearly reasonable and facially nondiscriminatory, minimal scrutiny applies and the interests identified by the State and Defendant-Intervenors are more than sufficient to justify it. Plaintiffs, therefore, are unable to establish any likelihood of success on the merits, let alone a "clear" or "substantial" one.

Moreover, Plaintiffs have failed to demonstrate that any harm, irreparable or otherwise, would ensue from the denial of an injunction. The very theory underlying Plaintiffs' "irreparable" harm claim – that, once an election is over, they cannot get a "do-over" – is lacking where Plaintiffs make no sufficient showing of a disadvantage that would necessitate such relief. Additionally, both research and historical facts in Florida demonstrate that the "position bias" argument threaded through their Motion is not actually prohibitive of electoral success in Florida, which only serves to increase the uncertainty surrounding any claim of harm Plaintiffs assert. Where a claim for relief is predicated upon a conjectural result that may or may not occur, there can exist no harm warranting injunctive relief. Plaintiffs, therefore, fail to meet their heavy burden.

The Secretary, on the other hand, asserts compelling state interests for Florida's statutory framework, interests that would be severely injured should the Court grant Plaintiffs' requested relief. The Ballot Order Statute, which is wholly consistent with Florida's authority under the U.S. Constitution to enact laws ensuring fair and honest elections, has been in effect for over 66 years.

Furthermore, the interest of the Defendant-Intervenors in being able to campaign under consistent rules, of party volunteers to be able to prepare and circulate sample ballots without additional confusion, and of Supervisors of Election throughout the state to be able to proceed with the preparation of ballots

under long-standing plans and processes countervail any interest asserted by Plaintiffs.

Because all four factors required for a mandatory injunction clearly weigh in favor of denying this injunction, this Court should reject Plaintiffs' request.

I. Plaintiffs Have No Likelihood of Success on the Merits.

To prevail in this claim for injunctive relief, Plaintiffs must demonstrate a heightened, "clear or substantial" showing of likelihood of success on the merits. *Martinez*, 544 F.2d at 1243; *Exhibitors Poster Exch.*, 441 F.2d at 561; *see also Koppell*, 8 F. Supp. 2d at 384. Where the constitutionality of voting regulations are in question, this success hinges on the Court's weighed analysis of the factors set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, and clarified by *Burdick v. Takushi*, 504 U.S. 428 (1992): (1) the "character and magnitude" of the injury to Plaintiffs' constitutional rights; (2) the "legitimacy and strength" of the interests identified by the State to justify the asserted burden; and (3) the extent to which the State's proffered interests necessitate burdening Plaintiffs' rights. Because the Ballot Order Statute imposes a purely speculative, if any, burden on Plaintiffs' constitutional rights, minimal scrutiny applies and the Secretary's asserted interests are entirely sufficient to justify the perceived injury, which has clearly been concocted for purposes of this litigation. Accordingly, Plaintiffs

cannot show a likelihood of success on the merits, let alone a "clear" or "substantial" one.

A. *Anderson*/*Burdick* Analysis Weighs in Favor of Constitutionality.

The Supreme Court has established a balancing test with which to analyze constitutional challenges to state ballot order statutes. *See Burdick*, 504 U.S. 428; *Anderson*, 460 U.S. 780. The threshold inquiry in these challenges is the applicable standard of review, which begins with the well-established premise that the right to vote and exercise political franchise is integral to our democracy. *Burdick*, 504 U.S. at 433. The First and Fourteenth Amendments, therefore, have come to encompass a variety of voting rights, including those to associate for political purposes, cast an effective vote, and create and develop new political parties. *New Alliance Party*, 861 F. Supp. at 293 (citing several Supreme Court decisions from which these rights are derived). Although "fundamental," these rights are not absolute; the Supreme Court has consistently recognized the States' constitutionally-derived authority to regulate elections. *See Burdick*, 504 U.S. 428; *Anderson*, 460 U.S. 780; *Sarvis v. Alcorn*, 826 F.3d 708, 714 (4th Cir. 2016); *Gill v. Rhode Island*, 933 F. Supp. 151, 154 (D.R.I. 1996); *New Alliance Party*, 861 F. Supp. at 293. This state supervision of elections, which may include the enactment of comprehensive and complex statutory framework, ensures that fairness, honesty and order accompany the democratic process. *Anderson*, 460 U.S. at 788. The right

to vote, therefore, has been clarified to mean "the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic process." *Burdick*, 504 U.S. at 441.

It follows, then, that all election laws, even valid ones, "inevitably affect[] – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. This does not, however, automatically classify them as constitutionally suspect. *Id*. Recognizing the requisite limitation on voting rights, the Supreme Court has restrained the reach of these types of claims and "eschewed a strict scrutiny standard in favor of a flexible standard," *Gill*, 933 F. Supp. at 154, only invalidating those restrictions "that, without compelling justification, *significantly encroach*[] upon the rights to vote and to associate for political purposes." *Unity Party v. Wallace*, 707 F.2d 59, 62 (2d Cir. 1983).

Because constitutional protection under this flexible approach is dependent on the extent to which an election law impinges on First and Fourteenth Amendment rights, the Supreme Court has set forth a balancing test to determine the appropriate level of scrutiny. *See Burdick*, 504 U.S. at 434. Where the Court finds that a challenged law "severely" burdens voting rights, heightened scrutiny applies and the law must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (internal citation omitted).

By contrast, where the Court finds that a challenged law imposes only "reasonable, non-discriminatory restrictions" on voting rights, minimal scrutiny applies and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id*. (quoting *Anderson*, 460 U.S. at 788). The class of laws facing higher scrutiny in these challenges is limited, as "[s]ubjecting too many laws to strict scrutiny would unnecessarily 'tie the hands of States seeking to assure that elections are operated equitably and efficiently.'" *Sarvis v. Alcorn*, 826 F.3d at 717 (quoting *Burdick*, 504 U.S. at 433).

Because of the lack of injury to Plaintiffs' asserted constitutional rights, Florida's Ballot Order Statute falls outside of the class of laws warranting heightened scrutiny, and the presumption in favor of the State under *Anderson*'s flexible standard applies.

B. Plaintiffs' Non-Existent "Injury" to Voting Rights Necessitates Minimum Scrutiny.

Plaintiffs assert First and Fourteenth Amendment claims that the Ballot Order Statute treats similarly situated candidates differently by denying Democrats an opportunity to appear first on the ballot, thereby depriving them of the perceived benefit of the "windfall vote" and diluting the weight of votes cast for their candidates. This contention not only relies on a flawed factual assertion of "position bias," but fails to even implicate a constitutionally protected right. Accordingly, no injury will be suffered by Plaintiffs and minimal scrutiny applies.

The entirety of Plaintiffs' claim is predicated on the existence of the purported "position bias" advantage. This hotly contested theory rests on the factual assumption that the candidate occupying the first position on the ballot will, by default, receive a substantial number of "extra" votes from uninformed or uninterested citizens that habitually select the first name listed on the ballot. *New Alliance Party*, 861 F. Supp. at 287. The resultant "loss" of these "windfall votes" has thus been characterized as a disadvantage or burden imposed upon the rights of those candidates not listed first on the ballot.

The body of research surrounding the position bias theory that Plaintiffs so squarely rely on, however, is "highly debated and subject to a multitude of confounding variables," classifying it indeterminate at best. *Sarvis v. Judd*, 80 F. Supp. 3d 692, 700 (E.D. Va. 2015). Although Plaintiffs fail to acknowledge the shortcomings inherent in the various studies they cite, courts reviewing the social science have been outspoken about the glaring inadequacies inherent in related research, often declining to accept it as viable. In *Clough v. Guzzi*, for instance, the Court examined a number of reputable studies on the effects of ballot position on election outcomes, finding mixed results: in some instances, first position on a ballot seemed to confer an advantage; in others, a disadvantage. *Clough*, 416 F. Supp. 1057, 1062-64 (D. Mass. 1976). In fact, one study found that, in some instances, *last* position was favored, *id*. at 1064, while still others determined that

position bias does not exist at all. *New Alliance Party*, 861 F. Supp. at 289, 290. With such varied results, it is clear that "[p]osition bias is a disputable fact because its existence is dependent upon the circumstances in which it operates." *Id.*; *see Mann v. Powell*, 333 F. Supp. 1261, 1263 (N.D. Ill. 1969) (stating that ballot position is *one of a number of factors* which *may* affect an election, and that the degree of that impact *varies with the circumstances*) (emphasis added).

That the impacts of this alleged position bias are nuanced is an understatement. Such studies cannot be conducted in a controlled laboratory setting. Plaintiffs' own expert, Dr. Krosnick, clearly acknowledges the difficulty of conducting a study of voter behavior in Florida focusing on this issue. Dr. Krosnick acknowledges, "It is not possible to conduct an analysis of actual elections in Florida . . . because Florida has not rotated the name order on ballots." Krosnick Report at 51 (ECF 31).

The resultant inability to ascertain and quantify the nuances that impact voter behavior in a given election in a given year lies at the root of the statistical deficiencies present in position bias research to date. Scholars fiercely debate this issue, as well as the significance of the research findings. For example, Professors Ho and Imai conducted a long-term study of California's elections from 1978 to 2002 and concluded for general elections that, "ballot order significantly impacts only minor party candidates, *with no detectable effect on major party candidates*."

Daniel Ho and Kosuke Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment*, 72 Public Opinion Quarterly 216 (Summer 2008) (emphasis added). Dr. Krosnick and his co-authors a few years later examined California's election and concluded "a small primacy effect appeared consistently that could have a substantial impact on some contest. This effect was larger in races for lower visibility offices, in years with higher turnout, and in races that were not close." Josh Pasek, et al., *Prevalence and Moderators of the Candidate Name-Order Effect: Evidence from All Statewide General Elections in California*, 78 Public Opinion Quarterly 416 (Jan. 2014).[3]

In any event, the "indeterminate and imprecise" nature of position bias necessitates a multifactored approach to any attempt at examining its effects in an election; one that acknowledges that, in addition to ballot position, the visibility of a race, type of election, number of candidates on a ballot, incumbency, party designation, candidate name recognition, and the sex, age, ethnic background and education level of the voter also impact outcomes. *New Alliance Party*, 861 F. Supp. at 289; *see also Clough*, 416 F. Supp. at 1065; *Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978).

[3] The manuscript is *available at* https://pprg.stanford.edu/wp-content/uploads/Manuscript-Prevalence-and-Moderators-of-the-Candidate-Name-Order-Effect-Pasek-J.-Schneider-D.-Krosnick-J..pdf (last visited July 13, 2018).

When considering ballot position in light of these factors, the research tells a different story. Although the susceptibility of complex voting behavior to such a vast array of often-elusive variables renders "proof of an advantage associated with being first on the ballot [] necessarily imprecise," *Clough*, 416 F. Supp. at 1060, courts have consistently found incumbency and party identification to be greater predictors of election outcomes than ballot position. *See New Alliance Party*, 861 F. Supp. at 289 (stating that a study's prior finding of position bias "stem[med] from the failure to disentangle the effects of incumbency from the effects of ballot position"); *Libertarian Party*, 938 F. Supp. 693 ("[P]arty identification militates against the effect of position bias" where candidates' party affiliations are included on the ballot); *Clough*, 416 F. Supp. at 1060 (stating a researcher's finding that "incumbency was a more significant and consistent advantage than first position"). A candidate's position on the ballot, therefore, is of little consequence if either party affiliation or status as an incumbent are used to identify candidates. *Id*.

Due to the importance of party affiliation, it logically follows that the effects of position bias are negligible in partisan races, including general elections. *See New Alliance Party*, 861 F. Supp. at 289-90. Similarly, ballot order has less of an impact in high-visibility races where voters are generally more aware of the candidates and issues. *See Clough*, 416 F. Supp. at 1060; *New Alliance Party*, 861 F. Supp. at 289. Some arguable degree of position bias, rather, is more likely to

occur in non-partisan and lower visibility races where the voter has fewer cues to guide them in their determination, *not* the highly partisan and readily visible congressional, gubernatorial and legislative elections at issue in this case. A finding to the contrary demonstrates a failure to "disentangle" ballot position from the other critical factors at play in democratic elections. *See New Alliance Party*, 861 F. Supp. at 289.

Florida's Ballot Order Statute, which simply states that the candidates of the party receiving the highest number of votes for Governor in the most recent election shall be listed first on the general election ballot, is, on its face, reasonable, non-discriminatory and well within the State's right to regulate elections. It places no restriction on parties' or candidates' access to the ballot, nor does it prevent voters from locating and voting for their candidates of choice. It prescribes a clear, predictable method of ordering, not subject to the arbitrary discretion of state officials. *See Mann v. Powell*, 33 F. Supp. 1261, 1265-66 (N.D. Ill. 1969) (upholding a preliminary injunction of a ballot order statute where it granted the Secretary of State discretion to determine ballot order in certain instances, and where he was found to have shown favoritism in carrying out his duties). Moreover, the Ballot Order Statute in no way cultivates a scenario in which position bias could arguably exist, as did the statutory schemes rejected in *Gould v. Grubb*, 14 Cal.3d 661 (Cal. 1975) (applying strict scrutiny and declaring

unconstitutional an "incumbents-first" statute that applied in a non-partisan election) and *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996) (applying strict scrutiny and declaring unconstitutional a statute requiring that the Democratic party candidate always appear in the top position of a ballot). In fact, courts have even upheld ballot order statutes more susceptible to the impacts of potential position bias than Florida's, including the "incumbents-first" system in *Clough* that not only specifically designated the candidates seeking re-election on the ballot, but did so in both primary and general elections. *Clough*, 416 F. Supp. 1057. If Courts decline to find a burden to constitutional rights warranting heightened scrutiny even under the most favorable, albeit still arguable, conditions for position bias, it must certainly decline to find one here.

The Ballot Order Statute also operates in a politically neutral manner, applying uniformly to all parties and affording each an equal opportunity at first ballot position under the statute. Although Plaintiffs assert that the statute operates to "entrench" Republican control in the State, that simply is not the case: the statute does not prescribe that one party or the other always be listed first, but rather the party of the candidate receiving the most votes for Governor in the most recent election. This could, in theory and in practice, be either Republicans or Democrats, or even another recognized party; that is, the "benefit" of being listed first under the provisions of the Ballot Order Statute may – and has been –

bestowed upon either party. These readily observable facts serve to highlight the opportunistic nature of Plaintiffs' claims. Equality of opportunity exists under this statute, "and equality of opportunity – not equality of outcomes – is the linchpin of what the Constitution requires in this type of situation." *Gill v. Rhode Island*, 933 F. Supp. 151, 155 (D.R.I. 1996).

i. Dr. Barber's Analysis Demonstrates Flaws in Dr. Krosnick's Study of Florida's Elections.

Turning the Court's attention to the report of Dr. Michael Barber of Brigham Young University, presented at Exhibit A, it is obvious from his analysis of Dr. Krosnick's report that the social science assumptions underlying this study are seriously flawed. Dr. Barber notes that Dr. Krosnick has acknowledged that "[n]ame-order effects do not always occur in every race," but rather are "a function of a number of contextual factors." Ex. A at 3. For instance, Dr. Krosnick and his co-authors found the effects of ballot order may be "smaller in contests that were relatively close," or in lower profile races less visible to the voting public.[4]

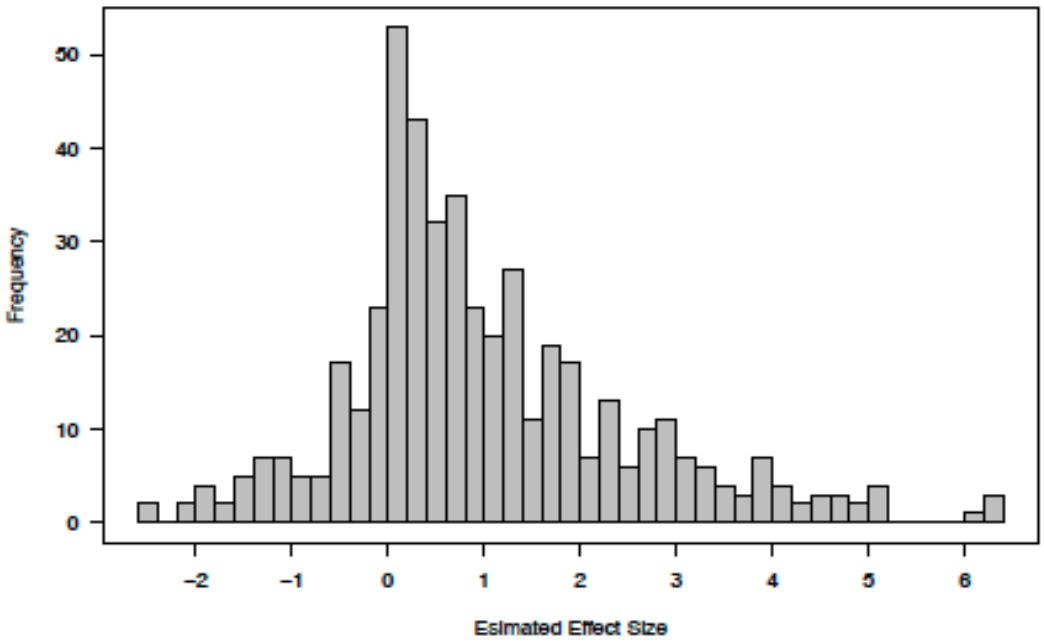
Dr. Krosnick, by his own admission, thereby affirms the argument, discussed *supra*, that position bias is nuanced and difficult to assess, and unlikely to be a factor in the higher-level, partisan elections Plaintiffs put at issue here. Moreover, his assertion that "each race must be considered individually to

[4] *See supra* n.3 at 19.

determine whether its outcome was materially affected" by ballot order undermines the very research he offers in support of Plaintiffs' case.

Dr. Barber notes that in order to perform his analysis, Dr. Krosnick made a number of analytical decisions that lead to bias in his results. Ex. A at 2, 6-7, 10. As Dr. Barber reports, assertions that Florida's and Ohio's electorate are similar are belied by analysis of factors that political science indicates are significant in voting behaviors. *Id*. at 3-4. First, Dr. Krosnick disregards the significant differences between the large number of Hispanic voters in Florida and relative lack of large numbers of Hispanic voters in Ohio. *Id*. Second, Dr. Barber notes that the vast majority (96.7% percent) of Florida's electorate live in areas deemed to be metropolitan areas, while in Ohio some 23% of voters live in rural areas. *Id*. at 4. Third, Dr. Barber notes that Dr. Krosnick selected mid-term elections for Ohio's state house of representatives as a "predictor" of votes in Florida. As Dr. Barber notes, significant literature in social science indicates that mid-term elections often reflect different voting patterns than Presidential election years. *Id*. at 10-11. And, as Dr. Barber finds, Dr. Krosnick's own examination of ballot order impact in Ohio actually clusters closer to zero than to showing any significant impact. Dr. Barber provides the following chart:

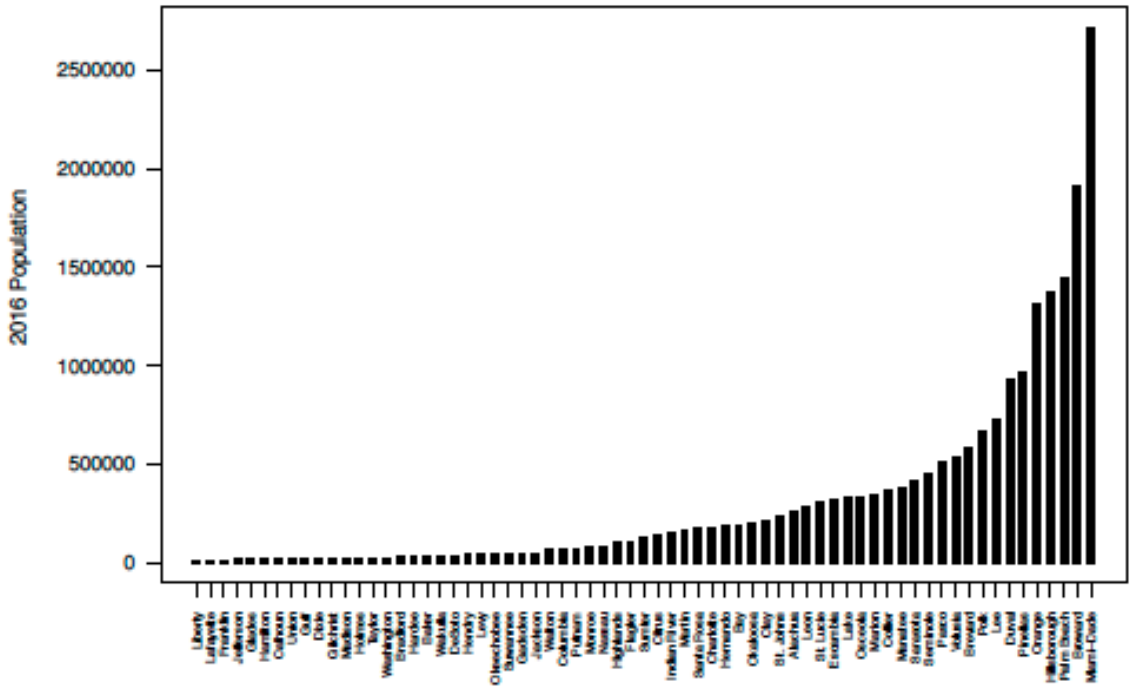
Figure 1: Distribution of Effect Sizes in Ohio



When turning to the Florida portion of Dr. Krosnick's analysis, Dr. Barber illustrates how Dr. Krosnick significantly oversamples rural counties that tend to lean more Republican, while not accounting for the significant portion of Florida's population that tends to live in larger counties that tend to vote more for Democratic candidates. *Id*. at 7-9. By choosing to treat each county in each election as a different observation, Dr. Krosnick's analysis includes significantly more observations from rural counties than from more heavily populated counties. As Dr. Barber notes, this likely made a significant impact on Dr. Krosnick's results, skewing them to show more of an impact for Republican candidates. *Id*. at

8. Dr. Barber provides the following graphic to illustrate the population of Florida's counties:

Figure 2: Population of Florida Counties



In conclusion, Dr. Barber says, "[t]he regression analysis conducted in the Krosnick memo of Florida elections has a number of methodological problems. These problems imply that the results are of little value given the likely potential for bias and measurement error in the regression." *Id.* at 2. Dr. Barber's analysis leads to the conclusion that Dr. Krosnick's report should be accorded little weight.

ii. Dr. Klick's Quantitative Analysis of Dr. Krosnick's Research and Report Reaches Conclusions Casting Doubt on Reliability of Dr. Krosnick's Report.

Dr. Klick's report, presented at Exhibit B, examines the literature cited by Dr. Krosnick and directly addresses his criticism of the Ho and Imai study. Ex. B at 3. Additionally, Dr. Klick provides definitive quantitative analysis of Dr. Krosnick's own data and shows how the use of the Ohio election results and the treatment of each county's election as a separate independent observation for each candidate leads to questionable results. *See, e.g.*, *id.* at 4-5.

Similarly to Dr. Barber, Dr. Klick notes that the significance of the results found in the existing literature are not nearly as dramatic or impactful as Dr. Krosnick's report would lead one to believe. *Id*. at 4. Dr. Klick notes, for example, that a review of some of the literature demonstrates that some of the studies are not generally statistically significant, or that they produce some anomalous and unexplained results. *Id*. at 2-4. Dr. Klick concluded "Krosnick's concerns about ballot order effects seems disproportionate to the literature, which is not nearly as definitive as he claims and, at best, shows very small effects." *Id*. at 4.

Dr. Klick notes that Dr. Krosnick highlights the 2004 study authored, in part, by Miller finding that President Bush gained a 9.5% advantage when being listed first in California in the 2000 election. *Id*. at 2-3. Dr. Klick notes that for California, this result was not statistically significant. In addition, this study does

not account for the fact that Al Gore appears to have been "burdened" with a *negative* ballot order effect of -4.5% (also not statistically significant). *Id*. These facts were not presented in the summary provided in Dr. Krosnick's report. Specifically, with respect to the dispute between Dr. Krosnick and Drs. Ho and Imai, Dr. Klick notes that Dr. Krosnick claims that the Ho and Imai study was based on faulty data, but makes no attempt to re-run their methodology with his supposedly "cleaned" data. Drs. Ho and Imai also note that some of Dr. Krosnick's earlier studies did not account for the specific way in which California rotates names on its ballots. *Id*. at 3.

Dr. Klick used the data provided by Dr. Krosnick to engage in qualitative review of the data presented. Dr. Klick notes the issues with the Current Population Survey ("CPS") data used to compare the electorate in Florida with the electorates in the other states he examined, including Ohio and others. *Id*. at 4-5. For example, every state examined has multiple double-digit differences in the electorates. Krosnick provides no examination of "whether these sizeable differences are innocuous or fatal." *Id*. at 4. Rather, Krosnick smoothes over all of the differences by averaging the characteristics. *Id*. In addition, CPS data has reliability problems for several reasons. First, people tend to "overstate the degree to which they vote." *Id*. Second, the supplement "counts both people who say they

didn't vote and people who were not asked whether they voted as non-voters." *Id*. Finally, there are differences between states on CPS responses. *Id*.

Turning to Dr. Krosnick's estimates of ballot order effects in Florida, Dr. Klick notes that while Dr. Krosnick finds "statistically significant ballot order effects of 2.70 and 1.96 for Republicans and Democrats respectively," Dr. Krosnick fails to report that the "difference in these coefficients is not statistically significant." *Id*. at 5. Dr. Klick notes that Dr. Krosnick fails to account for potential alternative explanations such as the impact of having an incumbent governor. *Id*. Dr. Klick describes this potential for spurious correlation as the "omitted variable bias problem." *Id*. at 5. n12.

Dr. Klick then re-analyzes the Ohio and Florida data presented by Dr. Krosnick. Dr. Klick finds no viable justification for using the Ohio vote share as a variable. Rather, when the regression is re-run without the Ohio control variable, the estimated ballot order effect in Florida is dramatically reduced. The Republican magnitude drops by almost a quarter, and the Democratic effect "loses statistical significance and drops by more than 70%." *Id*. at 7. The results that demonstrate how significantly the use of Ohio's elections impact Dr. Krosnick's results are presented in the following table:

Table 1:				
Ohio Variable Drives Florida Results				
	Republican		Democrat	
Candidate listed first on ballot	2.70 P = 0.00	2.05 P = 0.00	1.96 P = 0.00	0.56 P < 0.25
Percent of the statewide vote in Ohio received by Democratic candidates for the House of Representatives in the most recent election	0.60 P = 0.00		0.58 P = 0.00	
Republican/Democratic gubernatorial candidate in the last Florida gubernatorial election	0.33 P = 0.00	0.23 P = 0.00	0.34 P = 0.00	0.28 P = 0.00
Registered Republican voters as a percent of registered voters in the county	0.39 P = 0.00	0.22 P = 0.00	-0.42 P = 0.00	-0.23 P = 0.00
Registered Democratic voters as a percent of registered voters in the county	-0.46 P = 0.00	-0.67 P = 0.00	0.422 P = 0.00	0.65 P = 0.00
Race Dummies	Yes	yes	yes	yes
Number of Candidate Dummies	yes	yes	yes	yes
County Dummies	yes	yes	yes	yes

Dr. Klick also questions treating each candidate's race by county by election year as if they were statistically independent observations. As Dr. Klick notes, the "rule" is reset every four years, and clustering of elections results is a more reasonable way to examine the results. Dr. Klick explains:

> [A] ll of the elections analyzed in 2012 operated under the same rule because it was based on the 2010 governor election. In a sense, there is a lack of statistical independence among the observations analyzed during the 2012 elections, and that dependence needs to be accounted for. In fact, since the rule is reset only every

> four years, one might argue that there is a lack of independence among all of the observations between the 2010 election and the subsequent election in 2014. Accounting for dependence of this type involves calculating what are called clustered standard errors.

Id. at 8. Dr. Klick then re-runs the data with the elections clustered by year or by election cycle. This is illustrated in the following table:

Table 3: Accounting for Dependence						
	Republican			Democrat		
	Unclustered	Cluster (year)	Cluster (cycle)	Unclustered	Cluster (year)	Cluster (cycle)
Candidate listed first on ballot	2.70 SE = 0.45 P = 0.00	2.70 SE = 1.73 P < 0.13	2.70 SE = 2.17 P < 0.25	1.96 SE = 0.48 P = 0.00	1.96 SE = 2.04 P < 0.35	1.96 SE = 2.65 P = 0.48
Percent of the statewide vote in Ohio received by Democratic candidates for the House of Representatives in the most recent election	0.60 SE = 0.03 P = 0.00	0.60 SE = 0.16 P = 0.00	0.60 SE = 0.16 P = 0.00	0.58 SE = 0.03 P = 0.00	0.58 SE = 0.17 P = 0.00	0.58 SE = 0.17 P = 0.00
Republican/Democratic gubernatorial candidate in the last Florida gubernatorial election	0.33 SE = 0.03 P = 0.00	0.33 SE = 0.18 P < 0.08	0.33 SE = 0.18 P < 0.10	0.34 SE = 0.03 P = 0.00	0.34 SE = 0.22 P < 0.14	0.34 SE = 0.23 P < 0.18
Registered Republican voters as a percent of	0.39 SE = 0.03	0.39 SE = 0.11	0.39 SE = 0.11	-0.42 SE = 0.03	-0.42 SE = 0.11	-0.42 SE = 0.11

Id. When this is done to account for the "non-independence" of elections held under the same "rule" or in the same year, "Dr. Krosnick's ballot order effects are indistinguishable from random variation. The random noise in the data is such that it is impossible to tell with certainty whether his ballot order effects or 2.7 and 1.96

percentage points respectively are any different than common vacillations in the vote share data." *Id*. at 9.

Dr. Klick concludes:

> Krosnick's report, in my opinion, overstates both the magnitude and the robustness of the ballot order effect literature. Further, his assertion that studies from Ohio, California, North Dakota, and New Hampshire can be extrapolated to Florida has no scientific basis. As for his analysis of Florida election data directly, his analysis and conclusions are unreliable . . . . [T]he empirical model is incredibly fragile, exhibiting large swings in the estimated ballot order effect when seemingly irrelevant control variables are dropped, and Krosnick fails to account for substantial dependence in his sample which leads him to overestimate the precision of his estimates.

Id. For the following reasons presented by Dr. Klick, Dr. Krosnick's report should be given little evidentiary weight by this Court.

C. Application of *Anderson/Burdick* Standard Demonstrates that Plaintiffs Will Not Succeed on the Merits.

Based on the foregoing, Plaintiffs are unable to clearly demonstrate that position bias exists as a result of the Ballot Order Statute at all, let alone to any degree that would amount to a "harm." Even if Plaintiffs could demonstrate the presence of a tangible disadvantage imposed by ballot order, they still fail to implicate any protected constitutional right. Plaintiffs in this case do not claim that the Ballot Order Statute excludes them from the ballot, denies them fair access to the ballot, or prevents them from communicating their issue positions to the public. *See New Alliance Party*, 861 F. Supp. at 295. They do not claim that the statute

denies citizens the right to vote, or that it prevents voters from casting votes for the candidates of their choice. *Id*. They do not claim that the statute inhibits voters from locating their preferred candidates on the ballot. *See Sarvis v. Alcorn*, 826 F.3d 708, 717. Indeed, a statutory scheme with any such effects would impose a severe burden on constitutional rights. *See Clough*, 416 F. Supp. at 1067; *Koppell*, 8 F. Supp. 2d at 385.

Instead, all Plaintiffs claim is that the Ballot Order Statute impedes their ability to capture the "windfall vote" and, as a result, diminishes the weight of the votes of their supporters. While the Constitution does protect ballot access, there exists no constitutional right to a preferred position on the ballot. *See New Alliance Party*, 861 F. Supp. at 295; *Democratic-Republican Org. v. Guadagno*, 900 F. Supp. 2d 447, 457 (D.N.J. 2012); *Sarvis v. Alcorn*, 826 F.3d at 717. Nor does the Constitution confer a right to a "wholly rational election" based solely on reason and devoid of votes susceptible to the personal whims of the voter. *Sarvis v. Judd*, 80 F. Supp. 3d at 700, 701. In fact, courts have overwhelmingly dismissed such "vote dilution" claims, finding that "an irrational vote is just as much of a vote as a rational one," and declining to analyze whether the motivations behind an individual's vote render other voters' ballots less meaningful. *Sarvis v. Judd*, 80 F. Supp. 3d at 700. They have also criticized claims similar to Plaintiffs' that candidates will have to work harder on voter outreach to compensate for any such

windfall vote, stating that "hard work and sacrifice . . . are at the lifeblood of any political organization," *Koppell*, 8 F. Supp. 2d at 385-86, and that if "candidates want the votes of informed voters, they should inform them." *Sarvis v. Judd*, 80 F. Supp. 3d at 700. Stated differently, position bias, if it does exist, is surmountable.

Plaintiffs have demonstrated no scenario in which the Ballot Order Statute would burden their First or Fourteenth Amendment Rights. The research associated with the alleged position bias upon which they base their entire claim is too imprecise and inconclusive to prove a harm. Even if it was found to exist, because the statute only applies to partisan races in a general election – two scenarios considered virtually "immune" from ballot order effects – position bias would not even come into play under operation of the Ballot Order Statute. Further, assuming the existence of some degree of position bias, Plaintiffs fail to implicate a recognized constitutional right and, therefore, a harm for the Court to even assess. Because the burden in this instance is nonexistent, the presumption in favor of the State carries and minimal scrutiny applies.

D. The State of Florida Has a Compelling Interest in Enacting and Enforcing Reasonable, Non-Discriminatory Laws to Regulate its Elections.

Given that Plaintiffs have failed to demonstrate any harm or injury to their First and Fourteenth Amendment Rights, the Court "need not address the State's interest underlying the[] statute[] in order to find [it] constitutional under

Anderson." *See Democratic-Republican Org.*, 900 F. Supp. 2d at 459; *New Alliance Party*, 861 F. Supp. at 295-96. Even in the event that the Court does find that the Ballot Order Statute imposes some burden on Plaintiffs, however, the Secretary asserts compelling state interests for Florida's statutory framework, which has been in effect for 66 years.

The State's identified integral interests, which include the establishment and maintaintenence of an orderly and democratic process through comprehensible ballots and streamlined voting, have been consistently upheld as not only important, as required under *Anderson/Burdick*'s flexible standard, but compelling, and wholly consistent with a state's constitutional power to regulate elections. *See New Alliance Party*, 861 F. Supp. at 293-94; *Sarvis v. Judd*, 80 F. Supp. 3d at 698. When weighed against even a moderate imposition on individuals' rights to vote and associate for political ends, state interests are generally sufficient to justify the restrictions. *Anderson*, 460 U.S. at 788.

Such is the case here. Under the minimal scrutiny necessitated by such a slight, if any, burden to Plaintiffs' constitutional rights, the Court should find the Secretary's asserted interests of avoiding voter confusion and ensuring streamlined elections to be more than adequate to justify the Ballot Order Statute. Accordingly, Plaintiffs fail to display any likelihood of success on the merits, let alone the required "clear" or "substantial" demonstration.

II. Plaintiffs Cannot Establish Irreparable Harm.

Plaintiffs argue that their "severe" injury is irreparable because, "once the election occurs, there can be no do-over and no-redress." Pls.' Mot. at 29. This claim, however, is based on mere conjecture and is at best speculative. Plaintiffs' arguments related to the nature of their purported injury are irrelevant — irreparable or not — because they have failed to show to any degree of certainty that ballot order has the impact they assert. "Failure to show any of the four factors is fatal, and the most common failure is not showing a substantial likelihood of success on the merits." *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009).

Plaintiffs are not irreparably harmed because they were not reasonably diligent in pursuing their claims. *Benisek v. Lamone*, No. 17-333, 2018 U.S. LEXIS 3688 **3-4 (U.S. June 18, 2018) (holding that plaintiffs there were not reasonably diligent where they waited approximately five years to file their preliminary injunction). "[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Fla. Dep't of Educ. Div. of Blind Servs. v. United States*, No. 15-203, 2015 U.S. Dist. LEXIS 57457, *3 (N.D. Fla. April 30, 2015) (favorably quoting *Tough Traveler, Ltd. v. Outbound Prods*., 60 F.3d 964, 968 (2nd Cir. 1995)). Plaintiffs waited decades before bringing this lawsuit, and then

weeks after the filing of the Complaint before moving for the preliminary injunction. This undercuts their claim of irreparable harm.

Additionally, this Court should deny the requested injunction due to laches because Plaintiffs have unduly delayed on asserting their injury—they have waited decades. Such a delay is inexcusable. The studies and the election data Plaintiffs rely upon have existed for years, and this delay causes harm to Intervenor-Defendants. *See, e.g.*, Ex. E ¶¶ 9-13 (Barnett Aff.); *Citibank N.A. v. Citibanc Grp. Inc*, 724 F.2d 1540, 1546 (11th Cir. 1984). Courts both within this district and elsewhere have applied laches to election cases. *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Varner v. Smitherman*, 92-0586, 1993 U.S. Dist. LEXIS 17721 (S.D. Ala. Dec. 8, 1993) (applying laches to dismiss case where plaintiff was fully aware of Voting Rights Act 1982 amendments and other decisional law when plaintiff supported challenged legislation and then waited five years after enactment to challenge it).

III. Granting Relief Would Result in Significant Harm to the State and Operate to the Detriment of the Public Interest.

Granting the relief requested by Plaintiffs would inflict significant harm on the State of Florida, both administratively and as a matter of public policy. Enjoining operation of the Ballot Order Statute in the upcoming elections and compelling implementation of Plaintiffs' proposed ballot rotation scheme would result in voter confusion, increased costs, substantial administrative burden, and

the injection of human error into an already high-stakes electoral process. Moreover, imposing a court-mandated remedy would infringe on the general deference granted to States in the exercise of their constitutional right to regulate elections.

The Ballot Order Statute has been in effect in the State of Florida for the past 66 years. Voters are, therefore, familiar with the statutory scheme and have come to expect the ballot organization that it prescribes. To not only change it, but to do so without warning and so close to an election, would necessarily leave a large segment of the voting population unaware of the new ballot order and confused when they step into the ballot box. Given the expedited timeframe, any good faith voter education efforts on the part of the Secretary or his designees would likely fall short.

Even more glaring, perhaps, is the extreme cost and administrative burden the requested relief would impose on the State. Creating and implementing a new ballot order system requires time, money, and manpower; implementing a scheme that requires a different ballot in every precinct – and the coordination of those different ballots among precincts – requires even more of each of those precious resources. The logistical necessities and preparation alone will be taxing, and only exacerbated by the compressed timeframe within which it all must be completed. Finally, the need for enhanced coordination between precincts and the rushed

nature of logistical arrangements and software updates significantly heightens the risk for error on Election Day – human or otherwise.

Ion Sancho's conclusory assertions that ordering ballot order rotation would impose no burden on election administration should be given little weight. Affidavits of Sandra Mortham, the former Secretary of State of Florida, and Scott Gessler, the former Secretary of State of Colorado, attached hereto as Exhibits C and D, respectively, detail the concerns of election administrators when ballot ordering is changed, particularly at the last minute. Secretary Mortham's affidavit details the proofing and printing burdens in terms of staff time and costs that would be imposed should this Court order ballot rotation as requested by Plaintiffs. Ex. C ¶¶ 17-30. Secretary Mortham's affidavit is also evidence of how candidates can prevail in elections even when listed second on a ballot: in her election as Secretary of State, she received almost two percent more overall vote than did the incumbent Governor of a different party when she was listed second on the statewide ballot. *Id*. ¶¶ 6-11.

Secretary Mortham's concerns about election administration are echoed by Secretary Gessler's conclusions as well. Secretary Gessler concludes that "alternating candidate ballot positions by precinct will be a greater administrative burden and cost for Florida state elections officials, compared to using the same ballot positions for all precincts across the state." Ex. D ¶ 13. As Secretary

Gessler points out, there are 576 precincts in Broward alone, and there can be hundreds of districts within a single county. *Id*. ¶ 18. Additionally, he noted, federal law requires 13 counties to print ballots in English and Spanish, and one county to print ballots in Creole. *Id*. Secretary Gessler points out the increased printing costs, demands on staff time, increased programming necessary for the touch screens available for those with disabilities, complexity in counting, and increased waste for inventory cushions. *Id*. ¶¶ 20-27.

Finally, Exhibit E is an affidavit from Palm Beach County Republican Chairman Michael Barnett. In his affidavit, he describes a number of challenges faced in the administration of elections in Palm Beach County over the last decade or so, and explains the additional burden the proposed rotation of ballots would place on local political party committees and volunteers as the advocate for and against candidates. Ex. E ¶¶ 9-12 Finally, he expresses the real concern that changing the ballot order will impact the role local parties have played in advocating for their chosen candidates when people are actually voting. *Id*. ¶ 13.

Aside from the tangible harms to be incurred by the requested relief, there remain the harmful policy implications of court-prescribed remedies in this instance. Courts have repeatedly asserted that assigning ballot position is "properly a matter for legislative determination." *See Ulland*, 262 N.W.2d 412 at 418; *Clough*, 416 F. Supp. at 1068; *Sarvis v. Judd*, 80 F. Supp. 3d at 709. As a result of

this deference, Courts have often been reluctant to impose alternative ballot order schemes, acknowledging that various alternatives all come with their own disadvantages, *Clough*, 416 F. Supp. at 1068, and that, even where ballot order statutes proved constitutionally suspect, it is not appropriate to prescribe one over the others that must be followed in every election. *Sarvis v. Judd*, 80 F. Supp. 3d at 709. Under this line of reasoning, if the State has a sufficient justification for its particular ballot order scheme and has employed only reasonable regulations to effectuate it, then it has "acted within constitutional bounds and [a] Court may not stand in judgement of that discretion properly exercised by the legislative body." *Id.*; *see Mann*, 33 F. Supp. at 1265-66 ("When considering the constitutionality of legislation, courts should eschew examination of legislative motives except in exceptional circumstances.").

When presented with requests for injunctive relief, the Supreme Court has acknowledged that court orders affecting election processes, especially those sought in close proximity to an impending election, can result in a significant degree of voter confusion, *see Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), and disruption of the election process. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Such orders often have the effect of placing unreasonable demands on the State in adjusting to the new requirements, or of confusing voters to the extent that they they opt to stay away from the polls. *See Purcell*, 549 U.S. at 5; *Reynolds*, 377 U.S.

at 585; *Silberberg v. Bd. of Elections of N.Y.*, 216 F. Supp. 3d 411, 420-21 (S.D.N.Y. 2016). Accordingly, the Courts have consistently recognized "a strong public interest in the smooth and effective administration of voting laws that militate[s] against changing the rules in the days immediately before the election." *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).

In awarding or withholding Plaintiffs' requested relief, then, the Court "should consider the proximity of [the] forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds*, 377 U.S. at 585; *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("When an election is 'imminen[t]' and when there is 'inadequate time to resolve [] factual disputes' and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures."); *see also Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 08-445, 2008 U.S. Dist. LEXIS 91591, *47-48 (N.D. Fla. Oct. 29, 2008) (because of the temporal proximity to the election, the court granted a limited injunction permitting issue advocacy advertisments to air but declined to declare unconstitutional Florida's electioneering communication statute so long as it did not apply to issue advocacy). This is especially true where, as

here, Plaintiffs have unreasonably delayed. *Crookston*, 841 F.3d at 398; *see supra* at 30-31.

The risks injunctive relief pose to Florida's elections in this case are precisely those contemplated by the Supreme Court. Mr. Barnett, Secretary Gessler, and Secretary Mortham demonstrate, *supra* at 33-34, granting the requested injunction this close in time to the election, particularly when ballots must be printed, will impose undue administrative burdens on the Secretary of State and local electoral boards. Granting the injunction will also hinder the smooth administration of elections. Ex. C ¶¶ 16-30, 36. This is especially true given the number of ballot styles election administrators will be required to proofread and print, increasing the likelihood of error. *Id*. at ¶¶ 21-30; Ex. D ¶¶ 24-27. To ensure the smooth administration of the election and avoid the risk of confusion, this Court should deny the injunction. *See Purcell*, 549 U.S. at 4-5.

In light of the harm the State stands to incur, injunctive relief in this instance would operate to the extreme detriment of the public interest. The public, which has a critical interest in orderly and integral elections, would undoubtedly be impacted by the burdens that suspension of the Ballot Order Statute and implementation of a new ballot rotation scheme would impose on the State, as well as the public policy considerations at issue. Moreover, granting the requested relief in such close proximity of the upcoming elections would run directly counter to the

Purcell standard, creating a significant risk of voter confusion and significant disruption of election administration. Mandatory injunctions are disfavored and should not be granted absent a clear and substantial showing that doing so is in the public interest. The evidence presented by the affidavits demonstrates that this is simply not the case. The balance of the equities, therefore, weighs heavily against granting Plaintiffs' requested relief.

CONCLUSION

For the foregoing reasons, Defendant-Intervenors respectfully request that this Court deny the Motion for Preliminary Injunction.

Respectfully Submitted,

DATED: July 13, 2018

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

The foregoing Motion and Memorandum in Support of the Motion complies with Local Rule 7.1(F) because it contains 7,980 words, exclusive of the required certificates, case style, and signature blocs.

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018 the foregoing was filed with the Clerk via the CM/ECF system that sent a Notice of Electronic Filing to all counsel of record.

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