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-INTERVENORS' MOTION TO DISMISS

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I. INTRODUCTION

Like Defendant Florida Secretary of State (the "Secretary") before them, the National Republican Senate Committee and Republican Governors Association (together, "Intervenors") urge this Court to dismiss this matter at the outset and decline to consider the merits of Plaintiffs' claim that Florida's ballot order statute, Fla. Stat. § 101.151(3)(a) (the "Statute"), operates to confer a significant electoral advantage to the political party of the last-elected Governor in violation of the U.S. Constitution. Intervenors' interest in avoiding such review is understandable; for the past twenty years, as a result of the Statute and the successes of three Republican candidates for Governor, *all* Republican Party candidates have enjoyed this advantage in every single partisan race in Florida. If this Court does reach the merits and finds in Plaintiffs' favor, Intervenors stand to lose this advantage, including in their attempt to hold onto the Governor's office in 2018.[1]

Nevertheless, Intervenors' arguments that this case should be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) are wholly

[1] Recognizing that the Court has received hundreds of pages of motions papers and evidence from the parties in this case, both in relation to the Plaintiffs' Motion for a Preliminary Injunction ("Pls.' PI Mot.") (ECF No. 29) and the fully-briefed Motion to Dismiss filed by the Secretary (ECF No. 21), where Intervenors' Motion to Dismiss (the "Motion to Dismiss" or "Mot.") rehashes issues already addressed elsewhere, Plaintiffs cross-reference where possible to minimize the number of times that the Court has to review papers that say essentially the same thing.

without merit. Indeed, Intervenors fail to cite a single comparable case granting a similar motion to dismiss. To the contrary, there is a significant body of case law carefully considering ballot order challenges like this one, where the plaintiffs' allegations were not only evaluated on their merits, but the challenged procedures were ultimately invalidated as unconstitutional. *See, e.g.*, *McLain v. Meier*, 637 F.2d 1159, 1166 (8th Cir. 1980); *Graves v. McElderry*, 946 F. Supp. 1569, 1572 (W.D. Okla. 1996); *Netsch v. Lewis*, 344 F. Supp. 1280, 1281 (N.D. Ill. 1972); *Gould v. Grubb*, 14 Cal. 3d 661, 674 (Cal. 1975); *Holtzman v. Power*, 62 Misc. 2d 1020 (N.Y. Sup. Ct. 1970). Although many of these cases are expressly cited in the Complaint, Compl., ECF No. 1, ¶¶ 1, 6, 23, 44, 47, 48, 51, 52, 53, 58-59, the Motion fails to address all but *McLain*, in which the Eighth Circuit found that North Dakota's requirement that candidates of the party that won a previous congressional election must always be listed first on the ballot violated the Fourteenth Amendment. 637 F.2d at 1166. For obvious reasons, *McLain* is on all fours with the instant action, and Intervenors' attempts to distinguish it unavailing.

Instead, Intervenors repeatedly invite this Court to equate this case with challenges brought by independent candidates or minor parties, in which courts have upheld laws limiting ballot access to parties and candidates who can demonstrate a modicum of public support, or ballot order challenges where third-party candidates sought a completely random ordering of all candidates on the

ballot, including those without any meaningful public support. But this case does not involve questions of third- or minor-party ballot access, nor do Plaintiffs seek wholesale randomization of the ballot.

As the Complaint makes clear (and as Plaintiffs have repeatedly emphasized) this case involves a narrow challenge to the Statute's uniform favoritism of candidates who share their political affiliation with Florida's last-elected Governor on every single ballot for every partisan race, until a candidate from a different party is elected Governor. Due to the phenomenon known as "position bias" or the "primacy effect," first-listed candidates enjoy an artificial advantage that follows *solely* from their position on the ballot. In Florida, moreover, under the operation of the Statute, that advantage is so significant that it has likely been dispositive in deciding elections in recent years.

Plaintiffs have plainly stated a cognizable basis for pursuing their claims, and Intervenors' Motion to Dismiss should be denied.

II. BACKGROUND

In this action, Plaintiffs, five Democratic Party entities, one progressive advocacy and service organization that works to help elect Democratic Party candidates (collectively, "Organizational Plaintiffs"), and three Florida voters who consistently support Democratic Party candidates (collectively, "Voter Plaintiffs"), *see* Compl. ¶¶ 13-21, challenge the Statute, which provides in relevant part:

> The names of the candidates of the party that received the highest number of votes for Governor in the last election in which a Governor was elected shall be placed first for each office on the general election ballot . . . ; the names of the candidates of the party that received the second highest vote for Governor shall be placed second for each office[.]

Fla. Stat. § 101.151(3)(a).[2] Because the three candidates to win Governor's elections in Florida over the past twenty years have all run as Republicans, the Statute has required that, on all general election ballots in races for partisan offices during that time, the Republican candidate be listed first. Compl. ¶¶ 2, 4-5, 17, 31, 33, 35, 59 & n.26. In the two most recent gubernatorial elections in 2010 and 2014, the Republican candidate for Governor defeated the Democrat by only 1.2% and 1% of the vote, respectively. *Id*. ¶¶ 20, 34. Thus, for the past eight years, the Statute has placed Republican candidates first and Democratic candidates second in every single partisan race in every general election, based on a miniscule difference in the vote share that one candidate obtained in two elections over those eight years. *See id*.

Political parties have long suspected, an extensive body of research has repeatedly confirmed, and multiple state and federal courts have affirmatively

[2] A separate provision of the Statute, which Plaintiffs expressly do not challenge, provides that recognized major political party candidates are followed on the general election ballot by candidates of minor political parties, who are then followed by candidates who do not affiliate with a political party, organized in the order in which they qualified. *See* Fla. Stat. § 101.15(3)(b); *see also* Compl. ¶ 30 n.2.

found that the candidate listed first on a ballot receives an advantage of additional votes *solely* due to her ballot position. *Id*. ¶¶ 1, 3, 23-24. The Statute that is the subject of this challenge is no exception: under its operation, Republican candidates gain on average a 2.70 percentage point advantage when listed first on the ballot, and Democratic candidates gain on average a 1.96 percentage point advantage when listed first. *Id.* ¶¶ 3, 26.[3]

Plaintiffs allege that the Statute violates the First and Fourteenth Amendments because, on its face, it treats the political party whose candidate last won the Governor's election significantly more favorably than the political party whose candidate commanded the second highest vote share in the last Governor's election, to the systematic, significant, and irreparable injury of the latter. *Id*. ¶¶ 56-60. Plaintiffs further allege that the Statute violates the First and Fourteenth Amendments by placing an undue burden on the fundamental rights of the Voter Plaintiffs and the voting members and constituencies of the Organizational Plaintiffs, who consistently support the non-favored major political party's candidates, by diluting their voting power as compared to voters who support

[3] The full effect of the benefit conferred by the Statute is likely much more significant. Compl. ¶ 3 ("The overall percentage point gap attributable to position bias between the first and second listed candidates in Florida's two-party, two-candidate elections is estimated to be as high as 5.40 percentage points when Republican Party candidates are listed first, and 3.92 percentage points when Democratic candidates are listed first."); *see also id.* ¶ 27.

candidates who share their party affiliation with the political party upon which the Statute confers a consistent and uniform advantage, up and down the ticket. *Id*. ¶¶ 50-55. Because there is no legitimate (much less compelling) state interest to justify the injuries that the Statute works on Plaintiffs' fundamental rights, *see id.* ¶¶ 5, 53, 59, the Statute should be invalidated as unconstitutional and the Court order that the two major political parties be listed first on the ballot in the same number of a county's precincts, placing the same major party at the top of the ballot consistently across all races, which would effectively negate the unfair political advantage currently conferred on the party of the Governor under the Statute. *See* Pls.' PI Mot. at 2; *see also* Pls.' Resp. In Opp. to Sec'y's Mot. to Dismiss, ECF No. 38 ("Pls.' Resp. to Sec'y's' Mot.") 13-14.

III. RULE 12(B)(6) LEGAL STANDARD

The standard that the Court must apply when evaluating a motion to dismiss brought under Rule 12(b)(6) is one with which the Court is undoubtedly well familiar, and is discussed at length in Plaintiffs' opposition to the Secretary's Motion to Dismiss. Plaintiffs will not repeat that discussion here, except to reiterate that the standard is exceedingly high and requires the Court to accept as true all facts alleged in the Complaint and evaluate any inferences that follow in the light most favorable to Plaintiffs. *See* Pls.' Resp. to Secy's' Mot. at 17-18; *see also* Mot. at 4 (recognizing "this Court must accept all of Plaintiffs' factual

allegations as true"). Thus, 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." *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1380 (11th Cir. 2010) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (emphasis added). Because Intervenors do not and cannot meet this standard, their Motion should be denied.

IV. ARGUMENT

In an effort to avoid the Court ruling on the constitutionality of Florida's ballot ordering scheme, which operates to Intervenors' consistent advantage, Intervenors' Motion obfuscates the legal standard, legal precedent, and factual circumstances relevant to this case. First, Intervenors misapply the *Anderson-Burdick* standard, inviting the Court to bypass altogether the fact-intensive inquiry that standard demands by finding that the injury alleged is not significant enough to warrant the trouble. Intervenors similarly misconstrue the Statute as "facially neutral," when in fact, on its face, it requires the systematic disparate treatment of similarly situated major parties in violation of the Equal Protection Clause. And, ignoring the deference owed to Plaintiffs' factual allegations at this stage in the proceedings, Intervenors ask the Court to find at the outset that Plaintiffs' alleged burdens are minimal, notwithstanding the spate of cases (almost all of which

Intervenors avoid discussing entirely) striking down similar ballot order statutes regardless of the level of scrutiny applied. Finally, Intervenors grossly mischaracterize the relief that Plaintiffs seek, in an attempt to support what they allege to be Florida's interests. None of these arguments provide a legitimate basis for dismissing Plaintiffs' Complaint, and for all of the reasons that follow, Intervenors' Motion should be denied.

A. INTERVENORS MISAPPLY *ANDERSON-BURDICK*

Intervenors agree that the *Anderson-Burdick* standard applies to both of Plaintiffs' claims: one of which alleges systemic, disparate, prejudicial treatment of the similarly 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. Intervenors further agree that, under *Anderson-Burdick*, the level of scrutiny applied to Plaintiffs' claims "depends upon the extent to which" the Statute injures Plaintiffs' fundamental rights, such that severe burdens require strict scrutiny, and less significant injuries are reviewed under a less stringent level of scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 424 (1992); Mot. at 10-11.

But then Intervenors flagrantly misapply that standard throughout their Motion, pushing an application of the test that cannot be squared with 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 interests '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, 288-89 (1992)). Contrary to Intervenors' position, 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; *cf. Storer v. Brown*, 415 U.S. 724, 730 (1974) ("The rule is not self executing and is no substitute for the hard judgments that must be made," as "[d]ecision in this context, as in others, is very much a 'matter of degree,'[] very much a matter of 'consider(ing) the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.'") (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); citing *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972)).

While there are no doubt complaints that allege facts that, even if proven, could not, as a matter of law, sustain a claim under any iteration of the flexible *Anderson-Burdick* standard, this is not that case. Indeed, to grant Intervenors'

Motion would be to essentially find that no equal protection challenge to a ballot order statute that does not *expressly* entrench a political party by name at the top of the ballot could ever be maintained as a matter of law. That this is clearly not the law is evidenced by court opinions that have found similar statutes unconstitutional based on facts virtually identical to those alleged in Plaintiffs' Complaint. *See, e.g.*, *McLain*, 637 F.2d at 1166 (finding unconstitutional a ballot order system that prioritized first on the ballot candidates of the political party that won the last congressional election); *Holtzman*, 62 Misc. 2d at 1024 (finding unconstitutional a ballot order system that prioritized candidates based on "having been successful at a prior election"). Intervenors' contention that the Complaint fails to state a cognizable claim is clearly and demonstrably wrong.

B. THE STATUTE FACIALLY DISCRIMINATES AGAINST TWO CLASSES OF SIMILARLY SITUATED CANDIDATES

Intervenors baldly assert that the Statute is "facially neutral and non-discriminatory," Mot. at 12, but this cannot be squared with the plain text of the Statute nor extensive legal precedent. Plaintiffs have adequately (and correctly) alleged that, *on its face*, the Statute creates two classes of similarly situated candidates—those who belong to the party that won the last gubernatorial election and those who belong to the party whose candidate was the runner-up in the same election—and mandates that, in all races to follow (until a candidate from another political party wins a Governor's race four, or eight, or twenty years in the future),

the first category of candidates are *always* placed first on the ballot and the latter category are *never* placed first. *See* Compl. ¶¶ 2, 5, 17, 31, 33, 35, 38, 58; *see also* Fla. Stat. § 101.151(3)(a).

In other words, the Statute "discriminates on its face," because it explicitly creates a "statutory classification" between candidates of the last-elected Governor's party and candidates of the party that commanded the second highest vote share in the same race. *See Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 818-19 (4th Cir. 1995) (explaining express classifications are those "explicitly stated on the face of the statute or in the reasons given for its administration or enforcement"); *E & T Realty v. Strickland*, 830 F.2d 1107, 1112, n.5 (11th Cir. 1987); *see also* Compl. ¶¶ 5, 17, 31, 56-60.[4] Moreover, because (as Plaintiffs allege) that classification is not justified by a legitimate (much less compelling) state interest, it violates the Equal Protection Clause. *See, e.g.*, *McLain*, 637 F.2d at 1167; *Graves*, 946 F. Supp. at 1580; *Holtzman*, 62 Misc. 2d at 1024; *see also* Compl. ¶¶ 5, 53, 56-60.

Intervenors' argument appears to stem from an incorrect belief that a ballot order statute can only be facially discriminatory if it expressly entrenches a political party *by name*. *See* Mot. at 12 ("[U]nder the statute, Republicans,

[4] In contrast, a "facially neutral" statute does not contain an express classification on its face but may be unconstitutional due to "unequal application by favoring one class of persons and disfavoring another." *Sylvia Dev. Corp.*, 48 F.3d at 818-19.

Democrats . . . are all subject to the same requirement"). But neither of the two cases that Intervenors cite can be read to support their position.[5]

Moreover, multiple courts have come to the *opposite* conclusion, finding equal protection violations where, as here, the challenged ballot order procedure automatically slots certain types of candidates into the first ballot position, even where the characteristics of a candidate that result in their automatically being placed in the first position is not an affiliation with a political party expressly identified by name in the ballot order statute. *See, e.g.*, *McLain*, 637 F.2d at 1159 (holding unconstitutional statute requiring first listing of candidates of party receiving most votes in prior election); *Netsch*, 344 F. Supp. at 1281 (holding statute prescribing ballot order by past electoral success violated equal protection); *Gould*, 14 Cal. 3d at 664, 669-70 (finding procedure that automatically afforded "an incumbent, seeking reelection, a top position" on ballot "establishe[d] two

[5] *Graves v. McElderry* is highly relevant to this litigation, because it applied *Anderson-Burdick* to strike down a law that mandated Democrats be listed first, finding it violated equal protection, 946 F. Supp. at 1579-83, but nothing in the case can be read to require that a statute explicitly identify a party by name to create a facially discriminatory classification. And *Libertarian Party of Virginia v. Alcorn* (which Intervenors' Motion short cites as "*Sarvis*"), was a challenge by a third-party candidate to Virginia's tiered ballot order system, which placed the similarly situated major political parties (i.e., Democrats and Republicans) in the first tier, but did not "automatically elevate" any one political party "to the top of the ballot"; to the contrary, "[w]ithin the first two ballot tiers, party order [was] determined by lot." *Alcorn*, 826 F.3d 708, 720 (4th Cir. 2016), *cert. denied sub nom. Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017).

classifications of candidates for public office," which imposed "a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process,'" in violation of equal protection); *Holtzman*, 62 Misc. 2d at 1024 (holding system requiring incumbent at top of ballot unconstitutional, noting that statute's express favoritism of incumbents over all other candidates was "so disparate as to raise the possibility of invalidity on this basis alone"); *see also Sangmeister v. 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). Thus, the fact that the Statute facially creates classifications between similarly situated candidates and political parties that systematically advantage one and disadvantage the other, instead of expressly referring to party labels such as "Democrat" or "Republican," neither renders Plaintiffs' equal protection claim non-cognizable, nor will it save the Statute from invalidation.

Intervenors' argument also relies on the false factual premise that "candidates from all [major] parties have an equal opportunity to achieve the top position on the ballot" by "win[ning] the gubernatorial election," and that the Statute does not "entrench" a political party. Mot. at 12, 14. These assertions are ultimately questions of fact, and are squarely contrary to Plaintiffs' allegations in the Complaint, which the Court must accept as true on a motion to dismiss. *See*,

e.g., Compl. ¶¶ 2, 3, 5, 13-21, 26, 27, 31, 32, 33, 34, 36; *see also Speaker*, 623 F.3d at 1379. Specifically, Plaintiffs allege that under the operation of the Statute, which has conferred on average a 2.70 point advantage to the Republican candidate in every partisan race in Florida over the last twenty years, including in the 2010 and 2014 gubernatorial races, which the Republican candidate won with only 1.2% and 1% more of the vote share than his Democratic opponent, Democrats have not had an equal opportunity to achieve the top position on the ballot by winning the last gubernatorial election. Compl. ¶¶ 3, 20, 26, 34; *see also id.* ¶ 36 (describing the "self-fulfilling prophecy" of success of the party of the Governor).

But even more to the point, Intervenors' focus on the ability to win the Governor's election takes an inappropriately narrow view of "equal opportunity." A system that entrenches one political party in the top spot on the ballot in every single race for, at a minimum, four years at a time, cannot be said to offer candidates from other parties an "equal opportunity" to obtain the top position on the ballot. *Id.* at ¶¶ 34, 36, 38, 58, n.3; *see also Sangmeister*, 565 F.2d at 465; *Strong v. Suffolk County Bd. of Elections*, 872 F. Supp. 1160, 1164 (E.D.N.Y. 1994); *Gould*, 14 Cal. 3d at 664, 669-70. Indeed, Intervenors' argument that "Democrats have won four gubernatorial elections and Republicans have won six" since the Statute was enacted "about 50 years ago," Mot. at 3, 12, only serves to underscore that the Statute operates to systematically and unconstitutionally

entrench the political party of the Governor, where the party at the top of the ticket has changed only *once* in almost half a century, despite the fact that the party registration rates in Florida have, for a long time, been roughly equally divided between Democrats and Republicans.[6]

Nor is the Statute comparable to the cases upon which Intervenors rely in which very different types of ballot order systems were upheld as constitutional, Mot. at 12, 13, as each of those involved regimes that offered candidates of similarly situated major political parties an equal opportunity to be listed first on the ballot and did not entrench one political party automatically in the top spot, election after election. For example, as previously noted, the Virginia statute at issue in *Libertarian Party of Virginia v. Alcorn* provided candidates of major parties an equal opportunity to be listed first on the ballot in each election, where the first position was determined by a lottery. *See* 826 F.3d at 712. The same was true of the system at issue in *Board of Elections of Commissioners of Chicago v. Libertarian Party of Illinois*, 591 F.2d 22, 26 (7th Cir. 1979). And in *Schaefer v.*

[6] *See* FLA. DIV. OF ELECS., Voter Registration - By Party Affiliation: Party Affiliation Archive, http://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/by-party-affiliation-archive/ (last visited July 12, 2018). This Court may take judicial notice of matters of political history that are "not subject to reasonable dispute" under Federal Rule of Evidence 201(b). *See Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997) (noting that, among "the kinds of things about which courts ordinarily take judicial notice are . . . matters of political history").

Lamone, No. L-06-896, 2006 U.S. Dist. LEXIS 96855 (D. Md. Nov. 30, 2006), the statute at issue ordered primary candidates listed alphabetically.

Intervenors' reliance on cases upholding ballot order statutes that treated candidates who are not similarly situated to each other (e.g., a major versus minor party or independent candidate) differently is also wholly misplaced. This is because, as the Court in *Libertarian Party of Illinois* explicitly notes, the "Supreme Court has recognized that the distinctions between major and minor political parties do not necessarily violate the equal protection clause." 591 F.2d at 26. The same is categorically *not* true of a State's treatment of similarly situated major political parties, particularly in a case such as this, where that differential treatment results in a systemic and unabating electoral advantage up and down the ticket, to the clear detriment of the disfavored party and the hundreds of thousands of voters who support and affiliate with it. Thus, *Libertarian Party of Illinois*, *Alcorn*, 826 F.3d at 717, and *New Alliance Party v. New York State Board of Elections*, 861 F. Supp. 282, 298 (S.D.N.Y. 1994), are all clearly distinguishable. *See also* Pls.' Resp. to Sec'y's Mot. at 24-25, 28-29, 31-32 (distinguishing same cases).

In sum, Plaintiffs' claims are not only adequately alleged but clearly supported by a long line of state and federal cases finding ballot order systems similar to the Statute that Plaintiffs challenge here in violation of the Equal Protection Clause. Plaintiffs cited several of the cases in their Complaint, including

Mann v. Powell, 333 F. Supp. 1261 (N.D. Ill. 1969), *aff'd* 398 U.S. 955 (1970) *Gould*, *Netsch*, and *Holtzman*, yet Intervenors' Motion ignores them all except *McLain*, 37 F.2d at 1163, which Intervenors attempt to negate by asserting that the federal district court that decided that case got it wrong. *See* Mot. at 13-14. Intervenors, however, misread the opinion.

First, Intervenors' assertion that the court incorrectly identified the ballot order system at issue in *McLain* as an "incumbent" first system, when, in fact, the statute prioritized candidates of the party that won the prior congressional election, is not supported by the court's analysis. To the contrary, the *McLain* court clearly identified the statute as one which listed first "the party which received the most votes in the last congressional election" and presumably only referred to it as an "incumbent" statute because the plaintiff in the case was an independent congressional candidate who challenged the advantage the incumbent congressional candidate received pursuant to the statute. *Id*. at 1166. In any event, Intervenors fail to explain why this distinction has any legal import. If anything, an incumbent-first statute might have more a "rational" basis, because it would enable voters to find the candidates for whom they previously voted (as opposed to a statute like the one at issue here or in *McLain*, which do no such thing, *see* Pls.' Resp. to Sec'y's Mot. at 14-15), but, as Plaintiffs have repeatedly pointed out in other briefs filed in this case, courts have struck down those types of ballot

ordering statutes as unconstitutional, as well. *See* Pls.' PI Mot 16-18, 26; Pls.' Resp. to Sec'y's Mot. at 21, 22, 31, n.8. Second, Intervenors' argument that the *McLain* court did not fully consider defendant's argument that the statute was justified by preventing voter confusion, is also squarely contradicted by the opinion, which makes it clear that the voter confusion justification was thoroughly considered and rejected. *See* 37 F.2d at 1163, 1167.

C. THE STATUTE IMPOSES A COGNIZABLE BURDEN ON PLAINTIFFS' FUNDAMENTAL RIGHTS

Intervenors' argument that the Complaint should be dismissed because (in Intervenors' view) any burdens that follow from the Statute are "minimal," additionally fails because it relies almost entirely on abstract legal argument, untethered from the allegations of the Complaint, and ignores clearly analogous, persuasive precedent, pursuant to which the Court could find, not only that the Statute burdens Plaintiffs' fundamental rights, but that it does so severely, requiring the application of strict scrutiny. Moreover, whatever level of scrutiny the Court ultimately applies, Plaintiffs have alleged sufficient facts that, if proven, would require invalidation of the Statute. Intervenors' arguments to the contrary are not well-founded.

As an initial matter, Intervenors' argument that Plaintiffs' Complaint should be dismissed because it does not explicitly state that the Statute imposes a "severe[]" burden, Mot. at 9, makes no sense whatsoever. First, it is well

established that *Anderson-Burdick* creates a sliding scale, under which not only statutes that impose severe burdens, but those that impose lesser burdens (indeed, even "modest" or "minimal" burdens) can be invalidated as unconstitutional. *See Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 906 (S.D. Ohio), *aff'd*, 697 F.3d 423 (6th Cir. 2012) ("[H]owever slight that burden may appear. . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.") (quoting *Crawford*, 553 U.S. at 191); *Mich. State A. Philip Randolph Inst. v. Johnson*, 209 F. Supp. 3d 935, 947 (E.D. Mich. 2016) ("Even a minimal burden 'must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.'") (citations omitted), *aff'd* 833 F.3d 656 (6th Cir. 2016). Thus, there is no requirement that a plaintiff challenging an election law under the equal protection clause allege a "severe" burden to state a claim upon which relief may be granted. Moreover, as it comes to Plaintiffs' Complaint, Intervenors' argument is a pedantic point at best. While the word "severe" may not appear in the Complaint, Plaintiffs repeatedly allege that strict scrutiny applies, which is the legal equivalent of alleging that the burden imposed is "severe." *See, e.g.*, Compl. ¶¶ 5, 53, 59; *see also Norman v. Reed*, 502 U.S. at 280; *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1256 (N.D. Fla. 2016).

Finally, the question of whether and how severely a plaintiff is burdened by a particular law (which, in turn, determines the appropriate level of scrutiny to

apply to their claims) is largely a factual question. *See, e.g.*, *Arizona Green Party v. Reagan*, 838 F.3d 983, 989 (9th Cir. 2016); *cf. Holtzman*, 62 Misc. 2d at 1022 ("What would be unreasonable and unfair is a question of fact depending upon the circumstances of each case"; "[i]t is a judicial question and not a matter for arbitrary legislation."). Intervenors' assumption 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, is plainly inappropriate at this stage, where Plaintiffs clearly and repeatedly allege that the Statute imposes serious and systemic injuries to the fundamental rights of the members and supporters of the Organizational Plaintiffs, Compl. ¶¶ 16, 17, 18, 19, 20, 21, 52, as well as of the Voter Plaintiffs, *see, e.g.*, *id.* ¶¶ 13, 14, 15, 17, 52. These asserted injuries have been found to constitute a *severe* burden, warranting strict scrutiny, which no one (not the Secretary, nor Intervenors) even attempts to argue the Statute can survive. *See Gould*, 14 Cal. 3d at 669, 672 (concluding ballot ordering scheme "substantially dilute[d] the weight of votes of those supporting nonincumbent candidates, must be subjected to 'strict judicial scrutiny'" and did not survive such scrutiny) (citations omitted); Pls.' Resp. to Sec'y's Mot. at 30.

But even if Plaintiffs' Complaint only alleged a "minimal burden," it would still allege sufficient facts to maintain Plaintiffs' claims that the Statute nevertheless must be declared unconstitutional. Indeed, multiple courts that have

examined similar ballot order statutes on facts materially indistinguishable from those that Plaintiffs allege, have held that they do not survive even rational basis review. *See McLain*, 637 F.2d at 1167 (finding system that consistently listed first candidates of party that received most votes in last election could "not withstand even [rational basis review]"); *Graves*, 946 F. Supp. at 1581 (holding "[law classifying Democratic candidate in a manner that always places them first on ballot] cannot survive even this Court's lowest level of scrutiny, the rational basis test"); *Holtzman*, 62 Misc. 2d at 1024 ("The Court finds no rational basis for affording such favoritism to a candidate merely on the basis of his having been successful at a prior election.").

Intervenors not only ignore the ballot order cases that establish that similar statutes have repeatedly been found constitutionally wanting, even under the lowest possible levels of scrutiny, they rely on cases that are entirely inapposite. For example, Intervenors cite *Badham v. March Fong Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), which is a partisan gerrymandering case that has nothing whatsoever to do with ballot order. Moreover, Intervenors mischaracterize the *Badham* opinion, which dismissed the plaintiffs' complaint based on the court's finding "that plaintiffs have not alleged, and on [the record before the court] cannot allege, facts sufficient to state a claim under the Supreme Court's holding in *Davis v. Bandemer*." *Id*. at 666 (citing 478 U.S. 109 (1986)). *Bandemer* is one of the

Supreme Court's highly fractured partisan gerrymandering cases, and the language that Intervenors cite is from the *Badham* court's attempt to ferret out a test from that opinion (by counting Justices) that a plaintiff must meet to allege a justiciable *partisan gerrymandering* claim. *See id.* at 670.

The decision in *Storer v. Brown* similarly did not concern a ballot order challenge, nor is it at all clear why Intervenors think it might be useful here. 415 U.S. 724. That case considered the constitutionality of a California requirement that independent candidates remain unaffiliated with any political party a year before the primary, which the court found was not discriminatory towards independent candidates since party candidates faced a similar requirement to remain unaffiliated with any different party a year before the primary. *See id*. Moreover, in *Storer* the Court upheld the challenged statute only after finding that it was justified by a *compelling state interest* in the stability of the political system, indicating it applied strict scrutiny to plaintiffs' claims. *Id*. at 736; *see also id*. at 756 (Brennan, J., dissenting) (agreeing with majority "that the test of the validity of state legislation regulating candidate access to the ballot is whether we can conclude that the legislation, *strictly scrutinized*, is necessary to further compelling state interests") (emphasis added).

D. THE STATUTE IS NOT JUSTIFIED BY A LEGITIMATE, MUCH LESS COMPELLING, STATE INTEREST

Finally, Intervenors' argument that because (in Intervenors' view) the Statute is justified by "important state interests," the Complaint should be dismissed at the outset, *see* Mot. 15-17, misconstrues both Plaintiffs' challenge and the relief that they seek. Specifically, Intervenors' contention that the Statute "is necessary to prevent confusion through proper and uniform ordering of the ballot," is based entirely on Intervenors' incorrect assertion that "Plaintiffs seek an order from this Court mandating 'random' ballot placement." Mot. at 16. To make this argument, Intervenors selectively and misleadingly quote from the Complaint and ignore that Plaintiffs have repeatedly made clear that the narrow relief sought here would require only a minor adjustment to the ballot order in half of a county's precincts, consistently across all races, which would effectively negate the unfair political advantage currently conferred on the party of the Governor under the Statute. *See* Pls.' PI Mot. at 2.[7] Moreover, as discussed at length in Plaintiffs' opposition to the Secretary's Motion to Dismiss, the Statute's consistent favoritism of the last-elected Governor's political party is not only not necessary to achieve a state interest in "preventing confusion," Mot. 16, it actually does not further that interest. *See* Pls.' Resp. to Sec'y's' Mot. at 30-32. Rather than repeat those arguments here, Plaintiffs incorporate them by reference.

[7] Plaintiffs have not challenged the clause of Fla. Stat. § 101.151(3)(a) which provides that "[t]he names of the candidates" be listed "together with an appropriate abbreviation of the party name."

Finally, to accept *Intervenors'* bald assertions, first, that the "precise interest[s] *put forward by the State* as justifications for the burden imposed by" maintaining the Statute's favoritism, are, in fact, interests in avoiding confusion and promoting a uniform ballot, *and* that those interests adequately justify the burden that it imposes on Plaintiffs' fundamental rights, *see Burdick*, 504 U.S. at 434 (quotation marks and citation omitted) (emphasis added), would effectively be to find facts against Plaintiffs on nothing more than Intervenors' *ipse dixit* that (1) the "interests" Intervenors assert are, in fact, the *State's* justifications for the Statute's uniform favoritism; and (2) the Statute sufficiently promotes those justifications so as to totally foreclose Plaintiffs' claims. But, as has been previously discussed, far from *promoting* any interest in avoiding voter confusion, the Statute's consistent favoritism of the last-elected Governor's party only operates to *stoke and capitalize on* confusion. *See* Pls.' Resp. to Secy's' Mot. at 30-32. And Intervenors make no effort to address the decisions rejecting similar arguments that concerns about "confusion" are sufficiently important (or even legitimate) state interests that can save ballot order statutes like the one at issue here from invalidation. *See id*. at 30-31 (citing cases).

V. CONCLUSION

In sum, Intervenors urge this Court to find, as a matter of law, that ballot order statutes like Florida's have no appreciable burden and are essentially immune

from constitutional challenge. That is clearly not appropriate under either the *Anderson-Burdick* standard or in light of the panoply of case law invaliding strikingly similar statutes. For all of the foregoing reasons, Intervenors' Motion should be denied.

LOCAL RULE 7.1(F) CERTIFICATION

Counsel for Plaintiffs, Fritz Wermuth, Esquire, certifies that this motion contains 6,579 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 13, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Respectfully submitted,

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