UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NANCY CAROLA JACOBSON, *et al.*, Plaintiffs, v. KENNETH DETZNER, in his official capacity as the Secretary of State, *et al.*, Defendant and Defendant-Interveners.	Case No. 4:18-cv-00262-MW-CAS

SECRETARY'S RESPONSE IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

This case concerns the Plaintiffs' attempt to claim what they view as their share of "windfall votes" – votes of allegedly uninformed, undecided, or disinterested voters that, according to the Plaintiffs, somehow "dilute" Democratic votes.[1] [ECF 30 at 20-22.] The Plaintiffs thus challenge Florida's facially neutral Ballot Order Statute, and ask that this Court replace that 67-year old statute with an order directing the State's 67 Supervisors of Elections to list candidates affiliated with the Democratic Party first in every other voting precinct.[2] [ECF 29 at 2.]

[1] This Response refers to the Democratic Plaintiffs collectively as "the Plaintiffs," the Florida Secretary of State as "Secretary," § 101.151 of the Florida Statutes, as "the Ballot Order Statute," and references to prior filings before this Court as "ECF" followed by the appropriate docket number and pincite.

[2] The relevant provision of Florida's Ballot Order Statute provides in its entirety:

But the Plaintiffs only have a right to vote – not a right to *votes*, windfall or otherwise. An emerging consensus among the courts makes clear that "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern." *New Alliance Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994). This makes sense because, absent blatant favoritism for one party, a lawsuit filed in pursuit of windfall votes asks that a court cast "aspersions upon citizens who expressed their civic right to participate in an election and made a choice of their own free will." *Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708, 718 (4th Cir. 2016) *cert. denied sub nom. Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017). "Who are [the courts] to demean their decision?" *Id.* The Plaintiffs fail to state a claim for relief, show a likelihood for success on the merits, or demonstrate irreparable harm because their pursuit of a share of windfall votes asks this Court to first recognize a "constitutional right to a wholly rational election, based solely on a reasoned consideration of the issues and the candidates' positions, and free from other irrational consideration," and to

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> The names of the candidates of the party that received the highest number of votes for Governor in the last election in which a Governor was elected shall be placed first for each office on the general election ballot, together with an appropriate abbreviation of the party name; the names of the candidates of the party that received the second highest vote for Governor shall be placed second for each office, together with an appropriate abbreviation of the party name.

§ 101.151(3)(a), Fla. Stat.

then discount the otherwise valid votes cast by those whom they deem uninformed, undecided, or disinterested. *Id.* (citations omitted).

Even if the Plaintiffs had a constitutionally cognizable interest at stake, the minimal burden imposed through a facially neutral statute is far outweighed by the State's interest in avoiding voter confusion and promoting an efficient electoral process. This is especially so because, over its 67-year history, the Ballot Order Statute has more often resulted in Democratic candidates being listed first and, in more recent years, Democrats have won despite being listed second. In fact, the Plaintiffs' own expert, Krosnick, has said that "the magnitude of name-order effects observed . . . suggests that they have probably done little to undermine the democratic process in contemporary America." Joanne M. Miller and Jon A. Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, Public Op. Quarterly, Vol. 63, No. 3, at 291 (1998). The Secretary agrees.

A preliminary injunction upending a 67-year old statutory regime mere months before the General Election would also strain the equities and undermine the public interest. As detailed in the declarations from the Director of the Division of Elections and the President of the Florida State Association of Supervisors of Elections, also the Supervisor of Elections for Okaloosa County, the State's elections officials must do much between the August 28, 2018 (the Primary Election) and September 22, 2018 (the date when overseas ballots for the General

Election must be mailed). Rotating ballot order from precinct to precinct, among Florida's 6,056 precincts, many with multiple ballot styles, as the Plaintiffs suggest, would significantly increase the workload for Supervisors of Elections, and the possibility of human error in proof-reading and delivering the appropriate ballots for each voter at each precinct. Exh. 1 (Matthews Declaration) and Exh. 2 (Lux Declaration). Voter confusion, long lines, and a general undermining of confidence in the electoral process might result.

This Court should deny the Plaintiffs' request for a preliminary injunction.

II. STANDARD FOR PRELIMINARY INJUNCTION

"The purpose of a preliminary injunction is merely to preserve the relative position of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *Keister v. Bell*, 879 F.3d 1282, 1287 (11th Cir. 2018) (collecting citations). The four requisites the Plaintiffs "must clearly establish" are as follows: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the [P]laintiff[s] outweighs the potential harm to the [D]efendant; and (4) that the injunction will not disservice the public interest." *Id.* (citations omitted). Notably, the rule governing preliminary injunctions "does not

place upon the non-moving party the burden of coming forward and presenting its case against a preliminary injunction." *Ala. v. U.S. Army Corps of Eng'rs,* 424 F.3d 1117, 1136 (11th Cir. 2005) (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70,* 415 U.S. 423, 442 (1974)).

III. ARGUMENT

The Plaintiffs fall short of satisfying the "likelihood of success" or "irreparable harm" criteria for entry of a preliminary injunction because the Plaintiffs cannot establish any cognizable constitutional burden on their First or Fourteenth Amendment rights based on alleged "position bias" or "windfall vote" resulting from Florida's Ballot Order Statute. Even if the Plaintiffs could establish a cognizable burden, that burden is minimal and outweighed by the State's compelling interest in preventing voter confusion and running an efficient electoral process. The equities and public interest also stand resolutely against the Plaintiffs because, in short, the Plaintiffs seek to undo a 67-year old, facially neutral statutory regime mere months before a General Election.

A. Likelihood of Success and Irreparable Harm

1. There is no constitutionally cognizable burden.

The Plaintiffs agree that their "undue burden" claims under the First and Fourteenth Amendments are governed by the *Anderson-Burdick* standard, which seeks to balance the burdens that election laws impose on the right to vote with the

justification for those burdens. [ECF 30, at 14-15 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992))]. As the Fourth Circuit recently observed, however, "mere ballot order denies neither the right to vote, nor the right to appear on the ballot, nor the right to form or associate in a political organization." *Libertarian Party of Virginia*, 826 F.3d at 718 (quoting *New Alliance Party*, 861 F. Supp. at 295). Simply put, "[a]ccess to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is *not a constitutional concern*," and so the Plaintiffs fail to state a claim for relief. *Id.* at 719 (quoting *New Alliance Party*, 861 F. Supp. at 295) (emphasis added). There is simply nothing on the Plaintiffs' side of the *Anderson-Burdick* balance. *Id.*; *see also New Alliance Party*, 861 F. Supp. at 295 n.15 ("As the instant case indicates, however, there are election law regulations which do not burden constitutional rights and as such render the *Anderson*[*-Burdick*] test superfluous.") (citing *Eu v. San Francisco Cnty. Democratic Central Committee*, 489 U.S. 214, 222 (1989)).

2. Any minimal burden is outweighed by State's interests in avoiding voter confusion and promoting an efficient electoral process.

At most, even if the Plaintiffs could state a cognizable constitutional burden, ballot ordering laws like Florida's impose only a minimal burden on First and Fourteenth Amendment rights. *See Libertarian Party*, 836 F.3d at 718; *New*

Alliance Party, 861 F. Supp. at 297. Any minimal burden caused by such statutes is outweighed by the State's legitimate interest in preventing voter confusion and the proper administration of elections. *See Green Party v. Hargett*, No. 3:11-cv-692, 2016 U.S. Dist. LEXIS 109161 (M.D. Tenn. Aug. 17, 2016); *Sarvis v. Judd*, 80 F. Supp. 3d 692 (E.D. Va. 2015), *aff'd sub nom., Libertarian Party*, 826 F. 3d 708); *Meyer v. Texas*, No. H-10-3860, 2011 U.S. Dist. LEXIS 50325, 2011 WL 1806524 (S.D. Tex. May 11, 2011); *New Alliance Party*, 861 F. Supp. at 298.

Again, as the Fourth Circuit recently recognized, ballot order statutes serve "the important state interest of reducing voter confusion and speeding the voting process." *Libertarian Party*, 836 F.3d at 719. Such provisions allow "voters to more quickly find their preferred choice for a given office, especially when party loyalties influence many voters' decisions." *Id.* The every-other-precinct approach that the Plaintiffs propose would detract from this, randomizing the order of a voter's preferred choice for a given office and injecting some level of delay. *See* [ECF 29 at 2.] "For each extra minute that a voter spends deciphering his ballot in the voting booth, dozens or more voters may spend another minute in line." *Libertarian Party*, 836 F.3d at 720. "This all adds up." *Id.* "Long election lines may frustrate voters attempting to exercise their right to vote." *Id.*

The Director of the Florida Division of Elections, Maria Matthews, and the President of the Florida State Association of Supervisors of Elections, Paul Lux,

who is also the Supervisor of Elections for Okaloosa County, similarly caution against the approach the Plaintiffs seek. Director Matthews explains that the Plaintiffs' approach would undermine the State's interests through increased workload, increased error rates, and the like. Exh. 1 at ¶ 5. Supervisor Lux shares these concerns, Exh. 2 at ¶ 7, and warns that the Plaintiffs' approach could result in "catastrophic failure" if the State's 67 Supervisors of Elections were to seek to implement it before the 2018 General Election. *Id*. at ¶ 6.

Thus, even if there is a windfall vote, and even if the Plaintiffs have a cognizable constitutional right to claim a share of that windfall vote, the Plaintiffs still fail to raise a reasonable inference that Florida's Ballot Order Statute creates constitutionally significant burdens under *Anderson-Burdick*. *See Libertarian Party*, 836 F. 3d at 718.

3. The Plaintiffs rely on distinguishable cases that are inconsistent with a growing consensus among the courts.

In arguing the contrary, the Plaintiffs place great reliance on *Mann v. Powell*, 314 F. Supp. 677 (N.D. Ill. 1969) (*Mann I)* and 333 F. Supp. 1261 (N.D. Ill. 1969) (*Mann II)*, where the district court granted a preliminary and then permanent injunction in a case involving a "first-in-line" ballot order statute that gave the Illinois Secretary of State unfettered discretion to break ties. *Mann* is clearly distinguishable, however, because it involved evidence of discriminatory intent or bias. *Mann* also did not invalidate the state law in question, as the

Plaintiffs request here. Rather, the district court in *Mann* enjoined the Illinois Secretary of State from applying the law in a manner that had previously been declared unconstitutional after the Illinois Secretary of State had "threatened to employ personal favoritism or systematic bias in favor of incumbents in breaking ties." *Mann II*, 333 F. Supp. at 1266-67. In this case, there is no suggestion of personal favoritism or systematic bias in applying Florida's Ballot Order Statute because the statute affords *no discretion* to favor incumbents (or any other particular candidates) over others. Instead, under Florida law, all candidates from the party that prevailed in the previous gubernatorial election are slotted first, regardless of whether they are incumbents.

Another case cited by the Plaintiffs – *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977) – is distinguishable for the same reason because it involved evidence of discriminatory application of Illinois's Ballot Order Statute by election boards who had always placed candidates from their party at the top of the ballot. *Id*. at 464. Still other cases cited by Plaintiffs are distinguishable because, unlike this case, they involved statutes that expressly favored incumbents or candidates from a particular political party.[3] By contrast, ballot order in Florida is determined

[3] *See Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996) (law passed by Democratic-controlled legislature that expressly required Democratic candidates to be listed first); *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972) (law requiring listing of incumbents first); *Gould v. Grubb*, 13 Cal. 3d. 661 (Cal. 1975) (incumbents first); *Holtzman v. Power*, 313 N.Y.S 2d 904 (N.Y. Sup. Ct. 1970),

uniformly statewide based upon an *objective criterion*. Florida's law is not subject to the unbridled discretion of county election officials and it does not invariably grant priority on the ballot in each separate race based upon incumbency or seniority. If the political party whose gubernatorial candidate received the most votes in the last election changes, as it has in the past, the order in which parties appear on the ballot also changes. *Cf. Green Party*, 2016 U.S. Dist. LEXIS 109161, at *122 (upholding Tennessee statute requiring the candidate of the party in the majority in the combined houses of the general assembly to be listed first).

The U.S. District Court for the Southern District of New York upheld a similar ballot order statute in *New Alliance Party*. That case involved a New York law that, like Florida's Ballot Order Statute, positions candidates of political parties in descending order based on their party's performance in the preceding gubernatorial election. The district court upheld the law after concluding that any minimal burden caused by "position bias" was outweighed by the state's interest in creating "a logical and manageable ballot, thereby preventing voter confusion." *New Alliance Party*, 861 F. Supp. at 298. In doing so, the district court expressly disagreed with the Eighth Circuit's analysis of a similar North Dakota law in *McLain v. Meier*, 637 F.2d. 1159 (8th Cir. 1980) because *McLain* failed to

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aff'd, 311 N.Y.S. 2d 824 (1970) (incumbents first). *See also Williamson v. Fortson*, 376 F. Supp. 1300, 1302 (N.D. Ga. 1974) ("[T]he published opinion in *Netsch* is devoid of reasoning and its citations refer the researcher to cases which are not even arguably in point.").

recognize that the North Dakota law did *not* impose an "incumbent-first" ballot order. *Id.* And *McLain* "simply overlooked" that "prevention of voter confusion is not merely a legitimate, but a *compelling* state interest, which need not be supported by particularized evidence." *Id.* (emphasis in original).

With only one exception involving a blatantly discriminatory law,[4] every federal court that has addressed the constitutionality of a ballot order statute since *New Alliance Party* has similarly held that any minimal burden due to "position bias" is outweighed by the state's important regulatory interests. *See Green Party*, 2016 U.S. Dist. LEXIS 109161 (upholding Tennessee statute requiring the candidate of the party in the majority in the combined houses of the general assembly to be listed first); *Sarvis*, 80 F. Supp. 3d 692, *aff'd sub nom., Libertarian Party of Va.*, 826 F. 3d 708 (upholding Virginia's three-tiered Ballot Order Statute); *Meyer*, U.S. Dist. LEXIS 50325 (upholding Texas statute which, like Florida's, arranges party candidates in descending order beginning with party whose last gubernatorial candidate received the most votes).

[4] As noted above, in *Graves*, the court addressed a law passed by a Democratic-controlled legislature that expressly required Democratic candidates – and only Democratic candidates – to be listed first. The district court found the law unconstitutional because the only conceivable interest in invariably listing Democrats first was "entirely political" and such "political patronage" was not a legitimate interest. 946 F. Supp. at 1580-81. By contrast, Florida's law does not forever entrench any one political party in a particular position on the election ballot. Rather, the order in which parties appear on the ballot changes whenever the political party whose gubernatorial candidate received the most votes in the last election changes.

The Plaintiffs attempt to side-step this growing body of precedent by arguing that these recent cases "are distinguishable because they involve differential treatment of minor party or independent candidates, rather than major political parties, who are not similarly situated." [ECF 30 at 26.] Yet the Plaintiffs offer nothing to suggest that the Democratic Party or its members have any more cognizable interest in windfall votes than minor parties or independent candidates. They *cannot* because no such interest exists. To repeat, "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern." *Libertarian Party of Va.*, 826 F.3d at 718-19 (quoting *New Alliance Party*, 861 F. Supp. at 295).

4. Krosnick on Krosnick and other flaws in the Plaintiffs' claims of irreparable harm.

There is simply no basis for Plaintiffs' suggestion that "[on] its face, the Ballot Order Statute treats [the Democratic Party] differently than the similarly situated Republican Party," and thus harms their interests. [ECF 30 at p.20]. To the contrary, Florida's law is non-discriminatory on its face. Democrats are listed first following the election of a Democratic gubernatorial candidate, just as Republicans are listed first after the election of a Republican candidate.

Likewise, there is no basis for Plaintiffs' argument that the statute, "in its operation, creates an unlevel playing field, under which Plaintiffs have suffered and (absent an injunction) will continue to suffer a meaningful disadvantage from

the outset[.]" [*Id*.] To the contrary, this Court can take judicial notice of the identities and political party registrations of the elected Governors of Florida since the law was enacted in 1951 and determine that, of the 33 elections held since that time (from 1952-2016), Democratic candidates have been listed first in 20 elections, while Republican candidates have been listed first in 13 elections.[5] Democratic candidates have thus benefited more often from any windfall vote phenomenon, regarding which the Plaintiffs now complain, than the Republicans.

While ignoring the fact that Democrats have been listed first in the vast majority of elections held since enactment of Florida's Ballot Order Statute, the Plaintiffs insinuate some type of "disparate treatment," [ECF 30 at 27], by repeatedly referring to the opinion of their declarant, Krosnick, that the electoral "bump" allegedly caused by "position bias" favors Republicans by 2.70% when they are listed first, but Democrats by only 1.96%, and that the "overall percentage

[5] *See* Fed. R. Evid. 201(b) (allowing courts to take judicial notice of facts "not subject to reasonable dispute" because they are "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). Specifically, the law at issue was adopted by the 1951 Florida Legislature. *See* Ch. 26870, s. 5, Laws of Fla. (1951) (originally codified at 101.151(4), Fla. Stat.). Since the next election in 1952, the following have served as duly elected Governors of Florida: Daniel McCarty (Dem., January 6 to September 28, 1953, shortened term due to death); Leroy Collins (Dem., 1955-1961); Farris Bryant (Democrat, 1961-1965); Haydon Burns (Dem.,1965-1967); Claude Kirk (Rep., 1969-1971); Reubin Askew (Dem., 1971-1979); Bob Graham (Democrat, 1979-1987); Bob Martinez (Rep., 1987-1991); Lawton Chiles (Dem., 1991-1998); Jeb Bush (Rep., 1999-2007); Charlie Crist (Rep., 2007-2011); and Rick Scott (Rep., 2011-present).

gap due to position bias "is as high as 5.40 percentage points when Republicans are listed first and 3.92 percentage points when Democrats are listed first." [*See* ECF 30 at 9, 18-19.] But that argument is nothing more than a red herring because there is no basis to suggest that *the statute itself* creates any alleged disparity in the levels of "position bias" enjoyed by the various parties.

Even assuming that any such disparity in windfall votes exists between Democrats and Republicans, it is a wholly independent variable and Krosnick offers nothing to suggest that it is anything more than a statistical anomaly. Put another way, "[t]he existence and degree of the 'windfall-vote phenomenon' that underlies the asserted 'positional advantage' theory is highly debated and subject to a multitude of confounding variables," *Sarvis*, 80 F. Supp. 3d at 700, and so Krosnick should have isolated the phenomenon to Florida's Ballot Order Statute.[6] Krosnick himself seemingly agrees. In a 1998 paper considering "name-order effects" in Ohio, Krosnick explained that "[w]hether or not a name-order effect appears is a function of a number of contextual factors, so each race must be considered individually to determine whether its outcome was materially affected in this regard." Miller and Krosnick *supra* at 318-19.[7] But Krosnick did not do

[6] Krosnick does not, for example, control for demographic factors such as a voter's age, ethnicity, income, or location (urban versus rural).

[7] If this statement from Krosnick is true, then Krosnick cannot now rely on name-order results from races in California, Ohio, New Hampshire, and North Dakota, as

that here. Krosnick thus cannot establish that *Florida's Ballot Order Statute causes* any disparate impact, burden, or irreparable harm to the Plaintiffs or to Democratic candidates.[8] *Cf. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2514 (2015) ("If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case [of discriminatory effect], and there is no liability.").

Claims of vote dilution similarly fall flat. The notion that "[m]ore Democratic voters must turn out and support their candidates to counteract the inherent and consistent advantage that the Ballot Order Statute confers on Republicans," [ECF 30 at 22], is predicated on the false premise that the supposed windfall votes matter less than other votes or, at the very least, the Plaintiffs are entitled to some share of these votes. This predicate, however, casts "aspersions upon citizens who expressed their civic right to participate in an election and made a choice of their own free will." *Libertarian Party of Virginia*, 826 F.3d at 718. "Who are [the courts] to demean their decision?" *Id.* This is especially true because there is no such thing as a "constitutional right to a wholly rational

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he does in his declaration and report, to draw conclusions for Florida. *See* ECF 31 at 33-34; *see also id.* at Tables 2-7.

[8] Krosnick disagrees with himself elsewhere too. *In re Election of November 6, 1990 for Office of Attorney General*, 569 N.E.2d 447, 454 (Ohio 1991), the Supreme Court of Ohio notes that "Krosnick made a study of the 1990 Attorney General's race in Mahoning County and concluded that ballot position had no effect." Yet he now claims the opposite is true.

election, based solely on a reasoned consideration of the issues and the candidates' positions, and free from other irrational consideration," that then requires courts to discount the otherwise valid votes cast by those whom the Plaintiffs deem uninformed, undecided, or disinterested. *Id.* (citations omitted).

Of course, the Plaintiffs have no constitutional right to "an equal chance of attracting the windfall vote." *Libertarian Party of Va.*, 826 F.3d at 718–19 (quoting *New Alliance Party*, 861 F. Supp. at 295). "The fact remains that 'windfall' or not, [Florida's] ballot ordering law still does not 'restrict access to the ballot or deny any voters the right to vote for candidates of their choice.'" *Id.* at 718 (quoting *Sonnerman v. State*, 969 P.2d 632, 638 (Alaska 1998)). Thus, there is no constitutionally cognizable claim. Even if there were one, the State of Florida has "not merely a legitimate, but a *compelling* state interest" in preventing voter confusion and promoting the efficiency of the electoral process, "which need not be supported by particularized evidence." *New Alliance Party*, 861 F. Supp. at 298 (emphasis in original). Given this balance, Plaintiffs are not likely to succeed on the merits under *Anderson-Burdick* and cannot establish that they would suffer irreparable harm in the absence of a preliminary injunction.

B. Equities and the Public Interest

In addition, the equities and public interest decidedly favor the Secretary. "Call it what you will – laches, the *Purcell* principle, or common sense – the idea

is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). This is especially so when a plaintiff waits to file an action. It was for this reason that the Sixth Circuit in *Crookston* stayed the district court's preliminary injunction. *Id.* at 399. In *Conservative Party of New York State v. New York State Board of Elections*, 2010 U.S. Dist. LEXIS 114155, at *2 (S.D.N.Y. 2010) the district court similarly denied a preliminary injunction where the plaintiffs waited weeks before an election to file their action. In *Silberberg v. Board of Elections of New York*, 216 F. Supp. 3d 411, 420 (S.D.N.Y. 2016) the district court denied a late-filed action for fear of disruption. And less than a month ago, the U.S. Supreme Court held that the balance of equities did not weigh in favor of the plaintiffs' request for a preliminary injunction in an election law case where the plaintiffs did not demonstrate reasonable diligence in requesting injunctive relief. *See Benisek v. Lamone*, 2018 U.S. LEXIS 3688, at *5 (Jun. 18, 2018) ("In considering the balance of equities among the parties, we think that plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request.").

The Plaintiffs in this case could have filed their action much sooner. The Florida Legislature enacted the Ballot Order Statue in 1951. *See* Ch. 26870, s. 5, Laws of Fla. (1951) (originally codified at § 101.151(4), Fla. Stat.). That was 67

years ago. The first of Florida's recent string of 3 Republicans governors was elected in 1998. That was 20 years ago. Florida's current Republican governor was re-elected in 2014. That was 4 years ago. The last study on windfall votes that the Plaintiffs rely on in their complaint appeared in 2015. [ECF 1 at ¶¶ 23-24.] That was 3 years ago. By comparison, the plaintiffs in *Mann*, upon which the Plaintiffs in this case rely, brought suit within 1 week of the enactment of the Illinois law at issue. *See Mann II*, 333 F. Supp. at 1263-64 (Law enacted on Oct. 23, 1969; suit commenced on Oct. 30, 1969). If imminence is at all a factor when considering requests for preliminary injunctions, then the time for preliminary relief has long since passed. *See Wreal, Ltd. Liab. Co. v. Amazon.com*, 840 F.3d 1244, 1246 (11th Cir. 2016) (affirming denial of preliminary injunction where "the plaintiff pursued its preliminary injunction motion with the urgency of someone out on a meandering evening stroll rather than someone in a race against time").

On a related note, "[p]reliminary injunctions of legislative enactments – because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits – must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution." *Ne. Fla. Chapter. of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). The Ballot Order Statute is a legislative enactment that has remained a constant through over

six decades of legislative sessions. The most recent session adjourned in March 2018. Preliminary relief at this late stage of the 2018 Election Cycle would deprive the Florida Legislature of an opportunity to enact any remedial legislation.

Finally, and most importantly, the State's elections officials must do much between the August 28, 2018 (the Primary Election) and September 22, 2018 (date for sending ballots to stateside and overseas uniformed service members and overseas civilian voters). And they must do much between August 28, 2018 (the Primary Election), and November 6, 2018 (the date of the 2018 General Election). A list of these tasks between August 28, 2018 and November 6, 2018 follows:

Date	Task	Reference
August 28 (Tue)	**PRIMARY ELECTION**	**Section 100.061, F.S. – On the Tuesday 10 weeks prior to the General Election.**
August 28 (Tue)	"Emergency excuse" affidavit required for delivery of vote-by-mail ballot on election day. Supervisors of Elections may not deliver vote-by-mail ballots to electors or electors' immediate family members on election day unless voters affirm in an affidavit that an emergency that keeps them from being able to go to their polling places.	Section 101.62, F.S.; Rule 1S-2.052, F.A.C. - Exception exists for supervised voting in assisted living facilities as provided in s. 101.655.
August 28 (Tue)	Deadline for receipt of vote-by-mail ballots for the Primary Election.	Section 101.67, F.S. – All vote-by-mail ballots must be received by 7 p.m. election day.
August 28 (Tue)	**County canvassing boards to file preliminary election results with the Department of State within 30 minutes after polls close and report**	Section 102.141, F.S. – All election day ballots cast, early voting ballots, and for vote-by-mail ballots, those that are canvassed and tabulated by

	updates in 45-minute increments thereafter until all results for election day ballots, early voting ballots, and vote-by-mail ballots are completely reported.	each reporting increment.
August 28 (Tue)	Department of State to remit remainder of filing fees and party assessments to the respective political parties.	Section 99.103, F.S. – No later than the date of the Primary Election.
August 29 (Wed)	Deadline for all polling place returns to be submitted to county canvassing boards.	Section 102.141, F.S. – On or before 2 a.m. of the day following any election.
August 30 (Thu)	Deadline for persons voting a provisional ballot to provide evidence of eligibility to Supervisors of Elections.	Section 101.048, F.S.; Rule 1S-2.037, F.A.C.– No later than 5 p.m. on the second day following the election.
August 31 (Fri)	**Deadline for county canvassing boards to file First Unofficial Results of the Primary Election with the Department of State.**	Section 102.141, F.S. – No later than noon of the third day after a Primary Election.
September 2 (Sun)	**Deadline for county canvassing boards to file Second Unofficial Results for the Primary Election, only if recount was conducted.**	Section 102.141, F.S. – No later than 3 p.m. of the fifth day after a Primary Election.
September 4 (Tue)	**Deadline for county canvassing boards to submit Official Results to the Department of State for the Primary Election.**	Section 102.112, F.S. – 5 p.m. on the seventh day following a primary.
September 4 (Tue)	Deadline for county canvassing boards to submit Conduct of Election reports on Primary Election to the Division of Elections.	Section 102.141, F.S. – At the same time that the results of an election are certified.
September 5 (Wed)	County canvassing boards to begin publicly noticed audit of the voting system for the Primary Election.	Section 101.591, F.S.; Rule 1S-5.026, F.A.C. – Immediately following the certification of the election by the county canvassing board.
September 6 (Thu)	**Elections Canvassing Commission meets to certify Official Results for federal, state, and multicounty offices.**	Section 102.111, F.S. – 9 a.m. on the ninth day after a Primary Election.

September 9 (Sat) (approximate)	**Department of State certifies candidates for General Election Ballot to Supervisors of Elections.**	Section 99.121 – Department of State shall certify the names of persons nominated for office. No time deadline provided – typically takes 2-3 days to prepare the certifications.
September 9-20 (approximate)	**Supervisor of Elections prepares, prints, proofs and codes ballots for General Election. Also, includes about 2 days to prepare for mailing vote-by-mail ballots.**	Nothing in statute addresses these steps, but experience show that Supervisors of Elections need 9-11 days to complete the tasks. Many supervisors send their ballots out of state for printing.
September 7 (Fri) - September 12 (Wed)	Deadline for Supervisors of Elections to submit any revisions to county security procedures to the Department of State.	Section 101.015, F.S.; Rule 1S-2.015. F.A.C. – At least 45 days before early voting begins, specific date will depend on when county will begin conducting early voting.
September 11 (Tue)	**Deadline for county canvassing boards to complete the voting system audit and for the results to be made public.**	Section 101.591, F.S.; Rule 1S-5.026, F.A.C. – No later than 11:59 p.m. on the seventh day following certification of the election by the county canvassing board.
September 22 (Sat)	**Deadline for Supervisors of Elections to send vote-by-mail ballots to absent stateside uniformed and overseas voters (UOCAVA) for the General Election.**	Section 101.62, F.S. – Not less than 45 days before the General Election.
September 23 (Sun) - September 29 (Sat)	Second period in which proposed constitutional amendments are advertised in a newspaper of general circulation in each county.	Art XI, Sec 5(d), Fla. Const. - Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment shall be published in one newspaper of general circulation in each county.
September 24 (Mon)	Division of Elections to submit to the U.S. Department of Justice information on county compliance with 45-day	43 days before General Election.

	UOCAVA vote-by-mail ballot send-out for the General Election.	
September 26 (Wed)	Deadline for Supervisors of Elections to submit reports on post-election certification voting system audit to Division of Elections.	Section 101.591, F.S.; Rule 1S-5.026, F.A.C. – Within 15 days after completion of the audit.
September 27 (Thu)	Last day by when Supervisor of Elections must make information about provisional ballot available to individual voters on free access system for the Primary Election.	Section 101.048, F.S. – No later than 30 days following the election.
October 2 (Tue) - October 9 (Tue)	**Mandatory seven-day window for Supervisors of Elections to mail vote-by-mail ballots to all domestic (non-UOCAVA) voters who requested vote-by-mail ballots.**	Section 101.62, F.S. – Between 35th and 28th day before the election.
October 6 (Sat)	Deadline for Supervisors of Elections to update official voting history for Primary Election.	Section 98.0981, F.S.; Rule 1S-2.043, F.A.C. – Within 30 days after certification of election results by Elections Canvassing Commission for Primary Election.
October 6 (Sat)	Deadline for Supervisors of Elections to file with the Division of Elections precinct-level election results of the Primary Election and a reconciliation of voting history and precinct-level election results.	Section 98.0981, F.S.; Rule 1S-2.043, F.A.C. – Within 30 days after certification of election results by Elections Canvassing Commission for Primary Election.
October 7 (Sun)	First day a registered voter or poll watcher may file a voter challenge in the same county for the General Election.	Section 101.111, F.S. – No sooner than 30 days before an election.
October 7 (Sun) - October 12 (Fri)	**Deadline for Supervisors of Elections to mail notice of time and location of logic and accuracy (L&A) test to county party chairs and candidates, who did not receive notice at qualifying.**	Section 101.5612, F.S. – At least 15 days prior to the beginning of early voting, specific date will depend on when county will begin conducting early voting.

October 8 (Mon)	Deadline for Supervisors of Elections to designate early voting sites for the General Election and to provide the Division of Elections with addresses, dates and hours for early voting sites.	Section 101.657, F.S. – No later than the 30th day prior to the election.
October 8 (Mon) - October 13 (Sat)	Deadline to submit poll watcher designations for early voting sites for General Election.	Section 101.131, F.S. – Before noon at least 14 days before early voting begins, specific date will depend on when county will begin conducting early voting.
October 9 (Tue)	Deadline to register to vote (book closing) for the General Election.	Section 97.055, F.S. – On the 29th day before each election. If the 29th day falls on a Sunday or a legal holiday, the registration books must be closed on the next day that is not a Sunday or a legal holiday.
October 12 (Fri) - October 26 (Fri)	**Period in which logic and accuracy (L&A) test for General Election may be conducted. (Specific L&A date during this period will depend on when the county begins early voting).**	Section 101.5612, F.S. – Not more than 10 days prior to beginning of early voting.
October 15 (Mon) - October 20 (Sat)	Deadline for Supervisors of Elections to approve poll watchers and provide poll watcher identification badges for early voting sites for the General Election.	Section 101.131, F.S. – No later than seven days before early voting begins, specific date will depend on when county will begin conducting early voting.
October 17 (Wed)	Deadline for Supervisors of Elections to appoint poll workers for the General Election.	Section 102.012, F.S. – At least 20 days prior to any election.
October 21 (Sun)	Deadline for Department of State to report to the Florida Legislature voter registration and voting history information for the Primary Election.	Section 98.0981, F.S.; Rule 1S-2.053, F.A.C. – Within 45 days after certification of election results for Primary Election.
October 22 (Mon)	County canvassing board may begin canvassing vote-by-mail ballots for the General Election (the earliest start date).	Section 101.68, F.S. – 7 a.m. on the 15th day before the election.

October 22 (Mon)	**Early voting may begin prior to the mandatory early voting period, at the discretion of the Supervisor of Elections.**	Section 101.657, F.S. – Early voting may be offered at the discretion of the supervisor of elections on the 15th, 14th, 13th, 12th, 11th, and/or 2nd day before an election.
October 23 (Tue)	Deadline to submit poll watcher designations for election day for the General Election.	Section 101.131, F.S. – Prior to noon of the second Tuesday preceding the election.
October 23 (Tue)	If early voting begins on October 22, first day for Supervisors of Elections to prepare and upload daily electronic files of early voting summary and early voting details to the Department of State.	Section 101.657, F.S.; Rule 1S-2.043, F.A.C. – No later than noon of each day for the previous day's activities.
October 27 (Sat)	**Mandatory early voting period begins for the General Election.**	Section 101.657, F.S. – Early voting shall begin on the 10th day before an election.
October 28 (Sun)	First day after mandatory early voting period begins for Supervisors of Elections to prepare and upload daily electronic files of early voting summary and early voting details to the Department of State.	Section 101.657, F.S.; Rule 1S-2.043, F.A.C.– No later than noon of each day for the previous day's activities.
October 30 (Tue)	Deadline for Supervisors of Elections to approve poll watchers and provide poll watcher identification and badges for the General Election.	Section 101.131, F.S. – On or before the Tuesday before the election.
October 30 (Tue)	Deadline to mail or email sample ballots to voters for the General Election.	Section 101.20, F.S. – At least seven days prior to any election.
October 31 (Wed)	Deadline for Supervisors of Elections to receive requests for vote-by-mail ballots to be mailed to voters for the General Election.	Section 101.62, F.S. – No later than 5 p.m. on the sixth day before the election.
November 1 (Thu)	First day that a voter designee can pick up a vote-by-mail ballot for the General Election.	Section 101.62, F.S. – Up to five days prior to the election.
November 2 (Fri)	Deadline for Supervisors of	Section 101.62, F.S. – No later

	Elections to mail vote-by-mail ballots requested for the General Election.	than four days before the election.
November 2 (Fri)	Deadline for late registration for specified subcategory of UOCAVA individuals: any uniformed services or Merchant Marine member discharged or separated, or returned from military deployment or activation after 29-day registration deadline; or for any overseas U.S. citizen who left employment after 29-day registration deadline, and any family member accompanying them.	Section 97.0555, F.S. – 5 p.m. on the Friday before the election.
November 3 (Sat)	**Mandatory early voting period ends for the General Election.**	Section 101.657, F.S. – Early voting shall end on the third day before an election.
November 4 (Sun)	**Optional extension of early voting period ends for the General Election.**	Section 101.657, F.S. – Early voting may also be offered at the discretion of the supervisor of elections on the second day before an election.
November 5 (Mon)	Deadline for voter to submit vote-by-mail ballot cure affidavit for the General Election.	Section 101.68(4), F.S. – Until 5 p.m. on the day before the election.
November 5 (Mon)	Last day for Supervisors of Elections to prepare and upload daily electronic files of early voting summary and early voting details to the Department of State.	Section 101.657, F.S.; Rule 1S-2.043, F.A.C. – No later than noon of each day for the previous day's activities.
November 5 (Mon)	**Last day for Supervisors of Elections to publish sample ballot in newspaper of general circulation in the county for the General Election.**	Section 101.20, F.S. – Prior to the day of the election.
November 5 (Mon)	**Deadline for Supervisors of Elections to upload into county election management system the results of all early voting and vote-by-mail ballots that have been**	Section 102.141 (4)(a) - By 7 p.m. on the day before the election.

	canvassed and tabulated by the end of the early voting period.	
November 5 (Mon)	Last day for Supervisor of Elections to deliver 'no excuse' vote-by-mail ballot to voter or designee to pick up vote-by-mail ballot.	Section 101.62, F.S.
November 6 (Tue)	**GENERAL ELECTION**	**Section 100.031, F.S. – On the first Tuesday after the first Monday in November of each even numbered year.**

See Exh. 1 at Attachment 1. Clearly then Florida's elections officials have much to do between the Primary Election on August 28, 2018 and when the first ballots for the General Election are sent out on September 22, 2018. Changing a 67-year old statutory regime would add yet another task to the list. *See also Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1327 (S.D. Fla. 2008) (noting that the weeks leading up to an election "are the most tumultuous times in a Supervisor's office" and identifying the catalogue of tasks that must be accomplished for a successful election).

Rotating ballot order from precinct to precinct, as the Plaintiffs suggest, would not be an easy task either. Indeed, it would affect almost every aspect of election administration including ballot preparation, voting machine preparation and testing, staff training, and tabulation of votes. Florida has approximately 6,056 precincts. Exh. 1 at ¶ 12. Many precincts have multiple ballot styles to account for more localized races, like those in the hundreds of community development districts, or electoral district boundaries that do not perfectly align with precinct

boundaries. Exh. 1 at ¶ 12; Exh. 2 at ¶ 11. Each of these ballot styles is usually proof-read before printing, and then after printing. Exh. 2 at ¶ 11. Supervisors are required by law to mail ballots to uniformed and overseas absentee voters by a specific date. Exh. 1 at ¶ 10; Exh. 2 at ¶ 8*; see also* § 101.162, Fla. Stat. Failure to timely mail these ballots could expose Supervisors to federal criminal liability. Exh. 2 at ¶ 14; *see also* 18 U.S.C. § 608.

Voting machines must also be programmed, calibrated, and publicly tested prior to the election. Exh. 2 at ¶ 23. Voting machines must be certified by the Department of State before they can be used, and any change in software to accommodate a rotational ballot order system would necessitate re-approval. Exh. 1 at ¶ 16; Exh. 2 at ¶ 22. Voting machines in some counties, like Miami-Dade, are calibrated only to account for ballot style, making rotation of ballot order from precinct to precinct that much more difficult. Exh. 2 at ¶ 24.

Other less obvious but equally important aspects of the electoral process would also be affected. Voter education efforts, such as preparation and publication of sample ballots, would need to be reworked. Exh. 1 at ¶ 14; Exh. 2 at ¶ 17. Elections staff and volunteers, who are trained based on the existing ballot order system, would need to be re-trained. Exh. 1 at ¶ 15; Exh. 2 at ¶ 18. The chances for known unknowns like human-error would increase. Exh. 1 at ¶ 17; Exh. 2 at ¶ 18. Litigation testing the changes would likely ensue. Exh. 1 at ¶ 19.

Any change that affects a county's minimum security procedures could require preparation and submission of updated security procedures prior to the election. Exh. 1, at ¶ 18; Exh. 2, at ¶ 18. Reforms made after the 2000 Presidential Election, intended to promote uniformity in ballots, would be undermined. *See* § 7 Ch. 2001-40, Laws of Fla. and Rule 1S-2.032, Fla. Admin. Code. Voter confusion, long lines, and a general undermining of confidence might result from the abrupt changes that the Plaintiffs propose.

The possibility of "catastrophic failure" is too high a price to pay for the preliminary injunction the Plaintiffs seek. Exh. 2at ¶ 6.

IV. CONCLUSION

The Plaintiffs claim that ballot-order – not ballots cast – is responsible for their recent electoral defeats. The Plaintiffs thus challenge a 67-year old, facially neutral statute that has benefited them more often than their historic adversary, the Republican Party, in an effort to claim what the Plaintiffs perceive as their share of the windfall vote. But the Plaintiffs cannot state a claim, a likelihood for success, or irreparable harm to support their request for a preliminary injunction. The State's compelling interests, the equities, and the public interest also stand in the way of the Plaintiffs' request for preliminary injunctive relief. The Secretary asks this Court to deny the Plaintiffs' request for such relief.

***

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that this Motion complies with the size, font, and formatting requirements of Local Rule 5.1(C). The undersigned further certifies that this Motion complies with the word limit in Local Rule 7.1(F); this Motion contains 7,567 words, excluding the case style, signature block, and certificates.

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Dated: July 13, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via transmission of a Notice of Electronic Filing through the Court's CM/ECF system to the following on this 13th day of July, 2018:

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