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 Florida Secretary of State,

Defendant,

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

DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

Plaintiffs want this Court to believe that Florida's ballot order statute, Fla. Stat. § 101.151(3)(a) (the "Statute"), which has been in place for more than half a century and has seen both Republican and Democratic governors elected under its terms, now operates to "confer a *significant* electoral advantage" on Republicans justifying its invalidation "whatever level of scrutiny the Court ultimately applies . . . ." (emphasis added). Plaintiffs Response in Opposition to Defendant-Intervenors' Motion to Dismiss ("Opp.'n br.") at 1, 19. This is simply not true. In furthering their argument,

Plaintiffs have misapplied the appropriate legal standards and framed the operation of the Statute in such a way so as to best further their goals here. They should fail in this attempt. Specifically, the Plaintiffs fail to acknowledge that the Supreme Court applies a very flexible and forgiving standard when reviewing election laws and that the Statute is clearly facially neutral, imposing minimal burdens—if any—on Plaintiffs' interests, which are more than justified by legitimate state interests.

Further, not only do Plaintiffs offer only conclusory statements regarding the burdens, let alone *severe* burdens, on their votes, but they also tellingly fail to address the fact that many states operate under similar statutes, including states controlled by Democrats such as New York, Connecticut, and Pennsylvania. Rep. Party Orgs. Mot. to Dismiss ("Mot.") at 5-6.

Accordingly, Defendant-Intervenors respectfully request that the Court grant their Motion to Dismiss.

ARGUMENT

I. RECOGNIZING THE STATES ACTING UNDER A CONSTITUTIONAL GRANT OF AUTHORITY MUST ENACT COMPLEX ELECTION CODES, THE SUPREME COURT APPLIES A FLEXIBLE AND FORGIVING STANDARD.

Consistent with the Constitutional imperative that "[t]he Times, Places and *Manner* of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," Const. art I, § 4 (emphasis added), states have not only the obligation, but also broad authority, to create necessary election laws in order to manage election procedures. *See* Mot. at 10-11. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983)). *See also* Mot. at 10-11.

The "flexible standard" set forth by the *Anderson/Burdick* line of cases also means that discovery is not required in every case. This plainly represents one of those cases. States are not required to adduce evidence in cases where a state election law does not impose a severe burden on challengers' First and Fourteenth Amendment rights. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364, 370 (1997). Thus, courts can decide these issues on Motions to Dismiss. "It is well established that, in the election context, there is no need for an elaborate, empirical verification of

the weightiness of the State's asserted justifications." *Fla. State Conf. of the NAACP v. Browning*, 569 F. Supp. 2d 1237, 1251 (N.D. Fla. 2008) (internal quotation marks removed) (quoting *Timmons*, 520 U.S. at 364);

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. *Legislatures* . . . *should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively* . . . .

Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986) (emphasis added). "Indeed, if there was ever any doubt about this position, Crawford extinguished it. *See* [*Crawford v. Marion Cty. Elec. Bd.*, 128 S. Ct. 1610, 1619 (2008)] (upholding a voter identification law despite the fact that the record contained 'no evidence of any [in-person] fraud actually occurring in Indiana at any time in its history.')." *Fla. State Conf. of the NAACP*, 569 F. Supp. 2d at 1251.

Crawford and *Storer* do not say anything that contradicts this flexible standard, requires the state to adduce evidence proving its justifications, or requires a trial under the circumstances of this kind of case, despite Plaintiffs' assertions to the contrary. Opp.'n Br. 8, 9, 24. Both of these cases concern ballot access statutes and their analysis is therefore applicable to the

circumstances of this case. Of course, the standard of review applied by *Storer*, whether it be justification by permissible interests or compelling interests, was more stringent than is required in this case because the burdens were higher in that case. *Storer v. Brown*, 415 U.S. 724, 736 (1974) ("We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status."). The statute in *Storer*, while concerning ballot access and clearly applicable here, kept candidates off of the ballot or from affiliating with multiple political parties. The statute here imposes *no* burden whatsoever, let alone one that prevents access to the ballot or party affiliation. *New Alliance Party v. N.Y. Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994); *Sarvis v. Alcorn*, 826 F.3d 708, 717 (4th Cir. 2016) (determining as a matter of law Virginia's ballot order statute did not impose a severe burden on any political party).

Nonetheless, this Court can still find election administration statutes unconstitutional under the Equal Protection Clause even if they do not explicitly favor or disfavor one party over another. One example of this are so-called "incumbent first" statutes, meaning incumbents are automatically favored on the ballot for no other reason other than that they are incumbents.

In *McLain,* a case exhaustingly cited by Plaintiffs, the 8th Circuit mistakenly construed a ballot ordering statute as an incumbent first statute. *McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir. 1980). To say that the 8th Circuit did not classify this statute as an incumbent first statute, Opp.'n Br. at 17, is untrue. That court repeatedly and expressly classified the statute as an "incumbent first" statute. *See id*. at 1165 ("The Incumbent First Statute: N.D.C.C. § 16-11-06."); *id*. ("In the present case, we find that North Dakota's 'incumbent first' statute does not withstand even this minimal standard of review, because the justification offered for North Dakota's ballot arrangement is unsound."); *id*. ("This justification virtually admits that the state has chosen to serve the convenience of those voters who support incumbent and major party candidates at the expense of other voters."); *id*. ("we join the numerous other courts which have held 'incumbent first' ballot procedures to be constitutionally unsound."); *id*. at 1169 ("it follows that declaratory relief should have been granted with respect to 'ballot access' and 'incumbent first' issues."); *id*. at 1170 ("The denial of relief as to . . . the incumbent first statute, N.D.C.C. § 16-11-06, is reversed . . . ."). As discussed in our Motion, the statute at issue in *McLain* dictated that the party of the winner of the last congressional election is listed first on the ballot. This does not mean that *every* candidate listed on the ballot is an incumbent,

only the candidate for congress. *See also New Alliance Party*, 861 F. Supp. at 298 (criticizing *McLain*). Plaintiffs cite other incumbent first cases to support their opposition and they are similarly distinguishable. *See, e.g.*, *Holtzman v. Power*, 62 Misc. 2d 1020, 1024 (N.Y. Sup. Ct. 1970); *Netsch v. Lewis*, 344 F. Supp. 1280, 1281 (N.D. Ill. 1972); *Gould v. Grubb*, 14 Cal. 3d 661, 664, 669-70 (Cal. 1975); *Sangmeister v. Woodard*, 656 F.2d 460, 468 (7th Cir. 1977).

In this case, the Statute is not an incumbent first statute.

II. FLORIDA'S BALLOT PLACEMENT STATUTE IS FACIALLY NEUTRAL AND NON-DISCRIMINATORY.

In this case, the plain text of the Statute is facially neutral and non-discriminatory because anyone can obtain first ordering on the ballot. Democrats, Republicans, Libertarians, and any other party has an equal opportunity to have their candidate placed at the top of the ballot.

Since 1978, Democrats have won four gubernatorial elections, placing their candidates at the top of the ballot for the subsequent elections, and Republicans have won six gubernatorial elections, placing their candidates at the top of the ballot for the subsequent elections. *See* Ex. A. Plaintiffs construe these facts to somehow "only serve[] 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." Opp.'n Br. at 15 (emphasis in original). Plaintiffs plainly state an untruth. A simple examination of Exhibit A in Defendant-Intervenors' Motion demonstrates that the party at the top of the ticket has changed not "*once*" (Opp.'n Br. at 15 (emphasis in original)), but at least three times. *See* Ex. A (elections of 1986, 1990, 1998). Plaintiffs are simply wrong to assert that the statute systematically entrenches any certain political party. Regardless, the plain text of the Statute remains facially neutral and non-discriminatory.

In this manner, the present case is clearly distinguishable from *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 818-19 (4th Cir. 1995), which was a challenge to a denial of a special zoning designation, and is much more akin to *Sarvis v. Alcorn*, 826 F.3d 708, 711-12 (4th Cir. 2016) *cert. denied*, 137 S. Ct. 1093 (2017), an unsuccessful challenge to Virginia's ballot ordering law, which ordered candidates based on whether they were members of political parties that, inter alia, received at least 10 percent of the statewide vote. There, the 4th Circuit Court of Appeals held, affirming a 12(b)(6) dismissal that

> *The law is facially neutral and nondiscriminatory* — neither [the] Libertarian Party *nor any other party faces a*

> *disproportionate burden. All parties are subject to the same requirements*. None are automatically elevated to the top of the ballot. Virginia's ballot ordering law thus allows any political organization — of any persuasion — an evenhanded chance at achieving political party status and a first-tier ballot position.

Sarvis, 826 F.3d at 717 (emphasis added).

Plaintiffs attempt to distinguish *Sarvis* from the present case because it dealt with a tiered ballot ordering statute as opposed to an identical ballot ordering methodology as the Statute proscribes. But this is a factual distinction without a legal difference. In fact, the ballot ordering statute at issue in *Sarvis* had many more requirements and resulted in only two parties being qualified for the top ballot tier: Republicans and Democrats. Even with those stark qualifications set forth expressly on the face of the statute, the Fourth Circuit held that it was facially neutral because "[a]ll parties are subject to the same requirements." *Sarvis*, 826 F.3d at 717. The Statute at issue in the present case is even more facially neutral and non-discriminatory than the statute at issue in *Sarvis*.

Defendant-Intervenors are not attempting to argue that the only way a ballot ordering statute can be facially discriminatory is "if it expressly entrenches a political party *by name*." Opp.'n Br. 11 (emphasis in original). Surely, that would be one example of a facially discriminatory statute. *See, e.g.*, *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996).

Defendant-Intervenors are arguing that the Statute does not represent a facially discriminatory statute because every party is subjected to the same requirements, and has an equal opportunity to gain top placement on the ballot. *See Sarvis*, 826 F.3d at 717. Indeed each party has done so multiple times since the Statute was enacted.

To this, Plaintiffs assert that the question of whether "candidates from all [major] parties have an equal opportunity to achieve the top position on the ballot" by 'win[ning] the gubernatorial election,'" is a question of fact, contrary to allegations in the complaint which a court must accept as true on a motion to dismiss. Opp.'n Br. at 13 (citing Mot. at 12, 14). However, this is not a question of fact. Regardless of whatever hypothetical and amorphous statistical benefit the Plaintiffs allege the Statute provides, the face of the Statute is non-discriminatory and permits *any party* to appear at the top of the ballot, so long as the party received the highest number of votes for Governor in the last gubernatorial election. The Statute does not limit ballot placement or restrict the opportunity of *any party* to be placed atop the ballot.

Plaintiffs further contend that the Statute does not provide an equal opportunity because it only provides for a change in ballot ordering once every four years. Opp.'n. Br. at 14. But to courts who have examined this

issue, the potential for the ballot order to change every four years is not dispositive. *New Alliance Party*, 861 F. Supp. at 284, 295-97 (upholding ballot placement statute and finding it imposed only a minimal burden despite the ballot order being fixed for four years). Furthermore, several states have similarly decided to order their ballot in this manner, and the political parties of the governor have changed hand in each a number of times. *See* Arizona (Ariz. Rev. Stat. § 16-502) (Governor's political party changed 10 times since 1951), Georgia (Ga. Code § 21-2-285(c)); Missouri (Mo. Rev. Stat. § 168.703) (Governor's party changed 7 times since 1951, and currently has one Senator of each major party); , and Texas (Tex. Elec. Code § 52.091(b) (Governor's political party changed 5 times since 1951);) and Wisconsin (Wis. Stat. § 5.64(1)(es)) (Governor's party changed 8 times since 1951, and currently has one Senator of each major party); Connecticut (, Conn. Gen. Stat. §§ 9-249a, 9-453r) (Governor's party changed 6 times since 1951); , New York (, N.Y. Elec. Law § 7-116 (Governor's political party changed 5 times since 1951); , and Pennsylvania (, 25 Pa. Stat. § 2963) (Governor's political party changed 9 times since 1951 and currently has one Senator of each major party). These states clearly provide an equal opportunity for candidates to win office.

III. FLORIDA'S BALLOT PLACEMENT STATUTE IMPOSES MINIMAL BURDENS, IF ANY.

The Statute imposes minimal burdens on the Plaintiffs, if any, thereby mandating a very deferential review under *Anderson/Burdick*. Whether a statute imposes a minimal burden is a question of law. *See, e.g.*, *Sarvis*, 826 F.3d at 717 (affirming Rule 12(b)(6) motion to dismiss because "ballot ordering law impose[d] only the most modest burdens on [plaintiffs'] free speech, associational, and equal protection rights."); *New Alliance Party*, 861 F. Supp. at 296 (granting Rule 12(b)(6) motion to dismiss challenge to ballot ordering statute because the "State's interest in managing the ballot [did] not burden [plaintiff's] rights to vote, associate politically and develop itself as a party any more than the NFL's rule granting home-field advantage burdens the visiting team's ability to play, practice and develop into a championship contender.").

Plaintiffs stunningly argue that there is no need for them to allege a "severe" burden in order to survive a Rule 12(b)(6) motion in this case and that Defendant-Intervenors' argument to the contrary "is a pedantic point at best." Opp.'n Br. at 19. "To dismiss a complaint . . . under Rule 12(b)(6), Fed. R. Civ. P., *it must appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief*." *New Alliance Party*, 861 F. Supp. at 287 (emphasis added) (internal quotation

marks removed) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Plaintiffs' omission of any allegation of a severe burden is striking considering that strict scrutiny will only apply here under *Anderson/Burdick* if the burdens are severe. Defendant-Intervenors did not misleadingly quote or frame Plaintiffs' complaint and Plaintiffs are apparently unable to quote any portion of their complaint where they allege they suffer "severe" burdens. If Plaintiffs did not allege that their burdens are severe, which they did not, then a much lower standard of review applies. Accordingly, Plaintiffs "can prove no set of facts in support of his claim which would entitle him to relief." *New Alliance Party*, 861 F. Supp. at 287 (quoting *Conley*, 355 U.S. at 45-46).

Notwithstanding Plaintiffs' straw man and red-herring arguments, their alleged burdens are minimal, if they exist at all, and only justify a very deferential standard of review. *C.f. Graves v. McElderry*, 946 F. Supp. 1569, 1579 (W.D. Okla. 1996) (statute that reserved top ballot spot for Democrats imposed only a slight burden on voters).

IV. FLORIDA'S BALLOT PLACEMENT STATUTE IS JUSTIFIED BY LEGITIMATE STATE INTERESTS.

Florida's necessary interest in preventing voter confusion, increasing uniformity, and ensuring predictable and readable ballots is more than

sufficient to justify any slight burden that Plaintiffs may suffer as a result of the Statute. Mot. at 16.

Desperate to reframe their own requested relief so as to negate these legitimate state interests, Plaintiffs' Opposition Motion firmly states that Defendant-Intervenors are "incorrect" in their "assertion that 'Plaintiffs seek an order from this Court mandating 'random' ballot placement.' Mot. at 16" and therefore "misleadingly" and "selectively" quote from the complaint to do so. Opp.'n Br. at 23. However it is Plaintiffs who attempt to mislead the Court through selective quotation and misconstruction. In their Motion, Defendant-Intervenors state that "[t]he Plaintiffs seem to believe that Florida is required to adopt random rotational ballots. Compl. ¶¶ 46-48", Mot. at 9, and "Plaintiffs seek an order from this Court mandating 'random' ballot placement. Compl. ¶¶ 46-49." Mot. at 16. In their Motion for Preliminary Injunction, Plaintiffs explicitly request:

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

Pls.' PI Br. at 2 (emphasis added). Plaintiffs do not cite their own complaint here, so this document is outside the pleadings and improperly considered. Even if considered, what Defendant-Intervenors state is not different from what Plaintiffs stated in their complaint. They are seeking a ballot ordering that is precinct-by-precinct based and essentially random.

Florida is constitutionally vested with the power to organize the manner of its elections. Under the Supreme Court's flexible *Anderson/Burdick* standard, Florida's legitimate state interests, *supra* at 14, Mot. at 16, are sufficient as a matter of law to uphold the Statute. This Court should grant the Motion to Dismiss.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants respectfully request that this Court grant their Motion to Dismiss.

Respectfully Submitted,
DATED: July 20, 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 3,154 words, exclusive of the required certificates, case style, and signature blocs.

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 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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