UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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| NANCY CAROLA JACOBSON, *et al.*,<br>Plaintiffs,<br>v.<br>KENNETH DETZNER, *et al.*,<br>Defendant and Defendant-Interveners. | Case No. 4:18-cv-00262-MW-CAS |

**REPLY IN SUPPORT OF SECRETARY'S MOTION TO DISMISS**

## I. Introduction

Plaintiffs sat on their hands for years, arguably decades, before deciding to challenge Florida's 67-year old Ballot Order Statute put in place by a Democratic Legislature and signed into law by a Democratic Governor.[1] When Plaintiffs finally decided to act, they did so shortly before a general election. If ever a situation called for application of laches, this is it. Even if laches does not apply, and even if all of the allegations are accepted as true, Plaintiffs still cannot "state a claim to relief that is plausible on its face." *Delgado v. Crood*, No. 18-10346-E, 2018 U.S. App. LEXIS 19547, at *2-3 (11th Cir. July 16, 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs do not, and cannot, state a claim that would entitle them to relief because they have no right to some share of

[1] This Reply 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.

the "windfall vote." Nor can Plaintiffs state a claim for disparate impact because they do not even allege (and ultimately cannot prove) intentional discrimination. This Court should dismiss the Complaint.

## II. Argument

### A. Laches applies here.

Affirmative defenses, including laches,[2] may be properly raised at the motion to dismiss stage. As Plaintiffs concede, "[a] complaint is subject to dismissal under Rule 12(b)(6) when its allegations, on their face, show that an affirmative defense bars recovery on the claim." *Davis v. City of Apopka*, No. 17-11706, 2018 U.S. App. LEXIS 9403, at *11 n.7 (11th Cir. Apr. 12, 2018) (citation omitted). Laches applies when three elements are present: "(1) a delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." *Venus Lines Agency, Inc. v. CVG Int'l Am., Inc.*, 234 F.3d 1225, 1230 (11th Cir. 2000). Each of these three elements has been met here based on the face of the Complaint.

*First*, Plaintiffs allege that the Ballot Order Statute has been in effect for decades, ECF 1 at ¶ 2, and that each of the individual Plaintiffs has been a registered voter in Florida for decades. *See* ECF 1 at ¶ 13 (Jacobson-1984); ¶ 14 (Fleming-1998); ¶ 15 (Bottcher-1975). Even assuming Plaintiffs can plead a

[2] *See* Rule 8(c) of the Federal Rules of Civil Procedure.

claim, it first arose many years ago. Plaintiffs Jacobson and Bottcher were both registered voters when Republican Bob Martinez was elected governor in 1987. Plaintiff Fleming was a registered voter when Republican Jeb Bush was elected in 1998.

*Second*, Plaintiffs offer no explanation for this delay in their Complaint. Instead, Plaintiffs offer an excuse for the first time in their Response to the Motion to Dismiss. There, Plaintiffs assert that they were waiting on a body of research on the effects of ballot order to develop before filing their lawsuit. *See* ECF 38 at 9. This *post hoc* explanation is inconsistent with the Complaint. Plaintiffs rely on a decision from 1970 asserting that position bias was "universally accepted" at that time. *See* ECF 1 at ¶ 23 (citing *Holtzman v. Power*, 62 Misc. 2d 1020, 1023 (N.Y. Sup. Ct. 1970)). The most recent study cited in the Complaint is from 2015. *See* ECF 1 at ¶ 23. Plaintiffs cannot simultaneously assert that position bias has been universally accepted for years, while also claiming that the body of research was underdeveloped until 2018.

*Third*, the prejudice the Secretary would suffer as a result of Plaintiffs' delay is a matter of common sense.[3] Plaintiffs allege that the Secretary is responsible for

[3] While this reply is filed in support of a motion to dismiss, the Secretary would be remiss in not mentioning the sobering discussion of the equities and public interest in the Response in Opposition to the Motion for Preliminary Injunction already filed with this Court. *See* ECF 44 at 16-28; *see also* Declarations of Director

administering and enforcing the State's election laws, including the ballot order statute. ECF 1 at ¶ 22. Plaintiffs waited until late May to file a Complaint seeking nothing less than a fundamental change in how ballots are designed, printed, and presented to Florida voters. *See* ECF 1 at ¶¶ 46-49. Plaintiffs could have filed their Complaint well in advance of the November 2018 General Election to ensure that the Secretary, the State's 67 Supervisors of Elections, or even the Florida Legislature had sufficient time to address their concerns. Plaintiffs *chose* otherwise. They offer no rational explanation for their choice.

*Now relying* on an Eleventh Circuit decision from 2008, Plaintiffs argue that laches can never bar the kind of prospective injunctive relief they seek. ECF 38 at 4-5 (*citing Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1321 (11th Cir. 2008)). Plaintiffs are wrong; they overlook more recent cases from the U.S. Supreme Court and the Eleventh Circuit.

Specifically, six years after *Peter Letterese*, in *Petrella v. MGM*, 134 S. Ct. 1962 (2014), the U.S. Supreme Court addressed whether laches barred a copyright infringement claim brought within the three-year limitations period set out in 17 U.S.C. § 507(b). The U.S. Supreme Court held that laches cannot bar *legal* claims brought within the limitations period, *id.* at 1974, but can bar equitable claims because "the consequences of a delay in commencing suit may be of sufficient

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Matthews (ECF 44-1) and Supervisor Lux (ECF 44-2). That discussion and accompanying declarations bring into stark relief the costs of delay.

magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable." *Id*. at 1977 (emphasis added).[4] The Eleventh Circuit has since acknowledged the same. *See Black Warrior Riverkeeper, Inc. v. United States Army Corps of Eng'rs*, 781 F.3d 1271, 1286 n.10 (11th Cir. 2015).

**B. Plaintiffs fail to state a claim for relief.**

Substantively, even if the allegations in the Complaint are accepted as true, Plaintiffs cannot establish any cognizable constitutional burden on their First or Fourteenth Amendment rights, or show intentional discrimination for purposes of their disparate impact claim.

***First and Fourteenth Amendment Claims*** – To reiterate, "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 Va. v. Alcorn*, 826 F.3d 708, 717 (4th Cir. 2016) (quoting) *cert. denied sub nom. Sarvis v. Alcorn*, 137 S. Ct. 1093 (2017). Nor do Plaintiffs have a constitutional right to "an equal

[4] In *Petrella*, the U.S. Supreme Court cited two lower court decisions as examples of circumstances justifying application of laches to a claim for injunctive relief. *Id*. at 1977. In *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227 (6th Cir. 2007), the plaintiff allowed the defendant to partially construct a housing development before seeking equitable relief. In *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576 (2th Cir. 1989), a copyright holder waited until the defendant printed, packed, and shipped the infringing book to seek equitable relief. As explained above, Plaintiffs in this case could have filed their Complaint years ago, or even earlier this year. They *chose* not to do so.

chance of attracting the windfall vote . . . ." *Id.* at 719 (quoting *New All. Party v. N.Y. Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994)).

The cases cited in Plaintiffs' Response to the Motion to Dismiss simply miss the mark. *See* ECF 38 at 21-24. *Mann v. Powell*, 314 F. Supp. 677 (N.D. Ill. 1969) (*Mann I)* and 333 F. Supp. 1261 (N.D. Ill. 1969) (*Mann II)* involved a "first-in-line" ballot order statute that gave the Illinois Secretary of State unfettered discretion to break ties, and ultimately resulted in the district court enjoining 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 1264. 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.

The Seventh Circuit's decision in *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.[5]

By contrast, ballot order in Florida is determined 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 v. Hargett*, No. 3:11-cv-692, 2016 U.S. Dist. LEXIS 109161, at *122 (M.D. Tenn. Aug. 17, 2016).

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

[5] *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*, 14 Cal. 3d 661 (Cal. 1975) (incumbents first); *Holtzman v. Power*, 313 N.Y.S 2d 904 (N.Y. Sup. Ct. 1970), *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.").

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 All. 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 recognize that the North Dakota law did *not* impose an "incumbent-first" ballot order. *Id.* And *McLain* "simply overlook[ed]" 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,[6] 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

[6] 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.

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 v. Texas*, 2011 U.S. Dist. LEXIS 50325 (S.D. Tex. May 11, 2011) (upholding statute that arranges party candidates in descending order beginning with party whose last gubernatorial candidate received the most votes).

***Disparate Impact Claim* –** Florida's Ballot Order Statute is facially neutral. It does not, as Plaintiffs argue in their Response, ECF 38 at 27, create different classifications, and thereby excuse Plaintiffs from alleging (and ultimately proving) intentional discrimination.

Plaintiffs' reliance on *Obama for America v. Husted*, 697 F.3d 423, 428-29 (6th Cir. 2012) further undercuts their disparate impact claim. ECF 38 at 27. At issue there was a state requirement that expressly created two different early voting deadlines – one for military voters and another for non-military voters. *See Obama for Am.*, 697 F.3d at 427. The statute at issue here gives all political parties an equal prospect of being placed first. And it is undisputed that Democratic candidates have been listed first in a majority of the statewide elections held since the enactment of the Ballot Order Statute.

Thus, Plaintiffs – who include the *Democratic* National Committee, the *Democratic* Senatorial Campaign Committee, the *Democratic* Congressional

Campaign Committee, the *Democratic* Governors' Association, and the *Democratic* Legislative Committee – must allege and prove intentional discrimination resulting from Florida's Ballot Order Statute enacted by a *Democratic* Legislature and signed into law by a *Democratic* Governor. [7] *See generally Republican Party of N.C. v. Martin*, 980 F.2d 943, 955 (4th Cir. 1992); *Bd. of Election v. Libertarian Party*, 591 F.2d 22, 24-25 (7th Cir. 1979).

## III. Conclusion

For the foregoing reasons, the Secretary asks this Court to dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief.

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## CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that this Reply complies with the size, font, and formatting requirements of Local Rule 5.1(C). The undersigned further certifies that this Response complies with the word limit in Local Rule 7.1(F); it contains 2,372 words, excluding the case style, signature block, and certificates.

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[7] *See State Legislature Begins Sessions; GOP Is Rebuffed*, ASSOCIATED PRESS, Apr. 3, 1951, https://newspaperarchive.com/panama-city-news-herald-apr-03-1951-p-1/ (noting, in the first full paragraph of story, in the left column, the "three-man Republican minority" in the legislature).

Respectfully submitted by:

DAVID A. FUGETT (FBN 117498)
*General Counsel*
david.fugett@dos.myflorida.com
JESSE DYER (FBN 114593)
*Assistant General Counsel*
jesse.dyer@dos.myflorida.com
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building Suite, 100
500 South Bronough Street
Tallahassee, Florida 32399-0250
Phone: (850) 245-6536
Fax: (850) 245-6127

*/s/ Mohammad O. Jazil*
MOHAMMAD O. JAZIL (FBN 72556)
mjazil@hgslaw.com
GARY V. PERKO (FBN 855898)
gperko@hgslaw.com
MALCOLM N. MEANS (FBN 0127586)
mmeans@hgslaw.com
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
Phone: (850) 222-7500
Fax: (850) 224-8551

Dated: July 20, 2018

***Counsel for the Secretary of State***

**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 20th day of July, 2018:

Frederick S. Wermuth
KING, BLACKWELL, ZEHNDER &WERMUTH, P.A.
P.O. Box 1631
Orlando, FL 32802-1631
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
fwermuth@kbzwlaw.com

Jason Torchinsky
VA Bar No. 47481
45 North Hill Drive, Suite 100
Warrenton, VA 20106
Telephone: (540) 341-8808
Facsimile: (540) 341-8809
JTorchinsky@hvjt.law

*Counsel for Intervenors*

Marc E. Elias
Elisabeth C. Frost*
Amanda Callais*
Jacki L. Anderson*
John M. Geise*
Alexi M. Velez*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@perkinscoie.com
efrost@perkinscoie.com
acallais@perkinscoie.com
jackianderson@perkinscoie.com
jgeise@perkinscoie.com
avelez@perkinscoie.com
**Admitted Pro Hac Vice*

*Counsel for the Plaintiffs*

*/s/ Mohammad O. Jazil*
Attorney