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' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

To be clear: Plaintiffs—Democratic Party organizations and voters who consistently support Democratic candidates—challenge *only* Fla. Stat. § 101.151(3)(a)'s (the "Statute") differential treatment of similarly situated major political parties and their candidates and voters, pursuant to which one major party's candidates are automatically listed first on the ballot in every single election for (*at the very least*) a four-year period. Pls.' Mem. in Supp. of Mot. for Prelim. Inj. (ECF No. 30) ("PI Mot.") at 1. Plaintiffs do not challenge either the provision establishing a tiered ballot order system, *see* Fla. Stat. § 101.151(3)(b); PI Mot. at 7 n.3, or the requirement that all candidates be noted with their party designation, *see* Fla. Stat. § 101.151(3)(a); PI Mot. at 2. And the relief that Plaintiffs seek would maintain the same order of political parties throughout a ballot, making it no more difficult or time-consuming for a Florida voter who desires to support candidates of the same party for all offices to do so easily and efficiently. *See* PI Mot. at 2. Plaintiffs have established that they are entitled to a preliminary injunction to protect them from the irreparable injury that follows from the Statute's favoritism of the Governor's party. Nothing in the Secretary of State's (the "Secretary") or the Republican Party Defendant-Intervenors' ("Intervenors") (collectively, "Defendants") responses in opposition (ECF No. 42) ("Intervenors'

Opp.") (ECF No. 44) ("Sec'y's Opp.") provide a basis for finding otherwise. Plaintiffs respectfully request that the Court grant the Motion and enter appropriate relief as soon as possible.

II. ARGUMENT

A. Plaintiffs Are Highly Likely to Succeed on The Merits

1. The Statute's Favoritism Cannot Survive Even Traditional Rational Basis Review, Because It is Not Rationally Related to any Legitimate State Interest

The Statute's unrelenting favoritism of one similarly—nay, *identically*—situated political party over another, based on nothing more than the results (no matter how close) of a single election, held once every four years, cannot withstand even the most solicitous standard of review: ***even under traditional rational basis review, the Statute must be declared unconstitutional.*** *See, e.g.*, *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (holding statute requiring party whose candidate received most votes in prior congressional election be listed first "does not withstand even th[e] minimal standard of review"); *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); *Graves v. McElderry*, 946 F. Supp. 1569, 1580 (W.D. Okla. 1996) ("[N]o legitimate State interest . . . can possibly be served by the selection of one particular party's candidates for priority position on every General Election

ballot."); *Netsch v. Lewis*, 344 F. Supp. 1280, 1281 (N.D. Ill. 1972) (holding statute prescribing ballot order by past electoral success violated equal protection); *Holtzman v. Power*, 313 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1970) (holding system requiring incumbent at top of ballot unconstitutional), *aff'd*, 311 N.Y.S.2d 824 (1970). Defendants' arguments to the contrary confuse the issues and misread the case law.

In fact, *none* of the state interests that Defendants identify actually relate to the Statute's favoritism of the last-elected Governor's party. Claims of voter confusion might hold water if Plaintiffs, for example, challenged either the tiered system found in Fla. Stat. § 101.151(3)(b), or sought to rotate *all* candidates on the ballot, but they do not. Nevertheless, *every case relied upon by Defendants* to support their contention that concerns about voter confusion justify the Statute considered that kind of challenge. *See Green Party of Tenn. v. Hargett*, No. 3:11-cv-692, 2016 WL 4379150, at *38 (M.D. Tenn. Aug. 17, 2016) (considering challenge to ballot-order statute "as applied" to Green and Constitution Parties, "minor parties" whose candidates would be listed after "majority parties," "minority parties," and "recognized minor parties" in tiered ballot order system); *Sarvis v. Judd*, 80 F. Supp. 3d 692, 696 (E.D. Va. 2015), *aff'd sub nom., Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 711, 714 (4th Cir. 2016) (considering challenge by prospective Libertarian candidate to "three-tiered ballot

ordering law," on grounds that it "advantages candidates from . . . 'major parties' and disadvantages candidates [from] 'minor parties'"); *Meyer v. Texas*, No. H–10–3860, 2011 WL 1806524, at *6 (S.D. Tex. May 11, 2011) (dismissing write-in candidate's challenge to tiered statute that placed parties with a candidate in last governor's election first, followed by parties without one, followed by independent and then write-in candidates, because "the Court finds [a write-in candidate] is not similarly situated to party candidates"); *New Alliance Party v. N.Y. State Bd. of Elec.*, 861 F. Supp. 282, 284-85 (S.D.N.Y. 1994) (considering challenge to portion of statute that ordered "parties" before "independent bodies," brought by an "independent body" seeking that candidates of *all* groups be organized by success in last gubernatorial election).

Defendants fail to cite a *single* case that involved a challenge like the one here. And the cases that they rely upon cannot be read to support Defendants' blanket assertion of "voter confusion" as a state interest. In *New Alliance Party*, a minor party (or "independent body" under New York law), challenged a statute which required that major party candidates be listed first organized and candidates from independent bodies, second. 861 F. Supp. at 284-85. Thus, while the statutory system had a feature similar to the one at issue here (i.e., the major parties were ordered based on success in gubernatorial), the plaintiff was not subject to that part of the statute and the case did not present the question before this Court: whether a

state may constitutionally use prior success in a gubernatorial election to automatically elevate one similarly situated major party over another in race after race for an extended period of time during which the other major party has *no* opportunity to have its candidates listed first on the ballot. The New Alliance Party, understandably, attacked the statute from an entirely different angle, alleging that it "denies *independent bodies* the same opportunity [major] parties have to be listed in the first position on the ballot . . . ." *Id.* at 286 (emphasis added). And the court explicitly found that the "State's interest in organizing a comprehensible and manageable ballot," pertained directly to its interest in distinguishing between major and minor party candidates. *Id.* at 296. In fact, the court specifically noted that, "[i]dentifying candidates who can demonstrate the support to qualify for party affiliation and separating them from those who cannot is one method of keeping the ballot in a format that the voter can easily read and assimilate." *Id.* No such interest is present here, where the challenge is to the Statute's automatic and unremitting favorable treatment of all candidates of one similarly situated major party over another—which, in the present day, results because of nothing more than a 1% vote share differential between two candidates in an election held four years ago.

Defendants' reliance on *Sarvis/Alcorn* is similarly misplaced. Although the Secretary broadly claims *Alcorn* "recognized [that] ballot order statutes serve 'the

important state interest of reducing voter confusion and speeding the voting process,'" Sec'y's Opp. at 7 (citing 826 F.3d at 719), the Secretary selectively omits the lynchpin of that sentence: "Virginia's ***three-tiered ballot ordering law*** serves the important state interest of reducing voter confusion and speeding the voting process." 826 F.3d at 719 (emphasis added). Sarvis was a Libertarian Party member who challenged a tiered ballot order system, that listed Democratic and Republican candidates in the first tier, with their order determined by lot. *See id.* at 712. The Libertarian Party was among the second-tier parties, where order was also determined by lot. *Id.*[1] Sarvis sought to invalidate the *entire system*, and "move ballot ordering among parties and candidates to a more purely random system." *Id*. at 719.

In contrast, Plaintiffs' focus is *entirely* on the treatment of the parties in the top tier of Florida's tiered system, within which the Statute unconstitutionally automatically elevates the "candidates of the party that received the highest number of votes for Governor in the last [gubernatorial] election" to the top of the ballot while "the candidates of the party that received the second highest vote for Governor," are entirely denied that opportunity. Fla. Stat. § 101.151(3)(a). *Cf. Alcorn*, 826 F.3d at 717 (finding challenge to three-tiered ordering law where order of candidates in first two tiers were determined by lot imposes "only the most

[1] Independent candidates in the third tier were listed in alphabetical order. *Id*.

modest burdens" where no party is "automatically elevated to the top of the ballot").

Outside of their voter confusion argument, which cannot withstand scrutiny, the *only* state interest that Defendants identify to justify the Statute involves overwrought claims that requiring supervisors to rotate the order of the major party candidates by precinct would cause substantial administrative burdens.[2] Through these arguments, the Secretary improperly attempts to collapse the "state interest" inquiry under *Anderson-Burdick* with the "public interest" inquiry under the preliminary injunction standard. Only the former, however, relates to Plaintiffs' likelihood of success on the merits, which is the sine qua non of the preliminary injunction inquiry. *See Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011) ("If [plaintiff] is unable to show a substantial likelihood of success on the merits, we need not consider the other requirements."). Furthermore, Defendants do not cite, and Plaintiffs are unaware of, any case that finds that administrative burdens alone could justify favoritism like that at issue in the Florida Statute. There are, however, a raft of cases concluding the opposite. *See Gould v. Grubb*, 14 Cal. 3d 661, 675 (Cal. 1975) ("[N]umerous cases have refused to permit the state to justify

[2] Defendants no longer assert an interest in "straight party voting" or partisan "symmetry," *see* ECF No. 21 at 19; ECF No. 37 at 16, and for good reason: Plaintiffs' challenge in no way implicates a voter's ability to easily find and vote for all candidates from the same party, as ballot order would remain uniform throughout each ballot regardless of the precise nature of the relief granted. *See* PI Mot. at 2.

discriminatory legislation on the basis of similar 'administrative efficiency' interests."); *Obama for Am. v. Husted* ("*OFA*"), 697 F.3d 423, 434 (6th Cir. 2012) (finding state interest in "smooth election administration" insufficient to justify disparate burden on voters); *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016) (finding administrative inconvenience in allowing voters to cure ballots insufficient to justify burden). It would be particularly absurd to find so here, where the Statute *requires* rotating ballot order whenever the Governor's mansion changes hands.

Because the Statute cannot survive even the most deferential of rational basis reviews, the Court need not go further to find that Plaintiffs are highly likely to succeed on the merits. *See, e.g., Graves*, 946 F. Supp. at 1581 ("[T]he classification mandated by [Oklahoma's ballot order statute] cannot survive even . . . the rational basis test, because the State has failed to articulate any legitimate interest to be served by its classification."). The utter absence of a legitimate state interest on one side of the equation cannot outweigh Plaintiffs' asserted burden, however slight. But, because the burdens resulting from the Statute are substantial, it is properly subject to a more searching standard of scrutiny, which it clearly cannot survive.

2. The Statute Severely Burdens Plaintiffs' Fundamental Rights

Even if Defendants' asserted state interests had any bearing on the constitutional harms alleged (which they clearly do not), they are overwhelmingly outweighed by the Statute's burdens on Plaintiffs' fundamental rights.

i. Position Bias Confers a Meaningful Advantage to the First-Listed Candidate on a Vertical Ballot

As an initial matter, Defendants' own weak attempts to distinguish several cases implicitly acknowledge the existence of position bias. Defendants argue, for example, that statutes that "entrench" one political party at the top of the ballot, Sec'y's Opp. at 44 n.4, such that candidates from that party "always appear in the top position," Intervenors' Opp. at 15, are distinguishable from the Statute here. But regardless of *how* a particular type of candidate is elevated to first position, these cases clearly establish that first position confers a meaningful advantage. *See, e.g.*, *Graves*, 946 F. Supp. at 1576; *Gould*, 14 Cal.3d at 664 (finding position bias "is supported by abundant expert testimony introduced at trial and is consistent with parallel findings rendered in similar litigation throughout the country"). After all, there would be no "blatant[] discriminat[ion]" in a law requiring that one political party always be listed first, Sec'y's Opp. at 11, if there is no practical difference between first and second position. Indeed, Florida law implicitly recognizes an advantage for the party at the top of the ballot by mandating rotation each time the Governor's seat changes party hands. Fla. Stat. § 101.151(3)(a); *see*

also Gould, 14 Cal.3d at 668 n.8 ("The legislature must have deemed [ballot] position of real advantage[.]") (citation omitted). And Defendant's own witness, Oskaloosa County Supervisor of Elections ("SOE") Paul Lux, testified to his belief that it is "absolutely" common for voters to simply vote for the first candidate listed. Wermuth Decl., Ex. B at 121:24 to 122:1. In short, it appears beyond dispute that *some* ballot order advantage exists in elections generally, and in Florida general elections specifically. *See Graves*, 946 F. Supp. at 1576 ("Plaintiffs have met their burden to prove some measure of position bias exists . . . .").

While stopping short of asserting that position bias does not exist (because they cannot), Defendants attempt to muddy the waters regarding its significance and discredit the analysis of Dr. Jon A. Krosnick, the nation's leading expert in the effects of position bias in elections, who has studied, lectured on, and published about this phenomenon (including in several peer-reviewed journals) over the course of his distinguished career. *See* Expert Rep. of Jon Krosnick ("First Krosnick Rep.") at 5-8. Intervenors make two arguments contrary to scientific evidence: (1) the existence of position bias in partisan, general elections is inconclusive or somehow negated by variance in its impact in different types of elections; and (2) Dr. Krosnick's conclusion that the Statute results in Republican candidates receiving a 2.70 percentage point electoral bump on average in Florida is flawed. Neither of these arguments can withstand scrutiny.

Intervenors' argument that the literature finding position bias in partisan general elections in the United States is "indeterminate" is incorrect.[3] Intervenors' Opp. at 10; *see also id.* at 27. In support, Intervenors rely primarily on a review of the ballot order literature by a law professor, Jonathan Klick, who does not appear to have any background in studying position bias,[4] and by a political science professor, Michael Barber, who does not appear to have published on ballot order previously. Contrary to Defendants' assertions, the scientific evidence finding position bias in partisan, general elections in the United States is strong and consistent. *See* First Krosnick Rep. at 22-24. Indeed, Intervenors and the two professors whom they hired to review and critique Dr. Krosnick's analysis do not even address, much less attempt to distinguish many of the studies that Dr. Krosnick cites that find position bias in partisan, general elections in the United States, including Blocksom (2008), Brockington (2003), Byrne, et. al. (1974), Mueller (1969), and Bain (1957). First Krosnick Rep. at 18-19, 21-22; *see also*

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[3] This is a markedly different tune than when Intervenors made their case for intervention a few weeks ago, asserting that Republicans "stand to be *most* directly harmed by a change" to the current ballot ordering regime, Mot. to Intervene, ECF No. 23, at 16 (emphasis added), which is only logical if there is a real and meaningful primacy effect. *See* Pls.' Resp. in Opp. to Mot. to Intervene, ECF No. 33, at 10-11.

[4] Dr. Klick focuses his research on "the relationship between abortion access and risky sex, the health behaviors of diabetics, the effect of police on crime, addiction as rational choice, [and] how liability exposure affects the labor market for physicians." Jonathan Klick, Professor of Law, the University of Pennsylvania, https://www.law.upenn.edu/cf/faculty/jklick/. Notably missing from this list is election law, ballot order, and position bias.

Second Report of Jon Krosnick ("Second Krosnick Rep.") at 2-7. Instead, Intervenors and their experts cherry-pick certain studies cited in Dr. Krosnick's extensive report, and then attempt to distinguish that limited universe. But, even then, they rely on flawed analysis, pure speculation, and data entry errors.

Intervenors rely heavily on a deeply flawed study, Ho and Imai (2008), which critiqued a study of California elections conducted by Dr. Krosnick. Intervenors fail to acknowledge that Dr. Krosnick subsequently published a paper identifying errors in it, which Ho and Imai have not rebutted. *See* Second Krosnick Rep. at 2-3. As Dr. Krosnick and his co-authors explained in their peer-reviewed paper in rebuttal, Ho and Imai relied on a problematic dataset and a low power approach to gauging name order effects to reach the flawed conclusion that position bias "had no detectable effect" on major party candidates, *see* Pasek et al. (2014); First Krosnick Rep. at 19-20; Second Krosnick Rep. at 2-3, a conclusion contrary to the numerous other studies finding position bias in partisan, general elections throughout the United States. Even so, the Ho and Imai study found statistically significant position bias in over half of the elections it studied. *See* First Krosnick Rep. at 27. In sum, the Ho and Imai study is an outlier, has been

publicly rebutted in an article published in a peer-reviewed journal, and the Court should give it little weight.[5]

Nor do the cases upon which Intervenors rely provide a basis for rejecting Dr. Krosnick's conclusions. Indeed, several recognize or assume that position bias influences elections. *See, e.g.*, *Mann v. Powell*, 333 F. Supp. 1261, 1265 (N.D. Ill. 1969) ("[W]e agree[] that the order of listing candidates' names on the ballot can affect the outcome of an election."); *Sarvis*, 80 F. Supp. 3d at 700 (assuming "that the windfall-vote phenomenon exists"). Others are either clearly distinguishable, rely on outdated, decades old research, or involve situations in which the court was presented with no evidence of position bias. *See Clough v. Guzzi*, 416 F. Supp. 1057, 1065-66 (D. Mass. 1976) (considering "unique" Massachusetts statute that both expressly designated incumbents as incumbents and put them in the first ballot position and determining that, although both conferred some benefit, on the record before it, the "plaintiff [had] not proved a substantial advantage inherent in first ballot position alone"); *New Alliance Party*, 861 F. Supp. at 287, 289, 290 (relying on *Clough* and other research from 24 years ago, and noting "plaintiff [] tendered no empirical evidence in support of its claims," including, "no statistical studies or expert testimony demonstrating the existence of position bias and its

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[5] To be sure, nothing in the reports or backgrounds of Drs. Klick or Barber, both of whom appear to be opining on position bias for the first time, indicates the Court should credit their understanding (or, more accurately, misunderstanding) of the ballot order studies and literature over Dr. Krosnick's.

effects on the outcome of an election," and instead argued that position bias was "self-evident" enough to warrant "judicial notice"); *see also* Second Krosnick Rep. at 7 ("[A] huge amount of scholarship has unfolded since then, and that body of work now provides a very solid scientific basis to conclude that primacy effects have been rampant in elections").

Additionally, several of the cases upon which Intervenors rely evaluate ballot order effects where candidates are listed horizontally, in columns from left to right, not vertically in rows, as in Florida. *See Koppell v. New York State Bd. of Elections*, 108 F. Supp. 2d 382, 358 (S.D.N.Y. 1998) ("Plaintiffs have presented no evidence that position bias exists where choices are arranged in a horizontal rather than vertical fashion."); *New Alliance Party*, 861 F. Supp. at 285 (noting, in 1990 gubernatorial election, New York City voting machines "were arranged in horizontal rows of seven columns" and that Court "theorized" that "[p]lacement in the eighth slot . . . might have harmed NAP because it would have been positioned on the second horizontal row"); *see also Graves*, 946 F. Supp. at 1574 n.14 ("There is no evidence in the Court record which suggests that position bias occurs as a result of the placement of any candidate's name on a ballot where the party-column style of ballot is used.").

Intervenors' argument is further flawed because it illogically leaps from Dr. Krosnick's recognition that the level of position bias can *vary* in different types of

elections and the conclusion the Secretary advocates for, which is "that position bias is . . . unlikely to be a factor in the higher-level, partisan elections Plaintiffs put at issue here." Intervenors' Opp. at 16. But this argument is directly contrary to Dr. Krosnick's explicit conclusions. *See* Second Krosnick Rep. at 7 ("[P]rimacy effects were found in virtually all races examined, even though the magnitude of primacy effects varied from race to race to some degree, depending partly on the characteristics of the race (e.g., the publicity received, whether an incumbent is running, whether the candidates' party affiliations are listed on the ballot.") (citation omitted)). As Dr. Krosnick explains, scientific studies have consistently found that position bias exists in: (1) *partisan elections*, First Krosnick Rep. at 48 ("[N]ame order effects are present even in races where partisan affiliations are listed alongside candidate names"); (2) elections involving a highly visible race, *id.* at 47 ("[N]ame order effects are also apparent in highly publicized races") (citation omitted)); and (3) elections involving an incumbent, *id.* at 18 ("[T]hese [primacy] effects occur routinely, even in [elections] with highly visible incumbents"). In fact, even in high-profile, partisan elections, position bias can be sizeable. Second Krosnick Rep. at 7-8. And even if Intervenors *could* support their claim that position bias is of no effect in highly "visible congressional, gubernatorial, and legislative elections," Intervenors' Opp. at 14, they ignore that Plaintiffs challenge the impact of position bias up and down the ballot, including in lower-profile, less

visible, highly localized races, with no incumbent, like, for example, some Florida state legislature elections. *See* First Krosnick Rep. at 47-49; *see also* Compl. at ¶ 17 (ECF No. 1) (asserting the Statute harms Plaintiffs' candidates "at all levels").

Finally, Intervenors' proposed experts misguidedly attempt to undermine Dr. Krosnick's conclusion that the Statute gives first-listed Republican candidates in Florida a 2.70 percentage point advantage on average. But Dr. Krosnick explains, point by point, the numerous ways in which Drs. Klick and Barber misunderstand his analysis and misstate the best practices for evaluating any ballot order advantage in Florida. *See generally* Second Krosnick Rep. To offer just a few examples: Intervenors' contention that Dr. Krosnick failed to account for other variables that could potentially impact position bias in Florida is false, *see id.* at 23-33; Intervenors fail to recognize that Dr. Krosnick's calculation of a 2.70 percentage point advantage for Republicans when listed first was an *average* calculated by examining numerous *individual* elections, *see* First Krosnick Rep. at 55-56; and Dr. Krosnick's reliance on Ohio as a comparator state was amply justified, as demonstrated by further analysis revealing that the demographic differences Intervenors highlight (Hispanic and urban population) "do not undermine the comparison and indeed suggest even stronger name order effects in Florida than Ohio." Second Krosnick Rep. at 19; *see also id.* at 19-23. The Court should reject Intervenors' attempt to poke holes in Dr. Krosnick's analysis based

on the reports of two professors with no demonstrated experience in position bias, who provide little statistical analysis of their own, and when they do, their analysis is error ridden. *See* Second Krosnick Rep. at 4-5.

ii. The Burden on Plaintiffs' Rights Is Severe

Plaintiffs have established that the systemic disparate treatment of the Democratic Party, its candidates and voters, severely burdens their fundamental rights, both through disparate treatment of the Organizational Plaintiffs, and the consequent dilution of the Voter Plaintiffs' voting power. *See* PI Mot. at 20-22, 29-30.

On its face, the Statute automatically elevates all "candidates of the party that received the highest number of votes for Governor" in the last Governor's election, over all "candidates of the party that received the second highest vote for Governor," Fla. Stat. § 101.151(3)(a), giving the former a significant electoral advantage in every election for, at the very least, four years, no matter how minuscule the vote differential in the gubernatorial election or how unrelated any subsequent election in which candidate order is preordained by those results. *See* PI Mot. 15-21; Resp. in Opp. to Intervenors' Mot. to Dismiss at 10-18 (ECF No. 43). Thus, a difference of 1% of the vote share in the 2014 race between Rick Scott and Charlie Christ has resulted in a systemic disadvantage of the Democratic Party and its candidates in every single race for partisan office in Florida that has

followed, which can be quantified, on average, to be worth approximately 2.70 percentage points. First Krosnick Rep. at 3. Anyone who believes that the injury to the Democratic Party Organizational Plaintiffs, their candidates, and the Voter Plaintiffs is not severe has not spent much time in partisan politics, where a district projected to be within only five percentage points of the national popular vote margin is considered a "swing district." Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, NEW YORK TIMES: FIVETHIRTYEIGHT (Dec. 27, 2012), https://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/; *see also* PI Mot. 21-22.[6]

Particularly when compounded with the recent history of razor-thin electoral margins of victory in Florida elections, the advantage conferred upon Republican candidates over the last two decades by virtue of ballot position has very likely often been outcome determinative. *See* Compl. at ¶¶ 38-43; PI Mot. at 10-11; Second Krosnick Rep. at 10-14; *cf. Green Party*, 2016 WL 4379150, at *20 ("Most fundamentally, because the Green and Constitution Party candidates' baseline vote

[6] Defendants' argument that the Statute is "neutral," "non-discriminatory," or does not entrench a political party, Intervenors' Opp. at 14-15; Sec'y's Opp. at 11, n.4, misunderstands the law, as Plaintiffs have explained. *See* PI Mot. at 15-19; Pls.' Resp. to Intervenors' Mot. to Dismiss at 10-25. Similarly, Defendants' assertions that each major party has an "equal opportunity" to be listed first under the operation of the Statute, *see* Intervenors' Opp. at 15; Sec'y's Opp. at 13, are incorrect as both a matter of law and fact. *See* Pls.' Resp. in Opp. to Intervenors' Mot. to Dismiss at 13-15.

share is so low, ballot order has no likely effect on their actual prospects of winning office.").

Defendants' assertion that these are not injuries of "constitutional concern" ignores the raft of precedent finding otherwise and is not well-founded. *See, e.g.*, *McLain*, 637 F.2d at 1167; *Sangmeister*, 565 F.2d at 468; *Graves v. McElderry*, 946 F. Supp. at 1580; *Netsch*, 344 F. Supp. at 1281; *Gould*, 14 Cal. 3d at 664; *Holtzman*, 313 N.Y.S.2d at 908. Once again, Defendants rely on wholly distinguishable cases brought by third-party candidates or parties challenging statutes that distinguished between candidates of parties that were clearly *not* similarly situated and that, by the nature of their very different position, necessarily raised claims different than those Plaintiffs pursue here. *See Green Party*, 2016 WL 4379150, at *38; *Sarvis*, 80 F. Supp. 3d at 696; *Libertarian Party of Va.*, 826 F.3d at 711, 714; *Meyer*, 2011 WL 1806524, at *6; *New Alliance Party*, 861 F. Supp. at 284-85.[7]

As for Defendants' assertion that Plaintiffs do not have a constitutional right to a windfall vote or a wholly rational election, that plainly distorts Plaintiffs'

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[7] Moreover, even in the *third-party candidate* context, the court in *Alcorn* still found that Virginia's tiered ballot order statute imposed a "modest burden" on the plaintiff's rights, and weighed that burden based on the precise nature of the claims and evidence before it, as appropriate under *Anderson-Burdick*, ultimately finding that the state's interests in that system justified organizing parties on the ballot in tiers, 826 F. 3d at 719—interests that, as explained, cannot similarly justify the favoritism that Plaintiffs challenge in the Statute at issue in this case. *See supra* at 4-7.

position. Rather, Plaintiffs argue they have a constitutional right to fair and equal treatment with those with whom they are similarly situated. The favoritism of the Statute clearly denies them that right, both as political party organizations and voters. *See, e.g.*, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.") (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)); *Conservative Party v. Walsh*, 818 F. Supp. 2d 670, 676 (S.D.N.Y. 2011) (finding *New Alliance Party* court's conclusion that the windfall vote was not of a constitutional concern "inapposite" when plaintiffs' asserted "right to be free from unabashed *discrimination* in the process of determining ballot order'") (emphasis in original); *see also McLain*, 637 F.2d at 1166; *Graves*, 946 F. Supp. at 1579; *Gould*, 14 Cal.3d at 673, 670-71.

The Secretary also attempts to distort Plaintiffs' position by arguing that it relies on the assumption that "windfall votes matter less than other votes," Sec'y's Opp. at 15, but this argument completely misunderstands position bias. When a candidate is listed first on the ballot, some individuals implicitly and automatically vote for her based on heuristic cues, not as a result of a conscious and reasoned decision. *See* First Krosnick Rep. 35-42; *see also* Wermuth Decl., Ex. B at 121:24 to 122:1 (defense expert Lux testifying that what "commonly occur[s]" is that

voters will select the first candidate listed without reading the ballot). Thus, in determining ballot order, the State chooses how these votes, which can be outcome determinative in some elections, *see* First Krosnick Rep. at 33-34, are allocated, and a system that results in votes being systematically diluted violates the Constitution. Plaintiffs do not suggest that the windfall votes cast in each election should not count, only that the scales should not be tilted from the outset to shift all windfall votes to one party in every election for years at a time.

The cases cited by Defendants on this point do not lead to a different result. *See* Intervenors' Opp. at 26-27. *Koppell*, 108 F. Supp. 2d at 385, found that a lottery system, which, unlike the Statute, did not entrench any one political party and gave each candidate an equal chance to be listed first, imposed a "minor" burden but was justified by state interests; *see also id.* at 359 ("The lottery does not infringe on First and Fourteenth Amendment rights by 'freez[ing] the status quo.'") (citation omitted).[8] And *Sarvis v. Judd*, 80 F. Supp. at 701, only addressed vote dilution in dicta because the plaintiff candidates did not make or brief such an argument.

[8] In contrast, the court recognized that ballot order systems that treat candidates differently "in favor of incumbents or of candidates from the party that prevailed in the last election" implicate equal protection concerns. *Id.*

B. Plaintiffs Will Suffer Irreparable Harm Absent Relief

None of the hodgepodge of arguments that Defendants throw out seeking to combat Plaintiffs' showing of irreparable harm have merit. Most simply contend that Plaintiffs have not demonstrated that position bias is real, but those arguments are easily disposed of above, as discussed above. *See* supra 10-18. Intervenors also use the irreparable harm section of their brief to renew an earlier argument about laches, an argument which the Secretary's Response also makes, but under the section that purports to address balancing of the equities. *See* Sec'y's Opp. at 16-18. For ease of reference, Plaintiffs address these arguments together, here.

Defendants' assertions regarding laches are baseless both for the reasons stated in Plaintiffs' Opposition to the Secretary's Motion to Dismiss, *see* Pls.' Resp. in Opp. to Def.'s Motion to Dismiss at 4-7, 9-10, and because Defendants can point to no prejudice from Plaintiffs' timing in filing this suit and bringing a motion for a preliminary injunction since, as Defendant concedes, SOEs cannot even begin crafting a ballot for the November election until September 9. *See* Matthews Decl. (ECF No. 44-1) ¶ 8; *see also* Wermuth Decl., Ex. B at 43:7-19 (admitting any ballot layout attempted before candidates are finalized "is so completely unhelpful"). This irrefutable fact, the timing of this case, and the relief requested makes the cases that Defendants cite for this proposition easily distinguishable. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (motion

seeking preliminary injunction to suspend elections under congressional apportionment map not filed until six years after complaint); *Silberberg v. Bd. of Elections of the State of N.Y.*, 216 F. Supp. 3d 411, 414-15 (S.D.N.Y. 2016) (action filed 13 days before general presidential election); *Fla. Dep't of Educ. Div. of Blind Servs. v. United States*, No. 15-203, 2015 U.S. Dist. LEXIS 57457, at *3 (N.D. Fla. April 30, 2015) (considering standard for issuances of an ex parte temporary restraining order); *Conservative Party of N.Y. State v. N.Y. State Bd. of Elections*, No. 10-CV-6923 (JSR), 2010 WL 4455867, at *1-2 (S.D.N.Y. Oct. 15, 2010) (motion filed six weeks before election seeking relief that record demonstrated could only be implemented with considerable difficulty and would cause substantial confusion). Further, Defendants' argument essentially asserts that a law which effects a constitutional harm becomes unchallengeable due solely to the passage of time, contrary to seminal case law that stands for quite the opposite proposition. *See, e.g., Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

C. The Public Interest and Balance of the Equities Favor Enjoining the Statute

The purported administrative burdens connected with the remedy that Plaintiffs proposed in their Motion also fail as a factual matter, and the five declarations submitted by the Defendants do nothing to alter this conclusion.

Ms. Mortham is a good example of how the witness declarations offered by Defendants generally suffer from both the affiant's lack of personal experience and

lack of candor. For example, Ms. Mortham states that the current Statute "allows the supervisors to begin the process of building a ballot early," Mortham Aff. (ECF No. 42-3) ¶ 13, an assertion in stark conflict with her statement three paragraphs later that "[t]here is a short time window between when the candidate lists from the August 28, 2018 primaries are completed and when ballots for the November general election must be completed." *Id.* ¶ 16. Ms. Mortham also opines on the legislative intent of the Statute, *id*. ¶ 14, but cites neither to legislative history nor explains how she has personal knowledge as to the legislative intent behind a statute passed in 1951. And Ms. Mortham's assertion that rotating candidates by precinct would require SOEs to create 50% more ballot styles was refuted by one of the Secretary's declarants, SOE Lux, who admitted that this was false, and that the number of different ballot layouts would remain the same. *Compare id.* ¶¶ 22, 24, *with* Wermuth Decl., Ex. B. at 158:21-22 ("[Y]ou're right, that it would not create additional ballot styles"); *see also id.* at 158:14-15 (admitting his assertions about designing additional ballot styles and testing additional equipment were based on his misunderstanding of "what . . . was meant by the 'precinct rotating system'").

Mr. Gessler's affidavit might actually be even less helpful, as he lacks any personal experience with Florida election law at all; there is no reason for this Court to consider or credit his testimony. While it is true that Mr. Gessler was

qualified as an expert in *Bellitto v. Snipes*, 302 F. Supp. 3d 1335 (S.D. Fla. 2017), on the issues of voter registration and voter list maintenance procedures, this was solely because his expertise and experience in Colorado was "tied directly to the same federal standard under the NVRA with which Snipes is required to comply." *Id.* at 1352. Here, by contrast, Mr. Gessler offers only general perspectives on the burdens on *local* SOEs of an administrative change to a Florida-specific statute, about which he knows nothing and has no applicable experience. Indeed, Mr. Gessler's deposition testimony in *Bellito* highlights just a few of the many reasons why his opinion is unreliable, speculative, unhelpful, and should not be given any weight by this Court, as Mr. Gessler: (1) has not "litigated outside of the state of Colorado with respect to election law issues," Mot. to Exclude, Ex. D at 21:8-9, *Bellitto v. Snipes*, No. 16-cv-61474-BB (S.D. Fla. May 26, 2017), ECF No. 144, and has not litigated "cases involving non-Colorado election law," *id*. at 21:18-19; (2) has not been a county election official (even in Colorado, much less in Florida), Gessler Dep. at 37:24; (3) does not know the specifics of Florida's elections, *id*. at 85:4-16, 86:6-21, 86:24-87:8, 130:16-18, 162:11-163:7; and (4) admits that Florida SOEs have much more latitude on certain issues than local officials in Colorado, *id.* at 47:4-8. This Court should disregard Mr. Gessler's affidavit in its entirety.

Likewise, the results of Mr. Barnett's Google search for "Palm Beach election administration issues," which appear to form the basis for most of his

affidavit, are not particularly helpful to this Court's consideration. *See* Barnett Aff. (ECF No. 42-5) ¶¶ 8-9. Mr. Barnett never explains how these issues are tied to Plaintiffs' proposed remedy, and his argument, boiled down, seems to be that Palm Beach County is bad at administering elections, so this Court should not give them something new to mess up. Other than his citations to news stories, Mr. Barnett's declaration illogically states that changing ballot order "at this stage" will complicate the distribution of sample ballots on Election Day, currently 16 weeks away, and that it will be especially problematic to distribute sample ballots if the ballots are different from precinct to precinct. *Id.* ¶¶ 11-13. The latter of these arguments may have more merit if Mr. Lux, Mr. Sancho, and Ms. Matthews—all present or former *Florida* elections officials—had not all separately noted different ballot styles already exist within each precinct in Florida. *See* Lux Decl. (ECF No. 44-2) ¶ 11, Sancho Decl. (ECF No. 32) ¶ 8, Matthews Decl. (ECF No. 44-1) ¶ 12.

Ms. Matthews not only fails to point to any new or additional administrative burden that would follow from granting the injunction, most of her declaration demonstrates that, in fact, it would add very little additional administrative burden. First, Ms. Matthews confusingly provides a table of election dates from August 28 through November 6 as an attachment to her affidavit, a table which the Secretary appears to reproduce in its entirety in his brief. *Compare* Sec'y's Opp. 19-26, *with* Matthews Decl. Attachment A. While the ostensible point of this table is to

demonstrate that SOEs are busy, most of the tasks listed do not involve SOEs at all, and the Secretary clearly chooses this extended date range to increase the table's length, if not its usefulness. Indeed, Ms. Matthews notes, like Mr. Sancho, Sancho Decl. ¶¶ 5-6, that SOEs cannot even begin creating a ballot until September 9, demonstrating why the Secretary's purported concerns over the fact that this action was only filed in the Spring are overblown. *See id.* ¶ 8; *see also* Wermuth Decl., Ex. B at 43:22-25 (any rudimentary layout done before then "is simply to try to predict how big our ballot is going to be," to know "what size paper to order"). Indeed, Ms. Matthews notes that SOEs are used to ballot changes resulting from lawsuits filed much later than this case, such as if a primary candidate wins an election lawsuit. Matthews Decl. ¶ 9; *see also* Sancho Supp. Decl. ¶ 3. Ms. Matthews also agrees that SOEs must already deal with multiple ballot styles, including multiple styles within one precinct, Matthews Decl. ¶ 12, and does not explain why Plaintiffs' proposed remedy would make this process any more burdensome than it already is. While Ms. Matthews expresses concern that a change in ballot order could require a republishing of sample ballots if done too late, the date that she identifies is months from today. *Id.* ¶ 14. Finally, Ms. Matthews concludes with several speculative harms from changing ballot order, including having to retrain staff, *id.* ¶ 15, retest equipment, *id.* ¶ 16, change equipment programming, *id.* ¶ 17, change security procedures, *id.* ¶ 18, or deal

with additional litigation, *id.* ¶ 19. However, she does not and cannot tie any of this speculative parade of horribles to a change in ballot order, and there is no logical reason for the Court to conclude that a change in ballot order would lead to any such issues.

Finally, Paul Lux's assertions are rife with inconsistencies and rely on an admitted mistake of fact. Indeed, Mr. Lux testified in his deposition that his Declaration was based on a fundamental misunderstanding of the relief Plaintiffs seek, explaining that he wrongly believed Plaintiffs were proposing a wholesale scrambling of all candidates on the ballot. Wermuth Decl., Ex. B at 142:24 to 143:1 ("[A]t the time I wrote this, [I] was not of the mind you were only talking about rotating the major political parties"); *id.* at 158:13-16 ("[A]t the time of this writing, the presumption I was operating under, I did not know what specifically was meant by the 'precinct rotating system.'"). In backtracking and imagining new problems on the fly, Mr. Lux testified that rotating candidates could pose the risk of voters picking the first candidate listed, without reading the ballot or considering their choice; in other words, *Mr. Lux testified to his belief that the position bias effect is a "commonly occur[ring]" phenomenon in Florida*. *Id.* at 121:24 to 122:1. Mr. Lux also admitted that his opinion was colored by his general misgivings about ballot rotation as a concept, testifying: "I've just never particularly agreed with ballot rotation." *Id.* at 9:7-8.

At the same time, he also repeatedly offered that, while he has some personal, philosophical objection to ballot rotation, that ballot rotation would result in fairer elections. *See id.* at 9:9-12 ("I will agree that it may not be fair to the people who are -- getting their stuff put in second place."); *id.* at 9:19-21 (rotating all candidates "would be more fair"). He also conceded that the risk of voter confusion that Defendants have repeatedly alleged, and that Mr. Lux alleged himself in his Declaration at ¶ 19, regarding a voter's ability to identify his or her preferred party and vote along party lines if they so desire, is wholly imagined: "I think most people who understand written English understand R-E-P means Republican, and D-E-M means Democrat." *Id.* at 112:19-21.

Mr. Lux repeatedly testified that a precinct-by-precinct ballot rotation was entirely possible given a sufficient timeline, and that his complaints were mostly about timing. *See, e.g.*, *id.* at 111:18-22 ("I'm not saying it couldn't be done. I never said . . . that it can't be done. It's the timing of the implementation of it being done[.]"); *id.* at 8:22 to 9:1 (if "given plenty of time to implement [precinct-by-precinct rotation] . . . it would certainly be something that's doable"); *id.* at 155:12-15 (noting that he has no idea how long a software update might take). Finally, he admitted that his assertions about whether current election software was up to the task were entirely speculative, completely undermining his purported expertise in that area: "[I]t's just never been tested. It's a big question mark." *Id.* at 47:12; *see*

also id. at 66:25 to 67:1 (not "sure if it's capable of doing that"); *id.* at 72:17-21 ("without knowing what the software is capable of, I can't say specifically what's going to happen"); *id.* at 10:13-15 ("My biggest concern is the fact that you are asking software -- I don't even know if our software is capable of doing what they are asking[.]").

In any event, all the arguments that Defendants present about the administrative burdens of remedying the harms caused by the Statute's favoritism of the last-elected Governor's political party relate solely to *the specific form of relief proposed by Plaintiffs in their Motion* (that is, precinct-by-precinct rotation), not to Plaintiffs' ***entitlement*** to relief to protect them against irreparable harm in advance of the November 2018 election. Plaintiffs suggested rotation by precinct as a proposed remedy because they believe that it affords the fairest and most equitable means to address these constitutional harms; however, this Court of course is free to fashion whatever preliminary injunction it deems sufficient to address Plaintiffs' harms, considering the totality of the circumstances before it. *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982) (quotations omitted) ("The essence of equity jurisdiction has been the power of the [court] to do equity and to mold each decree to the necessities of the particular case.").

In support of their Motion, Plaintiffs attached the Declaration of Ion Sancho, in which he testified that ballot order rotation by precinct in the November 2018

election should not cause an administrative burden in light of the fact that ballot styles already vary by precinct, Sancho Decl. □ 3, and that SOEs cannot begin to create general election ballots until after primary results are certified, *id.* □□ 4-5. Upon further investigation, Mr. Sancho learned that the software patches required to effectuate a ballot order rotation-*by-precinct* system may be difficult to obtain and test in advance of the November 2018 election, particularly in light of the 90-day statutory deadline for doing so. *See* Sancho Supp. Decl. □ 6.

In light of this, and based on his "28 years of experience in elections administration and recent investigation," Mr. Sancho has confirmed that ballot order rotation *by county*, whereby all ballots in one county will list either Republicans or Democrats first for all races, would cause no administrative concerns. *Id.* ¶ 7; *see also* Wermuth Decl., Ex. B at 50:10-16 ("if you tell me tomorrow, for whatever reason, the Democrat candidate should go on the ballot first, and I will simply put the Democrat candidate first when I type it in and put the label 'Democrat' behind it and move on to whoever goes second,"). Indeed, where each county's SOE can count on a uniform ballot order for all precincts in her county, *all* of the administrative concerns raised by Defendants fall away. *Id.* ¶¶ 9-10. In his deposition, Mr. Lux independently confirmed that "if you tell me tomorrow, for whatever reason, the Democrat candidate should go on the ballot first, and I will simply put the Democrat candidate first when I type it in and put

the label 'Democrat' behind it and move on to whoever goes second," Wermuth Decl., Ex. B, at 50:10-14, and that current elections software would "absolutely" allow for ballot order rotation on a county-by-county basis *id*. at 133-34.

Ultimately, it is clear (and, indeed, undisputed) that, as an administrative matter, Plaintiffs' injuries can easily be redressed in advance of the November election by *some* method of ballot order rotation, even if the *ideal* unit of rotation is not immediately practicable. *See* Sancho Supp. Decl. ¶¶ 8, 10 & Wermuth Decl., Ex. A (demonstrating rotation by county in order of voter population results in 53% of voters receiving ballots with one major party listed first and 47% of voters receiving ballots with the other major party listed first); *id.*at Ex. C (showing rotation by overall population size would result in a breakdown of 54.3% and 45.7%). None of the administrative concerns raised warrant the very preventable, irreparable injury wrought by the all-or-nothing ballot order scheme currently in place.

III. CONCLUSION

Plaintiffs respectfully request that the Court issue a preliminary injunction that will protect Plaintiffs from the irreparable harm that will otherwise follow from the Statute's automatic and across-the-board favoritism of the last-Governor's political party, in advance of the November 2018 election.

LOCAL RULE 7.1(F) CERTIFICATION

Counsel for Plaintiffs, Fritz Wermuth, Esquire, certifies that this motion contains 7,998 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 20, 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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