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' SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

For the first time, Plaintiffs now ask this court to mandate ballot order rotation on a county-by-county basis for the 2018 elections and not on a precinct-by-precinct basis. Plaintiffs make this drastic change in their requested remedy because they now realize that their original requested remedy would cause significant administrative concerns and would be difficult to put in place prior to the November elections. Plaintiffs' Reply In Support Of Preliminary Injunction at 31 ("Pls.' Reply Br."); Motion to Dismiss at 16; Defendant-Intervenors Reply Brief in Support Of Their Motion To Dismiss at 14-15; Supp. Dec. of Sancho at ¶ 6.

Not only do Plaintiffs change the rules of the game on the eve of the hearing on their Motion—but the newly requested remedy represents a severe alteration of their requested remedy creating trial by ambush. Even more concerning to this Court should be the fact that changing the remedy to ballot ordering on a county-by-county basis would not actually substantially remedy Plaintiffs alleged harms, resulting in significant standing and other issues. Accordingly, not only can Plaintiffs not succeed on their Motion for Preliminary Injunction, but they should not now be permitted to succeed on the merits of their revised claim for relief.

ARGUMENT

I. Plaintiffs Chaotic Change To Their Requested Remedy At The Eleventh-Hour Counsels Against Granting Their Motion For Preliminary Injunction

Plaintiffs' slapdash transformation of their requested remedy in such a last-minute manner counsels against granting their motion for preliminary injunction. The change is a dramatic one and occurs less than two business days before the hearing on their motion. Such a change results in trial by ambush and creates chaos in briefing and trial—which Plaintiffs themselves seem to suffer. Accordingly, their new requested remedy should be denied along with their motion for preliminary injunction.

The chaotic nature of Plaintiffs requested relief is further demonstrated in Mr. Ion Sancho's deposition. During his deposition, Mr. Sancho testified that he did not

think Plaintiffs counsel had a complete understanding of the remedy they were requesting when they filed their Motion for Preliminary Injunction.[1] Sancho Dep. 8:10-25. Thus, for the first time, on or about July 18, Plaintiffs' counsel suggested to Mr. Sancho a county-by-county approach for ballot rotation. *Id.* 61:8-15. But in haphazardly cobbling their new remedy together, Mr. Sancho did not study the impact the county-by-county ballot rotation would have on down ballot races such as state Senate, state House, or congressional races. *Id.* 78:4-79:1, 79:14-80:8. This is an important consideration given that not all congressional or state House and Senate districts are wholly contained in single counties. Furthermore, Mr. Sancho does not know if this county-by-county ballot rotation system will ameliorate Plaintiffs' claimed injuries. *Id.* 40:5-44:1. Mr. Sancho was also unable to produce any example of another state using Plaintiffs newly requested relief. Since Plaintiffs do not know how the newly requested relief—apparently the product of a last second thought of Plaintiffs' counsel—will impact candidates, this Court should exercise its discretion and deny the requested relief. *Id*. 80:9-19.

In any event, it is well settled that new arguments brought forth for the first time in reply briefs should not be addressed by the reviewing court. *Sapuppo v. Allstate Floridian Ins. Co*., 739 F.3d 678, 682-83 (11th Cir. 2014); *See Big Top*

[1] Mr. Sancho's deposition was held at 9:30 A.M. on Monday, July 23. Due to the timing of the deposition, this Amended Sur-reply changes only this footnote, adds citations missing from the original, and attaches an initial transcript as an exhibit.

Koolers, Inc. v. Circus—Man Snacks, Inc., 528 F.3d 839, 844 (11th Cir. 2008) ("We decline to address an argument advanced by an appellant for the first time in a reply brief."); *Davis v. Coca—Cola Bottling Co. Consol.*, 516 F.3d 955, 972 (11th Cir. 2008) ("an argument not included in the appellant's opening brief is deemed abandoned. . . . [P]resenting the argument in the appellant's reply does not somehow resurrect it."); *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) ("[W]e do not address arguments raised for the first time [even] in a pro se litigant's reply brief."); *United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir. 2004) ("As for reply briefs, this Court follows this same rule and repeatedly has refused to consider issues raised for the first time in an appellant's reply brief."); *United States v. Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994) ("Arguments raised for the first time in a reply brief are not properly before a reviewing court."). Doing so results in trial by ambush, where Defendants and Defendant-Intervenors are forced to respond to arguments and factual assertions that have not yet been made.

This case is no different. Plaintiffs proposed one remedy in their motion for preliminary injunction, complaint, and response to Defendant-Intervenors' motion to dismiss—ballot re-ordering on a precinct-by-precinct basis—and now, on the eve of the hearing, propose a totally different remedy—ballot re-ordering on a county-by-county basis. Pls.' Reply Br. at 2, 31. Further, none of their experts properly address this new argument, and none of Defendant or Defendant-Intervenors'

experts have had or will have before argument on the motion an opportunity to address this new argument. By using their reply brief to propose a remedy that differs from any of their previous filings, Plaintiffs attempt to throw Defendant-Intervenors' arguments and research into upheaval. This upheaval is understandable given the ambush-like nature of the new remedy's introduction and the detailed legal, statistical, and political analysis that Defendant-Intervenors have been undertaking in preparation for the hearing.

By failing to raise this remedy earlier, Plaintiffs are also introducing chaos into briefing. In fact, only days ago, Plaintiffs, in their Response to Defendant-Intervenors' Motion to Dismiss, used their precinct-by-precinct remedy to attack and mischaracterize Defendant-Intervenors' arguments and accused Defendant-Intervenors of misrepresenting their proposed remedy. Plaintiffs' Motion In Opposition To Defendant-Intervenors' Motion to Dismiss at 23. Yet now, they abandon that same remedy in favor of a completely new one.

It is becoming obvious to Defendant-Intervenors that Plaintiffs have not thought out their challenge in its entirety. Faced with Defendant's and Defendant-Intervenors' persuasive arguments, Plaintiffs realize that a precinct-by-precinct ballot ordering system is untenable, costly, confusing, and cannot feasibly be implemented in time for the November elections. Supp. Dec. of Sancho ¶ 6.

In an attempt to rescue their case, Plaintiffs change their requested remedy mid-stream, rather than creating a calculated remedy earlier. By all appearances it would seem that Plaintiffs would rather achieve some injunction from this Court rather than a remedy that is both manageable and has any hope of remedying their supposed "wrong." Plaintiffs ready, fire, aim approach to litigation should be rejected because this Court, the parties, and the people of Florida deserve better. The federal courts must exercise great caution when the franchise and the orderly administration of elections are at stake. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2016). This is more true since Plaintiffs' have offered no evidence that this new county-by-county ballot rotation system would remedy *any* alleged wrong for the election of *any* candidate in Florida. Accordingly, Defendant-Intervenors respectfully request this Court not consider Plaintiffs new proposed "remedy," and to deny Plaintiffs motion for preliminary injunction.

II. Plaintiffs New Remedy Will Not Address Defendant's Alleged "Harms" Because of Population Disparities and Down Ballot Elections

In addition to the trial by ambush suffered upon the court and the parties by the metamorphosis of Plaintiffs' proposed remedy, the new remedy, assuming any remedy is actually warranted[2], will not properly address Plaintiffs alleged

[2] Defendant-Intervenors wish to emphasize their view that there is no harm that requires any remedy in this case. That being said, Defendant-Intervenors offer the arguments in this brief *assuming arguendo* that there is a "harm" that requires a remedy. Furthermore, Defendant-Intervenors also note that nothing contained within

"problems."[3] Plaintiffs now propose that counties be listed in order of either total population or number of registered voters and that each major political party alternate between first or second on a county by county basis. Pls.' Reply Br. at 31; *see generally* Decl. of Wermuth.

Based on this list an alternating value of 1 and 2 is assigned to each county, so that the most populous county, or the county with the most number of registered voters, is assigned the value of 1, the second most populous county is assigned the value of 2, and the third most populous county is assigned the value of 1, and so on. Decl. of Frederick Wermuth, Ex. A. Counties assigned the value of 1 will have one major party (Republican or Democratic) listed on the ballot first, and counties assigned the value of 2 will have the other major party listed on the ballot first. *Id*. This nearly evenly splits the number of counties where Republicans and Democrats are listed at the top of the ballot. *Id*. While the number of counties may be nearly evenly divided, neither the population nor the number of registered voters is even close. *Id*. The difference in the number of registered voters in Value 1 and Value 2

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this brief should be read as a waiver or acceptance that it was proper under any rule or law for Plaintiffs to allege new facts and a new remedy in a reply brief less than two business days prior to a hearing on a Preliminary Injunction.

[3] Furthermore, Plaintiffs county-by-county remedy still suffers from the same infirmities noted in the Declaration of Michael Barnett. Dec. of Barnett at ¶ 10-12. Political party committees will still incur additional costs and complications with get out the vote sample ballot distribution with the newly proposed ballot rotation system.

counties is almost 800,000 people and the difference in the total population in Value 1 and Value 2 counties is nearly 2 million people. *Id*.

Unlike Mr. Sancho, Defendant-Intervenors have done a initial analysis of the impact of this county-by-county system on congressional and state House and Senate districts. The massive population disparity between Group 1 and 2 districts impacts statewide elections and is filtered down to any districted election that crosses county lines. For the November 2018 elections this means that 22 Congressional Districts, 11 of the 20 Senate Districts, and 30 of the 120 State House districts that are significantly impacted by population disparities between Group 1 and Group 2 counties under either method of ordering. The disparity on down ballot elections in some races as a percentage of the total population is even greater than in statewide elections, as noted *infra*.

Assuming that ballot ordering affects election outcomes, Plaintiffs' own expert stated that down ballot elections, lower profile elections, and lower information races are affected more by ballot ordering than statewide races. Krosnick Rep. at 7. Coincidentally, under Plaintiffs new remedy, the rotation of down ballot elections for congress and state senate are even more unequal than in statewide elections. This is because electoral districts overlap unequally with county lines. The table below illustrates just a few of the total population disparities between

Group 1 and Group 2 counties based on the splits reports available from the public accessible data and based on 2010 Census data:[4]

District	TPOP Group 1 (2010 Census Population)	TPOP Group 2 (2010 Census Population)
Congressional District-1	66,849	629,496
Congressional District-2	652,475	43,869
Senate District-2	100,0080	374,232
Senate District-10	313,999	154,656
House District-5	99,866	59,332
House District-10	5,427	150,996

Table 1: Total Population ("TPOP") of select Florida districts.

This shows that Plaintiffs' new proposed remedy will not come close to evening out the number of ballots with each party listed first, especially in the down ballot elections that Plaintiffs' own expert identified as more dramatically impacted by ballot ordering. As a result, this "solution" does not remedy the "problem" they claims harms them.

In addition to what is illustrated in the table above, 5 Congressional Districts are wholly contained in a single county–meaning ***all*** voters in these districts would receive either a Group 1 or a Group 2 ballot. For the State Senate, 9 of the 20 districts

[4] Congressional Split Reports are available here: https://www.flsenate.gov/usercontent/session/redistricting/map_and_stats_11x17v5b_sc14-1905.pdf (Visited July 22, 2018); Senate Split Reports are available here: https://www.flsenate.gov/usercontent/session/redistricting/map_and_stats_11x17v5b_sc14-1905.pdf (Visited July 22, 2018); State House Split Reports are available here: http://www.flsenate.gov/PublishedContent/Session/Redistricting/Plans/h000h9049/h000h9049_pop_countyshare.pdf (visited July 22, 2018). Only even numbered state senate districts are up for election in 2018.

up for election in 2018 are wholly contained in a single county-meaning ***all*** voters in these districts would receive either a Group 1 or a Group 2 ballot. For State House races, 90 of 120 districts do not cross county lines at all. Once again, this means that ***all*** voters in these districts would receive either a Group 1 or a Group 2 ballot. For the reasons shown, this Court should therefore resist Plaintiffs' attempt to get a remedy for its own sake and deny the Preliminary Injunction. This is an "emergency" of Plaintiffs' own making having waited until weeks before ballots are to be printed to remedy an alleged wrong that, according to them, has been ongoing for over 50 years.

III. The New Proposed Remedy Raises Anew Standing and Redressability Issues with the Lawsuit

Plaintiffs' latest proposed remedy deprives Plaintiffs of standing because it fails to address the "harm" they claim to suffer under Florida's Ballot Order Statute, Fla. Stat. § 101.151(3)(a) ("the Statute").

Plaintiffs "must satisfy three requirements to have standing under Article III of the Constitution" including "that the injury will be redressed by a favorable decision. (internal quotation marks omitted) *Kennedy v. Solano*, 2018 U.S. App. Lexis 14379, * 3 (11th Cir. 2018) (citing *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001)). "The Supreme Court has described redressability as 'a substantial likelihood that the relief requested will redress the injury claimed.'" *I. L. v. Alabama*, 739 F.3d 1273, 1279 (11th Cir. 2014) (citing *Duke Power Co. v. Carolina Envtl.*

Study Grp., Inc., 438 U.S. 59, 75 n.20 (1978)). "[I]t remains part of the 'irreducible constitutional minimum of standing,' and this case can only proceed if the plaintiffs have shown that the requested injunctive relief would likely resolve their [alleged injury]." *Id.* (citing *Lujan*, 504 U.S. at 560); *see Warth v. Seldin*, 422 U.S. 490, 504 (1975). *see also Allen*, 468 U.S. at 753 n.19 (explaining that redressability "examines the causal connection between the alleged injury and the judicial relief requested"). In this case, Plaintiffs need to demonstrate that ordering ballots based on their county-by-county method, organized by either total population or registered voters, would *likely* resolve their primacy bias "injury."

As discussed *supra*, Plaintiffs' new proposed remedy will not provide for proper rotation for any election, and, even worse, will subject some of the down-ballot elections to no rotation at all while simultaneously subjecting others to ballot rotation titled towards one party or the other, in many cases significantly.

Plaintiffs' own expert witnesses have stated that down ballot elections are affected more by primacy bias, while larger, more publicized elections are affected less. Krosnick Rep. at 7. Assuming *arguendo* that position bias exists at all, Plaintiffs' proposed remedy: 1) still retains significant position bias by 800,000 registered voters or nearly 2,000,000 people under the total population paradigm for one of the two parties in statewide elections; 2) does not address position bias at all for 5 of 27 Congressional Districts, 9 of 20 Senate Districts and 90 of 120 State

House Districts; 3) leaves 22 of 27 Congressional Districts, 11 of 20 Senate Districts, and 30 of 120 State House Districts with significant position bias for one party or the other. Mr. Sancho confirmed during his deposition that in some cases, the county-by-county rotation system will not ameliorate the perceived impact of ballot placement for congressional races. Sancho Dep. 40:5-44:1.

Accordingly, since Plaintiffs have not and cannot demonstrate that ordering ballots based on their county-by-county method—no matter how the counties are organized—would resolve their supposed "primacy bias" injury, Plaintiffs cannot demonstrate redressability and therefore do not have standing.

Plaintiffs' lack of redressability under the remedy they now propose also goes to the merits prong of their motion for preliminary injunction. If no adequate remedy can be implemented, then it is impossible to succeed on the merits of their case. Therefore, they fail to meet the first and most important preliminary injunction prong. *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). Accordingly, not only must this court reject Plaintiffs' most recent iteration of their proposed remedy, it must also deny their motion for preliminary injunction.

IV. Plaintiffs' New Proposed Remedy Asks This Court To Make Policy Decisions Outside The Realm of the Federal Judiciary.

Plaintiffs new proposed remedy, that this court order ballot re-ordering on a county basis, asks this Court to make policy decisions that it cannot properly make. "The Supreme Court in *Baker v. Carr* set forth two criteria that an article III court

should apply in assessing the justiciability of a claim. The first criterion concerns policy making; it requires the court to stay its hand when faced with 'the impossibility of deciding [the controversy] without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1082 (11th Cir. 1983) (citing *Baker v. Carr*, 369 U.S. at 217).

Applying the first *Baker v. Carr* criterion, Plaintiffs new proposed remedy will require this Court to engage in policy making beyond its role in society and beyond its focus as an Article III Court. For example, will this Court determine which political party is assigned to Value 1, and which is assigned to Value 2, and therefore receives the alleged "benefits"—assuming for the sake of argument that there is any—and who is "disadvantaged?" Will this Court determine which metric to use in "ranking" counties in determining if they are assigned a Value 1 or Value 2? How will this Court determine if counties should be ranked by total population, alphabetical order, by geographic location, voter registration, or some other method? These decisions are outside the realm of the federal judiciary and belong with the elected representatives of the people. Accordingly, this honorable Court should stay its hand in granting Plaintiffs' requested relief and deny Plaintiffs' motion for preliminary injunction.

V. Dr. Krosnick's Second Report Is Riddled With Errors and Should Be Given Appropriate Weight By This Court

The attached affidavits from Drs. Barber and Klick (Exhibits A and B) address Dr. Krosnick's new regression analysis as he attempts to address the criticism levied at him in the initial reply brief. Dr. Krosnick's assertions of position bias in Florida's elections are riddled with assumptions, presumptions and correlations that make his reports unreliable indicators for this Court to justify upending a statute that has been in effect since 1951 at the last minute weeks before the printing of general election ballots. It is also highly probative and very notable that their statistical expert on supposed position bias did not provide any evaluation or analysis with respect to the county-by-county method of rotation proposed in the reply brief.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully Submitted,

Dated: July 23, 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 3,200 words, exclusive of the required certificates, case style, and signature blocs.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 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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