No. 19-14552

In the United States Court of Appeals for the Eleventh Circuit

NANCY CAROLA JACOBSON, et al.,

Plaintiff-Appellees,

v.

LAUREL M. LEE,

Defendant-Appellant.

PLAINTIFF-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR STAY PENDING APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
NO. 4:18-CV-262-MW-CAS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, 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 certify that they are not publicly traded and have no parent corporations and that no publicly held corporation owns more than 10% of their stock.

CERTIFICATE OF INTERESTED PERSONS

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OPPOSITION TO MOTION FOR STAY PENDING APPEAL

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation omitted). It should only be granted in extraordinary circumstances, where the movant meets her high burden of showing that suspension of the judgment below is clearly justified. The primary factor the Court considers is whether the movant has demonstrated a likelihood of success on the merits of her appeal. Florida Secretary of State Laurel M. Lee (the "Secretary") fails to do so.

The strong bases for the District Court's decision enjoining Florida's Ballot Order Statute, Fla. Stat. § 101.151(3)(a), are laid out in its 74-page order, which carefully considers the extensive evidence establishing that candidates listed first on the ballot receive, on average, a 5-percentage-point advantage in Florida's elections. *See generally* ECF No. 202 ("Final Order"). This finding is consistent with precedent from state courts, federal district courts, courts of appeal, and even the U.S. Supreme Court, striking down ballot order statutes that arbitrarily favor a certain category of candidates over similarly-situated opponents. *See Mann v. Powell*, 398 U.S. 955 (1970), *summarily aff'g* 314 F. Supp. 677 (N.D. Ill. 1969); *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980); *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977); *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996); *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972); *Akins v. Sec'y of State*,

904 A.2d 702 (N.H. 2006); *Gould v. Grubb*, 536 P.2d 1337 (Cal. 1975); *Holtzman v. Power*, 313 N.Y.S.2d 904 (N.Y. Sup. Ct. 1970), *aff'd*, 311 N.Y.S.2d 824 (1970); *Kautenburger v. Jackson*, 333 P.2d 293 (Ariz. 1958)

The Secretary does not argue that any of the District Court's factual findings are clearly erroneous. Instead, her argument for a stay is based entirely on the remarkable claim that the Supreme Court's determination that *partisan gerrymandering* claims are non-justiciable in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), renders non-justiciable virtually any elections-related challenge with political ramifications. But *Rucho*'s reach is unambiguously limited to partisan gerrymandering cases, which for a host of reasons are not just *sui generis*, but highly distinguishable from this case. While federal courts have wrestled with the proper test for partisan gerrymandering claims for decades, they have ably and easily decided the type of First and Fourteenth Amendment challenges—including to ballot order statutes specifically—at issue here. For nearly 30 years, federal courts have applied the *Anderson-Burdick* balancing test, applied by the District Court below, to cases alleging inequalities in the voting process—including inequalities based on party affiliation—without jurisprudential incident. The Secretary's *Rucho* argument is a meritless diversion.

The balance of the equities, meanwhile, provides no basis for a stay. The Secretary's assertion that the State will suffer irreparable harm without one is both

factually and legally unsustainable. On the other hand, millions of interested parties—including Plaintiffs and all of the candidates and voters who have to compete and cast ballots on an uneven playing field as a result of the Ballot Order Statute—will suffer serious and irreparable injury if Florida is permitted to avoid the District Court's judgment while this appeal is pending. Because each of the relevant factors strongly weighs against a stay, the Secretary's motion should be denied.

BACKGROUND

I. Factual Background

Florida's Ballot Order Statute provides in relevant part:

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

Fla. Stat. § 101.151(3)(a).[1] Since 1998, the Statute's effect has been to list Republicans first in every partisan race in Florida based on the electoral successes of four Republican gubernatorial candidates.[2]

It is widely understood in political circles that "the candidate who is listed first on the ballot has an advantage in the election—an advantage which can be

[1] A separate provision, not at issue, provides that these two major party candidates are followed by minor party candidates and then unaffiliated candidates, organized in the order they qualified. Fla. Stat. § 101.151(3)(b).

[2] Jeb Bush (1998 and 2002), Charlie Crist (2006), Rick Scott (2010 and 2014), and Ron DeSantis (2018).

decisive." Final Order at 1. That advantage is the result of a well-studied and consistently demonstrated phenomenon known as "position bias," or "primacy effect," in which people manifest bias toward selecting the first in a set of visually-presented options, as with candidates on ballots. *See id*. While there may have been a time when there was some debate as to whether the phenomenon carries over into voting, the research is now definitive. No less than 84% of 1,086 unique tests across 70 years of social science prove primacy effect in elections. *See id*. at 32.

Florida's elections are no exception. The District Court found that Plaintiffs' experts credibly demonstrated that the magnitude of the primacy effect in Florida's elections has been highly significant: First-listed candidates across parties have gained an average electoral advantage of five percentage points due to ballot position, *id.* at 44-45, an advantage that is amplified in "down-ballot" races about which voters have less information, *id.* at 38-39.

The question of whether ballot order impacts elections was not seriously disputed below. The Secretary agreed, for instance, that a statute requiring Democratic candidates to be listed first in all races was "blatantly discriminatory," ECF No. 44 at 11 n.4, and similarly recognized the "favor[itism]" inherent in incumbent-first statutes, ECF No. 115 at 26 & n.5; ECF No. 138 at 7-8. Representatives from Democratic and Republican organizations alike testified that it is "common knowledge among everybody involved in politics that a person

listed first on the ballot may get a benefit from that in an election." 1 Trial Tr. at 128:25-129:3; *see also id.* at 73:13-18, 102:17-103:9. Indeed, Intervenors—a group of Republican organizations—"originally sought to intervene in this case on the basis that Republican candidates and organizations 'stand to be most directly harmed by a change' in Florida's ballot order scheme." Final Order at 1 n.1.

And while the defense proffered a single expert witness who quibbled with some elements of Plaintiffs' experts' analyses, even he "did not dispute the central findings of the significant body of academic literature concerning name order effects." *Id*. at 33. He acknowledged that ballot order impacts elections, though he was not sure as to the precise degree of its effect in Florida. 3 Trial Tr. at 618:7-11, 711:10-13. Time and again, his "speculative critiques" of Plaintiffs' experts' analyses were found to be baseless or entirely without meaningful impact. *See* Final Order at 33-45.

The impact of position bias in Florida's elections is particularly significant in light of the state's recent history of exceedingly close races. This includes the 2018 gubernatorial election, which would award the advantage of first ballot position to all Republican candidates simply because Governor DeSantis received 49.6% of the vote—0.4 points more than his Democratic opponent, who received 49.2%. ECF No. 198-1 at 259. The prior eight years of mandated preference for the Republican Party on the ballot also resulted from elections decided by incredibly

slim margins, with former Governor Scott winning by only 1% of the vote in 2014, and 1.2% in 2010. *See id.* at 219, 237.

These elections were not aberrations. In 2018 alone, at least 11 Florida elections were won by a Republican within 2.7 percentage points, including for governor, U.S. Senate (decided by 0.2 percentage points), and nine state-legislative races. *Id.* at 257-70. Two were decided by fewer than 100 votes. *Id.* at 263, 268.

II. Procedural Background

In May 2018, Plaintiffs—a collection of Democratic Party committees, non-profit organizations, and voters—filed this lawsuit. Plaintiffs alleged that this perpetual (and self-perpetuating) thumb on the scale in favor of every candidate who shares their political party with the last-elected governor is unconstitutional. They sought declaratory judgment and an order requiring Florida to implement a "nondiscriminatory means of determining the order of candidates' names on the ballot," ECF No. 1 at 3; *see also Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *summarily aff'd*, 398 U.S. 955 (1970).

After fulsome pre-trial litigation, during which Republican organizations intervened as defendants, the District Court held a bench trial in July 2019. It issued its final order on November 11, 2019, concluding that Florida's elections are influenced by a ballot order effect, that the Ballot Order Statute provides an arbitrary advantage to candidates based solely on political affiliation, and that it is

unconstitutional under *Anderson-Burdick*. *See generally* Final Order. It issued a permanent injunction prohibiting the enforcement of the Statute and remitted the matter to the Legislature to enact remedial legislation. *Id*. at 71-73.

The Secretary appealed and moved for a stay in the District Court. ECF Nos. 204, 207. The District Court denied that motion, ECF No. 220; however, based on the Secretary's stated concerns, and at her request, the District Court gave the Secretary time to wait and see whether the Legislature enacts remedial legislation by the end of the 2020 legislative session, and, if it does not, to provide notice on "how [the Secretary] intends to proceed." *Id.* at 7.

Ten days after the District Court denied the Secretary's motion for stay, the Secretary filed the instant motion in this Court.

LEGAL STANDARD

This Court considers four factors to ensure that a stay pending appeal is not granted "improvidently." *Chafin v. Chafin*, 742 F.3d 934, 937 n.7 (11th Cir. 2013) (per curiam). They are: (1) whether the applicant has made a strong showing that she is likely to succeed on the merits; (2) whether she will be irreparably injured absent a stay; (3) whether a stay would substantially injure other interested parties; and (4) where the public interest lies. *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors "are the most critical." *Id*. at 434. They are also exceptionally difficult to satisfy. "A finding that the

movant demonstrates a probable likelihood of success on the merits on appeal requires that [this Court] determine that the trial court below was clearly erroneous." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). The party requesting a stay bears the entire burden. *Nken*, 556 U.S. at 433-434.

ARGUMENT

I. The Secretary is unlikely to succeed on the merits.

The Secretary's argument on the question of her "likelihood of success on the merits" is cabined to a single issue: whether the determination that partisan gerrymandering claims are non-justiciable in *Rucho* extends to virtually any elections-related challenge with political ramifications. But *Rucho* did nothing more than answer a decades-long dispute on the justiciability of partisan gerrymandering claims. To credit the Secretary's argument would "transmogrify [*Rucho*] into a far more expansive ruling than it was, in contradiction of clear, explicit limits announced in that decision itself and its fundamental rationale." Final Order at 11. The Secretary also misunderstands and mischaracterizes Plaintiffs' claims and the District Court's ruling, which found the Ballot Order Statute unconstitutional because it "systematically awards a material advantage to candidates affiliated with the political party of Florida's last-elected governor solely on the basis of their party affiliation, and therefore systematically disadvantages other candidates on the basis of their party." *Id*. at 46. As the

Secretary herself conceded in the proceedings below, such a system is "blatantly discriminatory," ECF No. 44 at 11 n.4, and it cannot constitutionally be sustained.

A. The Secretary's reliance on *Gonzalez* is misplaced.

The Secretary begins by attempting to minimize her burden to demonstrate a likelihood of success on the merits, incorrectly relying on *Gonzalez v. Reno*, 2000 WL 381901, at *1 (11th Cir. Apr. 19, 2000) (unpub.), for the proposition that she "need only present a substantial case on the merits when a serious legal question is involved." Mot. at 10. But *Gonzalez* said no such thing. It simply emphasized that the inquiry for such extraordinary relief is holistic: while reiterating that "the first factor is generally the most important," it acknowledged that "*where the balance of the equities weighs heavily in favor of granting the [relief]*, the movant need only show a substantial case on the merits." 2000 WL 381901, at *1 (emphasis added) (quotation marks, citations, and alterations omitted). And the case itself presented the rare situation where the equities weighed heavily in favor of interim relief while the appeal was pending: the child at the center of that immigration case would have been irreparably harmed by his removal from the United States and the mooting of his asylum claim. *See id.* at *1-2.

Contrary to the Secretary's suggestion, *Gonzalez* did not collapse the well-established standard for a stay into the single consideration of whether a "serious legal question was involved," Mot. at 10. And, unlike in *Gonzalez*, the equities

here come nowhere close to heavily favoring a stay of the District Court's considered order. *See infra* II-IV. The Secretary cannot escape the fact that she has the burden to make a *"strong* showing that [s]he is likely to succeed on the merits" of her appeal. *Nken*, 556 U.S. at 434 (emphasis added). She cannot do so here.

B. *Rucho* is inapplicable outside the partisan gerrymandering context.

Regardless of the standard, the Secretary cannot demonstrate even a "substantial case on the merits" that could justify a stay. *Rucho* held that partisan gerrymandering claims present political questions beyond the reach of federal courts. *See* 139 S. Ct. at 2491. It cannot be read to support the Secretary's expansive suggestion that *all* elections-related claims with political ramifications are similarly—and suddenly—non-justiciable. This was hardly an oversight on the Supreme Court's part. The opinion explicitly states that non-justiciability is the exception, not the rule, and that partisan gerrymandering claims present the "rare circumstance" in which "the absence of a constitutional directive or legal standards" to guide the courts rendered the plaintiffs' claims non-justiciable. *Id*. at 2508. The *Rucho* Court explained why, after decades of trying to find a manageable standard, partisan-gerrymandering claims have proven uniquely difficult for federal courts to referee.

The "basic reason" claims of "excessive partisanship in districting" have proven "difficult to adjudicate" is because federal law tolerates some amount of

partisanship in districting. *Id*. at 2491, 2497. Thus, the "'central problem'" presented by partisan gerrymandering cases "is not determining whether a jurisdiction has engaged in partisan gerrymandering" but rather "'determining when political gerrymandering has gone too far.'" *Rucho*, 139 S. Ct. at 2497 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)).

The same cannot be said for ballot order laws. No party to this litigation contends that the design of the ballot is an inherently partisan activity. And for good reason. Such a contention would contradict federal law. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) ("Ballots serve primarily to elect candidates, not as forums for political expression."); 52 U.S.C. § 20981(a) ("Help America Vote Act") (noting "the goal of promoting methods of voting and administering elections which . . . [are] nondiscriminatory and afford each registered and eligible voter an equal opportunity to vote and to have that vote counted"). Outside the redistricting context, it is well-established that states are generally forbidden from discriminating based on political views. *See, e.g.*, *Crawford v. Marion Cty. Election Bd*., 553 U.S. 181, 203 (2008) ("If [partisan] considerations had provided the only justification for a photo identification requirement, we may also assume that [the voter-identification law] would suffer the same fate as the poll tax at issue in *Harper*."); *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of

the way they may vote is constitutionally impermissible."). Accordingly, claims of partisan discrimination in ballot order are "decided under basic equal protection principles," *Rucho*, 139 S. Ct. at 2496; *see also* Final Order at 9 ("This case asks this Court to apply nothing more than 'basic equal protection principles,' and is therefore justiciable under any fair reading of *Rucho.*").

Indeed, at no point in the District Court did the Secretary defend the Ballot Order Statute on the grounds of any state interest in favoring the governor's political party. On the contrary, she conceded below that a statute that expressly gave top ballot position to a specific political party would be "blatantly discriminatory." ECF No. 44 at 11 n.4. She defended the Ballot Order Statute by claiming that it served the State's interest in "upholding the policy choices of Florida's duly-elected representatives," "preventing voter confusion," "promoting uniformity to reduce errors in ballot layout and vote tabulation," and "promoting voter confidence in the integrity of the elections administration process." ECF No. 199 at 34; *see also* Final Order at 50-51. After careful examination, the Court found none of these justifications persuasive or legally adequate. Final Order at 50-60. And the Secretary does not argue now that she is likely to succeed on any argument that the Court was wrong in its conclusions in this regard. *See generally* Mot.

Nothing in *Rucho* so much as hints that the Supreme Court had the intention of insulating from judicial review any and all elections laws that favor one political party over the other. If the Secretary is correct, then there is nothing to stop Florida or any other state from announcing, for example, that only Republican voters could cast their ballots early, or that the votes of Republican voters will count 1.5 times more than Democratic voters. This would be an absurd and plainly unconstitutional result. *See, e.g.*, 1 Trial Tr. 42:16-43:15 (Defendant-Intervenors acknowledging that a statute putting a "thumbs up" on the ballot next to all candidates of the State's favored political party would present a justiciable question). In short, the District Court was not asked to "allocate political power" between political parties, as the Secretary now suggests, Mot. at 11, but rather to apply a straightforward equal protection analysis to Plaintiffs' claim of unlawful discrimination. *See* Final Order at 49 (finding Ballot Order Statute "discriminatory because it awards the primacy effect vote to candidates based solely and uniquely upon their political affiliation").

The Secretary's suggestion that the District Court erred in applying the *Anderson-Burdick* analysis because *Rucho* did not "involve a reflexive application" of that analysis, Mot. at 15, is nonsensical. Of course *Rucho* did not apply *Anderson-Burdick*: the case involved partisan gerrymandering, a claim that has been in search of a standard for decades. *See Rucho*, 139 S. Ct. at 2497-98. And in

direct contrast to the position the Secretary now takes, the *Rucho* Court was explicit that adjudicating questions involving "matters of degree" is perfectly permissible so long as there are "constitutional . . . provisions" or "common law" decisions "confining and guiding the exercise of judicial discretion." *Id*. at 2505.

Here, the First and Fourteenth Amendment and the well-worn standard established by *Anderson-Burdick* do just that. *See* Final Order at 28 ("This Court and other courts have applied the *Anderson*/*Burdick* interest-balancing framework to a wide variety of voting-related issues, including claims relating to ballots."). Since the test was developed nearly 30 years ago, courts have evaluated challenges to voting laws of all stripes under its flexible standard.[3] Courts have also adjudicated ballot order claims without difficulty for decades, *see supra* at 1-2, more recently using *Anderson-Burdick* to differentiate constitutional ballot order statutes from unconstitutional ones. *See, e.g., Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 716 (4th Cir. 2016); *Graves*, 946 F. Supp. at 1578; *Akins*, 904 A.2d at 706-07.

Finally, the Secretary's focus on *Rucho*'s discussion about the challenge of "predict[ing] how a particular districting map will perform in future elections," 139

[3] *See, e.g*., *Buckley v. Am. Constitutional Law Found., Inc*., 525 U.S. 182, 200 (1999); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019); *Obama for Am. v. Husted*, 697 F.3d 423, 432 (6th Cir. 2012); *Wexler v. Anderson*, 452 F.3d 1226, 1231-32 (11th Cir. 2006); *Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992).

S. Ct. at 2503, is wholly misplaced. The fact that past elections have been exceedingly close helps illustrate the magnitude of the burden the Statute imposes, but Plaintiffs were not required to show that the effect has been or will be outcome determinative. *See McLain*, 637 F.2d at 1162 (holding ballot order system unconstitutional where plaintiff received only 1.5% of the vote); *see also Graves*, 946 F. Supp. at 1579 ("[A]lthough the impact may be slight, citizens' rights under the First and Fourteenth Amendments are directly infringed."). Whether an election was or will be decided by two points or ten, Plaintiffs demonstrated that the Ballot Order Statute treats similarly situated parties differently, causing the disadvantaged party injury without adequate state justification. *See* Final Order at 46; *see also Crawford*, 553 U.S. at 203; *Lee*, 915 F.3d at 1321.

In short, the Secretary's attempt to shoehorn this case into the reasoning of the partisan gerrymandering holding in *Rucho* fails on every level.

C. Relevant Supreme Court precedent confirms that this case is justiciable.

In rejecting the Secretary's *Rucho* argument, the District Court properly relied upon long-standing Supreme Court precedent establishing that questions of "*what appears on the ballot and how* are justiciable." Final Order at 5-7. In *Mann v. Powell*, for example, the Supreme Court summarily affirmed a ruling that a ballot-ordering system giving one category of candidates a systemic advantage constituted "a purposeful and unlawful invasion of [the] plaintiffs' Fourteenth

Amendment right to fair and evenhanded treatment." 314 F. Supp. at 679, *summarily aff'd*, 398 U.S. 988. As the District Court noted, "[t]he summary affirmance of *Mann* would alone compel the conclusion that Plaintiffs' claims are justiciable." Final Order at 6.

But there is more. As Defendant-Intervenors themselves acknowledged in the proceedings below, 1 Trial Tr. at 43:8-15, 70:10-16, in *Cook v. Gralike* the Supreme Court struck down an initiative that would have provided a notation on the ballot next to the names of candidates who declined to support term limits, finding that the "adverse labels" would "handicap candidates at the most crucial stage in the election process—the instant before the vote is cast," and place the marked candidates at "a political disadvantage." 531 U.S. at 525 (quotation marks omitted).

Indeed, the Secretary conceded below that ballot order systems that discriminate in favor of "a specific political party or a particular class of candidate" are unconstitutional. ECF No. 138 at 7-8. Thus, even the Secretary recognizes that election laws that favor certain candidates or parties in the design of the ballot are not only justiciable, but in many cases unlawful. There is simply no way to reconcile those concessions with the Secretary's position that the federal courts cannot adjudicate this case.

Accordingly, the Secretary's likelihood of success on the merits for her *Rucho* argument on justiciability—the sole merits argument she raises in support of a stay—is nil.

II. The Secretary will not suffer irreparable harm absent a stay.

The Secretary has also failed to demonstrate that she will be irreparably harmed if a stay is not issued while she pursues her appeal. First, the Court can easily dispose of the Secretary's leading argument—that a state is *always* irreparably harmed when it cannot enforce its existing statutes. Mot. at 18. Neither case the Secretary cites in support stands for the proposition that enjoining the enforcement of a law is an irreparable harm in and of itself. *See* ECF No. 220 at 3. Rather, each opinion makes clear that the state suffered harm because the injunction at issue prevented it from satisfying a legitimate governmental interest. *See Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, J., in chambers) (injunction prevented state from satisfying legitimate interest in collecting DNA as tool for investigating unsolved crimes); *Veasey v. Perry*, 769 F.3d 890, 895-96 (5th Cir. 2014) (injunction issued only nine days before election prevented state from satisfying legitimate interest in facilitating election). In this case, the Secretary contends she will be irreparably harmed by the mere fact that she cannot enforce a statute that not only has been found unconstitutional but also fails to satisfy even rational basis review. *See* Final Order at 63. Simply put, the State does not have an

interest in enforcing unconstitutional laws. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

The Secretary's contention that she will suffer irreparable harm because the District Court "empowered" the State of Florida "to adopt any ballot order scheme that comports with the requirements of the Constitution and other applicable law," *see* Final Order at 68-69, is also insufficient. *See* ECF No. 220 at 4 (noting that the Final Order "merely bows to the practical reality that" the Legislature or the Secretary may implement a new ballot order scheme, "and takes steps to ensure [the District Court] can effectuate its authority should either occur or fail to occur"). That the District Court afforded time and opportunity for the State's policymaking branches to adopt a constitutional ballot ordering system before the next general election—scheduled to take place one year from its Final Order—illustrates its deference to, not "excessive entanglement" with, those branches.

As for the Secretary's arguments that a stay is necessary because of the timing of the legislative session and the anticipated clip of this appeal, it presumes—without any evidence—that the Legislature would rather wait to see how the appeal turns out than definitively act and dictate how candidates on the ballot are ordered in future elections. In other words, this "irreparable harm"

argument is based entirely on speculation about the possible activities of third parties.

Even more speculative is the Secretary's assertion that she will suffer irreparable harm absent a stay if the Legislature does not act and the Secretary adopts an interim measure that is then challenged under Florida's Administrative Procedure Act by some as-yet-unidentified party in state court. *See* ECF No. 220 at 4-5 ("[T]he speculative possibility of an administrative challenge to any measure Defendant may or may not adopt is hardly an 'irreparable harm.'"). But even if the Secretary chooses to adopt an interim ballot order measure (which she need not, *see infra*), and even if she were then subject to the hypothetical lawsuit she fears, it is unlikely that a Florida state court would, or could, decide the case in a way that contradicts the District Court's judgment. *Cf. Educ. Res. Inst., Inc. v. Rickard*, 924 So. 2d 40, 41 (Fla. Dist. Ct. App. 2006) ("Florida courts apply principles of federal claim preclusion to determine whether a Florida claim is res judicata in cases where a prior federal court judgment exists.").

Finally, the Secretary's argument that she could not adopt an interim gap-filler exercising her emergency rulemaking powers, Mot. at 21, is inconsistent with what her counsel advised the Court below in the hearing on her motion to stay. *See* ECF No. 219 at 8:15-19, 24:20-25:5 (noting the Secretary is "in the process of putting a bow" on a rule that would "dictate how the ballots are ordered"). But

even if it were true, it ignores that the District Court made clear that if neither the Legislature nor the Secretary adopts a remedy, the Court may do so. *See* Final Order at 70-71; ECF No. 219 at 22:11-23:17. In fact, during the District Court's stay hearing, the Secretary's counsel conceded all she required to alleviate any purported harm was "a little breathing space" to determine her preferred course of action in light of what the Legislature chooses to do. ECF No. 219 at 24:30-25:5. The District Court provided just that; as the Secretary requested, the District Court allowed her seven days after the end of the legislative session to inform the Court "how she intends to proceed," at which time "[t]he element of forecasting what third parties may do will . . . be, if not eliminated, then at least much reduced." ECF No. 220 at 6-8. The luxury of multiple procedural and substantive options to fulfill her duty to implement a constitutional ballot ordering system (including the option of leaving it to the Court to determine an interim ballot ordering rule)—and time in which to consider those options—does not amount to irreparable harm to the Secretary.

III. Plaintiffs will be substantially and irreparably injured if a stay issues.

As the District Court held, the Ballot Order Statute "imposes a burden on Plaintiffs' First and Fourteenth Amendment rights which, although numerically small, is significant in both the statistical sense and in qualitative terms," and they face "a real and immediate threat that, absent equitable relief from this Court, they

will be wronged again." Final Order at 63, 65-66. The Secretary does not dispute that a stay would jeopardize Plaintiffs' ability to achieve a ballot ordering system for the 2020 election that does not systemically prefer all candidates of one similarly situated political party over another. She also does not dispute that, because of the systemic disadvantage that the Ballot Order Statute confers on all Democratic candidates, the committees and organizations that support those candidates, as well as the candidates themselves, will have to divert additional resources to combat the advantage the Statute gives their opponents. Final Order at 14 n.9.

Instead, the Secretary simply posits that, since no one can know which elections will be close and precisely by how much, it is *possible* that, in the end, the Ballot Order Statute may not be sufficient to impact actual election outcomes in 2020. *See* Mot. at 22 (citing lack of "definitive prognostications" for 2020 elections). The Secretary's shrugging speculation that 2020 may be the anomalous year when Florida has no close elections only illustrates the "real and immediate" threat the Ballot Order Statute imposes and the irreparable harm Plaintiffs face if the judgment below is stayed.

IV. The public interest weighs heavily against granting the stay.

If the Secretary's motion for stay is granted, it is highly likely not only that another election will take place that abridges the right to vote of millions of

Floridians "by systematically awarding a statistically significant advantage to the candidates of the party in power," Final Order at 50, but also that the results of that election will be suspect—particularly in any races that are decided within a 5-point margin—because of the manner in which the Ballot Order Statute has historically skewed Florida's elections, *see id.*at 48-49; *see also id.* at 59 ("[V]oter confidence in the integrity of Florida's elections process would actually be undermined by Florida's present ballot order scheme."). Thus, the public interest strongly favors denying the motion for a stay, particularly given the Secretary's failure to carry her burden of demonstrating she is likely to succeed on the merits of her appeal.

CONCLUSION

This Court should deny the Secretary's motion for stay pending appeal because the Secretary has not come close to satisfying her burden for this extraordinary relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on December 16, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

DATED: December 16, 2019 **PERKINS COIE LLP**

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume and limitations and typeface requirements of Fed. R. App. P. 27(d) because this Motion is typed in Times New

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