No. 19-14552

In the United States Court of Appeals for the Eleventh Circuit

NANCY CAROLA JACOBSON, *et al.*,
Plaintiffs–Appellees,

v.

LAUREL M. LEE,
in her official capacity as Florida Secretary of State,
Defendant–Appellant

and

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,
Intervenors-Appellants.

INTERVENORS-APPELLANTS' BRIEF

On Appeal from the
United States District Court
For the Northern District of Florida
No. 4:18-cv-262-MW-CAS

Jason Torchinsky
Holtzman Vogel Josefiak
Torchinsky PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20106
P: (540) 341-8808
F: (540) 341-8809
E: JTorchinsky@hvjt.law
Counsel to Intervenors-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the National Republican Senatorial Committee and Republican Governors Association 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

Intervenors-Appellants certify that the Certificate of Interested Persons filed on December 13, 2019, is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1.

/s/ Jason B. Torchinsky
Jason Torchinsky
Attorney for *Intervenors-Appellants*

STATEMENT REGARDING ORAL ARGUMENT

Intervenors-Appellants National Republican Senatorial Committee and Republican Governors Association concur with this Court's action *sua sponte* expediting this appeal and setting it for oral argument. *See Jacobson v. Lee*, No. 19-14552 (11th Cir. Dec. 20, 2019) (Order Denying Stay); *Jacobson v. Lee*, No. 19-14552 (11th Cir. Dec. 27, 2019) (Oral Argument Schedule) (setting oral argument for February 12, 2020). Insofar as a request is necessary, Intervenors-Appellants respectfully request oral argument. This appeal arises from a challenge to a sixty-eight-year-old statute that governs how Florida orders partisan candidates on its general election ballot, and the District Court's erroneous finding of unconstitutionality. With the fast approaching 2020 general elections and the possibility of special elections, oral argument will assist the Court in addressing the underlying issues of this case efficiently and effectively.

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JURISDICTIONAL STATEMENT

Plaintiffs below, several entities associated or aligned with the Democratic Party and three individual Democrats, brought an action under 42 U.S.C. §§ 1983 and 1988, which sought declaratory and injunctive relief. Specifically, Plaintiffs aimed to overturn the method by which Florida has organized the order of candidates on the ballot in all partisan elections since 1951. The United States District Court for the Northern District of Florida (the "District Court") issued its decision permanently enjoining the method of organizing partisan candidates on general election ballots. This decision was in error. The District Court lacked jurisdiction under the political question doctrine, the Plaintiffs lacked standing, and the decision below was wrong on the merits. This Court has jurisdiction to review the District Court's flawed rulings under 28 U.S.C. § 1292 because the District Court permanently enjoined Florida's ballot order statute.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs had standing despite never showing a concrete and particularized harm?
2. Whether the United States Supreme Court's opinion in *Rucho v. Common Cause* dictates that this case presents a non-justiciable political question unfit for judicial review?
3. Whether the State of Florida's ballot order statute should be subject to "minimal scrutiny?"
4. Whether the District Court erred in finding that first listed candidates enjoy a 5% benefit when listed first on the ballot in Florida?
5. Whether the equitable defense of laches bared Plaintiffs' claims?

STATEMENT OF THE CASE

A. Proceedings Below

Approximately six months before the 2018 general elections, Individual Plaintiffs Nancy Jacobson, Terence Fleming, and Susan Botcher along with affiliated or aligned Democratic Party organizations Priorities USA, the Democratic National Committee ("DNC"), the Democratic Senatorial Campaign Committee ("DSCC"), the Democratic Congressional Campaign Committee ("DCCC"), the Democratic Governors Association ("DGA"), and the Democratic Legislative Campaign Committee ("DLCC") (together "Plaintiffs", "Democratic Parties", or "Democrats") brought suit against Florida Secretary of State Kenneth Detzner, in his official capacity, alleging that the statute organizing Florida's partisan elections was a violation of their rights under the First and Fourteenth Amendments. ECF No. 1. Specifically, Democratic Parties alleged that the current method of ordering partisan candidates in general elections discriminates against Democrats in favor of Republicans in contravention of the rights of Democrats.

The suit was filed in the of the Northern District of Florida-Gainesville Division alleging that the sixty-eight-year-old method of organizing partisan ballots in Florida's general elections violated the U.S. Constitution. *See* ECF No. 1; *see also* Fla. Stat. § 101.151(3)(a). Shortly thereafter the National Republican Senatorial Committee ("NRSC") and the Republican Governors Association

("RGA") (together "Republican Intervenors", "Republicans", or "Intervenors-Appellants") intervened. ECF No. 36.

Judge Mark Walker transferred venue, *sua sponte*, from the Gainesville Division to the Tallahassee division. ECF No. 19. Two days later, Judge Hinkle recused and ordered the clerk to assign the case to Judge Walker because the earlier filed case *League of Women Voters of Florida, Inc., et al. v. Kenneth W. Detzner*, No. 4:18cv251 may have been closely related.[1] ECF No. 20. From that point forward Judge Walker presided over this case.

Over one month after filing their Complaint, Plaintiffs moved for a preliminary injunction seeking to halt the use of the heretofore wholly uncontroversial Ballot Order Statute. ECF No. 29. After briefing and a hearing on the motions to dismiss and for preliminary injunction, ECF No. 69, the District Court denied the motions to dismiss, ECF No. 71, and denied the motion for preliminary injunction, ECF No. 70. The Court denied the "extraordinary and drastic remedy" of preliminary injunctive relief because Plaintiffs did not show that they would be irreparably harmed absent such relief because of their significant delay in seeking relief. *See* ECF No. 70; *see also United States v. Jefferson Cty.,* 720 F.2d 1511, 1519 (11th Cir. 1983). After this initial flurry of

[1] *League of Women Voters of Florida et al. v. Kenneth W. Detzner*, No. 4:18cv251 involves claims regarding on-campus voting at Florida universities and was never in-fact related to the order of candidates on the ballot.

activity, the case was held in abeyance pending the outcome of the 2018 elections, because a victory of the Democratic candidate for Governor would have likely mooted Democrats case. ECF No. 81.

After the Democrats were unsuccessful in electing their preferred candidate for Governor, the stay was lifted, and a scheduling order issued. *See* ECF No. 88. The individual occupying the position of Secretary of State also switched from Kenneth Detzner to Secretary of State Laurel M. Lee. ECF No. 94. After extensive discovery and further motions practice including cross motions for summary judgment, which were denied, the case proceeded to a bench trial. ECF No. 158. A bench trial was held in Tallahassee, Florida from July 15 to July 17, 2019. ECF Nos. 187, 188, 190, 191, 192, 193. Four months later, on November 11, 2019, the District Court entered an order declaring Florida's Ballot Order Statute unconstitutional and permanently enjoined its use. ECF No. 202.[2]

B. Statement of Facts

The U.S. Constitution grants to the states the power to determine the "Times, Places, and Manner . . . of holding elections . . . ." U.S. Const. art. I, § IV. Congress, however, retains the plenary power to "make or alter such Regulations"

[2] The District Court's Opinion is also available at *Jacobson v. Lee*, No. 4:18cv262, 2019 U.S. Dist. LEXIS 198380 (N.D. Fla. 2019). All citations to the record, including the District Court's Opinion, will be to the District Court record document number except for the trial transcript which will be to the transcript itself and abbreviated "Tr."

at its choosing. *Id.*; *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2495-96 (2019). The federal judiciary, for its part, is given no express authority in the constitution to make election regulations. Congress has not passed any laws respecting the order of which candidates should be placed on the ballot.

At the heart of this litigation is Florida Statute Section 101.151(3)(a) ("Ballot Order Statute" or "the Statute") which provides the order in which all partisan candidates are listed on general election ballots in Florida. In 1951, the Democratic controlled Florida legislature passed the Ballot Order Statute. *See* Ch. 26870, s. 5, Laws of Florida (1951); Tr. 768:12-14. The Statute, signed by Governor Fuller Warren, a Democrat, states as follows:

> 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). The Ballot Order Statute does nothing more, and nothing less, than set forth that the political party whose candidate received the most votes in the last gubernatorial election be listed first on partisan general election ballots. *Id*. By way of example, because Governor DeSantis received the most votes in the last gubernatorial election and is a Republican, the Republican candidates for U.S. House of Representatives will be listed first on the ballot in any election in which

there is a Republican running. This is a facially neutral system of designating ballot order that fundamentally recognizes that the people of Florida have the power to determine their Governor and, thereby, are also permitted to determine the order of partisan ballots for the next four years. Ten states employ this system, or a very similar system, for organizing the ballot.[3]

After hearing the evidence, the District Court issued its opinion and order wherein it found that the Ballot Order Statute as currently constructed violates Democrats' First and Fourteenth Amendment rights and, consequently, permanently enjoined its use. ECF No. 202. The District Court found that Defendants' arguments on justiciability and standing were unpersuasive, disregarding them as "preliminary miscellanea," "hogwash," and the like. ECF No.

[3] Texas, Pennsylvania, Arizona, Connecticut, Georgia, Missouri, Wisconsin, New York, Indiana, Michigan, and Puerto Rico all employ some version of a statute where the winner of a partisan election determines how the remainder of the ballot is organized for a period of time. *See* Tex. Elec. Code § 52.091(b); 25 Pa. Stat. § 2963; Ariz. Rev. Stat. § 16-502; Conn. Gen. Stat. §§ 9-249a, 9-453r; Ga. Code § 21-2-285(c); Mo. Rev. Stat. § 168.703; Wis. Stat. § 5.64(1)(es); N.Y. Elec. Law § 7-116; Ind. Code §3-11-14-3.5; Mich. Comp. Laws § 168.703; P.R. Laws. tit. 16 § 4152. Of those ten states and one territory, five of the "determination" seats are currently held by Democrats (CT, MI, NY, PA, and WI) and five by Republicans (AZ, GA, IN, MO, and TX). Interestingly, Counsel for Appellees and many of their Plaintiffs, have recently brought suit in Texas, Arizona and Georgia challenging those state's ballot order statutes. Unsurprisingly, they have not sought to overturn the similar systems found in Pennsylvania and New York, nor have the members of the Democratic Governors Association who hold critical positions in those states acted to propose legislation changing the system in those states. Perhaps it is because the Democrats are currently listed first in those states, there is no political appetite to risk that placement.

202 at 4-18. Further, the District Court found that "the major parties in Florida receive an average primacy effect vote of approximately five percent when listed first . . . on the ballot." ECF No. 202 at 45. The District Court reasoned that it "need not find a precise percentage attributable to every election . . . to determine whether Florida's ballot order scheme violates Plaintiffs' rights . . . ." ECF No. 202 at 46. As will be discussed at length, the District Court committed error at every turn.

C. Standard of Review

1. Jurisdictional Arguments and Affirmative Defenses.

"The subject matter jurisdiction of the district court is a question of law [the Court] review[s] *de novo*." *Abebe-Jira v. Negewo*, 72 F.3d 844, 846 (11th Cir. 1996). As such, this Court reviews *de novo* findings regarding standing and whether a case presents a non-justiciable political question. *See*, *e.g.*, *United States v. Rivera*, 613 F.3d 1046, 1049 (11th Cir. 2010); *Camp Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1268 (11th Cir. 2006); *Engineering Contrs. Ass'n v. Metro. Dade Cty*, 122 F.3d 895, 903 (11th Cir. 1997). Relatedly, the applicability of the affirmative defense of laches is reviewed by this Court *de novo*. *See Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1319 n.38 (11th Cir. 2008). However, the application of laches to the facts of the case is reviewed for abuse of discretion. *Id*.

2. Merits Arguments.

Under normal circumstances, "[t]he standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *Mitchell v. Hillsborough Cty*, 468 F.3d 1276, 1282 (11th Cir. 2006) (quoting *Kona Technology Corp. v. Southern Pacific Transp. Co.*, 225 F.3d 595, 601 (5th Cir. 2000)). This is slightly modified when the district court grants a permanent injunction, which is ultimately reviewed for an abuse of discretion. *Thomas v. Bryant,* 614 F.3d 1288, 1303 (11th Cir. 2010). However, in a First Amendment case the court "reviews the district court's determination of the 'constitutional facts' . . . *de novo*." *Camp Legal Def. Fund, Inc.*, 451 F.3d at 1268 (quoting *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1316 (11th Cir. 2000)); *see also ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1203 (11th Cir. 2009). As this case is a First Amendment case, the standard of review is *de novo* for all questions of law as well as for all "constitutional facts."

Constitutional facts are "crucial fact[s] that determine[] the core issue of whether [the action] violates the First Amendment." *Id*. at 1205. In other words, a "constitutional fact" is one "upon which the resolution of the constitutional question depends." *Id.* at 1204; *see also Falanga v. State Bar*, 150 F.3d 1333, 1335 (11th Cir. 1998). As such, the Court is "obliged to make a fresh examination of

crucial facts in order to resolve the First Amendment issue in the case." *ACLU of Fla., Inc.*, 557 F.3d at 1205 (internal quotations omitted); *see also Bose Corp. v. Consumers Union of the United States, Inc.,* 466 U.S. 485, 499 (1984); *Falanga*, 150 F.3d at 1335-36.

As the District Court failed to distinguish between the facts relevant to the First Amendment claim and those facts relevant to the Equal Protection claim, all non-historical factual findings by the District Court should be reviewed *de novo*. *Cf. Falanga*, 150 F.3d at 1335; *Camp Legal Def. Fund, Inc.*, 451 F.3d at 1268. To the extent that any challenged facts are subject to the heightened clear error standard, clear error exists when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Fla. Int'l Univ. Bd. of Trs. v. Fla. Nat'l Univ., Inc.,* 830 F.3d 1242, 1255 (11th Cir. 2016).

INTRODUCTION

Democratic Parties do not trust Florida's voters. That is, simply put, the essence of their claims. There is no evidence, *none*, that any Florida voter was unable to cast a ballot for their preferred candidate. Similarly, there is no evidence, *none*, that any specific election has ever been decided by the sixty-eight-year-old Ballot Order Statute the District Court took great pleasure in striking down. Assuming *everything* Democratic Parties and the District Court say is true, Florida's Ballot Order Statute favors the first listed candidate only because Florida

voters sometimes *choose* to vote for the first listed candidate. This freedom of choice granted to voters is intolerable to the Democratic Parties who brought this action because, for the last 20-years, Florida voters have not elected Democrats' preferred candidate for governor. So, instead of doing the myriad of things that political organizations and operatives can do to win elections, they file lawsuits. *See*, *e.g.*, *Democratic Executive Committee v. Detzner*, 347 F. Supp. 3d 1017 (N.D. Fla. 2018); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018); *Fla. Democratic Party v. Detzner*, 2016 U.S. Dist. LEXIS 143620 (N.D. Fla. 2016); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016).

Democrats' actions, while certainly motivated by partisanship and a distrust of Florida voters, are at the very least understandable. The District Court's opinion, however, is not. As much as Democratic Parties like to sue Florida's Secretary of State, the District Court relishes in affording them relief. *See, e.g., Democratic Executive Committee v. Detzner*, 347 F. Supp. 3d 1017 (Walker, C.J.) (granting preliminary injunction); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205 (Walker, C.J.) (granting preliminary injunction); *Fla. Democratic Party v. Detzner*, 2016 U.S. Dist. LEXIS 143620 (N.D. Fla. 2016) (Walker, C.J.) (granting preliminary injunction); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (Walker, C.J.) (granting temporary restraining order); *see also* ECF No. 202

at 4. Aside from its many legal and factual errors, the District Court's opinion has all the hallmarks of "result-oriented" jurisprudence, and "represents a noteworthy exercise in the very judicial activism that the Court deprecates . . . ." *Engle v. Isaac*, 456 U.S. 107, 144 (1982) (Stevens, J. dissenting); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 234 (1989) (Stevens, J. concurring) ("disassociating" himself from the "too convenient and result oriented" phrases that have become the hallmark of the Court's constitutional tests) (citations omitted).

For example, the District Court uses language such as "hogwash," "hodgepodge," "tilt at . . . windmills," "universally weak," and "poppycock" to make up for in vociferousness what its opinion lacks in substance. *See generally* ECF No. 202. In any event, it is clear that on any fair reading of the record and any fair assessment using any standard of review, the District Court erred in its rush to soothe Democrats' complaints with a judicial resolution to Democrats' political problem.

"Access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote *is not a constitutional concern*." *Sarvis v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1093 (2017) (emphasis added) (quoting *New Alliance Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994)). A plaintiff's "squabbles with [a] particular position on

the ballot appear almost inconsequential . . . [when] [t]he ballot ordering law does not deny anyone the ability to vote" for any candidate nor prevent a candidate from appearing on the ballot with their "preferred party affiliation." *Sarvis*, 826 F.3d at 717-18. Despite these simple facts, and prior findings of both a federal appeals court and a sister district court, this District Court found necessary to, once again, upend Florida's electoral systems. This Court should reverse the District Court and reestablish a respect for federalism, which the District Court's opinion ignores completely.

SUMMARY OF THE ARGUMENT

It is an axiomatic principle of the federal judiciary that judges do not issue advisory opinions. Therefore, a court must be assured of its jurisdiction over a case before it can render judgement. Intervenor-Appellants argue before this Court, as they did before the District Court, that the courts lack subject matter jurisdiction over the Democratic Parties' claims. Democrats simply failed to show any particularized injury of the kind that would provide the federal courts with jurisdiction.

> That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. But [the federal judiciary] is not responsible for vindicating generalized partisan preferences. [Its] constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.

Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018) (unanimous op.). Rather than acknowledging this obvious defect, the District Court chose to simply ignore the Supreme Court's latest standing jurisprudence from *Gill v. Whitford*. However, this Court maintains an obligation to provide a fresh *de novo* review of the issue to assure itself of its jurisdiction over these claims.

The individual named plaintiffs failed to show the particularized facts required to prove their standing. *See Gill*, 138 S. Ct. at 1929. In fact, two of the three individually named plaintiffs never appeared in court, never offered sworn deposition testimony, and never provided any details of a particularized injury beyond what was alleged in the complaint. This spectral record cannot assure anyone—except apparently the District Court—of their standing. And for the one named plaintiff who did provide testimony, she alleged that she was allowed to vote for the candidate of her choice, and allowed to campaign, volunteer, and advocate for her preferred candidate. Clearly, there was no particularized harm to her.

Similarly, the Democratic Party organizations failed to even allege the kind of particularized injury required under *Gill v. Whitford* to satisfy the elements of standing. *See Gill*, 138 S. Ct. at 1933. Their allegation that the Ballot Order Statute harms voters is not particularized to the organizations. In the same way, their assertion that the Ballot Order Statute makes it harder to elect Democrats did not

provide any evidence of harm to specific candidates or elections. Finally, their claim that the Ballot Order Statute requires them to expend additional resources to elect Democrats in Florida was submitted without substantiation. Mere allegations, without more, cannot satisfy the Democrat Party organizations' burden of proving particularized injury. *Gill*, 138 S. Ct. at 1931. Democrats' own experts could not even testify to particularized injury. What is most striking about their expert testimony is the lack of evidence showing *any* harm to individual voters, specific party organizations, or particular elections.

Alongside the federal courts' standing doctrine lies the political question doctrine which cautions that a question "entrusted to one of the political branches or [which] involves no judicially enforceable rights . . . presents a political question . . . outside the courts' competence . . . ." *Rucho*, 139 S. Ct. at 2494. As there can be no judicially manageable standard for determining what percentage ballot order effect—if any exists at all—is too much, nor any standard for remedying such a claim, this case presents a political question beyond the courts' competency to resolve. *See Rucho*, 139 S. Ct. at 2501. It seems that the District Court felt unbound by binding Supreme Court precedent, but this Court must make a *de novo* review of its application to the Democrats' claims.

Even beyond their jurisdictional infirmity, Democrats' claims must fail on the merits. The Constitution entrusts to the states, Florida included, the authority to

enact election regulations and facilitate the ordering of their own elections. Because the Supreme Court has recognized this inevitably will lead to some burden on First and Fourteenth Amendment rights, it has crafted a balancing test to determine the appropriate scrutiny for such restrictions. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Because the Ballot Order Statute imposes only "reasonable, non-discriminatory restrictions" on voting rights, minimal scrutiny applies and Florida's "important regulatory interests are generally sufficient to justify the restrictions." *Id.* Again, seemingly ignoring the clear instructions of Supreme Court precedent, the District Court elected to apply a form of intermediate scrutiny, constituting reversible error.

Democrats produced no evidence that the Ballot Order Statute resulted in an election victory for a Republican, and their expert testimony showed no evidence the ballot order effect ever determined a specific election, or that the effect would ever determine a future election. Perplexingly, however, the District Court injected its own determination of a five percent effect into its decision. This finding is not supported by the record and, as a "constitutional fact" pertaining to the appropriate constitutional level of scrutiny, is subject to *de novo* review. *ACLU of Fla., Inc.*, 557 F.3d at 1203. Because Democrats' cannot prove their rights were severely burdened, Florida's legitimate interests supporting the Ballot Order Statute—

preventing confusion, promoting uniform ordering on the ballot, and promoting predictability on the ballot—are sufficient.

Finally, Democrats' claims are barred by the equitable defense of laches. The challenged statute has been in effect for 68 years. Even under the most charitable of estimates, Democrats waited nearly twenty years after they learned of the alleged ballot order effect before bringing this challenge. This delay is unexcused, politically-motivated, and most certainly has prejudiced Defendants.

ARGUMENT

I. THE COURTS LACK SUBJECT MATTER JURISDICTION OVER DEMOCRATIC ORGANIZATIONS' CLAIMS.

"Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies.'" *Rucho*, 139 S. Ct. at 2493. Both standing and the political question doctrines "originate in Article III's 'case' or 'controversy' language . . . ." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006).

> All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Allen v. Wright, 468 U.S. 737, 750 (1984). Fundamental to the sound exercise of the judicial power is the axiomatic pronouncement that "[t]he judicial power created by Article III, § 1 of the Constitution is not *whatever* judges choose to

do . . . ." *Veith v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.) (internal quotations omitted and emphasis in original); *see also Zivotofsky v. Clinton*, 566 U.S. 189, 203 (2012) (Sotomayor, J. and Breyer, J. concurring). Rather, the judicial power is confined to deciding actual cases and controversies by rules and standards. *Rucho*, 139 S. Ct. at 2507. Questions of subject matter jurisdiction, including standing and justiciability, are reviewed *de novo*. *See Abebe-Jira*, 72 F.3d at 846.

A. Democratic Parties Lack Standing.

"To ensure that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society, a plaintiff may not invoke federal-court jurisdiction unless he can show a personal stake in the outcome of the controversy." *Gill*, 138 S. Ct. at 1931 (internal quotation marks and citation omitted). To prove standing, a plaintiff must demonstrate an injury in fact that is traceable to the actions of the defendant that is redressable by a favorable decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). It is plaintiff's "burden of establishing that he has standing to sue." *ACLU of Fla. v. Dixie Cty.,* 690 F.3d 1244, 1247 (11th Cir. 2012) (internal quotation marks and citations omitted). "Because standing is not merely a pleading requirement, each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of

evidence required at the successive stages of the litigation." *Id*. To that end, "[t]he facts necessary to establish standing . . . must not only be alleged at the pleading stage, but also proved at trial." *Gill*, 138 S. Ct. at 1931.

1. The Democratic Parties Suffered No Injury-In-Fact.

To protect the courts from becoming "forum[s] for generalized grievances" a plaintiff must prove an injury in fact, which is "a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized[.]" *Gill*, 138 S. Ct. at 1929 (internal quotations omitted). Democratic Parties' claims of partisan vote dilution necessarily invoke the right to vote. Because "a person's right to vote is individual and personal in nature," voters must prove that they suffered a "disadvantage to themselves as individuals [to] have standing to sue to remedy that disadvantage." *Id.* (internal quotations and citations omitted).

Pleading and proof that is "individual and personal in nature" is essential to the standing analysis because the federal judiciary "is not responsible for vindicating *generalized partisan preferences*" and should instead "vindicate the individual rights of the people appearing before it." *Rucho*, 139 S. Ct. at 2501 (quoting *Gill*, 138 S. Ct. at 1933) (emphasis added). At base, all Democratic Parties—in so far as they provided any record testimony at all—failed to allege anything other than the type of generalized grievance about the working of

government that is not countenanced in federal courts. *See Gill*, 138 S. Ct. at 1923. The District Court, for its part, simply ignored *Gill v. Whitford*, which represents the latest pronouncement from the Supreme Court on standing to raise partisan vote dilution claims. Fortunately, because standing goes to the Court's subject matter jurisdiction, the Circuit Court reviews it *de novo*. *Abebe-Jira*, 72 F.3d at 846.

a. The Individual Plaintiffs Lack Standing.

The individual named plaintiffs' "right to vote is individual and personal in nature." *Gill*, 138 S. Ct. at 1929 (internal quotation marks and citation omitted). Therefore, Ms. Jacobson, Mr. Fleming, and Ms. Bottcher were required to prove "facts showing disadvantage to themselves as individuals" in order to "have standing to sue to remedy that disadvantage." *Id*. (internal quotation marks and citation omitted).

If there is one place in the District Court's opinion that serves as an example of just how badly the District Court missed the mark, it is its decision on the standing of Mr. Fleming and Ms. Bottcher. Neither Mr. Fleming nor Ms. Bottcher appeared in Court. Neither Mr. Fleming nor Ms. Bottcher testified in a sworn deposition. In fact, there is nothing known about Mr. Fleming and Ms. Bottcher except what is in the Complaint. Despite having no evidence respecting these two

individuals, the District Court still found that they had standing to sue.[4] ECF No. 202 at 14 n.10. Evidently, the District Court appears to be of the opinion that plaintiffs need not prove their claims and instead may ride the coattails of others to a favorable decision of constitutional dimension. Surely the "case and controversy" requirement of Article III requires something more.

Of the three individually named Plaintiffs, the only one to offer testimony of any kind is Ms. Jacobson. Ms. Jacobson introduced no record evidence of any individualized harm to herself as a voter. For example, she freely cast her vote for Secretary Clinton in 2016 and Andrew Gillum in 2018. Ms. Jacobson, Tr. 57:7-9, 57:23-25, 58:1-2. She testified that the order of ballots had no impact on her ability to vote for any candidate of her choice. Tr. 58:3-5, 61:25-62:2. Her ability to campaign, volunteer, and advocate for her preferred candidates has never been hampered. *See, e.g.*, Tr. 58:17-19, 59:7-10, 59:14-16, 59:20-22. In fact, her complaint about the Ballot Order Statute revolved around the weight of her vote and a vague and unsubstantiated claim of her "voice" being "suppressed." *See* Tr. 54:19-22. However, this claim was directly rebutted by her own testimony that none of her activities as a voter or supporter of Democrats has been impacted by the Ballot Order Statute. *See, e.g.,* Tr. 58:17-19, 59:7-10, 59:14-16, 59:20-22.

[4] Typically statements like "no evidence" ring of hyperbolism when spoken by counsel. However, in this instance, to remove any doubt from the Court's mind, "no evidence" in this instance quite literally means *zero* evidence of harms specific to Mr. Fleming and Ms. Bottcher were ever introduced.

Similarly, there was no allegation and no evidence that her vote was not counted in a similar manner to the millions of other votes cast in Florida's general elections.

Ms. Jacobson testified that she was bringing this lawsuit in part because her proposed remedies would benefit other Democrats in other parts of the state. Tr. 62:12-22; *see also* Tr. 66:16-67:2. Faced with nearly identical testimony of Professor Whitford in *Gill*, the Supreme Court rejected this argument. *Gill*, 138 S. Ct. at 1924-25 (noting that Professor Whitford lacked standing due to the lack of direct harm to him as a voter). As a result, Ms. Jacobson echoes Professor Whitford and simply lacks standing under controlling precedent.

b. Various Democratic Party Affiliated Organizations.[5]

None of the Democratic Party organizations proved harm sufficient to invoke this Court's jurisdiction. Essentially, each of the Democratic organizations claimed that they expended additional resources as a result of the Ballot Order Statute, but not one presented any evidence that any particular decision to allocate or not allocate resources to any particular election was directed or controlled by their views on the impact of the Ballot Order Statute. Furthermore, partisan vote dilution, which forms the basis of all their alleged harms, is simply not cognizable in federal courts. *See Gill*, 138 S. Ct. at 1933 (the Court "is not responsible for vindicating generalized partisan preferences."); *Rucho*, 139 S. Ct. at 2504-2505.

[5] Certain Democratic Party witnesses appeared at trial, and others appeared via *de bene esse* deposition.

The harms the Democratic Party organizations attempted to articulate generally take three forms: (1) the Ballot Order Statute harms voters; (2) the Ballot Order Statute makes it harder to elect Democrats; and (3) the organizations spend extra resources to elect Democrats in Florida. As is the case with most of the Democrats' case, their alleged harms are illusory.

First, the Democratic Party organizations' allegation of harm to voters is not theirs to raise. *See, e.g.,* ECF 195-2 at 37:2 ("I think it has a harmful effect on voters."); ECF 195-4 at 17:21-18:2. The harm alleged in the voting rights context must be "individual and personal in nature." *Gill*, 138 S. Ct. at 1929. The Democratic Parties cannot allege a harm that they do not experience because they are not voters. Further, even if the organizations' mission to elect Democrats is impeded, the federal courts are "not responsible for vindicating generalized partisan preferences." *Gill*, 138 S. Ct. at 1933.

Second, Democratic Parties allege that the Ballot Order Statute harms Democratic candidates in close elections. *See, e.g.*, Tr. 81:19-22; ECF No. 195-5 at 26:7-11 (ECF No. 195-5) (the "primacy effect injures Democrats who aren't listed first."); ECF 195-1 at 13:14-22 ("Because our focus is on electing Democrats to the U.S. Senate . . . we have an interest in changing" the Ballot Order Statute.). As discussed *supra*, there is no evidence that any specific individual candidate was

harmed, or any election impacted, by the ballot order effect. *See, e.g.*, Tr. 192:10-12 (testifying that down ballot disadvantage does not occur in every single race).

The third harm they attempt to articulate is the expenditure of extra resources to elect Democrats in Florida. *See* ECF No. 195-2 at 32:2-15; *see also* ECF No. 195-2 at 32:12-15 ("[W]e would have to, then, invest more resources into that state, in order to compensate for - - for that difference, between the two major parties."). This is the contention that the District Court credits most when erroneously finding Democratic Parties have standing. ECF at 202 at 13-14; ECF No. 202 at 14 n.9. However, every Democratic Party organization relied on the naked assertion that additional resources needed to be spent due to the ballot order effect. *See, e.g.,* ECF No. 195-3 at 17:2-4 (asserting that they "need to spend additional resources in the target districts we have.); ECF No. 195-3 at 24:4-9; ECF 195-4 at 60:4-6 (discussing the need to devote more "efforts" to "overcome" the ballot order effect). None of the organizations provided evidence of any additional amount of money or effort that was spent in Florida. *See, e.g.,* Tr. 99:7-9; Tr. 98:12-14. In fact, while it is true that recent political history shows that more money is spent in each subsequent Congressional election when compared with the previous Congressional election, this is true without regard for the particular way

in which a state or locality chooses to order its ballot.[6] Therefore, Democratic Parties failed to substantiate their threadbare allegations with any evidence showing that the ballot order effect induced them to spend any additional funds. Such threadbare assertions of spent money and time are insufficient to prove standing. Accordingly, because [t]he facts necessary to establish standing . . . must not only be alleged at the pleading stage, but also proved at trial" *Gill*, 138 S. Ct. at 1931, and it was Plaintiffs' burden to prove such facts, *ACLU of Fla.,* 690 F.3d at 1247, Democrats lack organizational standing.

Even assuming evidence exists that any of these committees made specific spending decisions as a result of the Ballot Order Statute (of which there was no testimony or evidence), there is no constitutional right to electoral success. *Badham v. March Wong Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988) *summ. aff'd.* 488 U.S. 1024 (1989) (specifically referring to the First Amendment); *see also Gill*, 138 S. Ct. at 1933.

i. Democratic Parties' Experts Did Not Prove Injury-in-fact.

The highly speculative expert testimony presented by Democrats' experts in this case does nothing solve their standing quagmire. In fact, the most extraordinary part of the "evidence" presented by Democrats is lack of any

[6] Open Secrets, Cost of Election, https://www.opensecrets.org/overview/cost.php (last visited Jan. 6, 2020).

evidence of harms to any individual voter, any specific party organization, or any election. There was no testimony by any expert or a finding in any expert report that any ballot order effect, no matter the size, actually changed the results of any election in the State of Florida. *See*, *e.g.*, Tr. 384:18-25. Consequently, there was no evidence produced whatsoever that any election has been, or will be, determined by the alleged ballot order effect. *See*, *e.g.*, *id*. at 387:17-25.

For instance, Dr. Krosnick testified that his estimate for the claimed ballot order effect, even taken at face value, is not a number that is applicable to any individual election. *See* Tr. 387:17-25. Dr. Krosnick further testified that any assertion he made about the differences in previous electoral results was simply a "counter factual." *See* Tr. 383:10-384:6; *but cf*. *Rucho*, 139 S. Ct. at 2503 ("We are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs."). Dr. Herrnson's report is simply not applicable to the question of ballot order effects in Florida. *See* Tr. 698:8-13. Finally, Dr. Rodden never "analyzed or opined" if the order of the ballot was outcome determinative in any election. *See* Tr. 191:22-192:1; Tr. 670:2-16; Tr. 668:11-14; *see also* Tr. 694:21:24.

As will be addressed in greater depth *infra*, the Democrats' claimed ballot order effect is really a prognosticative theory which asks federal courts to accept judgments about how voters *might* vote for partisan reasons in the future and that

tells neither the courts nor the parties anything about the impact ballot order has on elections in Florida.

B. Democratic Parties' Claims Present Non-Justiciable Political Questions.

"The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. at 353. Before the federal judiciary decides "an important question of constitutional law . . . [it] must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.'" *Rucho*, 139 S. Ct. 2494. However, questions that are "entrusted to one of the political branches or involves no judicially enforceable rights . . . presents a political question . . . outside the courts' competence . . . ." *Id*. (citations and quotations omitted). Such cases are deemed non-justiciable and "beyond the courts' jurisdiction." *Id*. The courts, generally, refuse to hear cases under the political question doctrine when there exist no "judicially discoverable and manageable standards for resolving them." *Id*. (internal alterations omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). This Court is presented with such a case.

Foundationally, "judicial action must be governed by *standard*, by *rule*, and must be principled, rational, and based upon reasoned distinctions found in the constitution or laws." *Rucho*, 139 S. Ct. at 2507 (emphasis in original) (internal

quotation marks omitted) (citing *Vieth*, 541 U.S. at 278). Specifically, where claims of excessive partisanship are at issue, the standard for resolving such claims "must be grounded in a limited and precise rationale and be clear, manageable, and politically neutral." *Rucho*, 139 S. Ct. at 2498. Democrats' claims are similar to claims of partisan gerrymandering in that the question presented "is one of degree: How to provide a standard for deciding how much partisanship is too much." *Id*. at 2488 (internal quotations and alterations omitted) (citing *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006) (hereinafter, *LULAC*)). There is nothing in the record or in the District Court's opinion articulating a "limited and precise rationale" that is "clear, manageable, and politically neutral" for determining *how much* windfall vote, if any, is *too much*. *See Rucho*, 547 S. Ct. at 2507. This is certainly because making that sort of determination "move[s] beyond areas of judicial expertise[.]" *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J. concurring).

Initially, the District Court's decision presents, as determinative, a district court opinion from Illinois and a Supreme Court decision both of which are wholly distinguishable.[7] Procedurally, *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill.

[7] The District Court also has a penchant for citing itself to make its opinions seem more authoritative than they actually are. *See*, *e.g.*, ECF No. 202 at 4. It is said that repetition is the mother of learning. But under the Supreme Court's jurisprudence, Judge Walker's repetition of his own opinions is not the father of authority. *Cf. Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 430 n.10 (1996).

1969), *aff'd without opinion*, 398 U.S. 955 (1970), was an action for a preliminary injunction with a quickly approaching election deadline. On the merits, *Mann* dealt with a Statute that gave the Secretary of State absolute authority to determine, if there was a simultaneous candidate filing, who would be listed first on the ballot. Consequently, with no guidance from the legislature to bind him, the Secretary of State dictated any filing tie should be settled by the incumbent being given preferred position. *Mann*, 314 F. Supp. at 679. The Florida Ballot Order Statute is completely dissimilar from the facts of *Mann*, because ballot position is not awarded to all candidates based on their status as an incumbent. Furthermore, the District Court fails to address *Sarvis*—a case with much more in common to the case at bar—which states unequivocally that "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern."[8] 826 F.3d at 719 (internal alterations and quotations omitted).

The District Court also mistakenly holds up *Cook v. Gralike*, 531 U.S. 510 (2001) as authoritative to this case. *Cook* dealt with a Missouri law that created an extraconstitutional requirement that congressional candidates swear fealty to the imposition of a term limits. Candidates, depending on this show of fealty, were

[8] The District Court only cites *Sarvis* for the general proposition that *Anderson-Burdick* applies to ballot order disputes generally. *See* ECF No. 202 at 28. The District Court refers to the case as *Libertarian Party of Va.* as there appears to be a discrepancy in the reporters as to its official title.

subject to special annotation on their ballot line such as "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS." What *Gralike* has to do with the order on the ballot is difficult to comprehend. In so far as the District Court claims Defendants agreed this case was binding, *see Jacobson*, 2019 U.S. Dist. 198380 at 7, the Court is mistaken.[9]

Both of Democrats' claims are effectively claims of partisan vote dilution. In fact, in this context a claim of "undue burden" on the right to vote cannot possibly be anything but a partisan dilutionary claim as there was no testimony that any Florida voter has ever had their individual vote burdened. *See infra* at 34-35, 39-43 (discussing the District Court's erroneous finding that there exists a blanket 5% benefit to Republicans). *Rucho* is clear that claims of vote dilution exist only in the one-person, one-vote and racial gerrymandering contexts. *Rucho*, 139 S. Ct. at 2501. As the *Rucho* Court explained:

> More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, "this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to

[9] Republican Intervenors agreed that, under the District Court's hypothetical, placing a "thumbs-up" next to a candidate's name is unconstitutional, but is also a non-sequitur to the questions at issue in this case. *See* ECF No. 202 at 6. There is *no* claim of extraconstitutional language being placed on the ballot in this case, but merely a question regarding the order in which candidates are listed.

> vindicate the individual rights of the people appearing before it." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018); *see also Davis v. Bandemer*, 478 U.S. 109, 150 (1986) (opinion of O'Connor, J.) ("[T]he Court has not accepted the argument that an 'asserted entitlement to group representation' . . . can be traced to the one person, one vote principle." (quoting *Mobile v. Bolden*, 446 U.S. 55, 77 (1980)).

Rucho, 139 S. Ct. at 2501 (internal citations modified). Vote dilution claims, therefore, are applicable only where either representation by the same number of constituents is at issue—one person, one vote—or in the case of allegations of improper racial distinctions, which has always elicited the "strictest scrutiny." *Id.* at 2501-2502. Further, "racial gerrymandering claim[s] do not ask for a fair share of political power and influence" *Id*. This case does not involve any one person, one vote or racial discrimination claims.[10]

The District Court, rather stridently, rejects this interpretation of partisan vote dilution jurisprudence and similarly rejects the applicability of *Rucho* based on a flawed reading of the same.[11] *See* ECF No. 202 at 7-10. The District Court's

[10] The fact that each and every Plaintiff is an avowed Democratic party actor belies any contention that their claims are anything but partisan in nature. More simply, the question is this: if a Democrat won the governorship in 2018, would Democrats' claims now be moot? Undoubtably, the answer must be yes. In fact, Democrats *must* rely on their partisan affiliation for any hope of maintaining Article III standing because there is absolutely no evidence that any election was ever decided because of the order of the candidates on the ballot. *See infra* at 39-40.

[11] In the *Rucho* district court, a three-judge panel found that North Carolina's congressional maps were impermissible partisan gerrymanders under, *inter alia*, the First and Fourteenth Amendments to the constitution. 139 S. Ct. at 2491. The

irrecoverable foundational error is its clinging to the unfounded belief that the Supreme Court's *Rucho* decision "in no uncertain terms . . . was limited to claims of partisan gerrymandering . . . ." ECF No. 202 at 8. This is demonstrably false.

While *Rucho* arose in the context of partisan gerrymandering, the *Rucho* opinion applies broadly to claims of partisan vote dilution, not merely gerrymandering. *See*, *e.g.*, *Rucho*, 139 S. Ct. at 2492 (the Fourteenth Amendment claim arose through an allegation of "intentionally diluting the electoral strength of Democratic voters."). This makes good sense because the most commonly asserted partisan gerrymandering claim—like the primary claim in *Rucho*—is a claim of partisan vote dilution. *See*, *e.g.*, *Rucho*, 139 S. Ct. at 2492; *id.* at 2501 (comparing "vote dilution in the one-person, one-vote" context to that in the partisan gerrymandering context); *Rucho,* 139 S. Ct. at 2514 (Kagan, J. dissenting) ("Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others."); *Davis v. Bandemer,* 478 U.S. 109, 132 (1986) (discussing partisan gerrymandering claims as claims of partisan vote

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Rucho district court found there was evidence of "invidious intent" on behalf of the North Carolina Legislature to favor Republicans at the expense of Democrats by attempting to ensure the election of a congressional delegation that was 10 Republicans to 3 Democrats. *Id*. In finding against the State of North Carolina, the district court found that the "Plan violated the First Amendment by diminishing [plaintiffs'] ability to elect their candidate of choice because of their party affiliation and voting history and by burdening their associational rights." *Id*. at 2403. The Supreme Court reversed the district court and determined that plaintiffs' claims presented a non-justiciable political question. *Id*. at 2508.

dilution); *Vieth*, 541 U.S. at 291 (noting the requirement of some form of evidence of vote dilution to make a partisan gerrymandering claim); *c.f., Gill*, 138 S. Ct. at 1930 (discussing partisan gerrymandering claims as claims of vote dilution).

There is neither "standard" nor "rule" for determining what percentage ballot order effect—assuming one exists at all—is too much, nor are there any standards for remedying such claims.[12] The Supreme Court's latest decision in *Rucho v. Common Cause* dictates that claims, like the one offered by Democratic Parties here, be considered non-justiciable political questions. Once again, like all jurisdictional questions, the Court reviews this issue *de novo*. *See Abebe-Jira*, 72 F.3d at 846.

1. Partisan Fairness Is Not Judicially Manageable.

Plaintiffs have oft relied upon general principles of "partisan fairness" throughout this litigation. *See, e.g.*, Tr. at 26 ("At the close of plaintiffs' case,

[12] While the District Court punted on the issue of remedy for now, ECF No. 202 at 67-70, as detailed below, nothing the Plaintiffs ever proposed was workable. Strict randomization, Plaintiffs originally requested remedy, is a practical impossibility in Florida. *See, e.g.,* Tr. 441:2-4, 441:18-442:23 (explaining that precinct-by-precinct rotation is a practical and technical impossibility in Miami-Dade County). County-by-county randomization does not truly remedy any of the alleged harms except for, possibly, statewide candidates. *See, e.g.*, Tr. 62:7-25. The District Court has not ordered specific relief but is instead allowing the State to craft any "constitutional" relief. ECF No. 202 at 67-70. However, this Court has cautioned against an approach that awards relief that was never requested by the parties. *See Democratic Executive Comm. of Fla. v. Lee*, 915 F.3d 1312, 1349 (11th Cir. 2019) (Tjoflat, J. dissenting) (the district court "overstepped by granting relief . . . that Plaintiffs never requested.").

plaintiffs will have established that position bias unfairly impacts Florida's elections"); ECF No. 1 at 30 ("Courts have consistently recognized that [precinct rotation] is the fairest."). "[P]laintiffs inevitably ask the courts to make their own political judgment about how much representation particular parties deserve—based on the votes of their supporters . . . ." *Rucho*, 139 S. Ct. at 2499 (emphasis in original). "But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." *Id*. Fairness, simply put, is not a judicially manageable standard. *See id*. at 2499-2500 (quoting *Vieth*, 541 U.S. at 291).

"The initial difficulty in settling on a 'clear, manageable, and politically neutral' test for fairness is that it is not even clear what fairness looks like in this context." *Rucho*, 139 S. Ct. at 2500. Just as in the partisan gerrymandering context, it is impossible to know what partisan fairness looks like here, especially since there is no constitutional right to the alleged ballot order effect or "windfall vote." *See Sarvis*, 826 F.3d at 718-19.

a. Democrats Reliance on Social Science "Prognostications" Is Unavailing.

A key feature of Democrats' claims is their reliance on social science research and expert testimony to make predictions about voters' future partisan behavior using estimates and averages. These claims, even if taken as fact, are simply not sufficient to warrant judicial intervention. Dr. Krosnick testified that the

average ballot order effect—which there are several reasons to doubt the accuracy of—in favor of Republicans is 5.35% and in favor of Democrats is 4.57%.[13] Tr. 343:9-12; 301. This is a number that is trumpeted over and over as the keystone, lynchpin, or the north star of Democrats' claims such that, in their view, any election falling within that number was determined because of the alleged ballot order effect. *See, e.g.*, Tr. 76:20-24; ECF No. 195-2 at 55:17-56:3. The District Court also feels this 5% figure is authoritative. ECF No. 202 at 45.

However, the 5% figure merely represents Dr. Krosnick's "prognostication as to the outcome of future elections." *Cf. Rucho*, 139 S. Ct. at 2503 ("To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." (quoting *Bandemer*, 478 U.S. at 160 (opinion of O'Connor, J.)); *see also Rucho*, 139 S. Ct. at 2503 ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." (quoting *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.)). This coupled with the undisputed fact that there is no evidence that any specific election was

[13] As the District Court notes, the two numbers approximating ballot order effect taken together and then averaged is approximately 5%. *See* ECF No. at 33 n.17. While this figure is not exact, as admitted by the District Court, it will be used in this brief as a matter of convenience.

ever determined by the alleged ballot order effect makes Democrats expert testimony largely inconsequential on the issue of justiciability.

II. THE DEMOCRATS' CLAIMS FAIL ON THE MERITS.

A. The District Court Erred by Not Applying Minimal Scrutiny to Florida's Ballot Order Statute.

Florida is vested with the constitutional authority to enact elections regulations. *See* U.S. Const. art. I, § 4; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Burdick*, 504 U.S. at 433, 441 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Although the right to vote is a fundamental right, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick*, 504 U.S. at 433. The Supreme Court has, therefore, recognized that a state's election code will "inevitably affect[] – at least to some degree – the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. This "burden" on the right to vote is not a *per se* violation of the constitution. *Id*.

To address the fact that election regulations will inevitably burden First and Fourteenth Amendment rights, the Supreme Court has articulated a balancing test to determine the appropriate level of scrutiny. *See Burdick*, 504 U.S. at 434. Where the Court finds that a challenged law imposes only "reasonable, non-discriminatory restrictions" on voting rights, minimal scrutiny applies and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id*. (quoting

Anderson, 460 U.S. at 788). However, when a challenged law "severely" burdens voting rights, heightened scrutiny applies, and the law in question must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (internal citation omitted). "However, the class of laws facing this higher scrutiny is limited. Subjecting too many laws to strict scrutiny would unnecessarily 'tie the hands of States seeking to assure that elections are operated equitably and efficiently.'" *Sarvis*, 826 F.3d at 717 (quoting *Burdick*, 504 U.S. at 433). By contrast, when there are "reasonable, non-discriminatory restrictions" on voting rights, minimal scrutiny is applied. *Burdick*, 504 U.S. at 434.

As is demonstrated below, Democrats here failed to prove that Florida's Ballot Order Statute imposed any burden at all on voting rights—and certainly not any burden that could be classified as severe. Accordingly, minimal scrutiny (*i.e.* rational basis) applies. *See Sarvis* 826 F.3d. at 717 (calling positioning on a ballot a "most modest burden"); *George v. Hargett*, 879 F.3d 711, 726 (6th Cir. 2018) (rational basis review is appropriate even if the state treats similarly situated voters differently); *Estill v. Cool*, 320 Fed. Appx. 309, 310 (6th Cir. 2008) (reasonable non-discriminatory restrictions that impose only "incidental burden[s]" are subject to rational basis review). Crucially, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (citations and internal quotation marks omitted). The State's asserted interests in this case are

more than sufficient to overcome the minimal scrutiny required here. Despite this, the District Court applied a form of intermediate scrutiny to Democrats' claims. ECF No. 202 at 62. In so doing, the District Court committed reversible error.

The Court reviews *de novo* the proper application of the legal standard. *Abebe-Jira*, 72 F.3d at 846. More importantly, because this case is a First Amendment case, the court "reviews the district court's determination of the 'constitutional facts' . . . *de novo*." *Camp Legal Def. Fund, Inc.*, 451 F.3d at 1268. Constitutional facts are "crucial fact[s] that determine[] the core issue of whether the action violates the First Amendment." *ACLU of Fla., Inc.*, 557 F.3d at 1205. Once this Court "make[s] an independent examination of the whole record," as it is required to do, *see Bose Corp.*, 466 U.S. at 499, it is apparent that the District Court erred in its application of the facts in this case.

B. The Democrats Have Produced No Evidence of a Restriction on Voting.

Before addressing what Democrats failed to prove, we must first address what they did not even attempt to prove. After a three-day trial on the merits, there was no record evidence that any specific election was impacted by the Ballot Order Statute. Consequently, there is no evidence that any specific Republican has won—or Democrat has lost—an election due to the alleged ballot order effect. And there was no evidence that anyone's vote was not properly received and counted as a result of the so-called ballot order effect.

1. The Democrats' Expert Testimony Failed To Prove That The Ballot Order Statute Imposed A Severe Burden.

a. The Democrats' Estimates Prove Nothing About any Specific Election.

What is absolutely clear from the expert testimony in this case is, even if we take it as true, there is no evidence that: (1) any specific election was ever determined by the claimed ballot order effect; (2) any specific election will ever be determined in the future by the alleged ballot order effect; or (3) any individual voter had his or her votes "diluted" as a result of the ballot order. Without evidence of either burden or impact, Democrats' claims must necessarily fail.

Dr. Krosnick testified at length to the inapplicability of his estimated 5% ballot order effect to any specific Florida election. His testimony, in fact, directly contradicts the continued use of the 5% figure as something that has been determinative in any specific election. Dr. Krosnick specifically stated that he "is not making an assumption about what happened" in any individual election. Tr. 381:20-382:2. This was something echoed by Dr. Rodden. Tr. 191:22-192:1 (testifying that none of his analyses are applicable to the question of the ballot order being outcome determinative in any election). Dr. Krosnick testified that some elections would see a greater impact, and some would see a lesser impact and he couched his discussion of any applicability of his average to actual Florida elections as a "counter-factual." *See* Tr. 382:6-9; Tr. 383:10-384:2. Dr. Krosnick

made clear that this was largely an academic exercise that applied to no specific elections. *See, e.g.*, Tr. 384:18-25, 387:14-25. He even testified that "election outcomes . . . are the result of many factors" Tr. 386:10-12, 20. Dr. Barber's testimony reinforced the inapplicability of Dr. Krosnick's estimates to specific elections. *See* Tr. 668:11-17 ("Q. . . . What is the true effect of ballot order? A. Unknown. It's very difficult to know what the impact of ballot order is in Florida").

b. The Democrats' Experts' Methodology Is Not Generally Accepted In The Political Science Community.

The figures used by Dr. Krosnick and Dr. Rodden are extrapolated from states other than Florida. Dr. Rodden relied on North Carolina and Dr. Krosnick relied on both Ohio and California. There are numerous reasons to doubt the applicability of these exogenous studies. Dr. Barber testified that one "can't fairly extrapolate anything from [other states] because they're so different" from Florida. Tr. 640:19-22.

Even so, it appeared that Dr. Krosnick's knowledge was limited regarding the substantial distinctions between the election systems in his home state (the subject of a substantial portion of his research) and the current system in Florida. For example, Dr. Krosnick was, rather stunningly, unfamiliar with California's open primary system. Tr. 393:7-24. This is remarkable considering that he lives in California, teaches undergraduate political science at Stanford University in

California, and is a supposed expert on California's election systems. The 1996 adoption of California's "blanket" primary, where only the top two candidates of any party advance to the general elections, is a well-known and much-discussed political marker in California's electoral history. *See California Democratic Party v. Jones*, 530 U.S. 567 (2000). There can also be no doubt that the electoral system so dissimilar from Florida's would certainly confound any applicability of any California studies on ballot order effects.

c. The District Court Attempted To Transform the Democrats' Expert Testimony From Uncertainty About Any Impact On A Single Election, To A Certain 5% Boost In Every Election.

The District Court found, contrary to the evidence, that "the major parties in Florida receive an average primacy effect vote of approximately five percent when listed first in their office block on the ballot, and that this advantage accrues to a candidate because of the candidates' name order . . . ." ECF No. 202 at 45. While the 5% ballot order effect figure presented by Dr. Krosnick was heavily disputed at trial, what was not disputed was that the 5% figure is an *average* that is not applicable in any specific election. Tr. 372:6-19; *but see id*. Tr. 381:20-382:2 (explaining that his 5.35% estimate is an average); Tr. 383:4-384:6 (explaining that the elections that would change in his counter factual was simply applying his average figure to those elections); Tr. 384:18-385:4 (further explaining that his Table 19 does not determine what would have happened had there been ballot

rotation); Tr. 387:14-25 (testifying that specific candidates and elections were impacted by any ballot order effect). In fact, the most Dr. Krosnick could definitively say about ballot order effect in Florida is that there is a 99% chance that there is a non-zero ballot order effect—*i.e.* that there is *some* effect. Tr. 372:6-19. Never was there any indication that his degree of certainty of the size of the effect ever approached the 5% the District Court treated as accepted truth.

As noted *supra*, Dr. Krosnick utilized California and Ohio elections systems to extrapolate data to apply to Florida. First, these states are sufficiently different from Florida to make any extrapolation to Florida highly suspect. *See*, *e.g.,* Tr. 640:14-22, 641:3-6 (agreeing that one "can't fairly extrapolate anything from [the other states] because they are so different . . . ."); Tr. 640:24-641:6 (explaining that the "heterogeneity across these" different states makes applying any analysis to Florida uncertain); Tr. 630:21-638:7 (detailing the failure of Dr. Krosnick to take into account demographic differences between Ohio, California, and Florida which necessarily impacted his results). Second, Dr. Krosnick seemed to have less than a rudimentary understanding of his home state's voting systems. Tr. 393:7-24.

However, Dr. Krosnick's most unbelievable statistical maneuver was to use votes for the Ohio State House of Representatives as a predictor for every voter in every election in Florida. *See* Tr. 348:17-25; Tr. 723:17-20. This type of statistical analysis–using election results from one state to calculate hypothetical results in

another state–appears to be outside the mainstream of political science. Tr. 641:17-21. None of the other three experts presented at trial in this case performed any sort of analysis like this, and not a single published study the Court reviewed cited by any expert in this case appears to have used this method of analysis. In fact, Dr. Barber was aware of no "ballot primacy effect" literature that has ever even utilized such an analysis. *See* Tr. 641:17-21. The District Court should have had serious concerns with Dr. Krosnick's analysis in light of the Supreme Court's admonition to the federal courts in *Rucho* regarding reliance on predictive social science in analyzing and predicting election outcomes. *Rucho*, 139 S. Ct. at 2503. It did not. Furthermore, Dr. Krosnick never accounted for nor explained why his estimate of Florida's ballot order effect is five times higher than his own research showed in Ohio. *See* Tr. 646:15-18. One would have expected a political scientist to proffer at least some explanation for this extreme divergence in results between states when he asserted the states are so similar.

Given the expert testimony in this case, it is impossible to tell if there is a ballot order effect in Florida and, if there is, what the size of any such effect is. *See* Tr. 669:3-670:15. By expressly adopting Dr. Krosnick's conclusions that there is an average 5% ballot order effect in Florida and simultaneously dismissing Republican Intervenors' expert at every turn, the District Court, erred under any standard of review.

Dr. Rodden, for his part, testified regarding the effect of ballot order on down-ballot elections. *See* Tr. 141:18-23. However, Dr. Rodden failed to include numerous variables that would have had a material effect on his results. *See* Tr. 189:1-25. For example, he did not look at any elections where Democrats were listed first on the ballot. Tr. 190:2-8. Despite his methodological problems "there is very little evidence of a dramatic down-ballot disadvantage." Tr. 759:7-11. Dr. Rodden's review of North Carolina is also unpersuasive. First, North Carolina and Florida are very different states with different populations. *See* Tr. 190:9-191:7. Second, the two elections Dr. Rodden reviewed were subject to very different political environments. For instance, the political environment in 2016 was a good year for Republicans—who won the Presidency and retained control of the U.S. House and U.S. Senate. In 2018, Dr. Rodden's single comparison year, North Carolina had no statewide elections on the ballot and the political winds had shifted in favor of Democrats. Tr. 191:14-16. Both Dr. Barber and Dr. Krosnick testified that ballot order effects need to be studied over time, and a single election is not enough to make a predictive determination given the inability to remove the myriad of other impactful factors. *See* Tr. 337:6-12; Tr. 636:15-637:3. Therefore, it is perplexing, to say the least, that the District Court fully credited this research as applicable to Florida.

Dr. Herrnson's report and testimony are uninformative and irrelevant to the questions presented in this case. Dr. Herrnson's report discusses "an interesting study on voter error." Tr. 698:10-13. "[H]owever, it is [Dr. Barber's] view that that study does not speak to anything about ballot order effects." *Id*. Once again, the District Court credited the testimony of an expert whose analysis seems to be little more than—at best—tangentially related to the questions in this case.

Accordingly, Plaintiffs failed to prove that their rights were burdened at all, let alone severely burdened. To uphold the Ballot Order Statute, Florida must therefore only demonstrate that it is justified by a legitimate interest. *Burdick*, 504 U.S. at 434. Among the many interests the State has that justify the minimal, if any, burdens placed on Democrats are the uniformity of elections and the avoidance of voter confusion. *See, e.g.,* Tr. 773:19-775:5.

C. Florida's Interest In Uniformed Ballots In The General Election Constitutes A Sufficiently Important Interest Justifying The Statute.

Florida has an interest in preventing confusion, promoting uniform ordering on the ballot, and promoting predictability on the ballot. Furthermore, it is not necessary that Florida justify its asserted interests with empirical evidence. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Using a non-discriminatory metric to place one party at the top of the ballot consistently across all races on that ballot reduces confusion and promotes predictability because it

"allows voters to more quickly find their preferred choice for a given office, especially when party loyalties influence many voters' decisions." *Sarvis*, 826 F.3d at 719. Furthermore, if voters know that their party's candidate is listed second in the gubernatorial race, then maintaining that symmetry throughout the ballot will help voters know that their party's candidate will be second in every other election on the ballot. *Id.* This too prevents confusion and promotes predictability and efficiency. *Id*.

Additionally, Florida's ballot placement statute maintains the integrity of Florida's election since the tabulation software with the State allows the various counties to upload their election results seamlessly. *See* Tr. 774:5-13; Tr. 479:11-17; *see Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (stating that the prevention of frustration of the democratic process, as well as deception, are sufficiently important state interests). Adopting another method of ballot order will require, at minimum, reconfiguring and testing the software to ensure individual votes are properly transferred to the Secretary of State's Office for amalgamation and tabulation and, depending on the method chosen, will also require some counties to acquire new voting system hardware.

Accordingly, when weighed against Democrats' slight burdens, even if this Court were to view Democrats' burdens as moderate, Florida's interests justify the Ballot Order Statute. *Anderson*, 460 U.S. at 788.

III. THE EQUITABLE DEFENSE OF LACHES BARS DEMOCRATS' CLAIMS.

The "[d]octrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). "To state the defense of laches, a party must show: (1) A delay in asserting a right or claim; (2) That the delay was not excusable; and (3) That the delay caused the party 'undue' prejudice." *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (citing *Citibank N.A. v. Citibanc Group, Inc*., 724 F.2d 1540, 1546 (11th Cir. 1984)), *aff'd sub nom*. *Chandler v. Harris*, 529 U.S. 1084 (2000). The proper application of the equitable defense of laches is reviewed *de novo* but the factual findings are reviewed for abuse of discretion. *See Peter Letterese & Assocs.*, 533 F.3d at 1319 n.38.

A. Laches Applies to Claims for Prospective Relief.

The District Court erred when it found that laches is inapplicable to claims for prospective relief. ECF No. 202 at 22-25. Constitutional claims, even those involving ongoing constitutional harms, are subject to the equitable defense of laches. This is because "[a] constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise." *Block v. North Dakota*, 461 U.S. 273, 292 (1983) (citation omitted); *see also United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008) (unanimous op.) (same). Similarly, "the availability of equitable relief"—of which injunctive relief is but a

type—"depends on the same general principles as laches." *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 909 (D.C. Ariz. 2005).

Similar to this case, First Amendment, Fourteenth Amendment, and voting rights claims are all susceptible to the defense of laches. *See Maxwell v. Foster,* 1999 U.S. Dist. LEXIS 23447, *6-7 (W.D. La 1994) (three-judge court) (racial gerrymandering and VRA claims dismissed based on laches); *Perry v. Judd*, 471 Fed. Appx. 219, 224 (4th Cir. 2012) (finding an alleged First Amendment violation to Virginia's ballot requirements was barred by laches); *Ariz. Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d at 909 (Fourteenth Amendment). Injunctive relief is also susceptible to the laches defense. *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (a party requesting a preliminary injunction must show "reasonable diligence" which "is true in election law cases as elsewhere.") (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (case involving laches stating that "[a] suit in equity may fail though not barred by the act of limitations.") (internal quotation omitted)). Therefore, it is clear that prospective relief outside the intellectual property context is susceptible to the laches defense.

B. Democrats Inexcusably Delayed in Bringing Their Claims.

The District Court clearly abused its discretion when finding that Democratic Parties' claims only accrue in 2020. ECF No. 202 at 23. "[D]elay is to

be measured from the time at which the plaintiff knows or should know she has a provable claim . . .” *Karson Indus. v. Component Hardware Grp., Inc.*, 120 F.3d 1199, 1206 (11th Cir. 1997). It is plain from the record that Democratic Parties “knew”[14]—or at least assumed, and therefore should have “known”—that there is a ballot order effect to being listed first on the ballot. *See*, *e.g.,* Tr. 61:12-20 (explaining how she knew there was a ballot order effect for over a decade and did nothing); Tr. at 96:23-97-2 (the DLCC knew of the ballot order effect as early as 2005). Even the District Court found there had been a delay, when it denied Plaintiffs’ motion for preliminary injunction. *See* ECF No. 70 at 2 (“Plaintiffs are only first alleging constitutional violations in 2018—almost four years since the last gubernatorial race that shaped the ballot order. Multiple elections have been held in the intervening years. This length of time weighs against irreparable harm.”). Inexplicably, under the most charitable of estimates, they waited almost twenty years to bring their claims.[15] Under any measure, this delay is unexcused.

C. The Democrats’ Delay Prejudiced Defendants.

“Prejudice may be established by showing a disadvantage to the Defendants in asserting or establishing a claim, or some other harm caused by detrimental reliance upon the Plaintiffs’ conduct.” *Fouts*, 88 F. Supp. 2d at 1354; *see also*

[14] This assumes that one can know something that may not actually exist in the first place.

[15] Jeb Bush was elected as a Republican in 1999, and a Republican has held the office of Governor ever since.

White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990). Despite this, the District Court held that costs to the State of Florida are not cognizable in the laches context. ECF No. 202 at 24. The District Court is, once again, mistaken. For the last 68 years, the State of Florida's entire general election reporting and tabulation system is based upon the current ballot order statute. *See* Ms. Matthews, Trial Tr. at 768:12-14; *see generally, e.g*., Ms. Matthews, Trial Tr. at 774:3-23. Any change in law will inevitably result in increased costs in time and manpower to the state and the counties. These increased costs—due to the State's reliance on a 68-year old legislative enactment—are prejudicial as a matter of law. *See Fouts*, 88 F. Supp. 2d at 1354. Another prejudice is the ability to properly defend the lawsuit in the first instance. *Natron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002) ("[O]ne general category of prejudice that may flow from unreasonable delay is 'prejudice at trial due to loss of evidence or memory of witnesses.). It can hardly be doubted that Defendants were denied the full opportunity for a proper defense when the precipitating act—the enactment of the Ballot Order Statute—occurred so long ago that evidence surrounding it has been long since lost. *See, e.g.,* Tr. 768:17-770:20 (the District Court refusing to admit a document that falls within the authentication exception of Fed. R. Evid. 902(6) as well as the ancient document exception to the hearsay rule in Fed. R. Evid. 803(16)).

CONCLUSION

Therefore, for the aforementioned reasons, this Court should REVERSE the District Court's Opinion and REMAND with instructions to DISMISS.

Respectfully submitted:

/s/ Jason B. Torchinsky
Jason Torchinsky
Holtzman Vogel Josefiak
Torchinsky PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20106
P: (540) 341-8808
F: (540) 341-8809
E: JTorchinsky@hvjt.law
Counsel to Intervenors-Appellants

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of FRAP 32 and Eleventh Circuit Rule 32-1 because, excluding the parts of the document exempted by FRAP 32(f), this document contains 12,320 words.

/s/ Jason B. Torchinsky
Jason Torchinsky
Attorney for *Intervenors-Appellants*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served through the Court's CM/ECF system to all counsel of record on this 7th day of January 2020.

/s/ Jason B. Torchinsky
Jason Torchinsky
Attorney for *Intervenors-Appellants*