No. 19-14452

In the United States Court of Appeals for the Eleventh Circuit

NANCY C. JACOBSON, *ET AL.*,

Plaintiffs-Appellees,

v.

LAUREL M. LEE, *ET AL.*,

Defendants/Intervenors-Appellants.

BRIEF OF APPELLANT SECRETARY LAUREL M. LEE

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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ORAL ARGUMENT STATEMENT

The Court has scheduled oral argument for the week of February 10, 2020. To the extent an oral argument statement is still required, Appellant Laurel M. Lee, Secretary of the Florida Department of State (the "Secretary"), respectfully submits that oral argument will assist the Court in resolving the important jurisdictional and constitutional issues presented by this case, some that are questions of first impression and others that turn on the considerable record evidence presented during a three-day bench trial.

STATEMENT OF JURISDICTION

Plaintiffs allege that Florida's Ballot-Order Statute, violates the First and Fourteenth Amendments to the United States Constitution. The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983 to consider these constitutional claims. The district court resolved all claims after a three-day bench trial and entered final judgment on November 15, 2019. Doc.202. The Secretary filed a timely notice of appeal on November 15, 2019. Doc.204. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs have raised a justiciable claim for partisan vote dilution where the U.S. Supreme Court held in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), that partisan vote-dilution claims present nonjusticiable political questions?

2. Whether Plaintiffs have Article III standing where the alleged injury is a "small but statistically significant advantage" that might exist for first-listed candidates in some close elections; the injury is caused by valid votes cast for what Plaintiffs believe to be an irrational reason; and there is no "fair" method to reallocate the "small but statistically significant advantage" in any given election?

3. Whether constitutional estoppel bars Plaintiffs from challenging a ballot-order scheme from which they have benefited more often than their principal opposition in Florida and from which they continue to benefit elsewhere?

4. Whether the *Anderson-Burdick* test applies where there is no burden on anyone's ability to cast a ballot, register to vote, qualify for office, or receive a vote?

5. Whether the *Anderson-Burdick* test tilts in state's favor when its interests in preventing voter confusion, promoting uniformity, and promoting voter confidence in the integrity of the election-administration process are weighed against negligible burdens imposed by a "small but statistically significant advantage" that might exist for the first-listed candidate in some close elections?

INTRODUCTION

Whether motivated by prudence or prejudice, shared race or shared gender, national trends or local concerns, ambivalence or intransigence, fealty to a political party, or a rush of emotions, people vote for all sorts of reasons or no reason at all.

According to the Plaintiffs, when people vote for the candidate listed first on the ballot solely based on the that candidate's position, their "donkey" or "windfall" votes have the effect of diluting "meaningfully and thoughtfully cast vote[s] for Democratic Party candidates." Doc.1 at ¶¶ 1 n.1, 1, 13, 15, 17, 52. So Plaintiffs ask the federal courts to allocate some share of the windfall vote to their preferred party and its candidates. In so doing they necessarily ask the federal courts to cast aspersions on valid votes—to demean a voter's choice for being uninformed, disinterested, or irrational—and then parse out partisan advantage.

This the courts cannot do. Partisan vote dilution claims present nonjusticiable political questions. Because Plaintiffs cannot establish anything other than a "small but statistically significant advantage" in some elections, some of the time, they cannot satisfy the three requisites for Article III standing. Because Plaintiffs have benefited and continue to benefit from the pole position on the ballot in Florida and elsewhere, constitutional estoppel bars their claims. And even if they could state a claim under the *Anderson-Burdick* test—which Plaintiffs wrongly see as a constitutional catchall—the State's compelling interests in uniform and efficient

election administration outweigh any "small but statistically significant" burdens that might be imposed in some elections some of the times.

STATEMENT OF THE CASE AND FACTS

I. FLORIDA'S BALLOT-ORDER STATUTE

Enacted in 1951 by a Democrat-led Florida Legislature with only three Republican members, section 101.151(3)(a) of the Florida Statutes prescribes the order in which candidates are listed on the ballot in partisan elections. *See also* Ch. 26870, s. 5, Laws of Fla. (1951) (codified at § 101.151(4) Fla. Stat. (1952)). Florida's Ballot-Order Statute states that "[t]he 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 [partisan] office on the general election ballot." § 101.151(3)(a), Fla. Stat. On its face, the statute favors neither a political party nor any incumbent; it simply places all candidates of the last successful gubernatorial candidate's party first.

Florida's Ballot Order Statute is by no means unique. It is nearly identical to ballot order statutes in six other states,[1] and it is very similar to the ballot order

[1] As in Florida, the ballot-order statutes of Connecticut, Georgia, Nebraska, New York, Pennsylvania, and Texas provide that the first spot on the ballot goes to candidates of the party whose candidate received the highest number of votes in the last gubernatorial election. *See* Def. Exh.14 (Conn. Gen. Stat. § 9-249a); Def. Exh.15 (O.G.C.A. § 21-2-285(c)); Def. Exh.16 (R.R.S. Neb. § 32-815(1)); and Def. Exh.17 (N.Y. C.L.S. Elec. § 7-116); Def. Exh.18 (25 P.S. § 2963(f)); and Def. Exh.19 (Tex. Elec. Code § 52.091(b)).

statutes in four others.[2] Of these ten states, five list Democrats first because a Democrat currently holds the relevant office, and five list Republicans first because a Republican currently holds the pertinent office. *See* Def. Exh. 4.

Over nearly seventy years, Florida's Ballot-Order Statute has resulted in candidates for the Democratic and Republican Parties being listed first in twenty and fourteen statewide elections respectively. Def. Exh.3. Republicans are currently listed first.

II. PLAINTIFFS SUE TO ENJOIN FLORIDA'S BALLOT-ORDER STATUTE.

In the summer of 2018, weeks before the first general election ballots were to be prepared and mailed to overseas voters, a handful of Democratic voters, a Democratic Super-PAC, and several national Democratic organizations (the "Plaintiffs") challenged the constitutionality of Florida's Ballot-Order Statute. They alleged that first-listed candidates receive an advantage—a name order bump—such that the "weight and impact" of Democratic votes are diluted. *E.g.*, Doc.1 at ¶¶ 3, 5, 13-15, 17, 32, 52. This vote dilution, Plaintiffs argued, places an undue burden on

[2] In Indiana and Michigan, the candidate whose party received the highest number of votes for Secretary of State is listed first. *See* Def. Exh.20 (Burns Ind. Code Ann. § 3-11-2-6)(a)); and Def. Exh.21 (M.C.L.S. § 168.703). In Wisconsin, ballot order is determined based on the number of votes received by each party's candidate for President or Governor in the last general election. *See* Def. Exh.22 (Wis. Stat. § 5.64(1)(b)). In Wyoming, ballot order is determined based on the number of votes received by each party in the last congressional election. *See* Def. Exh.23 (Wyo. Stat. § 22-6-121(a)).

their right to vote in contravention of the First and Fourteenth Amendments to the U.S. Constitution, and separately violates the Fourteenth Amendment's Equal Protection Clause. Doc.1 at ¶¶ 50-52, 56-59. Republican organizations intervened.

III. DISTRICT COURT DENIES PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

The district court denied a preliminary injunction motion in the summer of 2018 after holding an evidentiary hearing where alternatives offered by Plaintiffs were shown to be unworkable. *See* Doc.70 at 1-2; *see also* Doc.44-1, 44-2, 60, 68. The district court also denied motions to dismiss. Doc.71. The district court later denied cross-motions for summary judgment and held a three-day bench trial "regarding 'position bias' and its purported effects on Florida elections as well as the viability of alternatives to the current [ballot ordering] scheme." Doc.158 at 1.

IV. THE BENCH TRIAL.

A. The evidence regarding the existence and magnitude of the primacy effect.

The existence of a "position bias," also known as the "windfall effect," "name-order effect," "primacy effect," and "donkey vote," Plaintiffs presented the expert testimony of Jon A. Krosnick, a professor of communications, political science, and psychology at Stanford University. Doc.191 at 279:17-18; 283:21-24. Krosnick reviewed the political science literature and performed a "meta-analysis" by which he concluded that 84 percent of the reported tests of name-order effect were in the direction of primacy. *Id.* at 302:20-310:2; Pl. Exh.1 at 15-39. He testified that one

of the several regression analyses suggested that Florida candidates have gained an average advantage of 5 percent because of being listed first on the ballot.[3] *Id.* at 299:14-16. This "rough estimate" (*id.* at 300:5-7) is just one of many estimates of name-order effect in Florida that Krosnick presented over the course of the litigation. It was also the highest. *See* Pl. Exh.1 at 3 n.1; Doc.191 at 369.

Plaintiffs also presented the expert testimony of Jonathan Rodden, a professor of political science at Stanford University, regarding the effect on races for less visible offices. He conceded that "in any given election there are strong and weak candidates," "scandals and newspaper coverage," "external events for which candidates are rewarded," and, so, "by no means [s]hould we expect the down-ballot [primacy] disadvantage to be present in every single race." Doc.188 at 192:2-24.

Finally, Plaintiffs presented the expert testimony of Paul Herrnson, a political science professor at the University of Connecticut. Herrnson testified about "proximity error," which results when voters unintentionally select a candidate before or after the candidate they hoped to select. Doc.191 at 412:13-19. He opined

[3] Krosnick testified that because the statistical "p-value" associated with his 5 percent estimate is 0.00, there is a 99 percent chance that the effect is "real." Doc.191 at 357:20-23. He further explained that "real" does not mean that there is a 99 percent chance that the actual number is 5 percent. *Id.* at 372:21-373:11. It simply means there is a 99 percent chance that his estimate is not wholly explained by chance or, in other words, there is a 99 percent chance that his 5 percent estimate is not actually zero. *Id.* Thus, per Krosnick, the average name-order effect in Florida falls somewhere between 0 percent and 5 percent.

that proximity error primarily advantages the first-listed candidate and disadvantages the second-listed candidate (*id.* at 413:14-17), but he did not attempt to quantify the effect of proximity error. *Id.* at 434:15-19; Intervenor Exh.2 at 21. Nor did Hernson provide any conclusion as to whether all the different types of mistakes voters might make disproportionately favor the candidate listed first on the ballot. Pl. Exh.14 at 2.

B. The perspective of Florida's election officials regarding the operation and effect of Florida's Ballot-Order Statute.

Maria Matthews, Director of the Florida Division of Elections, testified that the Statute does *not* impose any requirements on a person's ability to register to vote; it does *not* impose any requirements on a person's preferred method of voting, whether absentee, early, or in-person election day; it does *not* dictate a language in which a person must vote; it does *not* require that Republicans or Democrats always be listed first; and it does *not* require that incumbents always be listed first. Tr. 767:15-25; Tr. 768:1-8. Plaintiff Jacobson agreed. Tr. 56:24-59:22; 64:1-65:15.

Director Matthews further explained that the Ballot-Order Statute serves the State's interests. These include upholding the policy choices of Florida's duly-elected representatives; preventing voter confusion, allowing voters to more quickly find their preferred candidate or party for a given office; assisting with the election administration process by promoting uniformity and helping limit errors in ballot layout and tabulation across Florida's sixty-seven counties, over 6,000 precincts,

spread across two time zones; and, ultimately, promoting voter confidence in the integrity of the elections administration process, because people know that their ballot is being arranged consistent with the choices their elected officials made, in a manner that makes it easy to find candidates of their choice on the ballot, in a manner that is uniform throughout the State, and in a manner that allows for accurate vote tabulation consistent with timelines set by the Florida Constitution and Florida Statutes. Tr. 773:4-25; Tr. 774:1-25; Tr. 775:1-4; Tr. 780:5-25; Pl. Exh.73 at 2 (interrogatory response); Joint Exh.1; ECF 198 at 293 (FSASE listing of precincts).

As a Florida voter, Director Matthews also testified about her personal voting experience. Director Matthews explained that she pre-marks a sample ballot after researching candidates and issues. Tr. 784:3-4. This is important to her because Florida ballots are long and include federal and state races, ballot initiatives, and local races. Tr. 784:5. The pre-marked sample ballot allows her to "just look at [her] sample ballot and then put [her] choices on the [actual] ballot." Tr. 784:6-8. This, in turn, allows Director Matthews "to get in there and get out." Tr. 784:11-12.

C. The perspective of Florida's election officials regarding the proposed alternatives to the Ballot-Order Statute

Director Matthews, Supervisor of Elections Christina White, Supervisor of Elections Mark Earley, and Supervisor of Elections Paul Lux testified about the possible alternatives to Florida's scheme. Deposition designations from election management system manufacturers, ES&S and Dominion, were also considered.

Director Matthews and the Supervisors all agreed that rotating the names of Democratic and Republican candidates from precinct-to-precinct within a county is unworkable. Tr. 441:6-16; Tr. 497:1-498:15; Tr. 776:12-779:18; Tr. 572:7-13; Tr. 256:15-257:4. Precinct-by-precinct rotation presents technical challenges concerning testing and certification of county-level systems, and the State's XML Schema which is used to tabulate election results. Tr. 497:1-498:15; Tr. 778:12-779:8. The corporate representative for Dominion, one of the two election management system vendors in Florida, testified that he does not know whether Dominion's machines can rotate only Democratic and Republican candidates, and it could take up to a year for Dominion to take the steps necessary for such rotation. Doc.196 at 101-104. The Supervisors also testified that such rotation would increase the time needed to prepare and proofread ballots; cause voter confusion; increase error rates for hand recounts. Moreover, because precincts vary significantly in the number of registered voters, equitably dividing precincts between the two major parties is difficult. Tr. 441:2-18; Tr. 446: 5-20; Tr. 496:22-497:15; Tr. 506:8-19; Tr. 783:20-785:4. The problems are particularly acute for Florida's most populous county, Miami-Dade, where the size and complexity of the elections administration process makes precinct-by-precinct rotation simply impossible. Tr. 441:18-442:19.[4]

[4] Rotation ballot-style-by-ballot-style suffers from many of the same problems. Tr. 457:22-458:6; Tr. 507:4-508:6; Tr. 788: 1-15.

Rotating the names of Democratic and Republican candidates from county-to-county (with the counties placed into two groups by population and apportioned among the two major parties) presents different challenges. While the individual counties would not need to re-certify and test their election management systems because a ballot is "static" within an individual county, Tr. 570:11-23, the State would need to ensure that its statewide XML Schema can accommodate such rotation. Tr. 783:3-15. There are some known unknowns. Technological changes are seldom as easy to make as they seem. The XML Schema, for example, was expected to take a few months to create and implement; the task took years. Tr. 508:12-25; Tr. 779:1-18. Mandating that the State change, test, and then use the XML Schema with county-by-county rotation for the first time during the 2020 Presidential Election would be irresponsible for security reasons among others. *See generally* Tr. 782:13-17.

County-by-county rotation would also make no difference for districts contained wholly within a county, i.e., districts that do not cross county lines. Florida has four Congressional districts wholly contained within one county, eighty-five State House districts wholly contained within one county, and fifteen State Senate districts wholly contained within one county. Tr. 785:17-25; Tr. 786:1-5. There would thus be *no* rotation from the perspective of voters *or* candidates in *any*

of these one hundred and four districts, Tr. 786:6-11, many (or perhaps all) of which Rodden believes suffer the greatest harm from the name order effect.

County-by-county rotation presents a problem for split districts as well, i.e., districts that cross county lines. As grouped Plaintiffs, an unequal number of Florida voters would be in Group 1 or 2; the split is 53 percent to 47 percent for Florida House districts and 63 percent to 37 percent for Florida Senate districts. Demonstrative Comp. Exh.1. Consider House District Seven, for example, which is spread across ten counties in North Florida. Tr. 506:3-15. Some of these counties would be grouped such that Democrats are listed first and some such that Republicans are listed first. Tr. 506:10-507:1. But one party's candidate would initially appear first on *more* ballots. *Id.*

Plaintiffs' proposed grouping method for county-by-county rotation reveals another problem. Of the fourteen House districts races where the most recent election results were within 5 percent—Krosnick's average name order effect—only two would see any rotation whatsoever. Joint Exh.1; Demonstrative Comp. Exh.1.; Def. Exh.12; Tr. 116:10-19. None of the four Senate districts within five percent would see any rotation. Joint Exh.1; Demonstrative Comp. Exh.1; Def. Exh.13; Tr. 118:10-16. In short, the grouping would provide no remedy for the competitive down-ballot races where the name order effect is alleged to be most impactful.

V. THE DISTRICT COURT'S ENTERS JUDGMENT IN FAVOR OF PLAINTIFFS AND ENJOINS THE BALLOT-ORDER STATUTE.

In its seventy-four-page Final Order, the district court considered and rejected the Secretary's threshold arguments (including justiciability after *Rucho*) as "preliminary miscellanea," Doc.202 at 4, quixotic, *id.*, "hogwash," *id.* at 8, "meager justifications," at 31, and the like. Among other things, the district court cited its own prior orders in which it compared the State and its positions to scenes from Groundhog's Day and Harry Potter, or dismissed the positions as "disingenuous." *Id.* at 4; *see also Madera v. Detzner*, 325 F. Supp. 3d 1269, 1273 (N.D. Fla. 2018); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1213 n.6, 1218 (N.D. Fla. 2018). The district court further cautioned against making arguments that "make up in temerity for what they lack in merit." Doc.202 at 7.

The district court went on to apply the *Anderson-Burdick* test by purportedly weighing the alleged burdens on the right to vote against the State's interests in its statutory scheme.

Regarding burden, the district court found Krosnick's testimony sufficient to establish "that candidates of 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, which in turn is prescribed by[the ballot-order statute]." Doc.202 at 45. "[G]iven Florida's history of election results in which the margin of victory or defeat

is less than three to five percentage points," the district court ultimately found that the ballot-order statute "has impacted Plaintiffs' First and Fourteenth Amendment rights by systematically allocating that small but statistically significant advantage to Republican candidates in elections where the last-elected governor was a Republican, just as it awarded that advantage to Democrats when Florida's last-elected governor was a Democrat." *Id.* at 45-46. There was no record support for the conflation of a statistically significant average of five percent and the margin of victory in any given election.

The district court then compared the small but statistically significant burden relevant in some unidentified elections to the State's interest in "'upholding the policy choices of Florida's duly-elected representatives,' preventing voter confusion, 'promoting uniformity,' and 'promoting voter confidence in the integrity of the election administrations process.'" *Id.* at 51. The district court criticized the State for putting forth interests that do not "justify the *specific* restriction . . . at issue." *Id.* (emphasis in original). Stated differently, the district court found that the State's justifications were not specific enough to rebut a burden rooted in a "small but statistically significant advantage" that might become relevant in some unidentified but close election. *See id.* at 48.

As to remedy, the district court "conclude[d] a permanent injunction against enforcement or application of [the ballot-order statute] is warranted, but that an

injunction requiring [Secretary] Lee to specifically adopt county-by-county rotation [the Democrats' newly preferred remedy] until the State of Florida chooses a replacement would not be appropriate." *Id.* at 67-68. Thus, as of November 15, 2019, "no ballot shall issue which is organized pursuant to the ballot order scheme described in section 101.151(3)(a), Florida Statutes." *Id.* at 72.

The Secretary appeals.

SUMMARY OF THE ARGUMENT

I. Because the Court has no subject-matter jurisdiction, it must reverse the district court and dismiss Plaintiffs' challenge to Florida's Ballot-Order Statute.

A. In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Supreme Court held that, because political-gerrymandering challenges reduce to an inquiry regarding the amount of partisan "fairness" required by the Constitution, such claims raise purely political questions that cannot resolved by the federal courts. In reaching this conclusion, the Court reasoned that questions of partisan fairness (1) are textually committed to the legislative branch (both State and Federal) and (2) turn on standards that are intractably unmanageable by the judiciary.

The same ailments infect Plaintiffs' claim. While the Elections Clause, as construed by *Rucho*, leaves such questions of political advantage to the political branches, Plaintiffs ask the federal courts to reallocate a slight, yet statistically significant, electoral advantage enjoyed by the candidate of a party appearing first

on a ballot. In any event, the record establishes that what might constitute "fair" in this context cannot be defined, quantified, or measured for any given election. *Rucho* should thus control.

B. Plaintiffs lack Article III standing to prosecute their claim. To open the doors of the federal court, Plaintiffs bore the burden of establishing a legally cognizable injury-in-fact; a causal connection between their purported injury and the Defendant they sued (the Florida Secretary of State); and a remedy that is both feasible and could meaningful redress their purported injury.

They succeed in carrying their burden on none of these elements. After a three-day trial, none of the record evidence established that their vote-dilution theory affected the outcome of *any* election. Even if they had, they failed to establish that the Secretary caused the dilution in their votes; instead, their theory depends on the actions of non-party, non-state-actors (*i.e.*, other voters) who, in their view, cast unmeaningful ballots and skew elections to the detriment of their preferred candidates. And, finally, the alternative ordering schemes they propose as a remedy are either technologically impossible or would fail to mitigate, the impact of the primacy effect that underlies their claims.

II. Even if the Court has subject-matter jurisdiction to reach the merits of Plaintiffs ballot-order challenge, it should refrain from doing so on equitable grounds. Specifically, because Plaintiffs (all of whom are affiliated with the

Democratic Party) benefited from the Ballot-Order Statute's primacy effect for decades, their decision to sue only now that it burdens them triggers the constitutional-estoppel doctrine. The constitutional-estoppel doctrine exists to ensure fundamental fairness and where, as here, a political party cries foul only when an electoral regulation ceases to benefit its interests, the Court should use it to foreclose enmeshing the Article III branch in political gamesmanship

III. Should the Court reach the merits, Plaintiffs claims fail as a matter of law and fact.

A. The *Anderson-Burdick* balancing test does not apply to Plaintiffs' vote-dilution claim. Rather, *Anderson-Burdick* is a tool used to determine whether an election regulation impermissibly burdens an individual's right to cast a ballot, or a candidate's right to receive a ballot. Because the Ballot-Order Statute places no burden on anyone's right to cast a ballot, and no burden on any candidate's right to receive a ballot, there is nothing to balance against the State interests that the Ballot-Order Statute advances. Moreover, the implicit premise necessary to maintain Plaintiffs' vote-dilution claim is that some votes (those that make up the primacy effect) have less value than votes for their preferred candidates. Because the Supreme Court has unequivocally enshrined the franchise for everyone *irrespective* of the reason why a particular person might vote for a particular candidate, this premise dissolves, and without it, Plaintiffs' vote-dilution claim disappears.

B. Should the Court apply *Anderson-Burdick*, Florida's Ballot-Order Statute survives it. Because the Statute's effect on the right to vote is negligible at best, heightened scrutiny does not apply. And because the Statute's negligible-at-best effect on the right to vote is far outweighed by the State interests advanced by it (*e.g.*, Statewide uniformity, error reduction, and voter confidence in election integrity), the Ballot-Order Statute does not violate the Constitution.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO RESOLVE PLAINTIFFS' CHALLENGE TO FLORIDA'S BALLOT-ORDER STATUTE.

Despite approximately a year-and-a-half of federal-court litigation over the constitutionality of Florida's Ballot-Order Statute, the fact remains that resolution of these issues never belonged to the federal courts. Since the days of *Marbury v. Madison*, the Supreme Court has recognized that certain controversies, particularly those untethered to "a specific duty assigned by law," are "only politically examinable." 5 U.S. 137, 166, 1 Cranch 137 (1803). And six-months ago, the Supreme Court reiterated that federal courts are neither "equipped" nor "authorized" to conjure up "their own political judgment about how much representation particular political parties deserve" or to "apportion political power as a matter of fairness." *Rucho*, 139 S. Ct. at 2499. At its core, Plaintiffs ask this Court to do precisely that: reallocate a slight and incidental thumb-on-the-scale that, for the *minority* of the Ballot-Order Statute's existence, has worked to the detriment of their

partisan interests. *Rucho* directs the Article III branch to stay out of the fray.

Even if their claims were justiciable as a matter of the political-question doctrine (and they are not), Plaintiffs have failed to satisfy the "'irreducible constitutional minimum' of standing." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In fact, they have not, and cannot, satisfy even one element of standing's three-part test. They have not suffered the requisite "injury in fact"—*i.e.*, "an invasion of a legally protected interest," *Lujan*, 504 U.S. at 560—because nothing in the record suggests that windfall effect giving rise to their claims ever changed the outcome of any election. Assuming that it had, their purported injury is not "fairly traceable" either to the Secretary or the Ballot-Order Statute, *see Spokeo, Inc*., 136 S. Ct. at 1547; rather, the purported dilution of their votes is caused by supposedly disinterested voters, none of whom are (or could be) defendants in this Section 1983 action. And even assuming a cognizable injury in fact that is fairly traceable to either the Secretary or the Ballot-Order Statute, the district court all but conceded that it is unredressable. *Id.*

For all these reasons, the district court erred by reaching the merits of Plaintiffs' nonjusticiable claims.

A. Standard of Review

The Court reviews *de novo* questions of subject-matter jurisdiction, including

non-justiciability under the political-question doctrine, *see Al-Tamimi v. Adelson*, 916 F.3d 1, 8 (D.C. Cir. 2019), and Article III standing, *see CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1268 (11th Cir. 2006).

B. Plaintiffs' challenge to Florida's Ballot-Order Statute raises a non-justiciable political question because Plaintiffs ask the Court to reallocate a slight partisan advantage.

In *Rucho*, the Supreme Court assessed the constitutionality of congressional districts that were drawn in a way that was both deliberately and "highly partisan, by any measure." *Rucho*, 139 S. Ct. at 2491. Indeed, in the first of two consolidated cases before the Court (*Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018)), the North Carolina "Republican legislators . . . instructed their mapmaker to" provide an advantage to the Republican party. *Rucho*, 139 S. Ct. at 2491. And in the second (*Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018)), Maryland's Democrat Governor "testified that his aim was to ' . . . change the overall composition of Maryland's congressional delegation to" favor Democrats at the expense of Republicans. *Rucho*, 139 S. Ct. at 2493. In both cases, the respective lower courts found that the "predominant intent" behind the redistricting efforts was to "discriminate against voters" of the minority party and to "entrench" candidates of those belonging to the majority. *Common Cause v. Rucho*, 318 F. Supp. 3d at 883-84; *accord Benisek*, 348 F. Supp. 3d at 498.

Despite the Supreme Court's recognition that intentional partisan gerrymandering posed a "problem," the Court nonetheless asked "whether there is an 'appropriate role for the Federal Judiciary' in remedying" it. Put differently, the Court queried whether "partisan gerrymandering" gives rise to "claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere." *Rucho*, 139 S. Ct. at 2487 (emphases in original) (citing *Gill v. Whitford*, 138 S. Ct. 1916 (2018)). The Court emphatically concluded that such claims raise only non-justiciable political questions. *Rucho*, 139 S. Ct. at 2507.

In so holding, the Supreme Court reasoned, first, that resolution of partisan-gerrymandering claims is "entrusted to one of the political branches," *id.* (quoting *Vieth v. Jubelirer*, 541 U. S. 267, 277, (2004) (plurality opinion)), by virtue of the Elections Clause, *see* U.S. CONST. Art. I, § 4, cl. 1. Second, the Court found that such claims lack "judicially discoverable and manageable standards for" resolution. *Rucho*, 139 S. Ct. at 2507 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Although the Court acknowledged that, in two narrow contexts (one-person, one-vote claims and racial-gerrymandering claims), there existed a "role for the courts," it did so only because the former are "relatively easy to administer as a matter of math," *id.* at 2501, and because the latter trigger the "strictest scrutiny," *id.* at 2502. For claims of *partisan* gerrymandering, in contrast, "[t]he Framers were aware of electoral districting problems," they chose to "address" the issue through the

Elections Clause, and, critically, "[a]t no point was there a suggestion that the federal courts had a role to play" in resolving them. *Rucho*, 139 S. Ct. at 2496.

Below, Plaintiffs insisted, and the district court agreed, that *Rucho* begins and ends at claims of partisan gerrymandering. But the principles underlying *Rucho*—specifically, that "[f]ederal judges have no license to reallocate political power between the two major political parties" in the absence of either a "plausible grant of authority in the Constitution" or "legal standards to limit and direct their decisions," *Rucho*, 139 S. Ct. at 2507—apply *more* forcefully to Plaintiffs' ballot-order claims, which challenge a facially *neutral* ballot-order provision that might, by virtue of electoral happenstance, provide a slight advantage to the political party of the sitting Florida governor. Accordingly, the Court should follow *Rucho*, conclude that the questions raised by Plaintiffs' claims are "not law," *id*. at 2508, and dismiss them as non-justiciable.

i. Ballot-order allocation is entrusted to the state legislature.

Plaintiffs' argument, distilled to its core, is that Florida's Ballot-Order Statute provides an unfair advantage for some candidates for office who possibly happen to share the political party of the most-recently elected governor—that the Statute dilutes the votes of the party whose candidate is *not* the governor. Setting aside that Plaintiffs (all Democrats) have reaped the ostensible benefit of the Statute for the majority of its existence, their argument suffers two insurmountable defects. The

first is that the Elections Clause entrusts questions of electoral partisan fairness to the legislative branch (both State and Federal). The second is that the Supreme Court has long recognized, and uniformly reiterated, that the Article III branch is not to judge with questions of partisan advantage.

Political acrimony predates the existence of the Republic. In Federalist 49, Alexander Hamilton recognized the issue and concluded that "a discretionary power over elections ought to exist somewhere." THE FEDERALIST No. 59, p. 362 (C. Rossiter ed. 1961). In his view, "there were *only* three ways in which this power could have been reasonably modified and disposed"—it could be "lodged wholly in the national *legislature*, . . . wholly in the State *legislatures*, or primarily in the latter, and ultimately in the former." *Id.* (emphases added). As Hamilton, and later the Supreme Court recognized, "[a]t no point was there a suggestion that the federal courts had a role to play;" "[n]or was there any indication that the Framers had ever heard of courts doing such a thing." *Rucho*, 139 S. Ct. at 2496. The Elections Clause thus makes no mention of Article III interference in election administration: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. CONST. Art. I, § 4, cl. 1.

Although the Supreme Court has carved out a role for Article III adjudication

of certain election-law matters (*e.g.*, one-person one-vote claims, *see Wesberry v. Sanders*, 376 U. S. 1 (1964), *racial* gerrymandering claims, *see Shaw v. Reno*, 509 U. S. 630 (1993), and *voter*-access claims, *see infra* (discussing *Anderson-Burdick* analysis)), the Court has steadfastly refrained from allowing the Article III branch to pass "judgment about how much representation particular *political parties* deserve—based on the votes of their supporters . . . ." *Rucho*, 139 S. Ct. at 2499 (emphasis added). Simply put, "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.* at 2500.

This steadfast refrain is critical, and draws a bright-line between, for instance, judicially reviewable one-person, one-vote claims and the non-justiciable arguments over partisan fairness raised by Plaintiffs' lawsuit. Indeed, while "'vote dilution' in the one-person, one-vote cases refers to the idea that . . . each representative must be accountable to (approximately) the same number of constituents," the Supreme Court has rejected the idea that this "requirement . . . extend[s] to political parties." *Id.* at 2501. In other words, there is no requirement "that each party must be influential in proportion to its number of supporters," and this remains true whether a party's influence is affected by "highly partisan" and deliberate political gerrymandering (as was the case in *Rucho*) or by a slight, yet statistically significant, primacy effect caused by disinterested voters (as is the case here).

Nor can Plaintiffs manufacture a justiciable controversy through the Supreme Court's racial-gerrymandering cases. By virtue of the Equal Protection Clause and "our country's long and persistent history of racial discrimination in voting," the Court has long "reserved the strictest scrutiny for discrimination on the basis of race." *Id.* at 2502. But while "it is illegal for a jurisdiction . . . to engage in racial discrimination in districting," a jurisdiction may indeed "engage in constitutional political gerrymandering." *Id.* If politicians may *deliberately* create an advantage for their political party without a federal court exercising any oversight, it necessarily follows that the Court should stay its hand when the controversy turns on whether a political party *incidentally* benefits from a ballot-order regime that, on its face, favors no political party.

Plaintiffs' lawsuit takes issue with the idea that, in any given election, the political party of the incumbent governor might find itself with "small but statistically significant advantage" in some (but not all) races. Their gripe over this incidental windfall is a paradigmatic request to vindicate a generalized partisan preference, but the Supreme Court was unequivocal when it pronounced that the Article III branch is "not responsible for vindicating generalized partisan preferences." *Rucho*, 139 S. Ct. at 2501. If denying that "legislators can[] take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities," *id.*,

then so too would a decision striking as unconstitutional Florida's partisan-*neutral* Ballot-Order Statute, since the Framers similarly entrusted this issue to partisan lawmakers when they ratified the Elections Clause. U.S. CONST. Art. I, § 4, cl. 1.

ii. There exist no judicially manageable standards to resolve Plaintiffs' ballot-order challenge.

While the Elections Clause (as construed by *Rucho*) provides a doctrinal basis for this Court to dismiss as nonjusticiable Plaintiffs' Ballot-Order Statute challenge, there exists a wholly separate practical reason: resolution of Plaintiffs' challenge is hopelessly unmanageable in any objective or rational way. Partisan jockeying will occur; it does so in each election cycle without running afoul of the U.S. Constitution.[5] "[T]he question," then, "is one of degree: How to 'provid[e] a standard for deciding how much partisan dominance is too much.'" *Rucho* 139 S. Ct. at 2499 (quoting *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.)). Any standard, per the Supreme Court, must be "especially clear," *id.*; "[w]ith uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal,

[5] *See, Rucho*, 139 S. Ct. at 2499 ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."); *Mobile v. Bolden*, 446 U. S. 55, 75-76 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

responsibility for a process that often produces ill will and distrust." *Vieth v. Jubelirer*, 541 U. S. at 307 (Kennedy, J., concurring in the judgment).

Therein lies the problem, and it is a fatal one for Plaintiffs. In their view, Florida's Ballot-Order Statute has, in recent election cycles, created an unfair advantage for the Republican Party. "But federal courts are" neither "equipped" nor "authorized" to apportion political power as a matter of fairness." *Rucho*, 139 S. Ct. at 2499. Because "[d]eciding among . . . different visions of fairness . . . poses basic questions that are political, not legal," *id.* at 2500, "[a]ny judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts," *id*. (quoting *Zivotofsky v. Clinton*, 566 U. S. 189, 196 (2012)).

Because there are many different ways to conceptualize a "fair" ballot order, courts first define "what fairness looks like in this context." *Rucho*, 139 S. Ct. at 2500. Does fairness require that the candidates of the major political party that finished *second* in the most-recent gubernatorial race (here, the Democrats) to be listed first? Given the advantages inherent in the two-party system, should the major political parties yield the first position to candidates of *minor* political parties (*e.g.*, the Green or Libertarian Parties)? Perhaps it would be fair to provide an advantage to candidates with fewer resources. Would it be more fair, then, to list candidates in ascending order of net worth? How about net income over the past 10 years? Over

the past 5 years? How about gross-campaign contributions? Or, given our social-media-centric culture, does communicative reach dictate fairness? Should we order candidates based on their number of tweets? Retweets? Instagram followers?

Courts are uniquely unqualified to decide this threshold fairness inquiry, which, by its nature, is "political, not legal." *Id*. Specifically, "[t]here are no legal standards discernible in the Constitution for" defining partisan fairness, *id*., and at no point have Plaintiffs suggested any whatsoever, let alone any with the requisite level of precision, clarity, manageability, and political neutrality for legitimate judicial resolution. *Id*. Instead, they ask a federal court to do something that is, at its core, "not law." The federal courts cannot acquiesce to that request. *Id.* at 2508.

And even if the Court could meaningfully and objectively settle on a definition of political fairness in this context, only then can it "even begin to answer the determinative question: 'How much is too much?'" *Id.* at 2501. Does a 3 percent windfall in one election cycle cross the constitutional line? Does 5 percent? Does 10 percent? Does the constitutional goalpost move in one direction if the election result is a landslide? In the other if it is close enough to trigger a recount? If the losing political party fails to turn out a critical (and as-of-now unquantified) mass of registered voters, does the victorious party get a constitutional mulligan?

Finally, the proceedings highlight a profound administrability issue. Plaintiffs' expert provided multiple, shifting estimates regarding the degree of the

primacy effect generally. There is, moreover, no reliable way to determine whether the primacy effect in any particular election was driven by disinterested voters blindly selecting the first-listed candidate, which is an implicit premise in the Plaintiffs' constitutional claims. Voter cast ballots based on "on the issues that matter to them," including "the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations." *Rucho*, 139 S. Ct. at 2504. "Many voters split their tickets," while others "vote for candidates from both major parties at different points during their lifetimes." *Id.* Accordingly, this is not, as the district court would have it, a case "relatively easy to administer as a matter of math." *Id.* at 2501. Rather, it necessarily involves "prognostications as to the outcome of future elections" and conjecture regarding the driving forces behind past elections." *Davis v. Bandemer*, 478 U.S. 109, 160 (1986) (opinion of O'Connor, J.). These are "matters as to which neither judges nor anyone else can have any confidence" especially when, as here, presented with shifting prognostications. *Id.*

In short, (1) there is no objective or rational way for the courts to define partisan fairness in the context of ballot-order placement, (2) there is no conceivable way to determine where the court should draw the constitutional line even if it could define "fairness," and (3) even if it could do either, there is no reliable way to quantify the primacy effect, given the wide variety of ways in which any given

election might be swayed. For these reasons, the principles motivating the *Rucho* Court apply just as compellingly here. Accordingly, the district court erred by reaching the merits of the Plaintiffs' claims, and this Court should order dismissal based on the political-question doctrine.

iii. Neither *Mann v. Powell* nor *Cook v. Gralike* foreclose the argument that *Rucho* mandates dismissal.

Rather than engaging meaningfully with the analysis set out above, the district court considered the political-question doctrine foreclosed by the Supreme Court's summary affirmance in *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *aff'd without opinion*, 398 U.S. 988 (1970). That was error. A summary affirmance binds lower courts only "from coming to *opposite* conclusions on the *precise* issues presented and *necessarily* decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (emphases added). Mann does not resolve this issue because it stemmed from "*purposeful*" discrimination enabled by a wholly *discretionary* ballot-order provision. 314 F. Supp. at 678-79 (emphasis added). *Mann* bears no resemblance to the issue raised by Plaintiffs here—purported vote dilution resulting from Florida's neutral, *discretionless* ballot-order provision.

The district court similarly erred when it concluded that *Cook v. Gralike*, 531 U.S. 510, 516 (2001), "clearly holds that questions of *what appears on the ballot and how* are justiciable." Doc.202, at 7 (emphasis in original). *Cook* involved a State law that mandated a disclaimer on all ballots that identified whether candidates

supported term limits. The Qualifications-Clause, compelled-speech, amendment-process, and Speech-or-Debate-Clause issues addressed in *Cook*, 531 U.S. at 516, have nothing to do with the argument the Plaintiffs raise here—that Florida's Ballot-Order Statute treats their preferred political party unfairly and thereby dilutes votes for that party. *Rucho*, however, does concern partisan vote dilution. The district court erred in disregarding *Rucho*.

More fundamentally, neither *Mann*, nor *Cook*, nor *Williams v. Rhodes*, 393 U.S. 23, 28 (1968), could bind this Court because "[t]he jurisdiction of [the U.S. Supreme] Court was challenged in none of these [previous] action[s]." *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).[6] Because the political-question doctrine issue sounds in jurisdiction, *see Rucho*, 139 S. Ct. at 2508 (remanding "with instructions to dismiss for lack of jurisdiction"), the "question is an open one before" this Court. *NRA Political Victory Fund*, 513 U.S. at 97.

C. The Plaintiffs lack Article III standing to advance their challenge to Florida's Ballot-Order Statute.

Separate and apart from dismissal based on their failure to raise a justiciable legal (as opposed to a non-justiciable political) question, Plaintiffs' challenge must be dismissed due to lack of Article III standing. Indeed, Plaintiffs have secured the rare trifecta by failing to establish, through "specific facts," *any* one of the three

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[6] *Accord Hagans v. Levine*, 415 U.S. 528, 533 n. 5 (1974); *United States v. L.A. Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (same).

elements necessary to satisfy this "irreducible constitutional minimum," despite having every opportunity to do so. *See Lujan*, 504 U.S. at 561. Because (1) their purported injury is entirely speculative; (2) it is not fairly traceable to the Secretary; and (3) it cannot be redressed in any meaningful way, the district court erred in reaching the merits of the Plaintiffs' claims.

i. The Plaintiffs have not suffered any legally cognizable injury.

Article III's injury-in-fact requirement demands an allegation (and, later, evidence) that Plaintiffs have suffered "an invasion of a legally protected interest" that must be "concrete and particularized" rather than "conjectural" or "hypothetical." *Lujan*, 504 U.S. at 560. The injury must "affect[] the plaintiff in a personal and individual way." *Gill*, 138 S. Ct. at 1929.

In this case, Plaintiffs' alleged injury is that partisan vote dilution caused by the Florida Ballot-Order Statute's primacy effect has resulted in the election of fewer Democratic candidates because, in recent election cycles, Republican candidates appear at the top of the ballot and benefit from a slight but statistically significant advantage in some elections where seemingly disinterested Florida voters reflexively pick the candidate in the pole position. Tr. 100:16-19. This purported injury is not enough for Article III standing.

Gill is instructive. There, the Supreme Court addressed a partisan vote dilution claim caused by gerrymandering. The Court held that "[a] plaintiff who

complains of gerrymandering but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" *Id.* at 1921 (quoting *United States v. Hays*, 515 U. S. 737, 745 (1995)). Just as the harm from partisan vote dilution through gerrymandering in *Gill* had to be "district specific" to satisfy the "injury in fact" test for Article III standing, the harm alleged by Plaintiffs here must be "election-specific." In other words, if Plaintiffs cannot show that the Ballot-Order Statute has affected their preferred candidate in a particular election, then their purported injury remains "conjectural" or "hypothetical."

But even after a three-day bench trial and extensive briefing of motions for dismissal and summary judgment, conjecture and hypotheses are all the Plaintiffs could muster. Not one of their experts testified that the primacy effect ever changed the outcome of any election. Indeed, their primary expert, Krosnick, concluded that the primacy effect amounts to five percent on average—statistically significant, but meager nonetheless, Tr. 299:14-16; Pls. Exh. 1 at 3, 63-64, 83—and at no point did he testify that the windfall vote was ever outcome-determinative. Rodden, for his part, testified that the effect is more pronounced in down-ballot races that do not receive as much media or public attention; he too, never identified any particular down-ballot race that came out against the Democratic candidate due to ballot-order placement. *See* Tr. 144:16-145:10; Pl. Exh.5, 17-41. And Rodden agreed that he "did

not analyze[] or opine[]" as to whether "ballot order was outcome determinative in any given election." Tr. 191:22-192:1.

At most, the Plaintiffs' experts surmised that, over the entire sixty-eight-year lifespan of the Ballot-Order Statute, first-listed candidates receive on average a small but statistically significant benefit. This average does not, and cannot, establish anything about any given election; to a person, all of Plaintiffs' experts admitted that they have no basis to expect the same primacy effect to occur in every race. *See* Tr. 192:10-12 (Rodden); Pl. Exh.2, 11 (quoting Miller and Krosnick, 1998). In some elections, the effect will peak; in others it will plummet. Tr. 344:19-44; Tr. 382:6-9 (Krosnick). This admission craters any suggestion that the Plaintiffs have established an actual, legally cognizable, non-conjectural injury-in-fact. But because they offered nothing to link the primacy effect to an outcome in any specific Florida election, they cannot avail themselves of federal jurisdiction.

In its final order, the district court similarly failed to identify a record-based, specific injury-in-fact. Instead, it reasoned only that, because some Florida elections have been decided by fewer than five percentage points, then, *ipso facto*, Florida's Ballot-Order Statute must have "impacted Plaintiffs' First and Fourteenth Amendment rights by systematically allocating that small but statistically significant advantage to Republican candidates in elections where the last-elected governor was a Republican, just as it awarded that advantage to Democrats in elections when

Florida's last-elected governor was a Democrat." *Id.* at 45-46. That conclusion is mathematically unsound because it compares a "statistically significant" average with the margin of victory in individual elections. That conclusion also cannot move the Plaintiffs' injury beyond the purely hypothetical; indeed, it does no more than "stack[] speculation upon hypothetical upon speculation" with regard to why elections turn out the way they do. *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011).

And in any event, the "statistically significant" injury that might or might not exist in any given election, fails to account for actual election outcomes. Florida has had close elections; however, the outcomes in those close elections show no systematic advantage for either party. Consider the following examples:

- Lawton Chiles (Democrat) defeated Jeb Bush (Republican) in the 2004 Florida Gubernatorial Election by 1.5%. Tr. 788: 16-789:11; Tr. 64:1-65:15; Doc.162 at 9,11.
- Nikki Fried (Democrat) defeat Matt Caldwell (Republican) in the 2018 Florida Agricultural Commissioner Election by 6,753 votes. Tr. 788: 16-789:11; Tr. 64:1-65:15; Doc.162 at 9,11.
- Bill Nelson (Democrat) defeated Bill MCollum (Republican) in the 2000 Florida Senate Election by 4.9 % and defeated Katherine Harris (Republican) in the 2006 Florida Senate Election by 9.8 %.
- Charlie Crist (Democrat) defeated David Jolly (Republican) in the 2016 Election for Florida House District 13 by 3.8 %.
- Geraldine Thompson (Democrat) defeated Bobby Olszewski (Republican) in the 2018 Florida State House of Representatives Election for District 44 by 2.6 %.

Generalized, conjectural, and hypothetical grievances are all that are left.

Such grievances do not amount to the concrete, particularized, individual, and personal injury of the kind required for Article III standing, *see Gill*, 236 S. Ct. at 131. In this context, Plaintiffs must show that show that the primacy effect actually affected the outcome of a particular election. Their failure to do so deprives the federal courts of subject-matter jurisdiction.

ii. Neither the Secretary nor Florida's Ballot-Order Statute caused Plaintiffs' purported injury.

Plaintiffs attempt to satisfy Article III causation fares even worse. To be considered "'fairly . . . trace[able] to the challenged action of the" Secretary, Plaintiffs' alleged injury (even assuming that it transcends the merely "conjectural" and "hypothetical," *Lujan*, 504 U.S. at 560), plainly cannot be "the result [of] the independent action of *some third party not before the court.*" *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). In other words, Article III causation cannot exist if the purported injury "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)).

In plain terms, Plaintiffs allege some statistically significant percentage of voters will reflexively pick the candidate listed first on the ballot for no reason other

than the candidate's appearance as first on the ballot, and that this reflexive pick dilutes their vote (unless, of course, their preferred candidate is listed first). But if vote dilution is the purported injury-in-fact, then the dilution is caused not by the Secretary or the Ballot-Order Statute. It is the supposedly disinterested voters not before the Court and not under the Secretary's control who are simply exercising their constitutionally guaranteed, "unfettered choice[]" to cast a ballot for any reason they see fit. *N.Y. Reg'l Interconnect, Inc.*, 634 F.3d at 587.

A court cannot predict the way any voter, or group of voters, will decide to exercise the franchise. And if it could so predict, it has no power to control the way votes are cast. And even if it could do both, non-state-actor citizens cannot be hauled into court to answer the allegations set out in Plaintiffs' Section 1983 lawsuit. Because the actors driving Plaintiffs' purported injury are not, and cannot, be defendants here, Plaintiffs have no standing and the federal courts lacks subject-matter jurisdiction.

iii. Plaintiffs' purported injury is not redressable.

Rounding out the trifecta, Plaintiffs' have failed to establish any conceivable way that a court might redress their purported injury. Per *Lujan*, standing requires a showing that Plaintiffs' alleged injury will "'likely[]' . . . be 'redressed by a favorable decision'"; "specula[tion]" is not enough. 504 U.S. at 561. Speculation, however, is the most Plaintiffs offered during the three-day trial, and speculation

was the sum total of what the district court offered when discussing redressability.

At trial, Plaintiffs insisted that Florida's Ballot-Order Statute could be replaced by a system in which Democratic candidates would appear first on the ballot in roughly half of Florida's sixty-seven counties, while Republican candidates would appear first on the other half. But the evidence at trial demonstrated that this proposed fix was entirely unworkable; county-by-county rotation of the major party candidates cannot randomly equalize Florida's population, does nothing for any down-ballot windfall vote effect, and could spawn at least 104 separate lawsuits by down-ballot candidates who, keying off Plaintiffs' theory in this case, believe that they have a constitutional claim to grab their fair share of the primacy effect. *Supra*.

Precinct-by-precinct rotation (another ballot order regime proposed by the Democrats) is *less* workable due to limitations inherent in the various election-management systems, statewide tabulation software, and concerns regarding increase error rates for tasks as important as manual recounts. *Supra* II.C at 12-13. And the problems are particularly acute for Florida's most populous county, Miami-Dade, where, according to Supervisor White, the scale and complexity of the elections administration process makes precinct-by-precinct rotation entirely impossible. *Id.*

The only other alternative mused over by the district court (*i.e.*, alphabetical ordering), does not appear feasible either. Superficially, alphabetical ordering might

appear more technologically feasible than other alternatives, but the Director of the State's Division of Elections nonetheless testified the entire State might not be able to implement this system. Tr. 801:17-22. Despite days of opportunity to submit evidence that alphabetical ordering would "likely" redress their purported injury, Plaintiffs allowed this remedy to remain "merely speculative." *Lujan*, 504 U.S. at 561. The burden to establish the redressability prong was theirs; their failure to carry their burden deprives the federal courts of subject-matter jurisdiction.

Rather than address redressability, the district court opted to ignore it. Specifically, it issued "a negative injunction rather than affirmative one," forbidding the Secretary from ordering ballots the way they have been ordered for nearly seven decades but without specifying how she should structure the ballots without it. Doc.202 at 69. Ostensibly delegating the appropriate remedy to the Florida Legislature, the district court vowed that it would nonetheless "monitor the status of [the] injunction." *Id*. at 73.

Later, the district court clarified its reasons for staying it hand with regard to the remedy, and it neatly underscores why Plaintiffs' complaint must be dismissed. In a subsequent order, the district court clarified that it "will not take precipitous action based on *speculation* about what parties *not before this Court*"—specifically, the Florida legislature—"will do or not do." Doc.220 at 6 (emphases added). The district court's highlights Plaintiffs in ability to offer a workable remedy.

This is not how redressability works. Plaintiffs failed to carry their burden of establishing a workable remedy likely to fix their alleged injury at trial. The district court, by deciding that it *would not* redress Plaintiffs' alleged injury, tacitly conceded that it *could not* redress Plaintiffs' alleged injury, at least not in a way that would approach practicality. Because redressability is an indispensable prong of the irreducible constitutional minimum for federal-court jurisdiction, the unredressability of Plaintiffs' purported injury mandates dismissal of the claims.

II. EVEN IF THE DISTRICT COURT HAD JURISDICTION (AND IT DID NOT), CONSTITUTIONAL ESTOPPEL BARS PLAINTIFFS' BALLOT-ORDER CHALLENGE.

A. Standard of review

The Court reviews *de novo* questions regarding estoppel, *see Wilkinson v. Legal Servs Corp.*, 80 F.3d 535, 538-39 (D.C. Cir. 1996); *accord Richardson v. Miller*, 101 F.3d 665, 667 (11th Cir. 1996) ("This court reviews a district court's conclusions on res judicata and collateral estoppel de novo . . .").

B. Because Plaintiffs' have historically reaped the windfall benefit of the Ballot-Order Statute, they cannot challenge it now that they labor under its burden.

Assuming that the Ballot-Order Statute awards a windfall to the first-listed candidate on a ballot, it follows that, because Plaintiffs' preferred political party (the Democrats) received this bump for roughly the first three decades of the Statute's existence, they cannot be heard to complain now that the benefit flows to Republican

candidates. As in *Robertson v. Federal Election Commission,* 45 F.3d 486, 490 (D.C. Cir. 1995) and *Wilkinson,* 80 F.3d at 538 , Plaintiffs must take the bitter with the sweet. The doctrine of constitutional estoppel enshrines this equitable principle.

In *Robertson*, a presidential candidate accepted matching campaign funds from the Federal Elections Commission. 45 F.3d at 488. When the Commission required the candidate to repay some of the funds because of certain improprieties, the candidate refused and, in an attempt to avoid repayment, claimed that the Commission had been unconstitutionally constituted. *Id.* at 489-90. Without reaching the merits, the D.C. Circuit found it "hardly open to [the candidate] now, after having taken the money, to claim that the very statutory instrumentality by which the funds are dispensed may not seek reimbursement because its composition is unconstitutional." *Id*. at 490. Instead, the court held that "a party wishing to make such a challenge must do so before it accepts and spends federal funds—not after, as a ploy to avoid its part of the bargain." *Id.* at 490.

The D.C. Circuit reiterated these principles in *Wilkinson* when reversing a district court's determination that the Legal Services Corporation's Board had been unconstitutionally composed and had, therefore, improperly discharged the Corporation's Inspector General. 80 F.3d at 536-39. In that case, the inspector general argued that the board could not "discharge" him because the board was composed of recess appointees who had not been confirmed by the Senate. *Id.* at

536. Because the inspector general had "been employed and compensated by a recess appointments [b]oard for nearly two years," *id.* at 538, the D.C. Circuit refrained from reaching the merits of his claims, holding instead that constitutional estoppel precluded his challenge because he had sat on his claims until the point at which he stopped benefiting from a system he now (apparently) believed to be unconstitutional. *Id.*; *accord S.J. Groves & Sons Company v. Fulton County*, 920 F.2d 752, 768 (11th Cir. 1991) ("Under the doctrine of constitutional estoppel, one may not 'retain the benefits of a statute or regulation while attacking the constitutionality of one of its provisions.'" (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

Like the plaintiffs in *Robertson* and *Wilkinson* Plaintiffs here must take the bitter with the sweet. History, moreover, establishes that they have enjoyed the sweet earlier and more often than they have suffered the bitter. Florida's Ballot-Order Statute has been on the books for sixty-eight years; during that time, Florida has administered thirty-four General Elections. In twenty of those elections (approximately 60 percent of the time), Democratic candidates have been listed first; if their theory is to be accepted, they have netted 3-to-5 undeserved percentage points in three out of every five elections. Def. Exh. 3.

This suit, however, did not arrive until nearly seventy years had passed. What changed? After decades of Democrats enjoying primary ballot placements,

Republicans took the pole position. That was over 20 years ago. What's more telling is the fact that Democratic candidates are listed first in five out of the ten other states with ballot-order statutes similar to Florida's. Not a single lawsuit has been filed in any one of those five. *See* Def. Exh. 4. But in three out of the five States in which Republicans will appear first on the 2020 General Election Ballot, Democratic-affiliated plaintiffs have filed suits that mirror the one at issue here. *See Mecinas, et al., v. Hobbs*, 2:19-cv-05547-DJH (D. Ariz. Nov. 1, 2019); *S.P.S., ex rel., et al., v. Raffensperger, et al.*, 1:19-cv-04960 (N.D. Ga. Nov. 1, 2019); *Miller, et al., v. Hughs*, 1:19-cv-01071 (W.D. Tex. Nov. 1., 2019). And Corporate Representative for the Plaintiffs made clear that they have no intention of filing suit while the law serves to benefit Democrats. Tr. 99:15-100:23.

Constitutional estoppel, a doctrine flowing from notions of equity and fundamental fairness, provides a tool to maintain the Article III branch as a safe harbor against the tempests of election-year partisan clashes. For these reasons, constitutional estoppel prohibits Plaintiffs from trying to dispense with a decades-old, duly enacted, facially neutral ballot-order mechanism now—and only now—that they no longer appear to benefit from it.

The district court brushed aside these concerns, remarking instead that "the Supreme Court has expressed 'doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it.'" *Id.* at 25

(quoting *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 456-57 (1998)) "Some benefit," however, is quite the understatement. For decades, Plaintiffs' favored party enjoyed the *same* "benefit" that, according to the core theory of their case, is so extreme that it exceeds the bounds of the First and Fourteenth Amendments to the United States Constitution. As a matter of logic, they can't have it both ways—the alleged primacy effect must be either (1) too modest to trigger the constitutional-estoppel doctrine, and constitutionally acceptable; or (2) so extreme that is raises constitutional concerns but, in turn, triggers the constitutional-estoppel doctrine. Either way, they cannot be heard to complain about the Ballot-Order Statute.

III. FLORIDA'S BALLOT ORDER STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

If the Court reaches the merits of Plaintiffs' claims (and for all the reasons discussed above, it should not), they fail as a matter of law. Although the district court applied the *Anderson-Burdick* balancing test, *Anderson-Burdick* is not the appropriate inquiry because Florida's Ballot-Order Statute does not affect anyone's ability to register to vote, cast a ballot, or appear as a candidate. Instead, Plaintiffs' claim is that the votes for their preferred political party are diluted because some small percentage of Florida voters will reflexively cast their ballot for any first-listed candidate. The concept of vote dilution, however, originates in the Supreme Court's one-person, one-vote jurisprudence, and the Supreme Court has never adjudicated a one-person, one-vote claim through the *Anderson-Burdick* prism. This Court need

not lend its imprimatur to the improper use of *Anderson-Burdick*.

Should the Court disagree and apply *Anderson-Burdick*, Plaintiffs claims still fail as a matter of law. In *Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708 (4th Cir. 2016) (Wilkinson, J.), the Fourth Circuit systematically and convincingly demonstrated why a facially neutral ballot-order scheme that is legally indistinguishable from Florida's Ballot-Order Statute (1) triggers the lowest level of scrutiny; (2) imposes little, if any, burden on anyone's right to vote; and (3) serves critical State interests in, among other things, election uniformity. Neither Plaintiffs nor the district court has offered any meritorious reason why this Court should split from the Fourth Circuit, and for that reason, the Court should rule in accord here.

A. Standard of review

The application of *Anderson-Burdick* to assess a statute's constitutionality is reviewed de novo. *See Wexler v. Anderson*, 452 F.3d 1226, 1230 (11th Cir. 2006); *see also Freenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 939 (11th Cir. 2013) ("We also review de novo the constitutionality of a challenged statute").

B. ***Anderson-Burdick*** does not apply to Plaintiffs' ballot-order challenge.

Because this case involve elections the Plaintiffs and district court reflexively presumed that *Anderson-Burdick* applies. This presumption is faulty. The Supreme Court did not apply *Anderson-Burdick* when grasping for manageable standards in *Rucho*. This makes sense. *Anderson-Burdick* applies only when a court is asked to

"evaluate a law respecting the right to vote." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring). Florida's Ballot-Order Statute is not such a law.

Specifically, Florida's Ballot-Order Statute is a facially neutral statute governing the order of candidates. It neither imposes any burden on the right to vote nor denies anyone the ability to cast a vote. Tr. 767:15-25; Tr. 768:1-8; Tr. 56:24-59:22; 64:1-65:15. The statute is unlike the restrictive ballot-access laws in *Anderson* and *Burdick* that would have denied supporters of certain candidates from voting for those candidates. *Anderson*, 460 U.S. at 782-83; *Burdick*, 504 U.S. at 430. It is unlike the voter-identification law in *Crawford* that allegedly to made it harder for certain people to vote. 531 U.S. at 185-86. It is unlike other cases before this Court where it is alleged that the State's early voting, vote-by-mail, and other standards make it harder to vote or deny the right to vote altogether.

Even Plaintiffs recognize the difference. They have not alleged that Florida's Ballot-Order Statute keeps a single Democrat from voting or makes it harder for a single Democrat to vote. They allege only that "[t]he weight and impact of their votes is consistently decreased . . . by the [lawfully cast] windfall votes accruing to the first-listed candidates." Doc.1 at ¶ 52.

Because "mere ballot order denies neither the right to vote, nor the right to appear on the ballot, nor the right to form or associate in a political organization,"

Plaintiffs cannot state an *Anderson-Burdick* claim. *Alcorn*, 826 F.3d at 717. Again, this again makes sense. Involvement in these disputes poises courts to engage in the type of "empirical analysis into burdens that would essentially displace the authority of state legislatures with the views of expert witnesses." *Id.* at 719.

And any lawsuit filed in pursuit of "windfall votes" asks the Court to cast "aspersions upon citizens who expressed their civic right to participate in an election and made a choice of their own free will." *Id.* at 718. But Democrats nor Republicans should ever ask a court to "demean [a voter's] decision"—to tell voters that they are uninformed, undecided, or disinterested because they chose to vote for the first person on the ballot, and accordingly, their vote is worthless. *Id.* This is because neither the Democrats nor the Republicans have a right to a "rational election, based solely on a reasoned consideration of the issues and the candidates' positions, and free from [what the parties deem to be] other 'irrational considerations.'" *Id.* If in a free speech context the courts refuse to serve as the "Ministry of Truth," *United States v. Alvarez*, 567 U.S. 709, 723 (2012), then in an elections context the courts should refuse to serve as the Ministry of Rationality responsible for considering the "weight and impact" of a lawfully cast yet apparently irrational "windfall vote" on a "meaningfully and thoughtfully cast vote for Democratic Party candidates." Doc.1 at ¶¶ 1 n.1, 1, 13, 15, 17, 52.

As a matter of law, there can be no undue-burden or vote-denial claim; thus, the *Anderson-Burdick* test does not apply and Plaintiffs' claims must fail. Simply put, "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is [simply] not a constitutional concern." *Alcorn*, 826 F.3d at 719; *see also New Alliance Party*, 861 F. Supp. at 295 n.15 ("As the instant case indicates, however, there are election law regulations which do not burden constitutional rights and as such render the *Anderson*[*-Burdick*] test superfluous.") (citing *Eu v. San Francisco Cty. Democratic Central Committee*, 489 U.S. 214, 222 (1989)).[7]

C. Even if *Anderson-Burdick* applied (and it does not), Florida's Ballot-Order Statute satisfies it.

Finally, should the Court decide to reach the merits of Plaintiffs' claims and apply the *Anderson-Burdick* inquiry (and for any of the reasons discussed *supra*, it should not), Florida's Ballot-Order Statute easily survives it. Under *Anderson-Burdick*, the Court must, (1) "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate'" against (2) "the precise interests put forward by the

[7] The traditional Equal Protection test similarly fails because Plaintiffs do not allege intentional discrimination. As Justice Ginsburg explained, "[t]he Equal Protection Clause . . . prohibits only intentional discrimination; it does not have a disparate-impact component." *Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting) (citing *Pers. Adm. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) and *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434 (citations omitted). In so doing, the Court must take into consideration the "legitimacy and strength" of the State's asserted interests and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

The standard is flexible, and the level of scrutiny fluctuates. For instance, "a regulation that imposes a 'severe' burden must be 'narrowly drawn to advance a state interest of compelling importance.'" *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788). In contrast, "'reasonable, nondiscriminatory restrictions' that impose a minimal burden may be warranted by 'the State's important regulatory interests.'" *Id.* In other words, "[l]esser burdens . . . trigger less exacting review." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

i. Plaintiffs' challenge to Florida's Ballot-Order Statute triggers the least-demanding scrutiny because the burdens are minimal at best.

With regard to the appropriate level of scrutiny, this Court need not tread new ground. In *Alcorn*, 826 F.3d 708, the Fourth Circuit addressed a challenge to a Virginia law that, as a practical matter, gave ballot-order preference to candidates from major political parties (*i.e.*, the Democrats and Republicans). Specifically, "first tier" political parties—those that received at least ten percent of the vote for any statewide office filled in either of the two preceding statewide general

elections—appeared first on the ballot. "Second-tier" political parties (generally, those with a requisite level of organization but that did not exceed the vote-receipt threshold) appeared second. Independent candidates and those of parties not qualifying as first or second tier appeared third.

Faced with a vote-dilution challenge similar to Plaintiffs', the Fourth Circuit reasoned that Virginia's ballot-order regime imposed "only the most modest burdens on [plaintiffs'] free speech, associational, and equal protection rights," *id.* at 717, because the Virginia law was "facially neutral and nondiscriminatory." *Id.* Specifically, all parties labored under the same requirements and each had an evenhanded chance to achieve a first-tier ballot position. *Id.* Regardless of any purported "windfall," the Fourth Circuit concluded that "the Virginia ballot ordering law . . . does not 'restrict access to the ballot or deny any voters the right to vote for candidates of their choice'" instead, it "'merely allocates the benefit of positional bias, which places a lesser burden on the right to vote.'" *Id.* (quoting *Sonneman v. State*, 969 P.2d 632, 638 (Alaska 1998)). For this reason, the Fourth Circuit refrained from applying heightened scrutiny.

So too here. The uncontroverted testimony at trial makes plain that Florida's Ballot-Order Statute does not burden any citizen's right to cast a vote, nor any candidates right to receive a vote. *Supra* II.B at 10. By "merely allocate[ing] the benefit of" the primacy effect Florida's Ballot Order Statute places, by magnitudes,

"a lesser burden on the right to vote" than the sorts of regulations historically prompting more searching review (*e.g.*, those that "restrict access to the ballot or denyany voters the right to vote for candidates of their choice.'" *Alcorn*, 826 F.3d at 718 (quoting *Sonneman*, 969 P.2d at 638)).

For these reasons, the district court erred by employing heightened scrutiny.

ii. The interests served by Florida's Ballot-Order Statute are critically important.

In contrast to the minimal (perhaps nonexistent) effect that the Ballot-Order Statute has on voting rights, the Statute serves critically important election-administrability interests. *Alcorn*, again, is instructive. In that case, the Fourth Circuit identified three state interests that Virginia's three-tiered scheme served. First, Virginia's law reduced voter confusion and sped up the voting process. *Id.* Second, the law maintained party-order symmetry across the many offices on the ballot. *Id.* at 720. And third, the law favored Virginia's "strong interest in the stability of [its] political system[]." *Id*. (quoting *Timmons*, 520 U.S. at 366). Florida's Ballot-Order Statute similarly advances these interests.

First, Florida's law, like the Virginia law, "emphasize[s] voter familiarity and more predictable order." *Id.* at 719. As the Fourth Circuit recognized, listing candidates in a predictable order allows voters to more quickly find their preferred choice for a given office. *Id.* This predictability minimizes voter confusion and avoids long voting lines that, according to some voters, interfere with or discourage

access to the franchise. *Id.* Director Matthews testified to these very points in her capacity as the Director of the Division of Elections and as a Florida voter. *Supra* II.B at 11-12.

Second, Florida's Ballot-Order Statute, like Virginia's law, maintains party-order symmetry across the many offices on the ballot. Because Florida's law dictates that the party of the current Governor will appear first in each race, the law ensures uniform, predictable presentation. As the Fourth Circuit recognized, this scheme advances the state's interest in "'efficient procedures for the election of public officials,'" because it "makes the ballot more easily decipherable, especially for voters looking for candidates affiliated with a given party." *Id.* (quoting *S.C. Green Party*, 612 F.3d at 759). Again, several of the State's Supervisors of Elections testified to this effect. *Supra* II.C.

Third, Florida's Ballot-Order Statute, like Virginia's, animates the State's "strong interest in the stability of [its] political system." *Id.* (quoting *Timmons*, 520 U.S. at 366). It does so in several ways. As Director Matthews testified, the Statute is one part of the election reforms taken after the 2000 Presidential Election to promote statewide uniformity in the election administration process. Tr. At 774:3-775:4; *See* 2001 Ch. 2001-40, Laws of Fla. (2001); 1S-2.032, Fla. Admin. Code. Supervisor Earley echoed the comments in noting that uniformity, in this digital age, helps prevent the spread of misinformation through social media. Tr. at 503:3-18;

784:10-11; Tr. 784:21-24 ("[P]eople talk to each other, whether it's family, friends, colleagues," and ask about their respective voting experience; *see also* Tr. 503:7-11 ("[t]here's a lot of social media and a lot of social media misinformation that we are always trying to monitor and set straight so that [voters] understand the official message as opposed to speculation."). Other supervisors added that the uniformity also helps with reducing errors in ballot layout and tabulation. Tr. 441:2-18; Tr. 446: 5-20; Tr. 496:22-497:15; Tr. 506:8-19; Tr. 783:20-785:4. Uniformity, then, is a thread a weaves together several interests necessary to promote integrity in the election process and the stability of the political system. *See Democratic Exec. Comm.*, 915 F.3d at 1322 (acknowledging that the State has a "legitimate and strong interest[]" in "protecting public confidence in the legitimacy of the election," and that "Florida has an important interest in structuring and regulating its elections to avoid chaos and to promote the smooth administration of its elections."); *Bd. of Election Comm'rs of Chicago v. Libertarian Party of Illinois*, 591 F.2d 22, 26 (7th Cir. 1979) (upholding a ballot tier scheme in part because the statute advanced the state interest in voter convenience and convenient tallying of results).

Thus, the State's interests are both legally and factually compelling. Even if Plaintiffs had anything on their side of the *Anderson-Burdick* balance, the balance still tilts decidedly in the State's favor.

CONCLUSION

The Court should reverse the district court's final order and remand for dismissal based on lack of subject-matter jurisdiction or constitutional estoppel. Alternatively, it should reverse the district court's final order and remand for entry of judgment in favor of the Secretary.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this brief contains 12,614 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on January 7, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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