No. 19-14552

In the United States Court of Appeals for the Eleventh Circuit

NANCY CAROLA JACOBSON; TERENCE FLEMING; SUSAN BOTTCHER; PRIORITIES USA; DNC SERVICE CORPORATION/DEMOCRATIC NATIONAL COMMITTEE; DSCC, A.K.A. DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; DCCC, A.K.A. DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE; DEMOCRATIC GOVERNORS ASSOCIATION; DEMOCRATIC LEGISLATIVE CAMPAIGN COMMITTEE,

Plaintiffs-Appellees,

v.

FLORIDA SECRETARY OF STATE,

Defendant-Appellant,

NATIONAL REPUBLICAN SENATORIAL COMMITTEE; REPUBLICAN GOVERNORS ASSOCIATION,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida, Tallahassee Division
No. 4:18-cv-00262

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, GEORGIA, INDIANA, KENTUCKY, OKLAHOMA, AND WEST VIRGINIA AS AMICI CURIAE SUPPORTING APPELLANTS

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Intervenor Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees:
Nancy Carola Jacobson; Terence Fleming; Susan Bottcher; Priorities USA; DNC Service Corporation/Democratic National Committee; DSCC, a.k.a. Democratic Senatorial Campaign Committee; DCCC, a.k.a. Democratic Congressional Campaign Committee; Democratic Governors Association; Democratic Legislative Campaign Committee

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Statement Regarding Oral Argument

The Court has already set this case for oral argument on Wednesday, February 12, 2020. Many of the arguments that Amici States raise in this brief are novel and have not been addressed by the parties. Accordingly, Amici States respectfully request the opportunity to participate in oral argument.

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Statement of Interest of Amici Curiae

This Court's decision will have an impact far beyond the State of Florida. At least eighteen States have ballot-order laws like the one that plaintiffs challenge here. *See* FLA. STAT. § 101.151(3)(a). Many States key ballot order to which party won the previous election for Governor[1] or Secretary of State.[2] Some key it to which party received the most votes for certain federal offices.[3] Others key it to which party currently holds a majority in the state legislature,[4] or won the smallest number of votes in the preceding election.[5] One permanently fixes the order—Democrats first, then Republicans.[6] All of them, one way or another, order candidates on a general election ballot by reference to party affiliation—allegedly benefiting some candidates and hurting others. *Jacobson*, No. 4:18-cv-00262, ECF 202 at 16 [hereinafter Order].

The organizational plaintiffs suing in this case have recently filed federal lawsuits challenging the ballot-order laws in five other States. Complaint, *Miller v. Hughes*, No. 1:19-cv-01071, ECF No. 1 (W.D. Tex. Nov. 1, 2019); Complaint,

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[1] ARIZ. REV. STAT. § 16-502(E); CONN. GEN. STAT. § 9-249a(a)(1); GA. CODE § 21-2-285(c); MD. CODE ELEC. LAW §§ 1-101(dd), 9-210(j)(2); MO. REV. STAT. § 115.239(1); NEB. REV. STAT. § 32-815(1); N.Y. ELEC. LAW § 7-116(1); 25 PA. CONS. STAT. § 2963(b); TEX. ELEC. CODE § 52.091(b).

[2] IND. CODE § 3-11-2-6(a)(1); MICH. COMP. LAWS § 168.703.

[3] WASH. REV. CODE § 29A.36.161(4); W. VA. CODE § 3-6-2(c)(3); WIS. STAT. § 5.64(1)(b); WYO. STAT. § 22-6-121(a).

[4] TENN. CODE §§ 2-1-104(11)-(12), 2-5-208(d)(1).

[5] MINN. STAT. § 204D.13.

[6] DEL. CODE tit. 15, § 4502(a)(5).

Mecinas v. Hobbs, No. 2:19-cv-5547, ECF No. 1 (D. Ariz. Nov. 1, 2019); Complaint, *S.P.S. ex rel. Short v. Raffensperger*, No. 1:19-cv-4960, ECF No. 1 (N.D. Ga. Nov. 1, 2019); Complaint, *Pavek v. Simon*, No. 19-cv-3000, ECF No. 1 (D. Minn. Nov. 27, 2019); Complaint, *Nelson v. Warner*, No. 3:19-cv-00898, ECF No. 1 (S.D. W. Va. Dec. 17, 2019). And suing every State with similar laws in the future is "something [they] would like to do." TT.100.

Because the ballot-order statutes in Texas, Arizona, Georgia, Minnesota, and West Virginia are similar in many respects to the Florida statute challenged here, this case will factor into the briefing and decision in five different circuits—the Fourth, Fifth, Eighth, Ninth, and Eleventh. Because additional suits may be waiting in the wings, this case may also impact future suits across the country. Amici therefore have a strong interest in the outcome of this appeal.

ARGUMENT

I. The Federal Courts Cannot Entertain Plaintiffs' Suit.

The district court should have dismissed this suit for a variety of reasons. None of the plaintiffs have pointed to an injury in fact, so they lack standing. Sovereign immunity bars this suit. And the only relief plaintiffs requested will not redress their alleged injury. The organizational plaintiffs, moreover, lack statutory standing. Each of these provides an independent reason to reverse and remand with instructions to dismiss the action.

A. The individual plaintiffs lack any injury in fact.

Plaintiffs' complaint names a mix of individual and organizational plaintiffs. But none of them has established an injury in fact—the first requisite to Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

All three of the individual plaintiffs—Nancy Jacobson, Terence Fleming, and Susan Bottcher—are Florida voters who support Democratic candidates. They assert that Florida's ballot ordering scheme will (1) cause some of the Democratic candidates for whom they have voted to lose, (2) increase the burden of supporting Democratic candidates in Florida, and (3) dilute their votes vis-à-vis Republican voters. Compl. 7-14. None of those things count as an Article III injury in fact.

The first alleged injury is a textbook example of a generalized grievance: A voter who complains that his preferred candidate is less likely to win an election expresses only an interest in "vindicating generalized partisan preferences." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). That harm is not "a restriction on voters' rights and by itself is not a legally cognizable injury." *Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000). In fact, even a candidate's outright loss—as opposed to a mere decreased likelihood of victory—does not injure the voter. *See Berg v. Obama*, 586 F.3d 234, 240 (3d Cir. 2009).

While it is possible that a ballot-order law might injure a *candidate* who loses, it does not and cannot legally injure the *voter* who voted for him. "Several other Circuit Courts have also concluded that a voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate." *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir.

2001) (per curiam) (collecting cases). At most, the individual plaintiffs have asserted a future injury that belongs to someone else. But they never even allege which candidates will lose which elections because of the ballot-order scheme. That future injury is not "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013); *see also Wagner v. Cruz*, 662 F. App'x 554, 555 (10th Cir. 2016) (affirming district court's conclusion that injury premised on candidate's possible loss was conjectural and hypothetical).

The second alleged injury fares no better because it flows from the first. Plaintiffs say they will have to spend "more time and resources" supporting Democratic candidates to combat § 101.151(3)(a)'s effects. Compl. 9, 11, 14. But Supreme Court precedent forecloses that route as well. Plaintiffs "cannot manufacture standing" by voluntarily incurring costs (spending more time and resources) to avoid something that is itself a non-injury (the potential loss by candidates). *Clapper*, 568 U.S. at 402, 416. Just like the attorneys in *Clapper* could not show standing by pointing to the costs they incurred to avoid potential government surveillance, plaintiffs here cannot show standing by pointing to costs they will incur to avoid potential losses by candidates. That kind of "self-inflicted" injury does not suffice. *Id.* at 418.

Finally, plaintiffs argue that § 101.151(3)(a) "dilutes" their votes. Compl. 8, 11, 13. Their own allegations, however, belie that theory. Vote dilution consists of "devalu[ing] one citizen's vote as compared to others." *Gill*, 138 S. Ct. at 1930. In the one-person-one-vote context, a vote in an overpopulated district counts for less than a vote in an underpopulated one. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Likewise, in the racial gerrymandering context, a vote in a "cracked" or "packed" district

"carr[ies] less weight" than a vote in a neighboring district. *Gill*, 138 S. Ct. at 1931. Plaintiffs' complaint, by contrast, is that equally weighted votes are being cast differently than they might otherwise have been based on ballot order. In other words, the problem is not that the vote of a citizen who supports Party A counts for more than the vote of a citizen who supports Party B; rather, it's that more people are voting for Party A. "[L]oss of political power through vote dilution is distinct from the mere inability to win a particular election." *Thornburg v. Gingles*, 478 U.S. 30, 57 (1986). The latter is not an Article III injury.[7]

B. The organizational plaintiffs lack any injury in fact.

The complaint also names several organizational plaintiffs—Priorities USA, DNC Service Corporation/Democratic National Committee (DNC), Democratic Senatorial Campaign Committee (DSCC), Democratic Congressional Campaign Committee (DCCC), Democratic Governors Association (DGA), and Democratic Legislative Campaign Committee (DLCC). Compl. 14-21. They too lack any injury in fact.

The Supreme Court has given organizational plaintiffs two avenues to demonstrate standing. One option is to assert injuries on behalf of their injured members (associational standing). *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*,

[7] Even assuming the "primacy effect" dilutes votes in the same way that gerrymandering does, the plaintiffs run into a different problem. The election rule that allegedly dilutes the plaintiffs' votes here is of the *political* (and non-justiciable) variety. Amici, therefore, agree with the Florida Secretary of State and the Intervenors that these kinds of claims present political questions. *See* Secretary Br. 28-39; Intervenors Br. 27-36.

528 U.S. 167, 181 (2000). The other is to assert injuries suffered by the organizations themselves (organizational standing). *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). The organizations have not shown an injury in fact under either approach.

1. Start with associational standing. To prevail on this theory, an organization must show that "[1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181. The organizations here fail that test in multiple ways.

First, there is no allegation that some of these organizations have members at all. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977). Priorities USA, DSCC, DCCC, DGA, and DLCC do not describe themselves as membership organizations. And not having members is fatal for associational standing. The DNC alone alleges that it has members. Compl. 16. But its "members" are candidates that benefit from the DNC's services. Associational standing based on work an organization does "on behalf of the group served by th[at] organization" has "never [been] recognized by any court." *Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1010 n.4 (6th Cir. 2006). Beneficiaries are not "members" for associational standing purposes. *Ibid.*

Second, even assuming these organizations have members, they do not identify any of them. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (requiring "specific allegations [regarding] at least one *identified* member") (emphasis added).

None of the organizations alleges the identity of a single member. *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) (requiring evidence regarding "a specific member"). The DNC, to be sure, says that "[it] has members and constituents across the United States including in Florida." Compl. 16. But who are they? Plaintiffs never say. And courts "cannot accept an organization's self-descriptions of its membership." *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018) (quotation omitted).

Third, even assuming some of the individual plaintiffs are members of some of the plaintiff organizations—despite a lack of evidence that they are—the organizations still lack associational standing. *See* Compl. 16 (recycling alleged "dilution" injury to Florida voters). In that case, the individual plaintiffs would still need to "have standing to sue in their own right." *Laidlaw*, 528 U.S. 181. As explained above, none of them do. *Supra* part I.A.1.

Finally, the district court erroneously relied on the statistical likelihood that some unknown member will be harmed. The court suggested there will "*always*" be standing to challenge *any* election law because it will "inevitably affect[]" some voter somewhere. Order 13-14. That does not suffice. *Summers*, 555 U.S. at 497-98 (rejecting an attempt to establish associational standing by pointing to "a statistical probability that some of those members are threatened with concrete injury"). "[S]tanding is not dispensed in gross"—not even in election-law cases. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation omitted).

2. The organizations fare no better if focus shifts to the organizations themselves. When assessing organizational standing, courts "conduct the same inquiry as

in the case of an individual." *Havens Realty Corp.*, 455 U.S. at 378-79. Has an organization—as an organization—suffered an injury in fact? Each organization here alleges that the ballot-order scheme causes harm by (1) "frustrating its mission" of electing Democrats and (2) forcing it to "divert additional funds and resources" to Florida and away from other States. Compl. 14-21.

The first alleged injury is insufficient. That is the same interest the individuals asserted in "vindicating generalized partisan preferences," now dressed up in organizational garb. *Gill*, 138 S. Ct. at 1933. And it fails for the same reasons it failed when the individual plaintiffs asserted it. *Supra* at 3-4.

Diversion of resources, by contrast, could establish an injury in fact, but only if it "perceptibly impair[s]" the organization's ability to pursue its mission. *Havens Realty*, 455 U.S. at 379. To show that it does, a plaintiff must first explain how the activities it undertakes in response to the defendant's conduct differ from its "routine activities." *City of Kyle*, 626 F.3d at 238; *see also Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994) (concluding organization's "budgetary choices" for allocating funds among its routine pursuits did not confer standing). Next, the plaintiff must "identif[y] specific projects [it] had to put on hold or otherwise curtail." *City of Kyle*, 626 F.3d at 238; *see also Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) (similar). The organizations fail on both scores.

First, as the complaint shows, the activities the organizations ordinarily undertake in pursuing their mission are the same as the activities they will undertake to combat the ballot-order scheme's alleged effects. *Compare* Compl. 15 (DNC's

mission is to elect Democratic candidates "by, among other things, making expenditures for, and contributions to, Democratic candidates (at all levels) and assisting state parties" in elections), *with ibid.* (DNC will be forced "to expend and divert additional funds and resources on [election turnout], voter persuasion efforts, and other activities in Florida"). Plaintiffs cannot show they "would not have undertaken the [injury-conferring activities] in the absence of" § 101.151(3)(a). *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 78 n.5 (3d Cir. 1998). Encouraging voters to vote for their party and spending money to do so is what they do anyway. TT.88 (admitting voter registration is part of DLCC's "normal activities"). Claiming they must do *more* electioneering in Florida and less in Georgia is a complaint about routine "budgetary choices." *BMC Mktg. Corp.*, 28 F.3d at 1276.

Second, plaintiffs fail to identify specific projects they will be unable to pursue because of their increased efforts to support unnamed Florida candidates. Instead, they assert vagaries: Combating the ballot-order scheme in Florida will detract from "efforts in other states." Compl. 15-16. Which efforts—media relations or door knocking? In which States—New York or Michigan? In which races—state legislature or U.S. Senate? Plaintiffs have averred nothing about "their actual ability to conduct *specific projects* during a specific period of time." *Browning*, 522 F.3d at 1166 (emphasis added).

* * *

Because none of the plaintiffs even alleged an injury in fact, this suit should have been dismissed at the outset. *Lujan*, 504 U.S. at 561. But as the case proceeded through "the successive stages of the litigation," plaintiffs' burden got heavier. *Ibid.*

Nothing changed at trial. Testimony there focused on the magnitude of the "primacy effect" and the feasibility of employing different ballot ordering schemes.

Nancy Jacobson was the only individual to testify. Despite initially claiming that her "vote, which is [her] voice, is being suppressed," TT.54, she admitted that § 101.151(3)(a) never prevented her from voting for, donating to, or canvassing, phone banking, and raising funds on behalf of her preferred candidates, TT.58-59. And Heather Williams, DLCC's Deputy Executive Director, was the only witness to testify on behalf of the organizations. Despite being given the opportunity, she never identified specific members who will be injured or specific projects which will be abandoned. TT.95, 97-98. In fact, she admitted she could not quantify the amount of money DLCC will allegedly spend to combat the ballot-order statute. TT.99, 120.

At the end of the day, the focal injury plaintiffs asserted—that some unnamed candidates might lose—is not an injury in fact as a matter of law. No amount of factual proof could fix that problem.

C. Because plaintiffs have not shown the Secretary is the source of any injury, sovereign immunity bars this suit and plaintiffs lack standing.

In addition to showing an injury in fact, plaintiffs had the burden to establish the remaining elements of standing and an exception to sovereign immunity. *See Regent Univ. v. Bd. of Regents of Univ. Sys. of Ga.*, No. 1:12-cv-00141, 2013 WL 12155469, at *3 (S.D. Ga. Mar. 5, 2013). But they cannot do either because they have not shown the "injury" they complain about is caused by the only person they have sought to enjoin—Florida's Secretary of State.

1. Ballot-order schemes vary across the States in certain respects. Some Secretaries of State do not oversee the day-to-day operations of the local officials who implement ballot-order rules. Accordingly, the Secretary would not be the proper defendant in those States. The district court, however, failed to conduct a state-specific analysis of the powers granted to Florida's Secretary of State here.

Texas's scheme is instructive. State law authorizes local officials, like the County Clerk, to prepare ballots for an election. TEX. ELEC. CODE § 52.002 ("Authority Preparing Ballot"). Those officials have an independent obligation to comply with Texas's laws regarding ordering on the ballot, regardless of any guidance or instruction the Secretary may choose to offer them. *Id.* § 52.091(b).

The Secretary, meanwhile, is tasked with "obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of" the Election Code. *Id.* § 31.003. To that end, the Secretary is authorized to "assist and advise" local election officials regarding "the application, operation, and interpretation of" the Election Code, *id.* § 31.004(a), and "maintain an informational service for answering inquiries of election authorities relating to the administration of the election laws or the performance of their duties," *id.* § 31.004(b).

But the Secretary does not have authority to coerce local officials with regard to ballot order. In some scenarios not relevant here, local officials may be held criminally liable. *Id.* §§ 52.004, 52.0063. In others, an individual may bring a private cause of action to challenge alleged malfeasance. *Id.* §§ 221.003(a), 232.002. But Texas law nowhere provides the Secretary authority to bring any kind of enforcement action in state court. It does not even provide for an administrative enforcement mechanism

within the executive branch. Nor may the Secretary fire a County Clerk, whose office is independently created by the Texas Constitution. *See* TEX. CONST. art. V, § 20. Other States are similar. *E.g.*, ARIZ. REV. STAT. § 16–503(A) (providing boards of supervisors in Arizona's fifteen counties—not the Secretary of State—are responsible for preparing ballots in compliance with the ballot-order statute).

The district court noted that Florida's Secretary of State has been called the State's "chief election officer," and insisted that title is "not window dressing." Order 17-18; FLA. STAT. § 97.012; *accord* TEX. ELEC. CODE § 31.001; ARIZ. REV. STAT. § 16-503(A). That says nothing about what authority the title—window dressing or not—carries with it. If her responsibilities are anything like those of Secretaries in other States, then Secretary Lee does not "enforce" Florida's ballot-order statute.

The evidence at trial suggests as much. Ion Sancho—the former Supervisor of Elections for Leon County and the plaintiffs' own witness—testified that:

> Actually, the state of Florida doesn't conduct elections. All elections are conducted at the county level. So we administer, select the voting equipment, lay out the ballots, determine the voter education materials. Essentially, elections are a local function of the 67 counties of the State of Florida.

TT.229. All the State does is provide local officials the names of primary winners. *Ibid.*; FLA. STAT. § 99.121. Lori Edwards, Supervisor of Elections for Polk County, said the same thing. She "handle[s] every single step conceivably applicable to an election," which is "held exclusively at the county level." TT.475. And in conducting that election, local officials are bound to "apply the [ballot-order] statute" because it "is the law." TT.251.

2. Sovereign immunity generally bars suits against state officers in their official capacities. The Supreme Court, however, has carved out a narrow exception where "a federal court commands a state official to do nothing more than refrain from violating federal law." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). That means the officer "must have some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 157 (1908). Accordingly, the *Ex parte Young* doctrine is subject to two limits relevant here: The state officer must enforce the challenged statute, and a court may not order that officer to take official acts.

Even where an official has authority to enforce a statute, the plaintiff seeking to invoke *Ex parte Young* must show that official "is likely to [do] so." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). Plaintiffs have not shown Florida's Secretary of State can enforce the ballot-order statute. It appears she does not do so herself and exercises no control over the local officials who do. Because plaintiffs have not shown the Secretary is tasked with enforcing the statute, they have impermissibly "ma[de] [her] a party as a representative of the state." *Young*, 209 U.S. at 157.

But even assuming the Secretary has the authority to enforce § 101.151(3)(a) and is likely to exercise it, the district court could not order her to exercise that power. *Ex parte Young* is about "prevent[ing] [a state officer] from doing that which [s]he has no legal right to do." *Id.* at 159. By acting *ultra vires*, so the theory goes, the official loses her official status with respect to that act and can be ordered to stop. *Id.* at 159-60. But ordering her to take "affirmative" action *intra vires* is premised on the idea that she retains her "official or representative character." *Id.* at 160. Accordingly, "a suit may fail" if a party requests relief that "cannot be granted by merely

ordering the cessation of the conduct complained of but will require affirmative action by the sovereign." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949).

At first, it seemed the district court recognized this rule when it said it would issue only a "negative" rather than an "affirmative" injunction. Order 69. But then it promptly did the opposite—ordering affirmative acts. Among other things, the court ordered the Secretary to: (1) actively supervise local officials by not "permit[ting] enforcement" of the ballot-order scheme and by "tak[ing] all practicable measures . . . to ensure compliance" with the court's order; and (2) provide official, "written guidance to the supervisors of elections of Florida's counties" informing them of the court's decision. Order 72-73. The district court had no power to award relief that required the Secretary to exercise her official authority.

Sovereign immunity bars this suit because it exceeds *Ex parte Young*'s "precise" limits in both respects. *Stewart*, 563 U.S. at 255.

3. As explained above, the plaintiffs have not suffered an injury in fact. *Supra* part I.A. But they also lack the other two requisites for Article III standing—causation and redressability.

Because the Secretary does not enforce the ballot-order statute, she will not cause the plaintiffs' hypothetical, future injury. "[N]o one contends that the [Secretary] is actually, affirmatively 'enforcing' [the ballot-order statute]—at least in the usual sense, say, of bringing suit to implement its provisions." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1298 (11th Cir. 2019) (en banc). And the ballot-order statute itself "envisions no role" for the Secretary. *Id.* at 1299. Only the Supervisor of

Elections is tasked with preparing the ballot. FLA. STAT. § 99.121. Under this Court's binding precedent, plaintiffs cannot fix that problem by "resort[ing] to a host of provisions of the [Florida Statutes] that generally describe the [Secretary's election] authority." 944 F.3d at 1300.

Because the Secretary will not cause the plaintiffs' future injury, relief against the Secretary will not redress that injury. Plaintiffs have not established that ordering the Secretary to issue guidance notices will "significantly increase the likelihood" that Supervisors of Elections will ignore the ballot-order statute. *Id.* at 1301. They are obligated to print candidates' names "upon the ballot in their proper place as provided by law," regardless of what the Secretary says. FLA. STAT. § 99.121. That means "the effect of the court's judgment on the defendant" would not suffice to provide relief. *Lewis*, 944 F.3d at 1301 (quotations omitted). Any relief would come from the effect of the court's judgment on "an absent third party." *Ibid.*

The district court all but admitted that plaintiffs fail the redressability requirement when it acknowledged that enjoining the Secretary was not enough to redress the plaintiffs' injuries. In its opinion, the court specifically admonished "supervisors of election"—who have never been named defendants in this suit—from disobeying its order. Order 70. In the injunction it went one step further and enjoined them as well: "No supervisor of elections of any Florida county . . . shall issue any ballot which is organized pursuant to the ballot order scheme" under § 101.151(3)(a). Order 72.

Of course, a district court has power to enjoin non-parties "in active concert" with a defendant. FED. R. CIV. P. 65(d)(2)(C). But that is true only where a plaintiff

with Article III standing has validly invoked the court's jurisdiction. A court cannot supply jurisdiction that it lacks (a front-end problem) by purporting to bind non-parties (a back-end remedy). And plaintiffs "cannot bootstrap [their way] into federal court" by requesting "[r]elief that does not remedy the injury suffered." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

D. The organizational plaintiffs lack statutory standing.

Even assuming plaintiffs have Article III standing and sovereign immunity does not bar this suit, the organizational plaintiffs lack "statutory standing." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014). To have statutory standing a plaintiff must show that his interest comes within the zone of interests protected by the law invoked and that he is asserting his own injuries, not those of some third party. *Id.* at 127-28 n.3. The organizational plaintiffs can do neither.

Both of plaintiffs' claims in this case are premised on the right to vote. Compl. 32, 36. But the organizational plaintiffs, as artificial entities, do not have voting rights. "It goes without saying that political parties, although the principal players in the political process, do not have the right to vote." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002). Thus, the organizational plaintiffs are not the members of the class of people that § 1983 protects—persons subjected to the deprivation of rights secured by the Constitution. 42 U.S.C. § 1983. They are also improperly relying on the rights of third parties—voters. *See* David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 45 (1981).

* * *

The district court did not meaningfully grapple with these arguments about jurisdiction or justiciability. It thought its ability to entertain this suit was beyond peradventure simply because the Supreme Court summarily affirmed in a case involving different challenges *fifty years ago* and did not discuss these justiciability issues. *See* Order 5-6, 28-29 (citing *Mann v. Powell*, 314 F. Supp. 677 (N.D. Ill. 1969) (per curiam), *aff'd*, 398 U.S. 955 (1970)). But that case predated by decades the Supreme Court's current pronouncements on Article III's requirements. In any event, a defect "neither noted nor discussed" in a previous case does not permit a court to ignore Article III's dictates in a later case. *Ariz. Christ. Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144-45 (2011). *Mann*'s failure to address Article III standing, sovereign immunity, statutory standing, and the political questions doctrine means it is not precedent on those issues. *Ibid.*

II. Florida's Ballot-Order Statute Does Not Violate the Constitution.

The district court should have dismissed this case without ever reaching the merits. But it considered the merits anyway and reached the wrong result. It concluded Florida's ballot-order statute violates the Constitution because it confers the "primacy effect"—a benefit that one candidate allegedly receives based on being listed first—to one "group[] of candidates on the sole basis of partisan affiliation." Order 16. That was wrong. Florida's law does not even implicate the right to vote. But assuming it does, it easily passes *Anderson-Burdick*'s balancing test.

A. Laws that order candidates based on partisan affiliation are ubiquitous and non-controversial.

The district court not only flouted important Constitutional limits on federal judicial power. *Supra* part I. By misapplying Supreme Court precedent regarding the right to vote, it also unsettled long-established election procedures for untold numbers of States. In our federal framework, States retain "broad power to prescribe the 'Times, Places and Manner of holding Elections for [federal offices],' which power is matched by state control over the election process for state offices." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quotation omitted).

The district court would set aside that principle and make federal judges the custodians of ballot policy. It chided Florida for having the "temerity" to defend its ballot-order law and for its "difficulty . . . with the concept" of "a free and fair election." Order 7, 71 n.29. But laws like Florida's are not controversial. Across this country, both Democrat- and Republican-controlled States maintain laws that operate in similar ways.

Almost twenty States have laws that assign candidates a ballot position based on their partisan affiliation. And most of those laws operate like Florida's: Arizona, Connecticut, Georgia, Maryland, Missouri, Nebraska, New York, Pennsylvania, and Texas all assign the first position to whichever party won the previous election for Governor. *Supra* 1 n.1. Other States assign the first position based on party membership but utilize a different trigger—like the previous vote for Secretary of State, or the previous vote for President. *Supra* 1 nn.2-3. Delaware's solution is simpler: Democrats are listed first, and Republicans are listed second. *Supra* 1 n.6. The district

court's reasoning calls into question nearly half of the ballot-order laws in this country.

Arguably, however, that understates the prevalence of the kinds of laws the district court found problematic. For example, many other States allocate the ballot's first position "by lot." *See, e.g.*, VA. CODE § 24.2-613(C); COLO. REV. STAT. § 1-5-404(1)(a). Under that scheme, a State conducts a lottery and the party that wins is listed first in all races on all ballots across the State. *See Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 712, 720 (4th Cir. 2016) (discussing Virginia's lottery system). These laws, just as much as the others, allocate any primacy effect solely to candidates of one party solely because they are members of that party. Under the district court's logic, these laws could likewise violate the Constitution.

B. Statutes ordering candidates' names on a ballot do not implicate citizens' right to vote.

The district court's first problem on the merits was its conclusion that this case even implicates the right to vote. Order 28. The court pointed to the Supreme Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), for the idea that "each provision of an election code" affects that right. Order 13-14. But context paints a different picture:

> Although these rights of voters are fundamental, *not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates*. . . . Each provision of [an election code], whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. *Nevertheless,*

> *the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions*.

Anderson, 460 U.S. at 788 (emphases added). The Supreme Court was narrowing, not expanding, the universe of election-law challenges. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

A better reading is that all election laws may affect the right to vote *in scenarios that make voting harder*. *See id.* at 441 (framing the question as a "burden on the right to vote for the candidate of one's choice"). That could be true of a law as mundane as one prescribing the ballot's font. Imagine a law requiring ballots to be printed in Times New Roman. A complaint that voters cannot find their preferred candidates because the font is illegible might implicate the right to vote. But as to a complaint that "Times New Roman is ghastly," it makes more sense to say the law does not implicate voting rights at all—not that it imposes a minimal burden justified by state interests. *See Burdick*, 504 U.S. at 434. Forcing that kind of claim through the *Anderson-Burdick* framework makes little sense. It should not matter why the State chose that font.

The same principles obtain here. None of the plaintiffs—neither the individuals themselves nor the organizations on their behalf—argued that the ballot-order statute somehow makes voting in Florida harder. Nancy Jacobson, the only individual plaintiff to testify at trial, conceded that Florida's law never prevented her from voting for or supporting her preferred candidates. TT.58-59. In fact, local election officials confirmed that the ballot-order rule fostered clarity for voters. So much so that,

after control of the Governor's mansion changed, voters expressed "no confusion" when the ballot order switched. TT.232-33.

The *Anderson-Burdick* test that plaintiffs invoke here applies only when a court "evaluate[s] a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring). That test is not implicated here because "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." *New Alliance Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 295 (S.D.N.Y. 1994).

Florida's ballot-order law does not make it harder to vote "for the candidate of one's choice." *Burdick*, 504 U.S. at 441. To the contrary, plaintiffs' alleged injury flows from other voters' unfettered ability to vote as they wish. "The Constitution does not protect a plaintiff from the inadequacies or the irrationality of the voting public; it only affords protection from state deprivation of a constitutional right." *New Alliance*, 861 F. Supp. at 295. And that constitutional right does not include a right *to win* elections. *See Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464-65 (1979) ("The First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective.") (quotations omitted).

C. Even if ballot-order statutes burden the right to vote, any burden is minimal and outweighed by valid state interests.

The district court recognized that plaintiffs' claims rise or fall together under the Supreme Court's *Anderson-Burdick* test. Order 27; *see also Anderson*, 460 U.S. at

786-87 n.7. Under that framework, a court weighs the nature and magnitude of the alleged burden on the right to vote against the state interests justifying the law at issue. *Burdick*, 504 U.S. at 434. State laws imposing minimal burdens are subjected to minimal scrutiny. *Clingman*, 544 U.S. at 586-87. Even if that framework applies here, Florida's ballot-order statute easily satisfies it.

Courts have recognized that the burden the plaintiffs complain about here is minimal. Because Florida's law "merely allocates the benefit of positional bias" and "does not restrict access to the ballot or deny any voters the right to vote for candidates of their choice," it "places a lesser burden on the right to vote." *Sonneman v. State*, 969 P.2d 632, 638 (Alaska 1998). Indeed, compared to other election regulations the Supreme Court has upheld, a complaint about candidates' "particular position on the ballot appear[s] almost inconsequential." *Libertarian Party*, 826 F.3d at 717. All a voter needs to do to find his preferred candidate is "look a bit further down the ballot." *Meyer v. Texas*, No. H-10-cv-3860, 2011 WL 1806524, at *6 (S.D. Tex. May 11, 2011).

Likewise, courts have recognized the legitimacy of countless state interests supporting ballot-order laws. Here, Florida pressed many of the same interests that Amici States would press in support of their own laws.

Ballot-order laws foster electoral integrity. Assuming the first position on the ballot provides a benefit, that benefit should be allocated in a way that avoids gamesmanship by government officials and any appearance of gamesmanship to citizens. That requires a neutral rule that is easy to implement and announced in advance, which describes Florida's law. It is neutral because it turns on gubernatorial

elections, which either party can win. *See Sonneman*, 969 P.2d at 638 ("[T]he statute is nondiscriminatory, because it gives each candidate an equal opportunity to receive the benefit of positional bias; the benefit is not allocated in favor of any definable group such as incumbents or a specific political party."). It is easy to implement because it does not require local officials to rotate parties' positions from office to office or candidates' position from ballot to ballot. And it is announced in advance. That makes it easier for local officials to implement and police compliance. Plaintiffs' suggested alternative of randomized ballots would force untold confusion.

Laws like Florida's also promote clarity for voters, many of whom choose candidates based on party affiliation. Ordering candidates consistently by party from one race to the next across the entire ballot reduces the likelihood that voters will miss or mistake their preferred candidate. The district court thought schemes that order candidates by surname might spread the primacy effect in a given election across both parties and multiple races. But that hardly helps the voter, who found the Democratic candidate for U.S. Senate (Mr. Anderson) at the top of the list but then must search for the Democratic candidate for state Senate (Ms. Wainwright) somewhere near the bottom. *See Bd. of Election Comm'rs of Chi. v. Libertarian Party of Ill.*, 591 F.2d 22, 25 (7th Cir. 1979) (upholding Illinois law because the State's "purpose was to prevent voter confusion [and] to serve voter convenience").

Reducing confusion for the voter in the booth reduces the burden for the next voter waiting in line. *See* Opinion, *No One Should Have to Stand in Line for 10 Hours to Vote*, N.Y. TIMES (Aug. 25, 2008). And ordering candidates in terms of past popularity enables most voters to find their preferred candidates more quickly. *See*

Libertarian Party, 826 F.3d at 719-20. These are among the reasons why States have a legitimate interest in "favoring parties with demonstrated public support." *Green Party of Tenn. v. Hargett*, No. 3:11-cv-692, 2016 WL 4379150, at *40 (M.D. Tenn. Aug. 17, 2016), *aff'd*, No. 16-6299, 2017 WL 4011854 (6th Cir. May 11, 2017).

Plaintiffs' interests are "almost inconsequential." *Libertarian Party*, 826 F.3d at 717. And the State's interests are "weighty" and important. *Burdick*, 504 U.S. at 439. Thus, even if Florida's ballot-order law imposes a burden—and it does not—it is easily outweighed by the State's interests.

Conclusion

The Court should reverse the district court's decision, vacate its judgment, and remand with instructions to dismiss the case.

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Certificate of Service

On January 14, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,496 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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