No. 19-14552

In the United States Court of Appeals for the Eleventh Circuit

NANCY CAROLA JACOBSON, et al.,

Plaintiffs-Appellees,

v.

LAUREL M. LEE,

Defendant-Appellant.

and

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,

Intervenors-Appellants.

BRIEF FOR APPELLEES

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

Marc E. Elias
Elisabeth C. Frost
Jacki L. Anderson
John M. Geise
PERKINS COIE LLP
700 Thirteenth Street, N.W.,
Suite 600
Washington, D.C. 20005
(202) 654-6200

Abha Khanna
PERKINS COIE LLP
1201 Third Avenue,
Suite 4900
Seattle, WA 98101
(206) 359-8000

Frederick S. Wermuth
KING, BLACKWELL, ZEHNDER & WERMUTH P.A.
P.O. Box 1631
Orlando, FL 32802
(407) 422-2472

Counsel for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Priorities USA, DNC Services Corporation/Democratic National Committee, DSCC a/k/a Democratic Senatorial Campaign Committee, DCCC a/k/a Democratic Congressional Campaign Committee, Democratic Governors Association, and Democratic Legislative Campaign Committee certify that they are not publicly traded and have no parent corporations and that no publicly held corporation owns more than 10% of their stock.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Plaintiffs-Appellees certify that the following is a complete list of all interested persons:

1. Anderson, Eric, *Attorney for Witness*
2. Anderson, Jacki, *Attorney for Plaintiffs/Appellees*
3. Barber, Devan, *Witness*
4. Barber, Michael, *Witness*
5. Barnett, Michael, *Witness*
6. Beazley, Michael, *Witness*
7. Bottcher, Susan, *Plaintiff/Appellee*
8. Brown, Joseph, *Attorney for Defendants/Appellants*
9. Burns, Jessica, *Witness*
10. Callais, Amanda, *Attorney for Plaintiffs/Appellees*

11. Cecil, Guy, *Witness*

12. Cox, Michael, *Attorney for Witness*

13. Davis, Ashley, *Attorney for Defendants/Appellants*

14. Democratic Congressional Campaign Committee, *Plaintiff/Appellee*

15. Democratic Governors Association, *Plaintiff/Appellee*

16. Democratic Legislative Campaign Committee, *Plaintiff/Appellee*

17. Democratic Senatorial Campaign Committee, *Plaintiff/Appellee*

18. Detzner, Kenneth, *Defendant/Appellant*

19. Diot, Kristen, *Attorney for Defendants/Appellants*

20. Dominion Voting Systems, *Witness*

21. DNC Services Corporation/Democratic National Committee, *Plaintiff/Appellee*

22. Dyer, Jesse, *Attorney for Defendants/Appellants*

23. Earley, Mark, *Witness*

24. Election Systems & Software, *Witness*

25. Elias, Marc, *Attorney for Plaintiffs/Appellees*

26. Fleming, Terence, *Plaintiff/Appellee*

27. Frontera, Michael, *Witness*

28. Frost, Elisabeth, *Attorney for Plaintiffs/Appellees*

29. Fugett, David, *Attorney for Defendants/Appellants*

30. Geise, John, *Attorney for Plaintiffs/Appellees*

31. Gordon, Phillip, *Attorney for Intervenor-Appellants*

32. Herrnson, Paul, *Witness*

33. Holtzman Vogel Josefiak, PLLC, *Attorney for Intervenor-Appellants*

34. Jacobs, Rachel, *Attorney for Plaintiffs/Appellees*

35. Jacobson, Nancy, *Plaintiff/Appellee*

36. Jazil, Mohammad, *Attorney for Defendants/Appellants*

37. Kazin, Daniel, *Witness*

38. Khanna, Abha, *Attorney for Plaintiffs/Appellees*

39. King, Blackwell, Zehnder & Wermuth, P.A., *Attorney for Plaintiffs/Appellees*

40. Klick, Jonathan, *Witness*

41. Krosnick, Jon, *Witness*

42. Lee, Laurel, *Defendant/Appellant*

43. Lienhard, Jonathan, *Attorney for Intervenor-Appellants*

44. Lux, Paul, *Witness*

45. Martin, Rachana Desai, *Witness*

46. Matson, John, *Attorney for Witness*

47. Matthews, Maria, *Witness*

48. McVay, Bradley, *Attorney for Defendants/Appellants*

49. National Republican Senatorial Committee, *Intervenor-Appellant*

50. Reese, Ezra, *Attorney for Plaintiffs/Appellees*

51. Rosenthal, Oren, *Attorney for Witness*

52. Perkins Coie LLP, *Attorney for Plaintiffs/Appellees*

53. Perko, Gary, *Attorney for Defendants/Appellants*

54. Primrose, Nicholas, *Attorney for Defendants/Appellants*

55. Priorities USA, *Plaintiff/Appellee*

56. Republican Governors Association, *Intervenor-Appellant*

57. Rodden, Jonathan, *Witness*

58. Sancho, Ion, *Witness*

59. Sawtelle, James, *Attorney for Witness*

60. Sheehy, Shawn, *Attorney for Intervenor-Appellants*

61. Taylor, Ben, *Witness*

62. Torchinsky, Jason, *Attorney for Intervenor-Appellants*

63. Valdes, Michael, *Attorney for Witness*

64. Velez, Alexi, *Attorney for Plaintiffs/Appellees*

65. Walker, Mark, *U.S. District Judge*

66. Wallace, Wendi, *Witness*

67. Wermuth, Frederick, *Attorney for Plaintiffs/Appellees*

68. Williams, Heather, *Witness*

69. White, Christina, *Witness*

70. Wilson, David, *Attorney for Witness*

STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for February 12, 2020.

TABLE OF CONTENTS

PAGES

TABLE OF CITATIONS

CASES **PAGES**

STATUTES

INTRODUCTION

Following trial on the merits, the district court issued a comprehensive, 74-page opinion finding Florida's Ballot Order Statute, Fla. Stat. § 101.151(3)(a), unconstitutional. The Statute mandates that all candidates of the Governor's political party be listed first in all partisan races on general election ballots, giving an arbitrary advantage to that party up and down the ticket. This is because of a phenomenon known as "position bias" or "primacy effect," whereby the candidate listed first receives an electoral advantage solely due to ballot position. As the district court noted, the issues this case presents are "not novel" or "even particularly challenging" jurisprudentially. Doc. 202 at 9. Plaintiffs assert equal protection claims of the sort routinely decided by federal courts "without difficulty or confusion," *id*. at 10, and in finding the Ballot Order Statute unconstitutional, the district court broke no new ground. Courts have consistently struck down ballot ordering schemes that arbitrarily favor a certain class of candidates over others similarly situated, and, for the past 30-some years, have done so using the *Anderson-Burdick* framework. *See, e.g., McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980); *Sangmeister v. Woodard*, 565 F.2d 460, 465-66 (7th Cir. 1977); *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969); *Graves v. McElderry*, 346 F. Supp. 1569, 1578 (W.D. Okla. 1996); *Culliton v. Bd. of Election Comm'rs of DuPage Cnty.*, 419 F. Supp. 126, 128-29 (N.D. Ill. 1976); *Netsch v. Lewis*, 344 F.

Supp. 1280, 1281 (N.D. Ill. 1972); *Mann v. Powell*, 314 F. Supp. 677, 678-79 (N.D. Ill. 1969), *aff'd* 398 U.S. 955 (1970); *Gould v. Grubb*, 14 Cal. 3d 661, 669-70 (1975); *see also Kautenburger v. Jackson*, 85 Ariz. 128, 131 (1958); *Elliott v. Sec'y of State*, 295 Mich. 245, 249-50 (1940); *Akins v. Sec'y of State*, 904 A.2d 702, 706-07 (N.H. 2006).

Anderson-Burdick is a highly fact-intensive inquiry, and the district court's decision was based on a painstaking review of the evidence. That evidence, the district court found, proved that (1) the candidate listed first on Florida's ballots receives, on average, a five-percentage-point advantage solely by virtue of their first-listed position; (2) five points is greater than the margin of victory in many recent Florida elections; and (3) the Ballot Order Statute "is discriminatory because it awards the primacy effect vote to candidates based solely and uniquely upon their political affiliation." Doc. 202 at 45, 49. In other words, the district court found that the facts overwhelmingly proved that, "Florida's ballot order scheme takes a side in partisan elections." *Id.* at 50. It found that Defendants offered little in terms of state interests to defend the Statute's favoritism of a single political party, and that the justifications they did offer could not sustain the Statute even under rational basis review. *Id.* at 63.

The Ballot Order Statute was defended, not only by Florida's Secretary of State (the "Secretary"), but also by Republican organizations ("Intervenors") who

intervened on the explicit basis that Republican candidates and organizations "stand to be most directly harmed by a change" in Florida's ballot order. *Id.* at 1 n.1, 14-15. Plaintiffs do not disagree. Because of the successes of a handful of Republicans in Florida's gubernatorial elections, the Ballot Order Statute has conferred a significant advantage on Republican candidates for decades. But for this litigation, the same would be true in 2020, based on a fraction of a percentage point's difference in vote share between the Republican and Democratic candidates in the 2018 gubernatorial election. It is thus not surprising that the Secretary and Intervenors argue passionately for a reversal of the district court's judgment to perpetuate the advantage the Ballot Order Statute has given Republican candidates.[1]

But the mere fact that Republicans are on one side of the case and Democrats on the other does not transform Plaintiffs' straightforward equal protection claims into a non-justiciable political question. Nor does it permit this Court to ignore more than half a century of federal court precedent adjudicating partisan disputes over the voting process, including ballot order challenges. Yet that is exactly what Defendants ask this Court to do. By seeking to "transmogrify" the Supreme Court's recent partisan gerrymandering decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), "into a far more expansive ruling," *id*. at 11,

[1] The Secretary and Intervenors are referred to collectively as "Defendants."

Defendants invite this Court to come to a breathtaking conclusion: that in finding in *Rucho* that *partisan gerrymandering* claims present political questions beyond the reach of federal courts, the Supreme Court silently overruled decades of its own precedent ably reviewing challenges to the voting process in other contexts to hold that *all* elections-related claims that have political ramifications are similarly—and suddenly—out of bounds. To credit Defendants' argument, this Court would have to disregard clear limiting language in *Rucho* itself, the fundamental rationale of that opinion, as well as Supreme Court precedent affirming a successful challenge to a ballot order statute under basic equal protection principles. In short, binding Supreme Court precedent forecloses Defendants' argument that this case is nonjusticiable.

The same disregard for precedent animates Defendants' arguments about standing, laches, constitutional estoppel, and even their comparatively brief discussion of the merits of the case. Defendants' repeated efforts to shoehorn this case into the Supreme Court's redistricting jurisprudence fails at every step. None of the arguments raised by Defendants, or the amici who now insert themselves, provides a sound basis for disturbing the lower court's judgment. This Court should affirm.

STATEMENT OF THE ISSUES

1. Plaintiffs brought equal protection claims functionally indistinguishable from claims challenging ballot order statutes that federal courts have ably adjudicated for more than half a century. Did the district court err in finding them justiciable?

2. Plaintiffs are Democratic organizations and voters who brought a case against Florida's chief elections officer concerning the constitutionality of a state law which provides a systemic advantage to Republican Party candidates in every election. Did the district court err in finding Plaintiffs had standing?

3. Based on its assessment of witness credibility and the evidence before it, the district court found Florida's Ballot Order Statute provides, on average, a five-percentage-point advantage to candidates affiliated with the Governor's party and is not justified by any legitimate state interest. Were these factual findings clearly erroneous, and did the district court err in its application of *Anderson-Burdick* to conclude that Plaintiffs proved the Ballot Order Statute violates equal protection?

4. Plaintiffs brought prospective constitutional claims and the district court found Defendants failed to establish either inexcusable delay or undue prejudice. Were these factual determinations clearly erroneous, and did the district court abuse its discretion in declining to apply laches to these facts?

5. Constitutional estoppel is an equitable doctrine whose applicability has been explicitly confined by this Court and the Supreme Court. Did the district court abuse its discretion in declining to apply this doctrine in an entirely new factual context?

STATEMENT OF THE CASE

I. Factual Background.

Florida's Ballot Order Statute requires 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 office on the general election ballot." Fla. Stat. § 101.151(3)(a). The second position is reserved for "the candidates of the party that received the second highest vote for Governor." *Id*. Because, since 1998, a Republican has won and a Democrat received the second most votes in Florida's gubernatorial races, the Statute's effect has been to list Republicans first and Democrats second on all general election ballots in every partisan race for the last two decades.[2]

During that time, the difference in vote share between the Republican gubernatorial candidate and his Democratic opponent has grown increasingly miniscule. In 2010, Governor Scott was elected with only 1.2 percentage points

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

more of the vote than his Democratic opponent. Doc. 198-1 at 219. In 2014, he won re-election by just one percentage point. *Id*. at 237. And in 2018, Governor DeSantis won with only 0.4 percentage points more than his Democratic opponent. *Id.* at 259.

It is indisputable that people manifest bias toward the first in a set of visually-presented options, as with candidates on a ballot. Pls.' Ex. 1 at 36.[3] As one court recognized, this phenomenon is "so widespread and so universally accepted as to make it almost a matter of public knowledge." *Holtzman v. Power*, 62 Misc.2d 1020, 1023 (N.Y. Sup. Ct. 1970). Courts have long acknowledged that this phenomenon can and does influence elections. *See, e.g*., *McLain*, 637 F.2d at 1166 (affirming "finding of ballot advantage in the first position"); *Sangmeister*, 565 F.2d at 465 ("[T]he trial court's conclusion that 'top placement on the ballot would be an advantage to the plaintiff' is supported by substantial evidence[.]"); *Graves*, 946 F. Supp. at 1576 (finding "some measure of position bias exists in Oklahoma's" elections); *Akins*, 904 A.2d at 706 (affirming finding that "the primacy effect confers an advantage in elections"); *Gould*, 14 Cal. 3d at 664 (describing finding of position bias as "consistent with parallel findings rendered in similar litigation throughout the country"); *State ex rel. Roof v. Bd. of Comm'rs*, 39 Ohio St. 2d 130, 136 (1974) (recognizing "it is generally agreed" that "candidates

[3] All Plaintiffs' Exhibits cited herein are available in the Supplemental Appendix.

whose names appear at the beginning of the list receive some votes attributable solely to the positioning of their names"); *Kautenburger*, 85 Ariz. at 130-131 ("[I]t is a commonly known and accepted fact that where there are a number of candidates for the same office, the names appearing at the head of the list have a distinct advantage."); *Elliott*, 295 Mich. at 249 (same).

At least 29 states either rotate,[4] alphabetize,[5] or randomize[6] the order of candidate names in general elections in an apparent effort to neutralize the effects of position bias. Lawmakers have also attempted to use ballot order to their party's advantage; in North Carolina, for instance, after a Democrat won the governor's race in 2016, the Republican legislature abolished that state's name ordering scheme which, like Florida's, favored the party of the governor, *see* H.B. 496, 2017 Sess. (N.C. 2018).

---

[4] *See* Alaska Stat. § 15.15.030(6); Ark. Code Ann. § 7-5-207(c)(1); Cal. Elec. Code § 13111; Idaho Code Ann. §§ 34-903(4) & 34-2419; Iowa Code § 49.31(1)(B)(2); Kan. Stat. Ann. § 25-610; Ky. Rev. Stat. Ann. § 118.225; Mont. Code Ann. § 13-12-205(2); N.H. Rev. Stat. Ann. § 656:5(II); N.D. Cent. Code §§ 16.1-11-27 & 16.1-06-05; Ohio Rev. Code Ann. § 3505.03; *Party Order on Ballots*, South Carolina Election Commission, https://www.scvotes.org/party-order-ballots.

[5] Ala. Code § 17-6-25; Haw. Rev. Stat. § 11-115; La. Rev. Stat. Ann. § 18:551(C); Me. Rev. Stat. Ann. tit. 21-A, § 601; Miss. Code Ann. § 23-15-367(2); Nev. Rev. Stat. § 293.267; Utah Code Ann. § 20A-6-302(1)(b); Vt. Stat. Ann. tit. 17, § 2472.

[6] Colo. Rev. Stat. § 1-5-404; N.J. Stat. Ann. § 19:14-12; N.M. Stat. § 1-10-8.1; N.C. Gen. Stat. Ann. § 163A-1114; Okla. Stat. Ann. tit. 26, § 6-106; Or. Rev. Stat. § 254.155; S.D. Codified Laws § 12-16-3.1; R.I. Gen. Laws § 17-19-9.1; Va. Code Ann. § 24.2-613.

II. Proceedings Below.

In May 2018, Plaintiffs—Democratic Party committees, non-profit organizations, and voters—filed this lawsuit, alleging that the Ballot Order Statute's thumb on the scale in favor of every candidate affiliated with the governor's party is unconstitutional.[7] They named the Secretary in her official capacity as the state's chief elections officer, and sought declaratory and injunctive relief requiring Florida to implement a "nondiscriminatory means of determining the order of candidates' names on the ballot," Doc. 1 at 3.

Within a few weeks, Republican organizations sought—and were granted—intervention on the basis that Republicans "stand to be most directly harmed by a change" in ballot order. Doc. 23 at 16. Plaintiffs moved for a preliminary injunction, while Defendants filed motions to dismiss. At a hearing on July 24, 2018, the district court denied all pending motions. Docs. 69-71. While declining to grant relief on "the eve of an election," the district court observed that its ruling "in no way minimize[d] the importance of the primacy effect or position bias." Supp. App'x 72 at 110:6-7, 111:4.

Following discovery, the parties filed cross motions for summary judgment, which the district court denied based on "material issues of disputed fact regarding

[7] Plaintiffs refer to the organizations who filed suit collectively as "Organizational Plaintiffs" and the voters collectively as "Individual Plaintiffs."

'position bias' and its purported effects on Florida elections as well as the viability of alternatives to the current scheme," Doc. 158 at 1.

The district court held a three-day bench trial in July 2019. On November 11, it issued its final order, concluding that the Ballot Order Statute is unconstitutional. Doc. 202 at 64. It issued a permanent injunction prohibiting the enforcement of the Statute and remitted the matter to the Legislature to enact remedial legislation. *Id*. at 71-73.

The Secretary appealed and moved for a stay in the district court, which was denied after briefing and argument. Doc. 220. The Secretary subsequently filed for a staying pending appeal with this Court. This Court denied that motion on December 20. In the same order, it expedited briefing and set oral argument for February 12, 2020.

III. Trial Evidence.

At trial, representatives of Democratic and Republican organizations testified that it is "common knowledge among everybody involved in politics that a person listed first on the ballot may get a benefit from that in an election[.]" Tr. 128:25-129:3; *see also id.* 73:13-18.[8] Plaintiffs' three expert witnesses provided evidence confirming that intuition regarding the effects of ballot order generally

[8] The trial transcripts are available at Tabs 188, 191, and 193 of the Secretary's Appendix.

and in Florida specifically.

Plaintiffs presented the expert testimony of Dr. Jon Krosnick, the preeminent scholar on candidate name order effects. *See* Pls.' Ex. 1 at 5-8; Tr. 279:10-293:17. Dr. Krosnick provided a comprehensive review of the scholarship on position bias, concluding that primacy effects are evident in the vast majority of elections that have been studied over the past 70 years. *See* Pls.' Ex. 1 at 15-39; Tr. 302:4-309:18. His meta-analysis of the 1,086 unique tests of name order effects reported in the literature demonstrated that 84% manifested differences in the direction of primacy, including studies from at least 19 other countries. Pls.' Ex. 1 at 29-32, 35.

Dr. Krosnick also testified about the effect of name order in Florida elections specifically. His regression analysis of general elections in Florida from 1978 to 2018 showed that first-listed candidates have gained an average electoral advantage of five percentage points due to their ballot position. Tr. 301:4-17; Pls.' Ex. 1, at 3, 63-64, 83. According to Dr. Krosnick, the probability that would occur by chance is "miniscule," less than one percent. Tr. 343:9-17; Pls.' Ex. 1 at 110.

Plaintiffs also offered expert testimony about the additional disadvantage experienced by second-listed candidates as a result of primacy effect in "down-ballot" races, about which voters generally have less information. Dr. Jonathan Rodden—a highly-regarded political science professor at Stanford University, *see* Pls.' Ex. 5 at 7-9; Tr. 137:9-140:10—determined that down-ballot candidates of

the second-listed party in Florida's statewide elections—Republicans and Democrats alike—suffered an average disadvantage between 3.1 and 5.6 percentage points compared to their top-of-ballot co-partisans. Tr. 161:3-17; Pls.' Ex. 5 at 2-5, 22. At the same time, down-ballot candidates of the first-listed party consistently outperformed their party's candidates for president, governor, and U.S. Senate. Tr. 158:16-161:22; Pls.' Ex. 5 at 17-41. Dr. Rodden testified he could conceive of no political science theory that would account for this other than ballot order. Tr. 162:22-163:22.

Dr. Rodden also analyzed whether changing ballot order might meaningfully impact election results. Tr. 175:14-179:18; Pls.' Ex. 5 at 41-48. To do so, he made use of the "natural experiment" created by the 2018 revision of North Carolina's ballot order law. *See* supra at 8; Tr. 177:15-198:18. Comparing the same precincts in 2016, when Republicans were listed first in all precincts, and in 2018, when Republicans were listed first in only half of the precincts, Dr. Rodden found that the increase in Democratic vote share from 2016 to 2018 was larger by 1.5 percentage points in the precincts in which Republicans no longer held the top spot on the ballot compared to those where Republicans maintained first position both years. *See* Pls.' Ex. 5 at 41-48. The effect was even larger in "open" seats (8 percentage points) and in races where the same pair of candidates competed in both years (4 percentage points). *Id*. Dr. Rodden testified that these results provided a

"clear sense of causality associated with reform and ballot order practices." Tr. 179:11-18, 186:14-18.

Plaintiffs' final expert witness, Dr. Paul Herrnson—a political science professor specializing in election administration and voting systems—provided testimony on "proximity error," which occurs "when a voter inadvertently selects a candidate listed immediately above or below the candidate the voter intended to vote for." Pls.' Ex. 8 at 2. Dr. Herrnson testified, based on empirical data and his own field work, that voters make fewer proximity errors when intending to vote for first-listed candidates, who have no one listed above them, than when intending to vote for second-listed candidates, whose position allows for proximity errors in either direction. *Id.* at 11-12; Tr. 418:22-421:1.

Defendants proffered a single expert, Dr. Michael Barber, who did not dispute the central findings of the literature, acknowledging he had no reason to question the results of Dr. Krosnick's peer-reviewed studies on name order effects. Tr. 711:10-13. Nor did he dispute that studies have shown name order effects in partisan races, races with an incumbent, and high-profile races, and even greater effects in open and low-profile races. Tr. 729:1-24. Dr. Barber offered no opinion on whether position bias affects elections in Florida. Tr. 761:7-12. Instead, his testimony was largely limited to critiques of Dr. Krosnick's analysis, which he said

led him to "question the persistence and validity" of Dr. Krosnick's five-percentage-point estimate. Tr. 618:7-11.

The district court also heard testimony from witnesses regarding the practical burdens of the law and the state's purported interests, as well as potential remedies. This included Plaintiff Nancy Jacobson and a representative from Plaintiff DLCC, both of whom discussed the burdens the law placed on them, Tr. 45:4-124:19, current and former county elections supervisors, who explained that alternative ballot ordering schemes would be easily administrable, Tr. 226:17-262:23, 473:13-491:24, and an elections administrator from Ohio who confirmed Ohio had never encountered voter confusion issues associated with rotating ballot order, Tr. 202:4-222:9; Pls.' Ex. 49. Defendants called three supervisors of elections and Florida Director of Elections Maria Matthews, none of whom asserted any state interest in favoring the governor's party on the ballot and all of whom confirmed that at least one alternative ballot ordering scheme could be easily administered, *see* Tr. 437:19-594:15, 764:6-839:3.[9]

[9] The district court also received into the record deposition testimony from representatives from Organizational Plaintiffs, Doc. 195, representatives from voting system manufacturers, Docs. 196-2, 196-3, and a voting advocate in New Jersey, Doc. 196-1.

IV. The District Court's Order.

The district court found that the evidence overwhelmingly proved that Florida's elections are significantly impacted by ballot order. First, the district court found no dispute among the parties as to the existence of a primacy effect in Florida elections, with Defendants disputing only the "quantum of the primacy effect." Doc. 202 at 30. The district court found Dr. Krosnick's "methods and conclusions reasonable, reliable, and credible" for at least four independent reasons. *Id*. at 32. First, Dr. Krosnick's conclusions were in accord with the overwhelming academic literature, which Dr. Barber did not dispute. *Id.* at 35-36. Second, Dr. Barber himself admitted there was "no reason to believe [the] demographic variables" he identified as potentially problematic in Dr. Krosnick's study "had any meaningful impact on the validity of Dr. Krosnick's conclusions." *Id*. at 35. Third, Dr. Barber's criticisms of Dr. Krosnick's methodology were undermined by Barber's use of the same methods in his own research. *Id.* at 36-38. Fourth, Dr. Krosnick ran additional analyses accounting for each of Dr. Barber's criticisms (whether or not he agreed with them) and none meaningfully changed his results. *Id.* at 36-38.

The district court also found Dr. Rodden's methods and analyses to be "reasonable, reliable, and credible." *Id*. at 40, 42. First, as to the down-ballot analysis, Dr. Barber, like Dr. Rodden, could think of no theory of political science

to explain Dr. Rodden's results other than position bias. *Id.* at 39. Second, Dr. Rodden's analysis remained "surprisingly strong" notwithstanding the "heterogeneity of the candidates in the races" that formed the basis of Dr. Barber's criticism. *Id*. at 40. Finally, regarding Dr. Rodden's comparison with North Carolina, the district court noted that Dr. Barber "did not offer any substantive critique of this analysis" and in fact had "also relied upon comparisons between Florida and North Carolina" in other expert testimony. *Id*. at 42. The district court found Dr. Rodden's testimony buttressed Dr. Krosnick's findings that position bias awards a statistically significant advantage to first-listed candidates in Florida, and that these effects are even more significant in down-ballot races. *Id*.

Finally, the district court found Dr. Herrnson's "testimony credible, and his methods and conclusions reasonable and reliable." *Id*. at 44. Dr. Barber's only criticism of Dr. Herrnson was that his testimony did not address position bias, but the district court disagreed, finding Dr. Herrnson provided "an empirical explanation for a portion of the advantage a first-listed candidate receives by virtue of being listed first[.]" *Id*. at 43.

In contrast, the district court found Dr. Barber's testimony "emphatically not credible and his opinions offered in this case to be unreliable." *Id*. at 45. This was due both to the "speculative" nature of his criticisms of Drs. Krosnick and Rodden, which fell apart on close review, and his "demeanor as a witness," including his

"labored responses to questioning by counsel," which the district court found "serve only to highlight his unconvincing equivocations." *Id.* at 34, 45.

Taken together, the district court found 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." *Id*. at 45. The district court noted that the practical burden on Plaintiffs was enhanced by a recent history of exceedingly close Florida elections in which the margin of victory was smaller than the average estimated primacy effect. *Id*. at 48-49, 61-62. Further, the district court held the character of the injury was "discriminatory because it awards the primacy effect vote to candidates based solely and uniquely upon their political affiliation." *Id*. at 49; *see also id.* at 61 ("Florida's ballot order statute is not neutral; instead, it affects Plaintiffs' rights in a politically discriminatory way.").

As for the states' interests in the law, the district court found them largely to be interests in preserving the status quo rather than justifications for the Statute's ballot ordering scheme. *Id.* at 51. But, in any event, the district court found that they did not outweigh the burdens the Statute imposed on Plaintiffs. First, the district court found no interest in upholding Florida's policy choices where those choices violate the Constitution. *Id*. at 53-54. Second, the interest in preventing voter confusion was based on unfounded, speculative concerns. *Id*. at 55. Third, the interest in uniformity was directed at just one potential remedy, not a justification

for Florida's existing law. *Id*. at 56-57. Finally, the court found that the interest in voter confidence was only undermined by a ballot ordering system "determined on a partisan political basis rather than a neutral one." *Id*. at 60.

Based on the evidence, the district court determined that Plaintiffs' claims warranted heightened scrutiny, but found in any event that the Ballot Order Statute could not survive even rational-basis review. *Id.* at 63-64.

The district court enjoined the Ballot Order Statute, *id.* at 64-67, and gave the Legislature the opportunity to choose a replacement scheme, detailing multiple remedies it considered constitutional because they would either rotate the names on the ballot or "cleans[e] the partisan taint" from the process by not distributing the benefits of position bias based on political affiliation. *Id.* at 67-71.

V. Standard of Review.

While questions of justiciability and Article III standing are legal questions reviewed *de novo*, *GEICO Gen. Ins. Co. v. Farag,* 597 F. App'x 1053, 1055 (11th Cir. 2015); *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1268 (11th Cir. 2006), the district court's underlying "findings of jurisdictional facts [are reviewed] for clear error." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013) (quoting *City of Vestavia Hills v. Gen. Fid. Ins. Co.*, 676 F.3d 1310, 1313 (11th Cir. 2012)).

As to the merits, "[t]he standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed *de novo*." *Mitchell v. Hillsborough Cnty.*, 468 F.3d 1276, 1282 (11th Cir. 2006) (quoting *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 601 (5th Cir. 2000)). The Secretary's assertion that application of *Anderson-Burdick* is reviewed *de novo* is misleading. Sec'y Br. 53. While the district court's conclusion that the statute is *unconstitutional* is reviewed *de novo*, all of the underlying factual findings are reviewed for clear error. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019); *Wexler v. Anderson*, 452 F.3d 1226, 1230 (11th Cir. 2006).

Intervenors acknowledge the appropriate standard but assert it does not apply, citing inapposite authority for the contention that "constitutional facts" are subject to *de novo* review. Int. Br. 9-10. But the cases upon which Intervenors rely are all First Amendment speech cases, not voting rights cases. *See, e.g.*, *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 499 (1984) (examining whether article critical of a loudspeaker product was written with "actual malice"); *ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1203 (11th Cir. 2009) (examining whether removal of books from school library violated First Amendment); *CAMP*, 451 F.3d at 1268 (challenging ordinance on prior-restraint First Amendment grounds); *Falanga v. State Bar*, 150 F.3d 1333, 1335 (11th Cir.

1998) (examining whether restriction on attorney client solicitation violated First Amendment). While the Court applies the "constitutional facts" standard to First Amendment cases that involve "free expression," *Bose*, 466 U.S. at 499, it treats voting rights cases under the level of scrutiny generally applicable to bench trials, reviewing factual findings for clear error and legal issues *de novo*. *See supra* at 19.

The Court reviews the district court's application of laches to the facts for abuse of discretion, although those facts are subject to clear error review. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1319 n.38 (11th Cir. 2008). The question of whether the defense of laches is even available in a case seeking prospective relief for a constitutional violation is a legal issue reviewed *de novo*. *Id*.

Finally, application of the equitable doctrine of constitutional estoppel is also reviewed for abuse of discretion. *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 n.4 (11th Cir. 2017). The facts themselves are subject to clear error review. *Robinson v. Tyson Foods, Inc*., 595 F.3d 1269, 1273 (11th Cir. 2010).

SUMMARY OF ARGUMENT

1. Plaintiffs bring straightforward equal protection claims similar to those that federal courts have easily adjudicated for over 50 years. This is precisely the opposite of the state of the case law involving partisan gerrymandering which confronted the Supreme Court in *Rucho*. Both the Supreme Court and this Court's

long line of precedent, along with limiting language in *Rucho* itself, require the conclusion that Plaintiffs' claims are justiciable.

2. Although only one Plaintiff need satisfy Article III's standing requirements to maintain this litigation, in this case all nine have standing. Defendants rely upon *Gill v. Whitford*, 138 S. Ct. 1916 (2018), another partisan gerrymandering case, to argue otherwise, but it is inapposite. Each Plaintiff has demonstrated the injury-in-fact, traceability, and redressability necessary for standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

3. The district court correctly applied the *Anderson-Burdick* standard to the facts of this case to find that the Ballot Order Statute is unconstitutional. *See Democratic Exec. Comm. of Fla.*, 915 F.3d at 1318. None of its factual findings were clearly erroneous. And its holding based on those findings that the Ballot Order Statute could meet neither heightened scrutiny nor rational basis review was correct and should be affirmed.

4. Laches is inapplicable in a case such as this, which seeks only prospective relief. But even if laches were available as a defense, the district court's conclusion that it did not apply here was not an abuse of discretion.

5. The reach of constitutional estoppel has been expressly limited by this Court and the Supreme Court, and it has no relevance here. The district court did not abuse its discretion in concluding that it did not bar this case.

ARGUMENT

I. Plaintiffs' claims are justiciable.

Both the Secretary and Intervenors expend significant effort attempting to convince this Court that the Supreme Court's recent decision in *Rucho* suddenly rendered Plaintiffs' claims nonjusticiable. There is no jurisprudentially sound basis for reading or applying *Rucho* in this way.

In that case, the Supreme Court concluded that partisan gerrymandering claims present political questions beyond the reach of federal courts because of the Court's inability to identify a judicially manageable standard for resolving those particular types of claims. *See* 139 S. Ct. at 2494. This was not for want of trying. Partisan gerrymandering claims had been in search of a judicially manageable standard for decades, but the Court repeatedly "struggled without success" to identify one. *Id*. at 2491. Accordingly, by the time *Rucho* came before it, the Court "ha[d] never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years." *Id*. at 2507.

The same is manifestly *not* true of equal protection challenges to laws that govern the voting process, even when they advantage one political party over another. All the while that the Supreme Court was struggling to identify a judicially manageable standard for partisan gerrymandering claims, both it and lower federal courts applying its precedent were ably deciding precisely the types of claims that Plaintiffs bring here, without jurisprudential incident. In one of these

cases, the Supreme Court explicitly rejected an argument markedly similar to the one Defendants raise here. *See Williams v. Rhodes*, 393 U.S. 23, 28 (1968) (holding in case regarding ballot access that "Ohio's claim that the political-question doctrine precludes judicial consideration of these cases requires very little discussion. That claim has been rejected in cases of this kind numerous times").

The intervening precedent provides no indication that the Supreme Court has changed its mind. Federal courts have proceeded to decide all manner of voting rights challenges outside the partisan gerrymandering context, including to ballot order schemes brought under the exact theory that animates Plaintiffs' claims—that an advantage is conferred upon first-listed candidates merely as a result of being first, and that laws that mandate that first position be occupied by certain types of candidates over others similarly situated violate equal protection. *See, e.g.*, *McLain,* 637 F.2d at 1167; *Sangmeister*, 565 F.2d at 465; *Graves*, 946 F. Supp. at 1582; *Culliton*, 419 F. Supp. at 128-29; *Netsch*, 344 F. Supp. at 1281; *Gould*, 14 Cal. 3d at 669-70.

Even the Supreme Court has passed upon the constitutionality of a ballot order statute, indicating that—unlike in the partisan gerrymandering context, where not a single case has made it successfully through that Court's doors without triggering a debate over whether a judicially manageable standard exists for its resolution—the same concerns about justiciability are simply not present. At issue

in *Mann v. Powell* was a practice that ordered candidates based on when their nominating petitions were received and, when two petitions were received simultaneously, favored incumbents. 314 F. Supp. at 679. The district court found the systemic favoring of incumbents—even only as a tie-breaker—an "unlawful invasion of plaintiffs' Fourteenth Amendment right to fair and evenhanded treatment," *id.*, and issued a preliminary injunction requiring that ballot order be determined by a "nondiscriminatory means by which each" similarly-situated candidate (i.e., those whose petitions were received simultaneously) must "have an equal opportunity to be placed first on the ballot." *Id*. The Supreme Court summarily affirmed that ruling, 398 U.S. 955, and that affirmance binds this Court. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (holding "lower courts are bound by summary decisions by this Court until such time as this Court informs them they are not") (quotation marks omitted); *see also Hand v. Scott*, 888 F. 3d 1206, 1208 (11th Cir. 2018). Like *Mann*, this case presents a simple question of equal protection to determine whether a state may, consistent with the Fourteenth Amendment, grant top ballot placement to one class of candidates, burdening other candidates similarly situated.

As the district court found, "[t]he summary affirmance of *Mann* would alone compel the conclusion that Plaintiffs' claims are justiciable." Doc. 202 at 6. But *Rucho* itself further makes clear that redistricting is *sui generis* among election

litigation. The "basic reason" the Court had so much trouble identifying a judicially manageable standard for partisan gerrymandering claims is that it has long been accepted that "a jurisdiction may engage in" some measure of "*constitutional* political gerrymandering." *Rucho*, 139 S. Ct. at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)) (emphasis added); *see also Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment."). Thus, the "central problem" there is not "whether a jurisdiction has engaged in partisan gerrymandering" but when it has "gone too far." *Rucho*, 139 S. Ct. at 2497.

Outside of redistricting, however, states are generally forbidden from discriminating based on political views. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) ("If [partisan] considerations had provided the only justification for a photo identification requirement, we may also assume that [the requirement] would suffer the same fate as the poll tax at issue in *Harper*."); *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."). And while "[a] partisan gerrymandering claim cannot ask for the elimination of partisanship," *Rucho*, 139 S. Ct. at 2502, any assertion that the design of the ballot is an inherently partisan activity contradicts federal law. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363

(1997) ("Ballots serve primarily to elect candidates, not as forums for political expression.").

Defendants do not contend otherwise. Indeed, the Secretary conceded that any ballot order system that favors a specific political party is "blatantly discriminatory" and unconstitutional. Doc. 44 at 11 n.4; *see also* Doc. 138 at 7-8. Rather than defend the Statute on partisan grounds, Defendants affirmatively argued below that the Statute is non-discriminatory, *see, e.g.*, Doc. 23-1 at 13, Doc. 37 at 12, Doc. 42 at 15, Doc. 44 at 1, 5, just as they insist here that it is "partisan-neutral," Sec'y Br. 34.

But in disclaiming the partisan nature of the Statute, Defendants only illustrate why *Rucho* is distinguishable. According to Defendants, "[i]f 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." Sec'y Br. 33. This gets *Rucho* exactly backwards. While *Rucho* found partisan gerrymandering claims nonjusticiable precisely *because* of the inherently partisan nature of redistricting, federal courts regularly adjudicate challenges to election laws that provide "incidental[]" benefits to one political party or candidate precisely because the voting process is *not* meant to be partisan. *See, e.g.*, *Crawford*, 553 U.S. at 203;

Soltysik v. Padilla, 910 F.3d 438, 446 (9th Cir. 2018) (reversing motion to dismiss because party affiliation rule applied unequally between parties); *Miller v. Moore*, 169 F.3d 1119, 1125 (8th Cir. 1999) ("[W]hile states enjoy a wide latitude in regulating elections and in controlling ballot content and ballot access, they must exercise this power in a reasonable, nondiscriminatory, politically neutral fashion."); *Fulani v. Krivanek*, 973 F.2d 1539, 1544, 1548 (11th Cir. 1992) (holding statute allowing certain parties, but not others, to waive signature verification fees to access ballot violated equal protection under *Anderson-Burdick*); *Common Cause Ind. v. Marion Cty. Election Bd.*, 311 F. Supp. 3d 949, 974 (S.D. Ind. 2018), *vacated on other grounds*, 925 F.3d 928 (7th Cir. 2019) (noting partisanship not a "legitimate basis" for closing early voting locations); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 929 (W.D. Wis. 2016) ("The redistricting process is inherently political through and through, and a gerrymandering claim requires a court to decide how much partisan politics is too much. By contrast, voter qualifications and election administration should not be political at all, and partisan gain can never justify a legislative enactment that burdens the right to vote.") (citation omitted).

Defendants' attempt to distinguish *Mann*, moreover, implicitly recognizes that redistricting and ballot order litigation are governed by different legal principles. Defendants argue that, unlike in *Mann*, "ballot position [here] is not

awarded to all candidates based on their status as an incumbent." Int. Br. 29; *see also* Doc. 51 at 5 (conceding "incumbent first" statutes are unconstitutional under the equal protection clause). Defendants never explain why this distinction renders this ballot order challenge nonjusticiable. In fact, while protecting incumbents has long been viewed as a traditional and generally legitimate criteria in redistricting, *see Rucho*, 139 S. Ct. at 2501; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440–41 (2006), *Mann* establishes that the same is *not* true of laws that attempt to protect incumbents through ballot design. Although the question of "[h]ow much" incumbent favoritism "is too much" might befuddle a court in the redistricting context because some degree of incumbent protection is permitted in redistricting, *see Rucho*, 139 S. Ct. at 2501, the Supreme Court and numerous lower courts have had no trouble adjudicating ballot order statutes favoring incumbents and finding them unconstitutional. *See, e.g.*, *Mann*, 398 U.S. 955; *Sangmeister*, 565 F.2d at 468; *Netsch*, 344 F. Supp. at 1281; *Gould*, 14 Cal. 3d at 664, 669-70; *Holtzman*, 62 Misc. 2d at 1024. Where Defendants concede that laws granting top ballot position to "all candidates based on their status as [] incumbent[s]" are *unconstitutional*, Int. Br. 29, it hardly follows that a law granting top ballot position to all candidates affiliated with the incumbent Governor's political party are nonjusticiable.[10]

[10] The Secretary's additional contention that "*Mann* does not resolve this issue

Nor does the *Anderson-Burdick* framework that Defendants agree "applies to ballot order disputes generally," Int. Br. 29 n.8, suddenly become unmanageable when ballot order laws favor candidates of a particular political party. For instance, in *Graves v. McElderry*, a federal district court had no trouble holding that a statute that mandated that the "name of the Democratic party candidate for office always be printed in the top position" violated equal protection. 946 F. Supp. at 1582; *see also, e.g.*, Doc. 23-1 at 13 (acknowledging statute at issue in *Graves* unconstitutional), Doc. 37 at 12 (same), Doc. 44 at 9 n.3,11 n.4 (same). Indeed, even those cases Defendants contend are authoritative adjudicated ballot order disputes raised by political parties under *Anderson-Burdick*. *See Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 712 (4th Cir. 2016); *New Alliance Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 284 (S.D.N.Y. 1994); *see also Akins*, 904 A.2d at 703. As these cases demonstrate, the question under *Anderson-Burdick* is not whether a 3-percentage-point or a 5-percentage-point ballot order effect is the appropriate "goalpost" for distinguishing constitutional ballot order statutes from

---

because it stemmed from '*purposeful*' discrimination enabled by a wholly *discretionary* ballot-order provision," Sec'y Br. 38 (quoting *Mann*, 314 F. Supp. at 678-79), is puzzling, not only for its failure to explain how or why justiciability of an entire class of cases would turn on this distinction, but also because the partisan gerrymandering claims in *Rucho* also involved purposeful discrimination, *see* 139 S. Ct. at 2491, 2493. The Secretary's concession that discrimination in ballot order is justiciable even though discrimination in redistricting is not illustrates how misplaced her reliance on *Rucho* is here.

unconstitutional ones. Sec'y Br. 36; *see also* Int. Br. 34. It is whether, based on the context of the claim and evidence, the "character and magnitude" of the ballot order effect impose an unconstitutional burden on Plaintiffs' voting rights. *Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983); *see also id.* at 789 ("The results of this evaluation will not be automatic[.]").

Defendants' concession, both before this Court and below, that a statute placing a "thumbs-up" next to all candidates affiliated with the Governor's party is not only justiciable but "unconstitutional" wholly undermines their position. *See* Int. Br. 30 n.9; Tr. 42:24-43:15. As with the present case, such a statute would be "partisan in nature," providing a "small but statistically significant advantage" to one party over another that would be difficult to "quantify" in any one election "given the wide variety of ways in which any given election might be swayed." Sec'y Br. 37-38; Int. Br. 33-34. While a "thumbs-up" perhaps presents more intuitively obvious favoritism for the Governor's party, under Defendants' formulation, it begs the question of how much political favoritism is too much. Would placing an asterisk next to candidates affiliated with the Governor's party be similarly unconstitutional? What about placing their names in slightly larger font, or in bold print, or in a different color? Or placing the names of all candidates affiliated with the Governor's party on the first page of a paper ballot? Ultimately, in their efforts to distinguish *some* ballot order statutes and *some* ways to design

ballots to favor one party over another that would be justiciable, Defendants reveal the illogic of their claim that *this* Ballot Order Statute is not.

Defendants ask this Court to find that, through *Rucho*, the Supreme Court silently overruled all of the precedent discussed above, removing from the federal court's purview all litigation over the constitutionality of election laws that implicate partisan actors or interests. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (noting Supreme Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*"). But the plain language of *Rucho* says otherwise. The Supreme Court made clear that the partisan gerrymandering context presents the "rare circumstance" where the questions raised are beyond the reach of the federal court's competence. 139 S. Ct. at 2508. Thus, by its own terms, *Rucho* is the exception to the rule, not the new prevailing standard.

At bottom, Defendants' repeated invocation of *Rucho* to assert that federal courts cannot be tasked with "apportioning political power," Sec'y Br. 30-32; Int. Br. 33-34, willfully misunderstands Plaintiffs' claim. Unlike in the partisan gerrymandering context, Plaintiffs are not asking for a "fair share of political power and influence," *Rucho*, 139 S. Ct. at 2502; they are simply asking for the *fair shot* the equal protection clause is meant to guarantee. Based on well-established equal protection principles and standards, this case is justiciable.

II. Plaintiffs have standing.

Like their justiciability arguments, Defendants' assertions that Plaintiffs lack standing misapply clear precedent and misconstrue Plaintiffs' claims. It is well established that only one plaintiff need have standing for a case to proceed. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). Here, Organizational Plaintiffs' standing to bring this suit is so broadly supported by precedent that the Court need not even consider Defendants' contrived efforts to prove a lack of standing by any other Plaintiffs. That said, there is ample evidence establishing that all nine Plaintiffs have standing. Defendants' arguments to the contrary should be rejected.

A. Plaintiffs have suffered an injury-in-fact.

The requirement that a litigant in federal court demonstrate they have suffered an injury-in-fact to invoke the court's jurisdiction is meant "to distinguish a person with a direct stake in the outcome of a litigation," even if small, "from a person with mere interest in the problem." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973). This element demands only the smallest, "identifiable trifle" of an injury. *Hallums v. Infinity Ins. Co.*, 945 F.3d 1144, 1147 (11th Cir. 2019) (quotation marks and citation omitted).

Plaintiffs more than meet this standard. They include the Democratic National Committee, the official national party committee of the Democratic Party, 52 U.S.C. § 30101(14); Doc. 195-4 at 15:15-18:4; the DSCC, the national

senatorial committee of the Democratic Party, 52 U.S.C. § 30101(14); Doc. 195-1 at 13:3-22; the DCCC, which occupies the same position with regard to the U.S. House, 52 U.S.C. § 30101(14); Doc. 195-3 at 12:4-13:13; the Democratic Governors Association, whose mission is electing Democratic gubernatorial candidates, Doc. 195-5 at 7:10-9:2, 12:23-13:17; and the Democratic Legislative Campaign Committee, whose mission is electing Democratic Party state legislative candidates, Tr. 72:22-75:20. Plaintiffs alleged and proved that the Ballot Order Statute has given Republican candidates an average five-point advantage in Florida general elections. Doc. 202 at 45. That each of these entities has been substantially injured as a result should be beyond any serious debate.

Courts have routinely found that political party entities have direct organizational standing where the injury alleged is a systemic disadvantage to that party relative to other political parties. *See, e.g.*, *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006) (Texas Democratic Party had direct standing based on "harm to its election prospects"); *Smith v. Boyle*, 144 F.3d 1060, 1061–63 (7th Cir. 1998) (Illinois Republican Party had standing to challenge voting rules that disadvantaged Republican candidates); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (Conservative Party official had standing to challenge opposing candidate's position on the ballot where opponent "could siphon votes from the Conservative Party" candidate); *Owen v. Mulligan*, 640 F.2d 1130, 1132–

33 (9th Cir. 1981) (holding "potential loss of an election" was injury-in-fact sufficient to give Republican Party official standing); *Nat. Law Party of U.S. v. Fed. Election Comm'n*, 111 F. Supp. 2d 33, 44, 47 (D.D.C. 2000) (holding "relative disadvantage to plaintiffs' candidacy and the injury to their interest in effectively voicing their political message" sufficient for standing); *Democratic Party of the U.S. v. Nat'l Conservative Political Action Comm.*, 578 F. Supp. 797, 810 (E.D. Pa. 1983) (three-judge panel) (holding Democratic Party had Article III standing because challenged action "reduce[d] the likelihood of its nominee's victory" and thus "injured the Democratic party in more than an ideological way").

The same is true where the challenged procedure threatens the party's mission and causes the party to divert some of its resources to combat it. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("[T]he new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote."), *aff'd*, 553 U.S. 181; *see also id.* ("The fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury."); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610-12 (5th Cir. 2017) (finding standing where an organization spent extra money to educate its members about law's effects); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1336-38 (N.D.

Ga. 2018) (finding Democratic Party organizations had standing to challenge voting laws requiring diversion of resources that would likely affect at least one party member); s*ee also Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008).

Political party entities also have associational standing to stand in the shoes of the candidates and voters whose interest they represent. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 512 (1975); *see also Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) (finding "political parties have standing to assert, at least, the rights of its members who will vote in an upcoming election") (citing *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1078-79 (N.D. Fla. 2004)).

Here, Organizational Plaintiffs asserted and proved direct injuries to their competitive interests, their mission, as well as harm based on diversion of resources. *See* Compl. ¶¶ 16-21; Doc. 202 at 26-50; Tr. 72:22-75:20; Doc. 195-1 at 13:3-22; Doc. 195-2 at 18:4-19:11; Doc. 195-3, at 16:15-17:11; Doc. 195-4, at 16:6-18:4; Doc. 195-5, at 7:25-9:2. They also asserted and proved injuries on behalf of their voters and their members, which include the Democratic candidates who have to run at a disadvantage in every partisan general election in Florida. *See, e.g.*, Compl. ¶¶ 13-15; Doc. 202 at 26-50; Doc. 195-4 at 17:21-18:2. Indeed, a finding that these types of entities do not have standing to raise these types of

injuries would be news to the Supreme Court. *See Crawford*, 553 U.S. at 189 n.7 (agreeing with unanimous view of the Seventh Circuit that state Democratic party had standing to challenge voter identification law).

Defendants ignore *any* precedent actually applicable to organizational standing in favor of a misapplication of yet another partisan gerrymandering case. This time they build their house of cards on the Supreme Court's decision in *Gill*. But *Gill* cannot sustain their contentions for a host of reasons, most critically because the only plaintiffs to that litigation were individual voters. As such, *Gill* never addressed the myriad bases for standing of political party entities. In fact, after the Supreme Court remanded the case to the district court to give plaintiffs the opportunity to establish standing, the *Gill* plaintiffs resolved the issue by filing a new action that included a *political party entity* as a plaintiff. *See* Compl., *The Wis. Assembly Democratic Campaign Comm. v. Gill*, No. 3:18-cv-763-JPD (W.D. Wis. Sept. 14, 2018). This was the path outlined by four justices who wrote in concurrence in *Gill*. *See* 138 S. Ct. at 1938-39 (Kagan, J., concurring). Thus, even if *Gill* had any bearing on this case, the involvement of Organizational Plaintiffs would solve any standing concerns.

While the Court need not even consider the arguments as to the Individual Plaintiffs' standing, *see supra* at 32, there, too, Defendants' arguments are not well founded. First, Defendants contend that because *Gill* required the individual

plaintiffs in that case to prove a district-specific injury, Plaintiffs here must demonstrate that a specific election was altered due to position bias to have standing. Sec'y Br. 41, 40-44; Int. Br. 39-40. This is an apples-to-oranges comparison. Because gerrymandering necessarily occurs district-by-district, a voter's injury in a partisan gerrymandering case arises "from the particular composition of the voter's own district." *Gill*, 138 S. Ct. at 1931. Thus, to raise a claim in that context a voter must show that *his* district has been gerrymandered; allegations about *other* districts are insufficient. *See id*. at 1930-31. The focus on district-specific harm has no application here, where Plaintiffs are injured by a state-wide law that applies in every election irrespective of where Plaintiffs live or compete. *See id*. at 1939 ("[W]hen the harm alleged is not district specific, the proof needed for standing should not be district specific either.").

Defendants' insistence that any injury in the elections context must demonstrate that the challenged statute was "outcome-determinative" in a specific election, Sec'y Br. 41; *see also* Int. Br. 26, is also thoroughly rebutted by the findings in other ballot order cases. *See, e.g.*, *McLain*, 637 F.2d at 1159 (holding ballot order system unconstitutional where plaintiff-candidate received only 1.5% of vote); *Graves*, 946 F. Supp. at 1579 ("[A]lthough the impact may be slight, citizens' rights under the First and Fourteenth Amendments are directly infringed."); *Akins*, 904 A.2d at 707 (noting even if "primacy effect's influence on

the outcome of elections is small, . . . elections are often decided by narrow margins, and even a small degree of influence carries the potential to change the result of an election"); *see also* Doc. 202 at 37 ("The burden of proof does not require Plaintiffs to establish the existence and magnitude of candidate name order effects with absolute statistical certainty—although in this case this Court finds they very nearly have—but rather to establish them by a preponderance of the evidence."). But even if Plaintiffs were required to show that position bias has altered elections to have standing (they are not), the district court found that they did, crediting Dr. Krosnick's testimony and, based on the facts presented to it, holding that "as Dr. Krosnick explained, candidate name order effects have often been outcome determinative." Doc. 202 at 49. Defendants do not argue this was clear error.[11]

Second, Defendants' contention that Jacobson cannot be heard to complain where the Ballot Order Statute has not prevented her from casting a ballot or otherwise engaging in the political process finds no basis in the law—and Defendants cite none. *See* Int. Br. 21-22; Sec'y Br. 54. Courts have repeatedly

[11] Nor does the Secretary's observation that some Democratic candidates have managed to win elections despite the Ballot Order Statute have any bearing. Sec'y Br. 43. Plaintiffs need not prove that the injuries inflicted by the Statute are insurmountable. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) ("For purposes of standing, a denial of equal treatment is an actual injury even when the complainant is able to overcome the challenged barrier.").

found that voters are injured in cases like this one based on the precise harms Jacobson experienced. *See, e.g.*, Tr. 55:1-11 ("[T]he way I think of it as a woman is as a woman who was a professional . . . I always had to run faster, work harder, et cetera, to achieve, you know, in the eyes of the others that -- what a man could simply achieve by being a man. This is what the ballot order statute makes me think of when I evaluate these races."); *McLain*, 637 F.2d at 1167 (finding ballot order statute operated at "expense of . . . voters" who support candidates disadvantaged by statute); *Graves*, 946 F. Supp. at 1579 (finding ballot order statute's effect injured voters). Indeed, in developing the *Anderson-Burdick* standard that governs this case, the Supreme Court expressly recognized that a voter's injury is not limited to outright denial of the right to vote or to have their vote counted. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (noting "[e]ach provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the *voting process itself*, inevitably affects" the right to vote) (quoting *Anderson*, 460 U.S. at 788); *see also* Doc. 202 at 13-14.[12]

[12] To the extent Defendants contend that the large number of Democrats in Florida renders Individual Voters' injuries a "generalized grievance," that is also not the law. *See Spokeo*, 136 S. Ct. at 1548 n.7 ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance.").

B. Plaintiffs' injuries are fairly traceable to the Secretary.

The Secretary proceeds under the umbrella of standing to also argue that Plaintiffs' injury is not traceable to the Secretary because it is caused by voters who vote on the basis of position bias, not the Secretary. This is wrong for a number of reasons.[13]

Plaintiffs do not claim that the effects of position bias alone cause their injury in this case. Rather, it is the *way* in which the Ballot Order Statute distributes position bias between similarly-situated major parties that is the crux of Plaintiffs' constitutional claim. *See also* Doc. 202 at 16 ("Plaintiffs' alleged injury in this case is not based on the mere existence of the primacy effect vote and its impact on elections. Rather, their claims concern the fact that Florida's ballot order statute allocates the primacy effect vote to groups of candidates on the sole basis of partisan affiliation."); *see also McLain*, 851 F.2d at 1048 (finding voter plaintiff had standing based on injury that was fairly traceable to ballot access law). The Ballot Order Statute is undeniably an elections law, which the Secretary of State has the power to implement and enforce as Florida's chief elections official. *See Democratic Exec. Comm. of Fla*, 915 F.3d at 1318. Thus, the injury that the Ballot Order Statute imposes on Plaintiffs is directly traceable to the Secretary.

[13] The tenuous basis of this argument is reflected in the Secretary's failure to raise it below. *See* Doc. 199 at 29-31; *see also* Doc. 202 at 11.

But even if Plaintiffs' injuries were exactly as the Secretary describes them, they would still suffice for standing purposes. This Court has "made it clear that the traceability requirement is less stringent than proximate cause: '[e]ven a showing that a plaintiff's injury is indirectly caused by a defendant's actions satisfies the fairly traceable requirement.'" *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1271 (11th Cir. 2019). Thus, however Plaintiffs' injuries are described, they easily satisfy Article III's traceability requirement.[14]

C. Plaintiffs' injuries are redressable.

The Secretary alone argues that Plaintiffs failed to meet the third requirement of Article III standing, redressability, but once again fails to address Plaintiffs' actual claims, the decision of the district court, and applicable precedent.

First, the Secretary attempts to persuade the Court that unless Plaintiffs' injuries are entirely and perfectly redressed, Plaintiffs lack standing. Yet the Secretary fails to cite a single case that actually endorses this theory, and for good reason. It is not the law. *See Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1126-27 (11th Cir. 2019) ("To have Article III standing, a plaintiff 'need not demonstrate anything 'more than ... a substantial likelihood' of redressability.'") (quoting *Duke*

[14] For the same reasons, amici's argument that sovereign immunity bars Plaintiffs' suit, Amicus Br. 10-16, is meritless. *See Democratic Exec. Comm. of Fla.*, 915 F.3d at 1318 (holding Secretary is correct official to sue for prospective injunctive relief regarding Florida election law) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

Power Co. v. Carolina Envt'l. Study Grp., Inc., 438 U.S. 59, 79 (1978)) (alteration in original); *see also id*. (noting "even partial relief suffices for redressability"); *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) (observing plaintiff "need not show that a favorable decision will relieve [their] every injury"); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310–11 (11th Cir. 2001).

The Secretary does not dispute that the district court had the power to enter a declaratory judgment announcing that the Ballot Order Statute is unconstitutional, or to enjoin its enforcement. *See also* Doc. 117 at 10 (Intervenors conceding the district court has "the power to declare [the] Statute unconstitutional, and to enjoin its enforcement"). That alone is more than sufficient to redress Plaintiffs' injuries, which, as established, flow from the operation of the Statute itself. *See supra* at 40; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663-66 (2015). And that is *exactly* what the district court did. Doc. 202 at 69-70. The Secretary cites absolutely nothing to support her contention that Plaintiffs' injuries (which the district court *redressed*) were not redressable.

The remainder of the Secretary's argument is spent shadowboxing against remedies discussed in the proceedings below, none of which the district court actually ordered be implemented. The fact that the Secretary has complaints about each of these potential remedies does not make Plaintiffs' injuries non-redressable, nor does the Secretary cite any precedent that holds as much. In addition, the

Secretary seems to presume that the remedies she discusses are the *only* possible remedies. Not so. There are likely as many ways to order a ballot as there are to skin a cat, *see, e.g.*, *supra* nn.4-6, and the district court appropriately deferred to the Legislature to find the one it most prefers (within constitutional bounds). Whatever the Secretary's concerns or preferences about the various remedial options, the audience that she should bring them to now is the Legislature, not this Court. Indeed, by rehashing her arguments about the feasibility or comparative desirability of these various options, the Secretary is improperly inviting this Court to engage in fact-finding in the first instance, something that the Court has repeatedly recognized it is not in a position to do. *See, e.g.*, *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1293 (11th Cir.2010) ("[A]s everyone knows, appellate courts may not make fact findings."); *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993) ("We, however, are not factfinders.").

To the extent the Court deems the Secretary's discussion of some of the potential remedial options relevant, it should be noted that the Secretary's characterization of the evidence is not just one-sided, but flatly incorrect. The evidence did not establish that county-by-county rotation was "unworkable." Sec'y Br. 46. In fact, it proved the opposite. Pls.' Ex. 51 at 10-11; Tr. 811:20-814:19, 817:16-818:9 (unique identifier for each candidate assigned at the state level is used to tabulate votes regardless of candidate order). The Secretary's assertion that

it would "do nothing" for down ballot races was directly refuted below. Tr. 90:9-94:24 (testifying that county-by-county rotation would significantly lessen harm to DLCC). The Secretary's speculation, moreover, that county-by-county rotation could prompt new lawsuits from litigants who choose to adopt the Secretary's misapprehension of the nature of the constitutional violation, Sec'y Br. 46, has no bearing on whether Plaintiffs' claims are redressable. As for alphabetical order, even the Secretary is unable to bring herself to assert that it is impossible, a wholly untenable position in light of the fact that Florida's primary ballots are ordered in this manner. Fla. Stat. § 101.151(4)(a) (2019); *see also* Sec'y App'x 219 at 22:14-18. The Secretary does not state that if the Legislature were to order any of these remedies, she would be unable to implement them, and nor could she. Because their claims are redressable, Plaintiffs have Article III standing.[15]

III. The district court's conclusion that Plaintiffs proved the Ballot Order Statute violates the First and Fourteenth Amendment should be affirmed.

The district court properly applied the *Anderson-Burdick* balancing test to Plaintiffs' claims. In doing so, the district court made extensive factual findings based on the record, and following this Court's instruction that "[t]he more a

[15] Amici's contention that Organizational Plaintiffs lacked statutory standing, meanwhile, is easily rejected. Even the Secretary acknowledges that jurisdiction was proper under 42 U.S.C. § 1983. Sec'y Br. 9. And amici cite to no relevant case law for this contention because it is meritless. *See, e.g.*, *Common Cause/Ga.*, 554 F.3d at 1350-51 (finding organization had standing in case under 42 U.S.C. § 1983 based on diversion of resources).

challenged law burdens the right to vote, the stricter the scrutiny to which we subject that law," *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1319, held the law was subject to heightened scrutiny. Doc. 202 at 62-63. However, the district court ultimately found that the Statute could not even survive rational-basis review. *Id.* at 63. Defendants provide no basis to disturb the district court's holding or to conclude that any of its extensive factual findings in support were clearly erroneous. This Court should affirm.

A. *Anderson-Burdick* is the correct standard to evaluate Plaintiffs' claims.

Nearly 30 years ago, the Supreme Court announced that challenges to state election laws should be evaluated under the *Anderson-Burdick* test. *See Burdick*, 504 U.S. at 433-34; *see also, e.g.*, *Common Cause/Ga.*, 554 F.3d at 1352-53 (noting *Anderson-Burdick* is the appropriate standard for "constitutional challenges to specific provisions of a State's election laws") (internal quotation marks and cite omitted). The premise of *Anderson-Burdick* is that all "[e]lection laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. "Each provision of a 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.'" *Id*. (quoting *Anderson*, 460 U.S. at 788). There is no "litmus test" immunizing certain types of laws from scrutiny,

nor are there certain recitations of interests that automatically make them immune. *Crawford*, 553 U.S. at 190. Rather, the court must balance these factors and "make the 'hard judgment' that our adversary system demands." *Id*. at 190-91.

Anderson-Burdick requires courts to "weigh 'the character and magnitude of the asserted injury to the rights . . . the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). It involves a "flexible" sliding scale, where "the rigorousness of [the court's] inquiry . . . depends upon the extent to which [the challenged law] burdens [voting rights]." *Id*. Thus, when a law subjects voting rights to a "severe" restriction, it "must be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 280 (1992). Less severe burdens remain subject to balancing: "[h]owever slight" the burden on voting rights "may appear," "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (quoting *Norman*, 502 U.S. at 288-89).

Contrary to the Secretary's assertion, the use of *Anderson-Burdick* is not limited to laws that are alleged to burden the right to cast a ballot or to access the ballot, but rather is the appropriate test to "evaluate a law respecting the right to

vote—whether it governs voter qualifications, candidate selection, or the *voting process*[.]" *Crawford*, 553 U.S. at 204 (Scalia, J., concurring) (emphasis added). Any number of cases from the Supreme Court on down that have applied *Anderson-Burdick* prove this contention false. *See, e.g*., *Buckley v. Am. Constitutional Law Found., Inc*., 525 U.S. 182, 200 (1999) (applying *Anderson-Burdick* in holding unconstitutional statutes requiring initiative-petition circulators to wear identification badges and disclose their names and wages during and after signature circulation); *Marcellus v. Virginia State Bd. of Elections*, 849 F.3d 169, 175 (4th Cir. 2017) (applying *Anderson-Burdick* in considering challenge to law prohibiting local candidates from having party identifier appear next to their name on ballot); *Libertarian Party v. D.C. Bd. of Elections & Ethics*, 682 F.3d 72, 74 (D.C. Cir. 2012) (applying *Anderson-Burdick* in considering challenge to regulation regarding vote tally of losing write-in candidates); *Wexler v. Anderson*, 452 F.3d 1226, 1231-32 (11th Cir. 2006) (applying *Anderson-Burdick* in considering challenge to Florida's practice of employing different manual recount procedures according to type of voting system employed in each county); *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992) (applying *Anderson-Burdick* in holding that provision of Florida election statute denying candidates option of waiving signature verification fee burdened fundamental First and Fourteenth Amendment right to associate politically).

Moreover, *every* ballot order case that federal courts have considered in the years since the Supreme Court announced the test has applied *Anderson-Burdick* to differentiate constitutional ballot order statutes from unconstitutional ones, including the two distinguishable cases Defendants rely on to claim the district court got it wrong. *See, e.g.*, *Alcorn*, 826 F.3d at 716; *Graves*, 946 F. Supp. at 1578; *New Alliance Party*, 861 F. Supp. at 294-95; *see also Akins*, 904 A.2d at 706-07. In sum, the Secretary's assertion that *Anderson-Burdick* was not the appropriate standard for the district court to apply to Plaintiffs' claims is flatly incorrect.

B. The district court's conclusion that the Ballot Order Statute burdens Plaintiffs' right to vote should be affirmed.

The district court properly applied the fact-intensive *Anderson-Burdick* inquiry to find that the Ballot Order Statute imposes a substantial burden on Plaintiffs' right to equal protection. Doc. 202 at 31-64. Neither the cherry-picked cases cited by Defendants nor their misleading attempts to relitigate the district court's factual finding and credibility determinations provide a basis to disturb its conclusion.

When the ballot order case law is viewed as a whole, it becomes clear that there is a distinction between challenges brought by minor party-affiliated or write-in candidates who seek to be treated as major party candidates, and those brought by similarly situated candidates and parties. This should not be surprising. First,

the Supreme Court has held that states may constitutionally "enact reasonable election regulations that may, in practice, favor the traditional two-party system," *Timmons*, 520 U.S. at 367; it has never found that they may enact regulations that favor one of those parties over the other. *See Crawford*, 553 U.S. at 203. Second, because minor-party and write-in candidates generally have less support than major-party candidates, they are often unable to demonstrate as an evidentiary matter that they are injured because of ballot position specifically. Thus, the burden that such plaintiffs can show is generally quite slight and may be outweighed by state interests in election administration and avoiding voter confusion that are present and legitimate precisely *because* of the difference between major- and minor-party candidates.

Both of the ballot order cases that Defendants rely upon were brought by plaintiffs *not* similarly situated to those with whom they sought parity of treatment. As previously noted, Plaintiffs do not challenge Florida's tiering of major and minor party candidates. *See supra* n.2; Doc. 1 at 25 n.2. But in both *Alcorn* and *New Alliance Party* it was precisely that type of tiering that was the subject of the plaintiffs' challenges.

In *Alcorn*, the statute at issue assigned candidates to one of three tiers, with the first reserved for major parties (effectively, Republicans and Democrats), the second for "recognized political parties" (including the Libertarian Party), and the

third for independent candidates. 826 F.3d at 712.[16] A candidate affiliated with the Libertarian Party sought an injunction mandating that candidates be ordered "on a random basis without regard to party status," *id.* at 713, effectively eliminating the statute's tiered structure. In evaluating the plaintiffs' burden, the Fourth Circuit refused to credit the plaintiffs' "cursory equal protection argument," contrasting it with a case in which Republican candidates successfully challenged the ballot order placement of Democratic candidates on equal protection grounds, *id.* at 718 (citing *Graves*, 946 F. Supp. at 1582). Unlike the present case, which "represents the first time there has been a fully developed record upon which to evaluate a ballot order claim," Doc. 202 at 28, the plaintiffs' challenge to Virginia tiered-system in *Alcorn* was dismissed at the outset, 826 F.3d at 711-12.

Likewise, the plaintiff in *New Alliance Party* was a minor political party that "tendered no empirical evidence in support of its claims," but still sought to be placed in the first tier of candidates on ballots, a position reserved for political parties that could obtain over 50,000 votes in a gubernatorial election. 861 F. Supp. at 287, 295. The court relied upon the state's interest in orderly election administration to justify the differential treatment between minor- and major-party

[16] Unlike Florida's Statute, candidates in the first tier were ordered "by lot," *id*., such that no party was "automatically elevated to the top of the ballot," *id*. at 718.

candidates. *Id.* at 298-99 ("Courts have consistently upheld two-tiered ballot placement schemes as constitutionally valid under the Equal Protection Clause.").

Both the Secretary and Intervenors avoid any discussion of the raft of ballot order cases actually analogous to the one presently at issue, and understandably so. Below, their discussion of these cases forced them to stumble into some important concessions. For instance, the Secretary conceded before the district court that ballot order systems that discriminate in favor of "a particular class of candidate," such as "incumbents or candidates from a specific political party," are unconstitutional. Doc. 138 at 7-8. Yet, on its face, the Ballot Order Statute here favors "a particular class of candidates"—i.e., all who affiliate with the political party of the incumbent Governor. Both the Secretary and Intervenors also agreed below that systems that give election officials the authority to "list[] candidates from their party first" are unconstitutional. *Id.* at 8 n.4; *see also* Doc. 141 at 28. By arguing that this case is meaningfully different, they ignore that the Secretary was appointed to her position "by the Governor" and "serve[s] at [his] pleasure." Fla. Stat. Ann. § 20.10(1). Thus, Florida's Ballot Order Statute not only allows but mandates that the Secretary list candidates from her party first.

More importantly, although neither Defendant even mentions the case here, the Secretary acknowledged below that the Eighth Circuit's decision in *McLain* is not "clearly distinguishable." Doc. 138 at 7-8. The statute the court considered in

McLain was strikingly similar to Florida's; it grouped candidates into different tiers and listed first-tier candidates in the order of each party's vote share in the last congressional election. 637 F.2d at 1165-69. Significantly, the Eighth Circuit held that the state's *tiered* system was constitutional, *id.* at 1168 ("This result is in accord with the overwhelming majority of cases approving various forms of disparate treatment for independent and party candidates, respectively."), but held that its favoritism of the sitting congressman's party *within the first tier* was unconstitutional, *id.* at 1167 ("Such favoritism burdens the fundamental right to vote possessed by supporters of the last-listed candidates, in violation of the fourteenth amendment.").

Rather than address this case law, Intervenors attempt to relitigate the district court's factual and credibility findings in evaluating Plaintiffs' burden—a pursuit so unfounded, they do not even attempt an argument that the court's findings amount to clear error. The bulk of Intervenors' argument relies on their preferred assessment of the experts' testimony. Int. Br. 39-43. This rehashing of the record, however, fails to address, let alone dispute, the district court's findings that each of Plaintiffs' experts presented "reasonable, reliable, and credible" testimony, and that Defendants' sole expert provided testimony in response that was "emphatically not credible." Doc. 202 at 44-45; *see also id.* at 34 (noting that

Dr. Barber was "forced to admit" on cross-examination that "almost all" of his direct testimony "was either speculative, unsound, or both").

Of course, this determination was uniquely within the district court's discretion. *See Increase Minority Participation by Affirmative Change Today of Nw. Fla., Inc. (IMPACT) v. Firestone*, 893 F.2d 1189, 1195 (11th Cir. 1990) ("The decision by a trial court on the competency of, and what weight should be given to the testimony of, an expert is a highly discretionary one."); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017) (appellate courts "give singular deference to a trial court's judgments about the credibility of witnesses . . . because the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record") (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)); *Anderson*, 470 U.S. at 575 (trial court's assessment of witness credibility "can virtually never be clear error"). Intervenors identify no basis whatsoever for this Court to revisit, let alone reverse, these findings.

In any event, the record thoroughly supports the district court's findings, and thoroughly undermines Intervenors' revisionist history. For instance:

- Intervenors assert, based on Dr. Barber's testimony, that demographic differences between Florida, Ohio, and California render Dr. Krosnick's comparisons between the states invalid. Int. Br. 42. But on cross-examination, Dr. Barber admitted he had "no reason to believe" that any of those demographic differences have any relevance to a voter's susceptibility to position bias. *See* Tr. 714:3-718:24; *see also* Doc. 202 at 35.

- Intervenors assert, based on Dr. Barber's testimony, that Dr. Krosnick's decision to use a variable from Ohio's legislative elections in his regression analysis was unfounded. Int. Br. 42. But when Dr. Krosnick replaced that variable with one specifically suggested by Dr. Barber, he found even *larger* ballot order effects in Florida. *See* Pls.' Ex. 1 at 69; Tr. 727:19-728:19.

- Intervenors assert, based on Dr. Barber's testimony, that Dr. Rodden was wrong to examine North Carolina's recent change in ballot order systems to analyze whether changing a scheme like Florida's might impact election results. Int. Br. 40; *see* Pls.' Ex. 5 at 41-48; Tr. 175:14-179:18. But not only did Dr. Barber offer no critique of Dr. Rodden's North Carolina analysis in his report, on cross-examination he admitted he had similarly compared the two states in his own expert testimony in another case. Tr. 707:25-708:17; *see also* Doc. 202 at 42.

- Intervenors assert, purportedly based on Dr. Barber's testimony, that "there is very little evidence of a dramatic down-ballot disadvantage." Int. Br. 44 (quoting Tr. 759:7-11). Here Intervenors resort to mischaracterizing the testimony of their own expert, who stated that there was little evidence of a down-ballot disadvantage in one "particular election"; "[a]t no point" did he state "that this one election calls into question the pattern observed by Dr. Rodden across all of the elections he analyzed." Tr. 759:1-15.

- Intervenors assert, based on Dr. Barber's testimony, that Dr. Herrnson's study of proximity error "does not speak to anything about ballot order effects." Int. Br. 45. But Dr. Herrnson specifically testified that proximity error accounts for a portion of the benefit of being listed first. Tr. 435:6-11; *see also* Doc. 202 at 43-44.

At the end of the day, in trying to convince the Court that it is "impossible to tell if there is a ballot order effect in Florida and, if there is, what the size of any such effect is," Int. Br. 43, Intervenors protest too much. The efforts and resources Intervenors continue to expend to defend the Ballot Order Statute belies their insistence that a significant ballot order effect "may not actually exist in the first place," *id.* at 49 n.14. Intervenors' very presence in this case confirms that first

position on the ballot confers an advantage in Florida worth fighting for—and a commensurate burden on Plaintiffs. *See* Doc. 202 at 15 ("Intervenors cannot contend both that their interests are implicated but Plaintiffs have not been injured without doing violence to basic logic.").[17]

C. The district court's finding that none of the state's identified interests justifies the burden on Plaintiffs' rights should be affirmed.

The district court properly applied the second part of the *Anderson-Burdick* inquiry in weighing whether the interests put forward by the Secretary for Florida's Ballot Order Statute justified the burdens it imposes on Plaintiffs' rights. The district court correctly found that the majority of these interests were largely ones "which would tend to support any ballot order system," and did not justify "the specific ballot order scheme Florida uses as opposed to any alternative one." Doc. 202 at 51. It further found that even those that, generously, were specifically related to *this* Statute ranged in weight from "minor to meager," laying out the bases for its findings in great detail. *See id.* at 50-64. Defendants' arguments, which, for the Intervenors, consist principally of restating these interests and, for the Secretary, seek to tie her interests to an inapposite case with a different factual

[17] Though Intervenors' initially alleged that a change in ballot order might affect their campaign efforts, *see* Pls.' Ex. 74 at 4, after the facts unfolded in discovery they were forced to retract that assertion, Pls.' Ex. 75 at 3; *see also* Tr. 129:4-9.

record, do not show that the district court committed clear error. This Court should affirm.

Intervenors attempt to justify Florida's Ballot Order Statute on grounds of preventing voter confusion, promoting uniform ordering, and predictability on the ballot, Int. Br. 45-46, but the district court considered and explained why it found each of these interests unavailing, despite the same worn-out arguments Intervenors offer here. *See* Doc. 202 at 50-60. Stated succinctly, Florida's purported need for "symmetry throughout the ballot" would be met by several of the alternative schemes considered below. *See id.* at 52. Their concern with the logistical issues that a new ballot ordering system might bring is not a specific interest furthered by the current ballot ordering scheme so much as a justification for maintaining the status quo. *Id*. at 51-52. Merely restating the interests found unavailing below does not demonstrate that the district court committed clear error.

The Secretary's argument for why her asserted state interests should "tilt[]" the balance in the State's favor is even less compelling. Sec'y Br. 61. The Secretary identifies interests in reducing voter confusion, maintaining party order symmetry, and stability of the state's political system, reasoning that since those interests were credited in *Alcorn* they should be credited here. *Id*. at 59-61. But, as stated above, *Alcorn* was an inapposite case involving a challenge to a tiered ballot order system by a third-party candidate, thus involving concerns (and interests) not

relevant here. *See, e.g.*, 826 F.3d at 720 (holding the Constitution "permits [a state legislature] to decide that political stability is best served through a healthy two-party system"). The district court considered and rejected the exact same arguments for these interests which the Secretary presents here and detailed why each of them did not measure up in the context of this case. *See* Doc. 202 at 50-60. The Secretary merely re-recites these arguments without explaining or even addressing why the district court's concerns or conclusions were incorrect. This does not demonstrate clear error.

In light of its extensive factual findings concerning the significant burdens Florida's Ballot Order Statute places on Plaintiffs' right to vote and the at most minor interests in the Statute put forth by the State, the district court was correct to apply heightened review under *Anderson-Burdick*. Given the almost total lack of specific interests put forth by the State, the district court's conclusion that the Statute could not satisfy even rational basis review was also correct. *See id.* at 64. This Court should affirm.

IV. Laches does not bar Plaintiffs' claims.

Intervenors alone argue that laches requires reversal of the district court's judgment, but this argument, too, cannot withstand scrutiny. Intervenors fail to establish that the district court abused its discretion in finding that laches did not bar relief.

First, as a matter of law, it is not appropriate to apply laches in a case such as this, where Plaintiffs seek only prospective relief. Doc. 1 at 32-39. At least three precedential decisions so conclude. *See Peter Letterese*, 533 F.3d at 1321 (explaining that "laches serves as a bar only to the recovery of retrospective damages, not to prospective relief"); *see also id*. ("'The effect of laches is merely to withhold damages for infringement which occurred prior to filing of the suit.") (quoting *Studiengesellschaft Kohle mbH v. Eastman Kodak Co*., 616 F.2d 1315, 1325 (5th Cir. 1980)); *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981) (finding "laches may not be used as a shield for future, independent violations of the law" because "[t]he concept of undue prejudice, an essential element in a defense of laches, is normally inapplicable when the relief is prospective"). None of the cases that Intervenors cite are binding authority in this Circuit. Further, the few that actually touch on elections are highly distinguishable, involving either concerns unique to redistricting, *see Maxwell v. Foster*, 1999 U.S. Dist. LEXIS 23447, at *6-7 (W.D. La 1994); *Ariz. Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d 887, 909 (D. Ariz. 2005), or 11th-hour challenges to laws shortly before an election, *see Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012).

But even *if* laches could be raised as a defense in this case, the district court's rejection of it was well founded and firmly within its discretion. Laches is

an extraordinary form of equitable relief and may only be applied when the party invoking the defense can prove (1) the plaintiff unreasonably and inexcusably delayed; and (2) that delay has resulted in material prejudice to the defendant. *Peter Letteresse*, 533 F.3d at 1321; *see also United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005). Intervenors fail to establish that the district court abused its discretion by finding those factors were not met. *See* Doc. 202 at 22-25 (considering but rejecting defense of laches).

On the question of delay, Intervenors first argue that the district court should have applied laches because *some* of the Plaintiffs were aware of the impact that primacy effect has on elections at some point before the decision to bring suit was made. However, there is no requirement that voting rights plaintiffs bring suit as soon as they are aware of a constitutional violation. *Cf. Democratic Exec. Comm. of Fla.*, 915 F.3d at 1326 (holding plaintiff need not "search and destroy every conceivable potential unconstitutional deprivation, but could catch its breath, take stock of its resources, and study the result of its efforts"). Even if there were such a requirement, Intervenors do not assert that all of the Plaintiffs had prior knowledge about the primacy effect in elections. Nor could they. *See, e.g.*, Tr. 53:18-54:6 (Jacobson testifying she was unaware of studies establishing existence and magnitude of primacy effect until recently). The Court may not impute knowledge

of voting rights violations from one plaintiff to another. *See Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 579 n.2 (S.D.W.Va. 2000).

The second argument that Intervenors make in an attempt to establish delay is not only misplaced, it actually undermines their position. Specifically, Intervenors rely on the fact that the district court denied Plaintiffs' motion for a preliminary injunction, brought in May of 2018, because they "first alleg[ed] constitutional violations in 2018—almost four years since the last gubernatorial race that shaped the ballot order." Doc. 70 at 2. But the question of whether a plaintiff proved irreparable harm to justify a preliminary injunction is not equivalent to the question of whether a defendant has proved a delay so unreasonable and inexcusable as to bar all relief. At the preliminary injunction stage, "[a] delay . . . of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm," *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016), whereas laches is not "a mere matter of time; but principally a question of the (equity or) inequity of permitting the claim to be enforced." *Bush v. Oceans Int'l*, 621 F.2d 207, 211 n.3 (5th Cir. 1980). Moreover, Intervenors' argument that this Court should adopt, with regard to laches, the district court's rationale regarding the 2018 election at the preliminary injunction stage ignores that 2018 itself was a gubernatorial election year in Florida. And it is the result of the *November 2018* election that dictates ballot order

in Florida going forward through at least the end of 2022. Thus, under the very reasoning upon which Intervenors now rely, Plaintiffs have not delayed at all.

Intervenors entirely ignore the district court's *other* reason for rejecting the argument that any delay required application of laches: it was not clear that Plaintiffs "would have been able to prosecute their claims without substantial data on the primacy effect collected over time." Doc. 202 at 23. No doubt, if Plaintiffs had filed suit without the overwhelming evidentiary proof that primacy effect skews elections (including in Florida in particular), Intervenors would be the first to argue that Plaintiffs' claims were speculative. In any event, by failing to even attempt to explain why the district court's conclusion in this regard was an abuse of discretion, Intervenors have failed to carry their burden on appeal.

Intervenors also fail to show that the district court abused its discretion in finding that any delay did not result in undue prejudice to Defendants. Intervenors first attempt to make this showing by claiming that the *State* is unduly prejudiced because it will have to expend time and money changing its approach, now that the Ballot Order Statute has been found unconstitutional. Putting aside the question of whether Intervenors can raise this assertion of prejudice for another party (especially where the Secretary has chosen not to advance a laches argument on appeal), the argument is not well-founded as a matter of precedent. The district court's conclusion that any such prejudice is "not a cognizable prejudice within the

doctrine of laches at all, much less an undue one," Doc. 202 at 24, is well supported by the case law. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1286 (11th Cir. 2015) ("Any harm demonstrated by the Intervenors must stem specially from Riverkeeper's delay in bringing suit, rather than from the consequences of an adverse decision on the merits."). Intervenors offered no evidence to suggest that changing the method of ordering candidates on the ballot will be more costly (if at all) because of the amount of time that has passed since the Statute's enactment, and they make no effort to explain why the district court's conclusion was an abuse of discretion.

As for their assertion that the passage of time has caused crucial evidence to be lost, it is illogical and unsupported. Here, Plaintiffs' claims did not rely on legislative intent, and Intervenors fail to explain or establish why evidence from the time the Statute's enactment would be relevant, much less necessary to defend the law. *See Eat Right Foods Ltd. v. Whole Foods Mkt., Inc.*, 880 F.3d 1109, 1120 (9th Cir. 2018) (to claim prejudice from loss of evidence for laches, defendant must "state exactly what particular prejudice it [would] suffer[] from the absence of the witnesses and evidence it claims are unavailable") (internal quotation marks and citation omitted). The district court's decision to deny admission of a single newspaper article, which was offered to prove that the Ballot Order Statute was passed by Democrats, hardly prejudiced Defendants since the facts within it were

subject to judicial notice and, as Intervenors themselves make clear, actually did make it into the record below. *See* Int. Br. 50 (citing Tr. 768:17-770:20). This is hardly the prejudice necessary for laches, and woefully insufficient to show the district court abused its discretion in reaching the merits and granting Plaintiffs relief.

V. Constitutional estoppel is wholly inapplicable here.

Contrary to the Secretary's suggestion, the district court did not abuse its discretion in refusing to apply the equitable doctrine of constitutional estoppel.[18]

According to the Secretary, because Democratic candidates benefited from the Ballot Order Statute in the past, "they cannot challenge it now that they labor under its burden." Sec'y Br. 48. But the cases she relies upon are inapposite because they involved individuals seeking to protect interests that existed only as a result of the entities whose constitutionality they sought to challenge, the sole situation in which the doctrine has ever been applied. *See Wilkinson v. Legal Servs. Corp.*, 80 F.3d 535, 537 (D.C. Cir. 1996); *Robertson v. Fed. Election Comm'n*, 45 F.3d 486, 490 (D.C. Cir. 1995). The Secretary's effort to stretch the doctrine's limited reach to the present case falls flat.

[18] The Secretary mistakenly advances the *de novo* standard of review for the legal doctrine of *collateral* estoppel, Sec'y Br. 48, instead of the abuse of discretion standard applicable to the equitable doctrine of *constitutional* estoppel, *see supra* at 20. Accordingly, she does not even advance an argument that the district court's decision in this regard was an abuse of discretion.

In choosing to rely on these two D.C. Circuit cases, the Secretary carefully avoids binding authority from the Supreme Court and the 11th Circuit. The Supreme Court has stated that the doctrine is most appropriate where a party seeks to "retain the benefits" of a governmental act while attempting to invalidate its burdens, and, as such, has only applied it in those circumstances. *United States v. City and Cty. of San Francisco*, 310 U.S. 16, 20 (1940) (holding city could not retain federal land grant and attempt to invalidate restrictions under which grant was provided); *see also Fahey v. Mallonee*, 332 U.S. 245, 256 (1947) (holding shareholders "who utilize[] an Act to gain advantages of corporate existence [were] estopped from questioning the validity of its vital conditions"); *see also Brockert v. Skornicka*, 711 F.2d 1376, 1380 (7th Cir. 1983) (refusing to apply doctrine where plaintiff "once benefitted" from a regulation "but now has been denied that benefit" and "does not seek an unfair advantage from the city by keeping a benefit while attempting to do away with a corresponding burden"). And the one time the Eleventh Circuit has confronted the issue, it echoed the Supreme Court's admonition against overapplication of the doctrine. *S.J. Groves & Sons Co. v. Fulton Cty.*, 920 F.2d 752, 769 (11th Cir. 1991) ("Appellants obviously are not creatures of any statute, and we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it.")

(quoting *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 456–57 (1988)) (internal quotation marks omitted).

Here, neither Plaintiffs nor the fundamental rights they seek to vindicate are a function of the Ballot Order Statute, nor do Plaintiffs seek to maintain any advantage they may receive from the Statute while avoiding its disadvantages. Accordingly, the district court was correct to find that "[t]he doctrine [of constitutional estoppel] does not apply here at all." Doc. 202 at 25-26.

The Secretary's further gripe that Plaintiffs have not filed "a single lawsuit" in five states in which Democratic candidates are listed first, Sec'y Br. 51, not only abandons any pretense of a grounding in the doctrine of constitutional estoppel but is wholly untethered to any legal principles (or common sense). The Secretary's suggestion that to obtain a judgment in a case challenging the constitutionality of a specific state statute, a plaintiff must also simultaneously mount a judicial challenge against all similar laws from which persons with whom the plaintiff shares a political affinity gain some benefit, is beyond absurd. Indeed, as counsel for Intervenors was quick to note during the preliminary injunction hearing, *see* Supp. App'x 72 at 53:18-54:2, Plaintiffs and their political allies would almost certainly lack standing to challenge laws from which they suffer no harm.

CONCLUSION

For the reasons stated herein, the Court should affirm the District Court's well-reasoned ruling and deny the Secretary's and Intervenors' appeals.

DATED: January 21, 2020

PERKINS COIE LLP

By: /s/ Frederick S. Wermuth

Marc E. Elias
Elisabeth C. Frost
Jacki L. Anderson
John M. Geise
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@perkinscoie.com
efrost@perkinscoie.com
jackianderson@perkinscoie.com
jgeise@perkinscoie.com

Abha Khanna
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
akhanna@perkinscoie.com

Frederick S. Wermuth
Florida Bar No.: 0184111
KING, BLACKWELL, ZEHNDER
& WERMUTH, P.A.
P.O. Box 1631
Orlando, FL 32802-1631
Telephone: (407) 422-2472
Facsimile: (407) 648-0161

fwermuth@kbzwlaw.com

Counsel for the Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 21, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/*Frederick S. Wermuth*
Frederick S. Wermuth
Florida Bar No.: 0184111

Counsel for the Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

This response complies with the type-volume and limitations and typeface requirements of Fed. R. App. P. 27(d) because this Motion is typed in Times New Roman 14-point proportionally spaced typeface and contains 15,796 words, as determined by Microsoft Word.

/s/*Frederick S. Wermuth*
Frederick S. Wermuth
Florida Bar No.: 0184111

Counsel for the Plaintiffs-Appellees