No. 19-14552

In the United States Court of Appeals for the Eleventh Circuit

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

v.

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

and

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

INTERVENORS-APPELLANTS' REPLY BRIEF

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Intervenors-Appellants certify that the following is a complete list of interested persons as required by Federal Rule of Civil Procedure 26.1 and Eleventh Circuit Rules 26.1.

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/s/ Jason B. Torchinsky

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the National Republican Senatorial Committee and Republican Governors Association certify that they are not publicly traded and have no parent corporations and that no publicly held corporation owns more than 10% of their stock.

/s/ Jason B. Torchinsky

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INTRODUCTION

Appellees' arguments are unavailing.[1] Appellees brought suit against the Florida Secretary of State, Laurel M. Lee, alleging that the sixty-eight-year-old method of ordering candidates on the ballot for partisan general elections (the "Statute" or the "Ballot Order Statute") violated the U.S. Constitution. *See* ECF No. 1; *see also* Fla. Stat. § 101.151(3)(a) (Lexis through the 2019 Session of the Florida Legislature).

Under the prevailing law and the facts of this case, allowing Appellees' claims to succeed would upend the basic ballot ordering statutes of some 19 states in the midst of a federal election year[2] and would ignore recent Supreme Court precedent in *Rucho* and *Gill* as well as basic common sense. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *see also Gill v. Whitford*, 138 S. Ct. 1916 (2018). Intervenors-Appellants ask this Court to (1) uphold Florida's facially neutral Ballot Order Statute as constitutional; and (2) reverse and vacate the District Court's Opinion and remand with instructions to dismiss due to the District Court's lack of

[1] Appellees are as follows: Individual Plaintiffs Nancy Jacobson, Terence Fleming, and Susan Botcher, along with Democratic Party organizations Priorities USA, the Democratic National Committee ("DNC"), the Democratic Senatorial Campaign Committee ("DSCC"), the Democratic Congressional Campaign Committee ("DCCC"), the Democratic Governors Association ("DGA"), and the Democratic Legislative Campaign Committee ("DLCC") (together "Appellees", "Democratic Parties", or "Democrats").

[2] Br. for the States of Texas, *et al.*, as Amici Curiae 14 (Jan. 14, 2020) (collecting statutes for the 19 states (including Florida) that have a ballot ordering scheme that use a prior election or party affiliation).

Subject Matter Jurisdiction and its failure to properly apply controlling law to the facts of this case.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

"Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies.'" *Rucho*, 139 S. Ct. at 2493. Doctrines of standing and political question arise out of the "case" or "controversy" language of Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). In 2018 and 2019 the Supreme Court issued landmark opinions regarding standing and the political question doctrine in *Gill* and *Rucho*, respectively. *See Gill*, 138 S. Ct. at 1916; *see also Rucho*, 139 S. Ct. at 2484. Both the District Court and the Democrats refused to apply or even consider *Gill* or *Rucho* in arguing and deciding the case at hand. The District confusingly found Intervenors-Appellants' reliance on *Gill* and *Rucho* as "preliminary miscellanea," ECF No. 202 at 4-18, while in reality they are binding and controlling precedent that entirely foreclose the claims advanced by the Democrats.

A. Democrats Lack Standing.

As the Supreme Court has stated, "[t]he law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "Relaxation of standing requirements is

directly related to the expansion of judicial power[.]" *Id.* at 408-09 (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). In *Gill*, the Supreme Court restated the familiar three-part test for Article III standing and "insist[ed]" that a plaintiff show that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial opinion." 138 S. Ct. at 1929 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). "The facts necessary to establish standing, however, must not only be alleged at the pleading stage, but also proved at trial." *Id.* at 1931. Appellees below failed at every stage of this inquiry.

1. Democrats Failed to Prove Injury in Fact at Trial.

Appellees alleged at trial, and argued in their Response, that both the Individual Plaintiffs, as well as the Democratic Parties, suffered injury due to an alleged 5% advantage Republican candidates supposedly enjoyed in Florida general elections.[3] Proof of alleged injuries in fact hinge on whether or not Appellees met their burden at trial—the law and the record clearly show they did not.

The evidence presented by Democrats at trial is primarily the research and testimony of Dr. Krosnick and Dr. Rodden. Democrats would have the Court believe that Dr. Krosnick definitively proved that whoever is on the top of a

[3] We note that the injury alleged here is *not* actually caused by the state or any state action at all, but rather by individual Florida voters casting legitimate and valid votes that the Democrats' expert claims would not have otherwise been cast.

Florida ballot gains a 5% advantage. Appellees' Br. 49. However, that could not be farther from the truth. There are two primary problems with Dr. Krosnick's testimony. First, his 5% numerical calculation was nearly the highest possible number within a range. *See* Tr. 334:16-335:19. To reach that dubious conclusion he used votes for the Ohio State House of Representatives to predict the past and future actions of every voter in every election in Florida.[4] It was relying on this data that the District Court arrived at the so-called 5% advantage. *See* Tr. 348:17-25, 723:17-20. However, Dr. Krosnick specifically testified that he was "not making an assumption about what happened" in any Florida election. Tr. 381:20-382:2. In fact, he testified that there was a possible range of ballot order effect in Ohio, anywhere from "less than 1 percentage point to as large as five percentage points." Tr. at 312:3-6. While he had confidence that there was some effect within that range, he had no basis to believe—and neither did the District Court—that the 5% bump was more likely than a 1% bump or less. *See* Tr. 334:16-335:19, 344:18-24.

Further, Appellees' other expert, Dr. Rodden, testified that none of his analyses were applicable to the question of ballot order being outcome determinative in any specific election. Tr. 191:22-192:1. Dr. Krosnick even went

[4] There is no evidence in the record that using an out-of-state vote from another state to predict or analyze voters in another state is a validated, legitimate, and accepted social science methodology. In fact, not one of the 84 studies Dr. Krosnick cites used the methodology he employed in this case.

so far as to say that any applicability of his 5% average advantage to actual Florida elections was a "counter-factual" as applied to Florida general elections. *See* Tr. 382:6-9; Tr. 383:10-384:2. Dr. Krosnick made it very clear that his research, as applied to Florida elections, was largely an academic exercise that did not apply to specific elections. *See*., e.g., Tr. 384:18-25, 387:14-25; *see also* Tr. 192:10-12 (Dr. Rodden). (Q. "[B]y no means would we expect the down-ballot disadvantage to be present in every single race; correct? A. Yes.").

Essentially, what Dr. Krosnick did with his research, and what the District Court accepted as indisputable fact, was create a "hypothetical state of affairs" and then claim that Appellees would be injured based on "fears of hypothetical future harm that [was] not certainly impending." *Clapper*, 568 U.S. at 416; *see Gill*, 138 S. Ct. at 1928. While Dr. Krosnick's research may make for an interesting hypothetical discussion in a graduate level political science course, it certainly does not establish injury in fact for Appellees under prevailing law.[5]

a. *Gill* Applies to the Case at Hand.

Both the District Court and Democrats summarily dismiss the applicability of the Supreme Court's recent pronouncement regarding standing in *Gill*. Interestingly, Democrats couch Intervenors-Appellants' reliance on recent Supreme Court precedent, which directly addresses the matter at hand, as building

[5] This is true for both past and future elections.

a "house of cards." Appellees' Br. 52. While claiming that relying on recent binding precedent is building a "house of cards," Democrats build their case out of decades-old cases, many of which have been superseded by latter caselaw.

Gill is a case about standing in the context of assertions of partisan vote dilution, specifically injury in fact. 138 S. Ct. at 1929. The analysis the Court adopted to look at injury in fact can most certainly be applied to other non-related matters. However, even if *Gill* is read narrowly, as only applying to partisan vote dilution claims, then it still applies here. Neither the District Court nor Democrats give a good reason as to why *Gill* should not apply.[6]

At its core, *Gill* stands for the proposition that one cannot establish standing based off a "hypothetical" injury which may or may not occur in the future. *Id.* at 1928. Further, in order to prove past injury, one must show an injury which is "concrete and particularized" and not just a "generalized grievance[.]" *Id.* at 1929. These reaffirmed pronouncements of the Court apply to *any* individual or organization seeking to invoke the jurisdiction of a federal court.

In *Gill*, the Court held that a plaintiff cannot rely upon evidence of generalized statewide partisan dilutionary harms to prove injury in fact because

[6] Democrats attempt to argue that, since *Gill* only deals with individual voters and not organizations, it does not apply to the case at hand. Appellees' Br. 52. First, it is apparent that Democrats are conceding that their Individual Plaintiffs lack standing under *Gill*. Second, Democrats' contention that a political party can show a "hypothetical" injury to maintain standing is simply unsupported by Article III, the Supreme Court's standing jurisprudence, or *Gill*.

generalized partisan preferences are not a cognizable injury. *Id.* at 1931. Only voters who prove "'facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Id.* at 1929 (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). This is because "a person's right to vote is 'individual and personal in nature.'" *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). Further, insofar as an association's standing flows from its membership, Democratic organizations must also prove individualized and personalized harm to its members to invoke the jurisdiction of the federal judiciary. *Pennell v. San Jose*, 485 U.S. 1, 7 (1988) ("[A]n association has standing on behalf of its members only when its members would otherwise have standing to sue in their own right." (internal quotations omitted)).

As with the individual plaintiff in *Gill*, Ms. Jacobson, who was the only Individual Plaintiff to even attempt to proffer *any* evidence to the District Court, Intervenors-Appellants' Br. 31 n.4, testified that the order of names on the ballot had no impact on her ability to vote for any candidate of her choice. Tr. 58:3-5, 61:25-62:2. Ms. Jacobson further went on to say that her ability to campaign, volunteer, and advocate for her preferred candidates had never been hampered. *See, e.g.*, Tr. 58:17-19, 59:7-22. Just as Mr. Whitford in *Gill* attempted to argue, Ms. Jacobson claimed her voice had been "suppressed" as a result of the Ballot Order Statue, despite her contrary statements that it had not impacted her in any

way. *See* Tr. 54:19-22. After testifying that her Congressional, Senate, and State House districts are entirely within Orange County, she testified that relief sought in this case would benefit her because Democrats *in other parts of Florida* would benefit from ballot order rotation. Tr. 62:12-22. Unfortunately for Democrats, simply not liking something is not sufficient to show injury in fact. *See Gill*, 138 S. Ct. at 1931 ("[P]laintiffs may not rely on the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." (internal quotations omitted)).

Just as the Court found in *Gill*, the Appellee's dislike of the Ballot Order Statute alone, without any particularized injury, is not sufficient to prove injury in fact. Alleging generalized state-wide harm by being unable to elect more Democrats from other parts of the state is not sufficient to show injury here, just as it was insufficient to show injury in *Gill*. 138 S. Ct. at 1930.

Furthermore, the Individual Plaintiffs here are distinguishable from the individual plaintiffs discussed in *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009). In *Common Cause/Georgia*, the plaintiffs challenged a law which required voters to produce a form of identification in order to vote (a voter ID card could be provided free-of-charge if need be). *Id.* at 1345. Plaintiffs who did not have any form of identification claimed that because they would be required to obtain identification prior to voting, they suffered an injury sufficient to

prove standing—the Court agreed. *Id.* at 1351-52. The Court further opined that even if the individual plaintiffs already did have identification, the mere act of them having to produce identification in order to vote was sufficient to show injury. *Id.*

The *Common Cause/Georgia* individual plaintiffs are wholly different from the Individual Plaintiffs here for two reasons: (1) the ability to actually cast a vote was at stake in *Common Cause/Georgia*; and (2) the denial of the right to vote is a "concrete, particularized, non-hypothetical injury[.]" *Id.* Here, none of the Individual Plaintiffs were denied the right to vote and the ability to elect more Democrats is not a legally protected right. Further, Individual Plaintiffs' alleged injury was grounded in hypothetical generalized harm derived from an academic social science experiment. As such, while the individual plaintiffs in *Common Cause/Georgia* had standing, the Individual Plaintiffs here are clearly distinguishable and do not have standing.

b. Democratic Party Organizations Also Failed to Prove Injury.[7]

Appellees seem to argue their injury issues are solved because of the presence of the Democratic Parties, and source the portions of the concurrence in *Gill* authored by Justice Kagan and joined by only three other Justices. This

[7] At base, Plaintiffs failed to properly prove associational standing by never identifying any members that have "suffered the requisite harm." *See Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009); *see also Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018).

portion of *Gill* is not controlling or binding. *Compare Gill*, 138 S. Ct. at 1931 ("The reasoning of this Court with respect to the disposition of this case is set forth in this opinion and none other.") (unanimous op.), *with id.* at 1934 (Kagan, J., concurring). Appellees incorrectly imply that Intervenors-Appellants contend that a political party can never maintain standing following *Gill*. *See* Appellees' Br. 49-52. After mischaracterizing Intervenors-Appellants' position, Appellees then put forth over a dozen non-analogous cases where political parties successfully proved standing and contend that somehow that establishes sufficient precedent to support their flawed standing claim. *Id.*

Appellees' contentions are misguided for several reasons: (1) Intervenors-Appellants are not putting forth the argument that a political organization can never show standing following *Gill* but rather asserting that political organizations need to meet the burden established in *Gill*; (2) nearly every case Appellees rely on pre-dates *Gill* and several may have been decided differently by a post-*Gill* court; and (3) nearly every case Appellees rely upon have facts where the political organization was able to show a particularized, non-hypothetical injury and would, therefore, meet the burden discussed in *Gill*. None of the cases Appellees cite show injury from a hypothetical social science experiment based on a study of elections

from an entirely different state, as Appellees have done in the case at hand.[8] Rather, the parentheticals placed by Appellees following their cited cases merit closer examination to determine the accuracy of the asserted parenthetical.

[8] Here are just a few of the misleading cases cited by Appellees where they were loose with the facts: *Tex. Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006) (a *specific* Republican candidate in a *specific* future election was removed from the ballot and replaced by different candidate as election was approaching and the Texas Democratic Party was able to show *specific* increased costs they would incur as result of this change); *Smith v. Boyle*, 144 F.3d 1060 (7th Cir. 1998) (in a pre-*Rucho* political question case, with no discussion of standing, the court considered *specific* voting boundaries with *specific* voters residing within the contested boundaries); *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994) (Standing was not contested nor discussed before the 2nd Circuit. Case addresses *specific* election where *specific* nominating petitions for *specific* candidates were invalidated due to a New York election law); *Owen v. Mulligan*, 640 F.2d 1130 (9th Cir. 1981) (Standing was not contested nor discussed before the 9th Circuit. Case addresses *specific* candidates, in *specific* elections, sending *specific* mail pieces for which the United States Postal Service failed to provide a non-profit postage rate); *Nat. Law Party of the United States v. FEC*, 111 F. Supp. 2d 33 (D.D.C. 2000) (*specific* political party's candidate was not allowed to participate in a *specific* 1996 presidential debate for a *specific* election); *Democratic Party of the United States v. Nat'l Conservative Political Action Comm.*, 578 F. Supp. 797, 809-10 (E.D. Pa. 1983) (three-judge panel) (this case involving the ability of PACs to donate money was not decided on Article III standing, but via a grant of jurisdiction from Congress by statute); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (holding that Democratic Party had standing due to a *new* voter ID law which *prohibited* individuals from voting without ID "to assert the rights of its members who will be *prevented* from voting by the new law." This case is distinguishable from the present case because the Ballot Order Statute does not *prevent* anyone from voting, and there is no evidence to show that any Florida voters would be *prohibited* from voting due to Ballot Order Statute); *OCA-Greater Hous. v. Texas*, 867 F.3d 604 (5th Cir. 2017) (holding that the *specific* increased costs of bi-lingual interpreters to explain the effects of a law involving ability of voters to use interpreters in the voting booth *in order to cast a ballot* was sufficient to show injury); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324 (N.D. Ga. 2018) (holding that a political party's request for *specific* injunctive

Democrats, and the District Court, in arguing and finding injury, most heavily relied on the unsupported proposition that every Democratic Party organization will be required to expend additional resources to fulfill their mission of electing Democrats in Florida as a result of the Ballot Order Statute. *See, e.g.*, ECF No. 195-2 at 32:1-15. None of the Democratic Party organizations provided *any* "concrete, particularized, [or] actual or imminent" evidence regarding any expenditures they have been or will be required to make. *Clapper*, 568 U.S. at 409 (internal quotations omitted); *see, e.g.*, ECF No. 195-3 at 16:25-17:4 ("we need to spend additional resources in the target districts that we have."); ECF No. 195-3 at 24:4-9; ECF No. 195-4 at 59:19-60:6 (discussing the need to devote more "efforts" to "overcome" the ballot order effect). Appellees provided no evidence at trial of any additional monies that were spent, or would be spent in the future, in any Florida election.[9] *See, e.g.*, Tr. 99:7-9.

i. New and Recent Precedent Supports Argument that Democratic Party Organizations Failed to Prove Injury.

In a case just decided on January 24, 2020, the Sixth Circuit held that "an organization can no more spend its way into standing based on speculative fears of

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relief surrounding the acceptance of *specific* provisional and absentee ballots from a *specific* election was sufficient to show injury).

[9] Appellees produced no evidence along the lines of what the NAACP produced in *Common Cause/Georgia v. Billups*. *See Common Cause/Georgia*, 554 F.3d at 1350 (articulating the specific additional time, effort, and money that would need to be expended due to the law in question).

future harm than an individual can." *Shelby Advocates for Valid Elections v. Hargett*, No. 19-6142, 2020 U.S. App. LEXIS 2327, at *9 (6th Cir. Jan. 24, 2020). The organizational plaintiff in *Shelby Advocates* alleged that it would be required to spend additional funds to ensure fair elections due to alleged unconstitutional actions of the Tennessee Secretary of State. *Id.* at *6. In addition to holding that a plaintiff cannot "spend its way into standing," the Sixth Circuit held that any additional expenditures which the organizational plaintiff claims it would need to make in the future would not be a diversion of resources for purposes of showing injury. *Id.* at *9. The court arrived at this conclusion because the organization would still be spending funds to advance its mission—"to address the voting inequities and irregularities" —and would not support future spending "based on speculative fears of future harm" to be sufficient for injury. *Id.* In the case at hand, as discussed *infra*, the Democratic Parties' claims of spending additional funds are "based on speculative fears of future harm." *Id.* And, in any event, the expenditure of resources to further their mission of electing Democrats, which is something they would be doing any way, fails to prove injury. *See id.* ("That is its mission.").

As both Individual and organizational Plaintiffs failed to show injury in fact, they are without standing to assert their claims in this matter.

B. Democrats' Claims Present Non-Justiciable Political Questions.

Issues that are "entrusted to one of the political branches or involve[] no judicially enforceable rights … present a political question … outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho*, 139 S. Ct. 2494 (internal quotations omitted).

The most recent Supreme Court pronouncement regarding justiciability under the political question doctrine from the Supreme Court is *Rucho*. As they did with *Gill* with respect to standing, Appellees, and the District Court, refused to consider *Rucho* as applicable to our case. *See* ECF No. 202 at 7-10. At its core, *Rucho* is a case regarding non-justiciable political questions as applied to partisan vote dilution claims. 139 S. Ct. at 2494. Just as *Gill* must be applied to cases where standing is at issue, so *Rucho* must be applied to cases, such as here, where Appellees assert that federal courts should be the arbiters of fairness or the solution for complex public policy problems that are outside the expertise of the judiciary. This is evidenced by a recent decision from the United States Court of Appeals for the Ninth Circuit where the court applied *Rucho* in a case involving global warming. *Juliana v. United States*, No. 18-36082, 2020 U.S. App. LEXIS 1579, at *27-28 (9th Cir. Jan. 17, 2020).

In *Juliana*, a group of plaintiffs, both individuals and organizations, brought suit against various governmental entities seeking to compel government action on

climate change. *Id.* at *27-8. The Ninth Circuit held that "*Rucho* reaffirmed that redressability questions implicate the separation of powers, noting that federal courts 'have no commission to allocate political power and influence' without standards to guide in the exercise of such authority." *Id.* at *27-28 (quoting *Rucho*, 139 S. Ct. at 2508). "Absent those standards, federal judicial power could be 'unlimited in scope and duration' and would inject 'the unelected and politically unaccountable branch of the Federal Government into assuming such an extraordinary and unprecedented role.'" *Id.* at *28 (quoting *Rucho*, 139 S. Ct. at 2507). Using the same rationale articulated in *Rucho* that a "proposed standard involving a mathematical comparison" was "too difficult for the judiciary to manage[,]" the court held that the issues before it—*i.e.*, deciding how much is too much when it comes to carbon emissions and exactly how to solve any alleged harm—were non-justiciable political questions better left to the political branches of the federal government to decide. *Id.* at *28-29.

Just as the Supreme Court found in *Rucho* and the Ninth Circuit found in *Juliana,* this Court should find that Appellees' claims are non-justiciable political questions because there is no "judicially discernible and manageable standard for deciding them." *Rucho*, 139 S. Ct. at 2498. Appellees' expert, Dr. Krosnick, never gave any indication as to his degree of certainty of the size of the ballot effect, let alone that it ever approached the 5% the District Court treated as accepted truth. In

fact, the most Dr. Krosnick could definitively say about ballot order effect in Florida is that there is a 99% chance that there is some ballot order effect—*i.e.*, that there is an effect greater than zero. Tr. 372:6-19. To put it another way, under Dr. Krosnick's methodology, he is 99% confident that there could be a .07% effect, 5% effect, or some other non-zero effect, and that is all. Assuming *arguendo* that there is a ballot order effect, the question then becomes, "[h]ow much is too much?" *Rucho*, 139 S. Ct. at 2501. Where is the line between a permissible, constitutional ballot order effect and an impermissible and unconstitutional ballot order effect? Appellees failed to prove any judicially manageable standard for answering this fundamental question and provided no grounding in the U.S. Constitution for justifying any answer they might assert to this question. For its part, the Supreme Court requires "limited and precise standards that are clear, manageable, and politically neutral" before the federal judiciary should enter the fray. *Id*. at 2500. This is a high bar that neither Appellees nor the District Court even attempted to clear.

Furthermore, there is no remedy that could create, or would create, a perfectly "fair" election that cures any ills social science might claim as a result of a ballot ordering statute. Nor is that the requirement under the Constitution. *Id.* at 2500. For example, if ballots were arranged alphabetically, is it fair to those whose last names start with "J" as opposed to "A"? What if you were to rotate ballot

placement on a county-by-county basis? If so, statewide candidates would benefit over candidates wholly within a single county or in a district that does not cross county lines. There is no requirement for a perfectly fair election as "[f]airness does not seem to us a judicially manageable standard." *Id.* at 2499.

As they did with standing, Appellees attempt to bury very recent Supreme Court precedent by discussing well over a dozen decades-old cases whose facts are not analogous. Appellees' Br. 38-47. Appellees fail to cite to a single case that addresses a facially politically neutral statute regarding the effect of ballot order. *Id.* Instead, Appellees cite to cases which are either based on discriminatory conduct of election personnel,[10] statutes which required the placement of a particular named party or incumbent candidate on the top of a ballot,[11] statutes which required additional language next to a candidate on a ballot,[12] or denied ballot access altogether or involved a non-ballot related election issue.[13] Appellees advanced the argument that since these cases, many of which are decades old and

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[10] *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977); *Culliton v. Bd. of Election Comm'rs*, 419 F. Supp. 126 (N.D. Ill. 1976); *Mann v. Powell*, 314 F. Supp. 677 (N.D. Ill. 1969).

[11] *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999); *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996); *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972); *Gould v. Grubb*, 14 Cal. 3d 661, 536 P.2d 1337 (1975).

[12] *Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018); *Miller*, 169 F.3d at 1119.

[13] *Williams v. Rhodes*, 393 U.S. 23 (1968); *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992); *Common Cause Ind. v. Marion Cty. Election Bd.*, 311 F. Supp. 3d 949 (S.D. Ind. 2018).

were decided under a different legal standard, were held to be justiciable, that the case at hand must also be. *Id.* at 47. Appellees are misguided in this flawed assumption because none of their cited cases rely on social scientists divining a general standard using data from other dissimilar states that are, by the social scientist's own admission, inapplicable to any specific election. See., e.g., Tr. 192:10-12, 384:18-25, 387: 14-25. The vast majority of cases cited by Appellees involve issues that were easily discernable and remedied without reliance on a complicated mathematical formula. In other words, each of those cases had judicially discernable and manageable standards and did not place the judiciary into the position of deciding "[h]ow much is too much?" *Rucho*, 139 S. Ct. at 2501.

Intervenors-Appellants are not advancing the preposterous strawman Appellees suggest: that *Rucho* "silently overruled all of the precedent discussed above, removing from the federal court's purview all ligation over the constitutionality of election laws that implicate partisan actors or interests." Appellees' Br. 47. Intervenors-Appellants are simply asserting the Supreme Court's long-standing requirement that federal courts are limited to deciding matters that involve "judicially discernible and manageable standard[s]"—nothing more, nothing less. *Rucho*, 139 S. Ct. at 2499. And, as recently reinforced in *Gill* and *Juliana*, judicial standards which involve "mathematical comparison[s]" to a "hypothetical state of affairs" simply are not for courts to decide, but better left to

the political branches of government. *Gill*, 138 S. Ct. at 1928; *Juliana*, 2020 U.S. App. LEXIS, at *28.

II. DEMOCRATS' CLAIMS FAIL ON THE MERITS.

Florida is vested with the constitutional authority to enact elections regulations. *See* U.S. Const. art. I, § 4; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Burdick v. Takushi*, 504 U.S. 428, 433, 441 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Therefore, the Supreme Court has recognized that a state's election code will "inevitably affect[]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. Even what would appear to be a quintessentially severe burden, such as limiting the choices of voters, is not necessarily subject to strict scrutiny. *See Burdick*, 504 U.S. at 434. Minimal scrutiny (*i.e.*, rational basis) applies to "reasonable, non-discriminatory restrictions" on voting rights. *Id.* Crucially, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id*. (quoting *Anderson*, 460 U.S. at 788).

Democratic Appellees primarily rely upon *Graves*, 946 F. Supp. at 1569 and *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980) for all manner of contentions. Both cases, far from the lynchpin Appellees seek, involve either foundationally different facts or law and are, therefore, minimally informative to this case.

First, *Graves* is easily distinguishable as the statute in that case was fundamentally different from Florida's. The Oklahoma statute mandated that the Democrat *always* be placed in the top position. *Compare* Fla. Stat. § 101.151(3)(a) (Lexis through the 2019 Session of the Florida Legislature) (placing the party of the candidate who won the previous gubernatorial election at the top of the ballot), *with Graves,* 946 F. Supp. at 1571 ("a dispute over … a provision of the Oklahoma Election Code … which provides that ….the Democratic party candidate always appears in the top position"). However, even the *Graves* court found the burden to voters to be slight, *i.e.*, that minimal scrutiny applied. *Id.* at 1570. It was Oklahoma's justification—political patronage—that was an impermissible state interest. *Id.* at 1581. Florida has relied upon no such interest here.

Second, *McLain* is also readily distinguishable. In *McLain,* the United States Court of Appeals for the Eighth Circuit found that the State's interest—voter convenience—was, just as in *Graves,* insufficient under rational basis review. 637 F.2d at 1167. However, this conclusion is in direct conflict with *Anderson/Burdick* where the Supreme Court held that "'the State's important regulatory interests *are generally sufficient* to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788) (emphasis added). This apparent contradiction is, in fact, no contradiction at all because *McLain* predates the *Anderson/Burdick* line of cases. *Compare McLain*, 637 F.2d at 1159 (decided 1980), *with Anderson*, 460

U.S. at 780 (decided 1983), *and Burdick*, 504 U.S. 428 (decided 1992). Therefore, while "voter convenience" may have been insufficient to justify a statute in 1980 in the view of the Eighth Circuit at the time, it is most certainly sufficient under *Anderson/Burdick* today. *Burdick*, 504 U.S. at 434 (generalized regulatory interests are sufficient to overcome minimal scrutiny). Furthermore, as the Southern District of New York noted after the *Anderson/Burdick* line of cases was decided, "[i]t is difficult to understand how *McLain* could simply overlook the strength of this interest, especially when invoking the rational basis test." *New All. Party v. N.Y. Bd. of Elections*, 861 F. Supp. 282, 298 (S.D.N.Y. 1994). In sum, *McLain* was incorrect when it was decided and, in any event, its reasoning has been subsequently overruled by the Supreme Court in *Anderson/Burdick* and their progeny.

Appellees have failed to prove that Florida's Ballot Order Statute imposed any burden at all on voting rights—and certainly not a severe burden. As such, the proper standard for review is minimal scrutiny (*i.e.*, rational basis). *See Sarvis v. Alcorn*, 826 F.3d 708, 717 (4th Cir. 2016) (calling positioning on a ballot a "most modest burden"); *George v. Hargett*, 879 F.3d 711, 726 (6th Cir. 2018) (rational basis review is appropriate even if the state treats similarly situated voters differently); *Estill v. Cool*, 320 F. App'x 309, 311 (6th Cir. 2008) (reasonable non-discriminatory restrictions that impose only "incidental burden[s]" are subject to

rational basis review). The District Court erred by applying heightened scrutiny, and the rational basis test is clearly met by Florida's statute and the justifications advanced by the state.

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

"To state the defense of laches, a party must show: (1) A delay in asserting a right or claim; (2) That the delay was not excusable; and (3) That the delay caused the party 'undue' prejudice." *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1353 (S.D. Fla. 1999) (citing *Citibank, N.A. v. Citibanc Grp., Inc.*, 724 F.2d 1540, 1546 (11th Cir. 1984)), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000).

A. Laches Applies to Claims for Prospective Relief.

As Appellees would have this Court believe, prospective relief is no bar to a laches claim. This contention was refuted by the Supreme Court over one-hundred years ago. *Saxlehner v. Nielsen*, 179 U.S. 43, 45 (1900) (Plaintiff "has been guilty of laches which preclude her right to an injunction."). It has repeated the refrain many times. *See, e.g.*, *Ancient Egyptian Arabic Order v. Michaux*, 279 U.S. 737, 748-49 (1929) (denying a prospective injunction based on a laches defense). That makes sense: laches originated as a defense in courts of equity, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017), it therefore applies equally to all equitable remedies, *Abbott Labs. v. Gardner*, 387

U.S. 136, 155 (1967). Furthermore, Appellees' authority on their laches arguments are distinguishable.

First, their purported "binding" Eleventh Circuit authority is an intellectual property case, which the Circuit itself has distinguished as such. *See Peter Letterese & Assocs. v. World Inst. Of Scientology Enters.*, 533 F.3d 1287, 1319 n.38 (11th Cir. 2008). The Court of Appeals for the Eleventh Circuit must, in any event, still follow the United States Supreme Court, which has stated unequivocally that a "constitutional claim can become time-barred just as any other claim can." *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008).

Additionally, *Benisek v. Lamone* is directly on point. In *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018), the Supreme Court found that a claim for prospective relief, in that case a preliminary injunction, failed because the plaintiffs did not exercise "reasonable diligence" in pursuing their claim. The *Benisek* plaintiffs were not "reasonabl[y] diligen[t]" because they waited "six years, and three general elections" to bring their claims. *Id.* While not laches, *per se*, *Benisek* is an example of applying fundamental principles of equity to an alleged constitutional violation for prospective relief. Laches is simply the equitable counterpart to the statute of limitations. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 909 (D. Ariz. 2005). It is also the case that "equitable considerations can and do factor into equal

protection challenges, in particular voting rights cases . . . ." *Maxwell v. Foster*, No. 98-1378, 1999 U.S. Dist. LEXIS 23447, at *6-7 (W.D. La. Nov. 24, 1999) (three-judge court).

B. Democrats Inexcusably Delayed in Bringing Their Claims.

The District Court abused its discretion when finding that Democratic Parties' claims only accrue in 2020. ECF No. 202 at 23. "[D]elay is to be measured from the time at which the plaintiff knows or should know she has a provable claim . . . ." *Kason Indus. v. Component Hardware Grp., Inc.*, 120 F.3d 1199, 1206 (11th Cir. 1997). It is plain from the record that Democratic Parties at least assumed, and therefore should have "known," that there is a ballot order effect to being listed first on the ballot. *See*, *e.g*., Tr. 61:12-20 (plaintiff knew there was a ballot order effect for over a decade and did nothing); Tr. at 96:23-97-2 (the DLCC knew of the ballot order effect as early as 2005). Under the most charitable of estimates, Appellees waited almost twenty years to bring their claims. Under any measure, this delay is inexcusable.

C. Democrats' Delay Prejudiced Defendants.

"Prejudice may be established by showing a disadvantage to the Defendants in asserting or establishing a claim, or some other harm caused by detrimental reliance upon the Plaintiffs' conduct." *Fouts*, 88 F. Supp. 2d at 1354; *see also White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). Despite this, the District Court

held that costs to the State of Florida are not cognizable in the laches context. ECF No. 202 at 24. The District Court is, once again, mistaken. Any change in law will inevitably result in increased costs in time and manpower to Florida and its counties. The entire election infrastructure of the state is built around the requirements of the current statute—especially the state's hardware and software systems. Tr. 774:3-775:4, 776:21-777:5, 828:22-829:13. Any change to the Ballot Order Statute may well require changes to these systems. These changes will require the increased expenditure of money and time to train people, administer, and implement and test the new systems. Tr. 777:15-779:18, 783:3-15. These increased expenditures—due to the State's reliance on a 68-year old legislative enactment—are prejudicial as a matter of law. *See Fouts*, 88 F. Supp. 2d at 1354.

Another prejudice is the inability to properly defend the lawsuit in the first instance. *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002). It can hardly be doubted that Defendants were denied the full opportunity for a proper defense when the precipitating act—the enactment of the Ballot Order Statute—occurred so long ago that evidence surrounding it has been long since lost. *See, e.g.*, Tr. 768:17-770:20.

CONCLUSION

For the aforementioned reasons, as well as the reasons stated in Intervenors-Appellants' Brief, Intervenors-Appellants respectfully request that this Court REVERSE and VACATE the District Court's Opinion and REMAND with instructions to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of FRAP 32 and Eleventh Circuit Rule 32-1 because, excluding the parts of the document exempted by FRAP 32(f), this document contains 6,432 words.

/s/ Jason B. Torchinsky
Jason Torchinsky
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served through the Court's CM/ECF system to all counsel of record on this 4th day of February, 2020.

/s/ Jason B. Torchinsky
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