No. 19-14552

In the United States Court of Appeals for the Eleventh Circuit

NANCY C. JACOBSON, *ET AL.*,

Plaintiffs-Appellees,

v.

LAUREL M. LEE, *ET AL.*,

Defendants/Intervenors-Appellants.

REPLY BRIEF OF APPELLANT SECRETARY LAUREL M. LEE

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

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INTRODUCTION

This case is not about a voter's access to the franchise. After years of litigation, there has been no allegation that Florida's Ballot-Order Statute has made it more difficult for any voter to cast a ballot.

This case is not about a candidate's access to the ballot. After years of litigation, there has been no allegation that Florida's Ballot-Order Statute prevented any candidate from registering, campaigning, or otherwise participating in the democratic process.

Nor is this case about the "voting process." Florida's Ballot-Order Statute has no effect on the submission or consideration of provisional or vote-by-mail ballots; candidate-registration deadlines; polling places; voter-identification laws; or any other area of voting-rights jurisprudence that, for good reason, needs to be kept separate from questions of partisanship.

This case is about winning and losing partisan elections. The Plaintiffs argue that candidates who appear first on a ballot, on average, enjoy an incidental and meager, yet statistically significant, advantage caused by presumably disinterested voters' selection of the first-listed candidate. Because Plaintiffs' preferred candidates have not recently reaped whatever benefit this windfall might have provided, they believe that they are laboring under an unfair electoral disadvantage that violates the Constitution.

Every contested election will have a winner, each will have a loser. But one side's dissatisfaction with their win-and-loss record, no matter how fierce, cannot conjure federal-court jurisdiction to sort out questions of partisan fairness, particularly when they arise from a neutral statute.

Even if the Plaintiffs could surmount the insurmountable jurisdictional bars, Florida's Ballot-Order Statute passes any conceivable test of fairness. Textually, it favors no party, nor does it afford the Secretary any discretion that could give rise to concerns of purposeful or intentional political discrimination. Empirically, it has resulted in remarkable equity over its sixty-eight-year existence. The statute benefited the Democrats twenty times while benefiting their rival fourteen times. Conceptually, Florida's Ballot-Order Statute animates the will of the Florida electorate by affording primary ballot position to candidates sharing the party of Florida's governor—the individual who received the largest number of votes in the most high-profile, high-stakes Statewide election.

Far from creating an "arbitrary advantage," Pls.' Br. 1, Florida's Ballot-Order Statute plainly, neutrally, rationally, and fairly orders Florida ballots in a way that achieves the uniformity long demanded by the Supreme Court. This Court should thus reverse the grant of final judgment in favor of Plaintiffs.

ARGUMENT

I. THE COURT HAS NO SUBJECT-MATTER JURISDICTION OVER PLAINTIFFS' PARTISAN VOTE-DILUTION CLAIMS.

A. Partisan vote-dilution claims are non-justiciable.

In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Supreme Court held that there is no jurisprudentially sound way for the Article III branch to settle a conflict over partisan fairness. This is so, in the first instance, because the Framers committed the task of refereeing partisan-fairness disputes to the politically accountable State legislatures (subject only to the oversight of the politically accountable federal Congress). *See* U.S. Const. Art. I, § 4, cl. 1. By giving State legislatures the duty of instituting "[t]he times, places and manner of holding elections for Senators and Representatives," *id.*, and assigning the federal legislature the role of the Constitutional backstop, "there is 'a textually demonstrable constitutional commitment of th[is] issue to a coordinate political department.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)). In other words, it "involves a political question," and the Court "lacks the authority to decide" it. *Id.*; *see also* Sec.'s In. Br. 29-34 (discussing Framers' intent).

This textual commitment to the political branches results in a wholesale lack of any judicially manageable standards to resolve the question posed by the Plaintiffs' lawsuit. Without an "objective measure for assessing whether" the

primacy effect "treats a political party fairly," *Rucho*, 139 S. Ct. at 2501, a court can do no more than "make [its] own political judgment about how much" of the primacy effect "particular political parties deserve," *id.* at 2499. And because "federal courts are not equipped to apportion political power as a matter of fairness," *id.*, the Plaintiffs' claims, which ask the Court to decide questions of partisan fairness, are nonjusticiable, per Article I, Section 4 of the U.S. Constitution.

Furthermore, nothing about the principles driving *Rucho* are limited to partisan gerrymandering, either explicitly or logically. Partisan gerrymandering claims are premised on the idea that some voters might find it more difficult to elect the candidates of their preferred party because their congressional districts have been drawn in way that favors candidates of the opposing party. A similar premise underlies the Plaintiffs' claims—that voters who reflexively choose the first-listed candidate will make it slightly harder for the Plaintiffs to elect the candidates of their preferred party.

For both claims, the insurmountable problems are identical: to whom does the U.S. Constitution assign the responsibility of deciding "how much partisan dominance is too much," and by what "standard" might a court decide this question? *Id*. at 2498 (citation omitted). Under *Rucho*, the political branches, and not the courts, must resolve it, because the political branches serve as the "avenue for reform established by the Framers" for questions of partisan fairness. *Id.* at 2508. And

assuming the primacy effect provides a small yet statistically significant benefit to one party at the expense of all others, there is no judicially manageable way for a court to determine the point at which assigning that benefit to one party at the expense of the others transgresses a constitutional line.

In response, the Plaintiffs argue, first, that they raise nothing more than a straightforward equal-protection challenge to a "law[] that govern[s] the voting process." Pls.' Br. 22. But a run-of-the-mill equal protection challenge, which is justiciable, requires proof of discriminatory intent (rather than just disparate impact). *See Pers. Adm. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 239 (1976).[1] This is true for purposes of ballot-placement equal-protection challenges;[2] indeed, *each* of the cases the Plaintiffs trot out involved an

[1] *See also Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 42 (2012) ("[D]isparate impact . . . alone is insufficient" to prove a constitutional violation); *cf. Hand v. Scott*, 888 F.3d 1206, 1210 (11th Cir. 2018) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.") (quoting *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985)).

[2] *See, e.g.*, *Bd. of Election Comm'rs. of Chi. v. Libertarian Party of Ill.*, 591 F.2d 22, 24-25 (7th Cir. 1979) (ballot placement equal-protection claim requires showing of "an intentional or purposeful discrimination"); *Republican Party of N.C. v. Martin*, 980 F.2d 943, 955 (4th Cir. 1992) (voting-rights equal-protection claim requires allegation of "'intentional discrimination against an identifiable political group and an actual discriminatory effect on that group'") (quoting *Davis v. Bandemer*, 478 U.S. 109, 127 (1986)).

allegation of intentional political discrimination,[3] explicit partisan favoritism,[4] or attempts to entrench incumbents,[5] which are unquestionably "*intended* to suppress opposition by freezing the status quo." *New Alliance Party v. N.Y. Bd. of Elections*, 861 F. Supp. 282, 298 (S.D.N.Y. 1994) (emphasis added). That includes *Democratic National Committee v. Hobbs*, Case No. 18-15845, 2020 WL 414448 (9th Cir. Jan. 27, 2020) (en banc), the subject of Plaintiffs' 28(j) letter, where the court found evidence of intentional race discrimination. *Id.* at 96-101. It also includes *Mann v. Powell*, the case the Plaintiffs (wrongly) insist controls by virtue of the Supreme Court's summary affirmance.[6]

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[3] *See Sangmeister v. Woodard*, 565 F.2d 460, 467 (7th Cir. 1977) ("[E]xcluding plaintiffs from top ballot positions was intentional . . . ."); *Culliton v. Board of Election Commissioners of the County of Du Page*, 419 F. Supp. 126, 129 (N.D. Ill. 1976) ("[T]he plaintiff has been intentionally denied equal access to the top ballot position.").

[4] *See Graves v. McElderry*, 946 F. Supp. 1569, 1580 (W.D. Okla. 1996) ("[I]n the event a benefit was to be obtained by ballot position, the name of the Democratic party candidate for public office was placed in a position on the ballot where the candidate could enjoy such benefit.").

[5] *See McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) ("[T]he state has chosen to serve the convenience of those voters who support incumbent and major party candidates at the expense of other voters."); *Netsch v. Lewis*, 344 F. Supp. 1280, 1280 (N.D. Ill. 1972) ("[I]nsofar as [a bill] purports to grant priority in listing on the election ballot by reason of incumbency and seniority, [it] violates the Fourteenth Amendment."); *Gould v. Grubb*, 536 P.2d 1337, 1345 (Cal. 1975) ("[A]n election procedure which grants positional preference to incumbents violates the equal protection clause of [the] federal constitution.").

[6] *See Mann v. Powell*, 314 F. Supp. 677, 678 (N.D. Ill. 1969) ("This case and the challenged statute are a sequel to the case of *Weisberg v. Powell* . . . ."); *Weisberg v. Powell*, 417 F.2d 388, 392 (7th Cir. 1969) ("All the candidates . . . have

Rather, what the Plaintiffs have raised is a partisan vote-dilution challenge to a ballot-order statute that favors no party and affords no discretion to any State official. The Statute does no more than prescribe who appears first on a ballot in a way that animates the will of Florida's statewide electorate in the most recent gubernatorial election. The alpha and omega of the Plaintiffs' grievance is their belief that an *incidental* windfall (that might not exist in all elections), one that is caused by purportedly disinterested voters and has recently (though not historically) benefited candidates they oppose, is not fair to them. *Rucho* prevents the Court from resolving this partisan-fairness dispute.

Rucho, moreover, specifically cautions against allowing plaintiffs to shoehorn a partisan-fairness challenge into the discriminatory voting-rights framework. *Rucho* took up the argument that partisan vote dilution "should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint." *Rucho*, 139 S. Ct. at 2504. That theory, per *Rucho*, reduced to an argument that "any level of partisanship in districting would constitute an infringement of their First Amendment rights," *id.*, and that argument, in turn, would run afoul of the principle that "a jurisdiction may engage in constitutional political gerrymandering," *id.* at 2497 (citation omitted). More fundamentally, trying to cram

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a federally protected right to the application and enforcement of the state law without intentional or purposeful discrimination . . . .").

a vote-dilution claim into a discriminatory voting-rights claim failed to solve the problem at the heart of *Rucho*—while "[t]he First Amendment test simply describes the act of districting for partisan advantage[,] [i]t provides no standard for determining when partisan activity goes too far." *Id.* at 2504.

So too here. No matter how often the Plaintiffs repeat their mantra that they raise a garden-variety equal-protection challenge, the fact remains that they have not once suggested how, as a matter of fairness, a court should dole out the Ballot Order Statute's incidental primacy effect. Indeed, as they close their discussion of this issue, the Plaintiffs' insist that they "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." Pls.' Br. 31 (emphasis in original). But because "[i]t is not even clear what fairness looks like in" *either* "context," *Rucho*, 139 S. Ct. at 2488-89, this is a distinction wholly without any difference.

Finally, the Plaintiffs argue that *Rucho* must be confined to the partisan gerrymandering context, an area which, in their view, is *sui generis* because it is inherently partisan. Pls.' Br. 25-27. For at least four reasons, the Court should reject their request to inappropriately cabin the principles underlying *Rucho*.

First, the Plaintiffs' underlying premise is false—redistricting is *not* inherently partisan. Districts can be drawn in ways that have nothing to do with partisan advantage; indeed, the Florida Constitution flatly prohibits doing so. *See*

Art. III, § 20, Fla. Const. And even in States where partisan gerrymandering is not forbidden, nothing prevents any State from drawing its districts in a way that is politically neutral.

There is, however, no U.S. Constitutional requirement that States remove *all* partisanship from redistricting. Indeed, *Rucho* explicitly recognized that a degree of partisanship in partisan elections does not run afoul of the Constitution, and the upshot of *Rucho* is that courts are uniquely ill-suited to decide how much partisanship in partisan elections is too much. Distilled to its core, the Plaintiffs argument turns on their belief that their preferred candidates are laboring under a partisan disadvantage by virtue of the primacy effect. The point at which this advantage transgresses a constitutional line is a determination that *Rucho* takes away from the Article III branch.

Second, Florida's Ballot-Order Statute is not inherently partisan either. It does no more than assign ballot-order primacy in partisan elections. In so doing, it gives candidates of all parties an opportunity to appear first on the ballot, depending on how their party performed in the most-recent gubernatorial election. And it has worked remarkably well over its existence in dividing the position between Democratic and Republican candidates.

The problem, in the Plaintiffs' view, is that some disinterested voters will reflexively vote for the first-listed candidate on any ballot, and the first-listed

candidate will unfairly receive votes that the candidate would not have otherwise received. The problem for the Plaintiffs, however, is that there is no meaningful way for a court to determine whether and when this fairness concern rises to the level of a constitutional violation. The Secretary's political-question argument is not, as the Plaintiffs would have it, premised on the idea that ballot-order is inherently political and should therefore be adjudicated in the political branches. Instead, she merely points out that the lack of any judicially manageable standards means that the judiciary should not be trying to figure out how to fairly allocate an incidental electoral windfall.

Third, to remove *all* partisan advantage conferred by Florida's Ballot-Order Statute would mean structuring ballots in a way to eliminate the primacy effect. While this is likely impossible,[7] would unleash election-administration mayhem as a practical matter, and undermine ballot uniformity as a policy matter (*see, e.g.*, Sec.'s Br. 17-20), it would also eviscerate the Elections Clause, which reserves to the legislative branch the responsibility of prescribing "[t]he Times, Places and Manner of holding Elections." U.S. Const. Art. I, § 4, cl. 1; *see also Rucho*, 139 S. Ct. at 2495.

Fourth, *Rucho* has already been applied in contexts well beyond

[7] It would, at minimum, require candidates of all parties to be listed first on an equal number of ballots, in an equal number of newsworthy and obscure races, and before an equal number of interested and disinterested voters.

gerrymandering or elections. In *Juliana v. United States*, the Ninth Circuit took up a case in which a "substantial evidentiary record document[ed] that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse." No. 18-36082, 2020 WL 254149, at *2 (9th Cir. Jan. 17, 2020). After determining that the plaintiffs were likely to suffer a cognizable injury in fact caused by the defendants, the Ninth Circuit held that it could not fashion a remedy without running afoul of the political-question doctrine.

Specifically, *Juliana* relied on *Rucho* for the proposition that "a constitutional directive or legal standards must guide the courts' exercise of equitable power." *Id.* at *9 (quoting *Rucho*, 139 S. Ct. at 2508 (internal quotation marks omitted)). After observing that "[t]he Court found in *Rucho* that a proposed standard involving a mathematical comparison to a baseline election map is too difficult for the judiciary to manage," *id.* (citing *Rucho*, 139 S. Ct. at 2500-02), the Ninth Circuit found it "impossible to reach a different conclusion" in climate-change litigation, *id*. Thus, courts have already recognized that the principles driving *Rucho* apply generally to *any* controversy that lacks judicially manageable standards, and when those controversies arise, they must be resolved by the political branches.

B. The Plaintiffs have failed to satisfy any of Article III's standing criteria.

Stated plainly, the Plaintiffs' constitutional theory is that (1) the primacy effect has injured them because it makes it more difficult to elect candidates of their preferred political party, (2) the primacy effect is caused by Florida's Ballot-Order Statute and the Secretary, and (3) tossing out Florida's Ballot-Order Statute will remedy their injury. But (1) they have failed to show that the primacy effect has "actual[ly]" or will "imminent[ly]" cost their party any election; (2) the primacy effect is caused by "the independent action of some third part[ies] not before the court" (*i.e.*, disinterested voters reflexively casting ballots for the first-listed candidate); and (3) the primacy effect has not been, and cannot be, meaningfully remedied by court order. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1991). Thus, the Plaintiffs have no Article III standing.

i. The Plaintiffs cannot show that Florida's Ballot-Order Statute is likely to cost any of their preferred candidates a partisan election.

The harm alleged by the Plaintiffs is partisan vote dilution. The question for the Court is at what point does partisan vote dilution become a legally cognizable injury. Under *Lujan*, an "injury in fact" requires "an invasion of a legally protected interest which is (a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. And under *Gill v. Whitford*, when a plaintiffs' "alleged harm is the dilution of their votes" due to partisan

gerrymandering, "that injury is district specific." 138 S. Ct. 1916, 1930 (2018). Taken together, *Lujan* and *Gill* establish that, because the Plaintiffs have brought primacy-effect vote-dilution claims, they must establish a concrete and particularized, actual or imminent, *election-specific* injury. Stated more succinctly, they must show that the primacy effect changed (or will imminently change) the outcome of a partisan election.

They have not done so. The best conjecture they can muster is that the primacy effect has an *average* effect of 3-to-5 percentages points, and that some partisan elections in Florida have been decided by margins less than 3-to-5 percentage points. Without tying the primacy effect to the outcome of any of these elections (or empirically forecasting that the primacy effect will imminently change the outcome of a future election), they have not satisfied the injury-in-fact requirement for purposes of their ballot-order challenge. *See Gill*, 138 S. Ct. at 1930.

The Plaintiffs' counter arguments fail. Every case they cite was decided before *Gill*, which serves as the basis for the Secretary's argument that, to have an injury in fact, the Plaintiffs must show that the primacy effect is changing the outcome of elections. As discussed in the Secretary's initial brief, Sec.'s In. Br. 40-44, they have not done so.

Nor does the involvement of political organizations salvage federal-court jurisdiction. By its terms, Florida's Ballot-Order Statute does not work a "systemic

disadvantage" to the Democratic Party, Pls.' Br. 33; indeed, the Democratic Party has benefited from top-ballot position the majority of the time. Unlike this case, where the Plaintiffs have done no more than establish an *average* primacy effect untethered to any particular Florida election, all but one of the cases Plaintiffs cite involved an allegation of political disadvantage in a *particular* election.[8]

Nothing in the record, moreover, suggests that the Organizational Plaintiffs have diverted any resources to account for the primacy effect. By all accounts, they are not doing anything except campaigning the same way they had before they knew the primacy effect existed.[9] And even if they had, they "cannot manufacture standing

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[8] *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006) (last-minute substitution of congressional candidate would cause financial injury to rival and harm election prospects in *specific* election); *Smith v. Boyle*, 144 F.3d 1060, 1061-63 (7th Cir. 1998) (at-large method for electing supreme court justices from a *particular* county disadvantaged party); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (inclusion of a gubernatorial candidate from another party "could siphon votes from" party candidate in *specific* election); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (*specific* candidate had standing to challenge Postal Service's failure to allow it to use a bulk-mail permit in *specific* election); *Nat. Law Party of U.S. v. Fed. Election Comm'n*, 111 F. Supp. 2d 33, 44, 47 (D.D.C. 2000) (disadvantage suffered based on exclusion from 1996 presidential debates).

The only other case cited by Plaintiffs did not involve claims of political disadvantage or vote dilution; instead, it involved an action seeking to uphold the constitutionality of campaign expenditure limits. *See Democratic Party of the U.S. v. Nat'l Conservative Political Action Comm.*, 578 F. Supp. 797 (E.D. Pa. 1983). The Supreme Court subsequently reversed the district court's holding that the Democratic Party had standing. *See Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985).

[9] *See generally Shelby Advocates for Valid Elections v. Hargett*, No. 19-6142, 2020 WL 401803, at *3 (6th Cir. Jan. 24, 2020) ("The alleged diversionary actions—

merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).[10]

The Individual-Plaintiff-specific arguments fare no better. No Individual Plaintiff has alleged that Florida's Ballot-Order Statute has prevented him or her from voting or having a vote counted. *See* Sec.'s In. Br. 16. They argue only that some elections have not gone the way they would have liked. Without connecting these outcomes to the primacy effect, however, their injury is not cognizable.

ii. Allegedly disinterested voters—*i.e.*, absent third parties—cause the primacy effect underlying the Plaintiffs' claims.

Even if the Court were to recognize ballot-order vote-dilution as a cognizable injury in fact (and it should not), the Plaintiffs still had an obligation to tie the vote-dilution to the defendant they sued. *See Lujan*, 504 U.S. at 560. This obligation cannot be satisfied if the vote-dilution "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *N.Y. Reg'l*

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spending money to 'bring, fund, and participate in this litigation,' . . . and spending its resources 'to address the voting inequities and irregularities' throughout the county . . . —do not divert resources from its mission. That is its mission.").

[10] *See also Shelby Advocates*, 2020 WL 401803, at *3 ("[A]n organization can no more spend its way into standing based on speculative fears of future harm than an individual can.") (citing *Clapper*, 586 U.S. at 416).

Interconnect, Inc. v. FERC, 634 F.3d 581, 587 (D.C. Cir. 2011). And because vote dilution is caused not by the Secretary, and not by Florida's Ballot-Order Statute, but instead by the "unfettered choices" of disinterested third-party voters, *id.*, the Plaintiffs have no standing.

The Plaintiffs' cursory counterarguments wither when considered in the following light. Currently, ten other states order their ballots in a way that is functionally identical to the way Florida orders its ballots. In five of those states, the primacy effect benefits the Republican Party; in the other five, it benefits the Democratic Party. In the first five, Democratic organizations have sued to enjoin the ballot-order statutes, and in the latter five, they have not. And according to the Plaintiffs, they would have no standing to challenge the five statutes in which the primacy effect benefits them. *See* Pls. Br. 65.

That fates the Plaintiffs' case. As a matter of common sense, Florida's Ballot-Order Statute is not the cause of their injury if a ballot-order statute that functions in precisely the same way in another jurisdiction causes them *no* injury. The only logical conclusion is that some other variable is causing their purported injury in Florida, and that variable is not present in other jurisdictions. That variable, of course, is the electorate—the third-party voters who are casting their ballots differently in different states. It follows, then, that other voters (and not any Florida State statute or State Official) have caused the Plaintiffs' vote-dilution injury. And

because those third-party voters are not (and cannot be) defendants in this Section 1983 action, Article III standing is lacking.

The Plaintiffs' remaining arguments require little attention. It is flatly incorrect to say that the Secretary, as the State's chief elections officer, causes every conceivable election-related injury; accepting this argument would not only shred Article III's causation requirement but would also slash the Eleventh Amendment, which requires a far greater connection between a State actor and an alleged injury. *See Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999) ("'There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute . . . ." (quoting *Fitts v. McGhee*, 172 U.S. 516, 529-30 (1899)). Left with little else, the Plaintiffs argue that Article III causation can be indirect. But because vote dilution is caused *entirely* by absent third-party voters, they cannot even satisfy their preferred skim-milk causation test.

iii. The Court cannot redress the Plaintiffs' vote-dilution claims.

Finally, the Plaintiffs cannot satisfy Article III's redressability requirement. Under *Lujan*, it must be likely, not just speculative, that a court order can fix their alleged vote-dilution injury. Try as they might, they have failed to even suggest a remedy that would be technologically possible or administratively feasible, and that would not prompt an argument that the primacy effect violates some other candidate's constitutional rights. *See also* Sec.'s In. Br. 17-20, 45-48.

Even in their brief to this Court, the Plaintiffs make no meaningful suggestion as to how Florida should reorder its ballots. Instead, they offer the flippant comment that "there are likely as many ways to order a ballot as there are to skin a cat." Pls. Br. 42-43. This comment, however, reveals a glaring admission; by throwing up their hands and saying, "we guess there are ways a court can remedy our injury," the Plaintiffs expose their failure to carry their burden of establishing redressability.[11]

Finally, the Plaintiffs cannot fabricate redressability by grasping at the district court's power to declare a law unconstitutional. Courts have uniformly held that the power to strike a law as in excess of the U.S. Constitution does not, without more, satisfy Article III standing. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S.

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[11] At no point has the Secretary argued that Article III requires that a court "entirely and perfectly" redress an injury. Pls.' Br. 41-42. Instead, the Secretary maintains that neither the Plaintiffs nor the district court has come up with a solution that would remotely or even partially redress the alleged vote dilution.

667, 671 (1950) ("The operation of the Declaratory Judgment Act is procedural only. . . . Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."); *accord Gagliardi v. TJCV Land Trust*, 889 F.3d 728, 735 (11th Cir. 2018) ("An otherwise nonjusticiable case cannot be resurrected simply by seeking declaratory relief."). And this makes sense. If it were otherwise, redressability would be satisfied robotically every time a plaintiff asks a court to strike a statute as unconstitutional. That is not the law.

II. CONSTITUTIONAL ESTOPPEL FORECLOSES THE PARTISAN GAMESMANSHIP UNDERLYING THE PLAINTIFFS' VOTE-DILUTION CLAIMS.

Constitutional estoppel, like all equitable doctrines, exists to ensure fundamental fairness. Here, it allows a court to decide whether a party can seek to dismantle a system from which it once enthusiastically enjoyed a benefit after the benefit becomes a burden.

That is what is occurring here. For thirty-six years, the Democratic Party gladly accepted the benefit of the primacy effect. Now that it no longer benefits from the primacy effect in Florida, it has cried foul. It has similarly cried foul in other jurisdictions with ballot-order systems that inflict an incidental and meager disadvantage on their preferred candidates. In jurisdictions where the primacy effect confers a marginal benefit, they remain silent.

This gamesmanship need not receive the Court's imprimatur. And this argument is not foreclosed by either Supreme Court or Eleventh Circuit precedent.

Indeed, the Plaintiffs are engaged in precisely the sort of activity that the Supreme Court has said is *most* appropriate for constitutional estoppel: retaining the benefits of the primacy effect while attempting to invalidate its burdens. *See United States v. City and Cty. of San Francisco*, 310 U.S. 16, 20 (1940). And the primacy effect is not merely "[*s*]*ome* benefit," *S.J. Groves & Sons Co. v. Fulton Cty.*, 920 F.2d 752, 769 (11th Cir. 1991) (emphasis added); it is the *same* benefit that is giving rise to the Plaintiffs' claims.

Finally, the Plaintiffs' suggestion that the Secretary's constitutional-estoppel argument is "beyond absurd" exposes their conundrum in this case. If they cannot bring ballot-order challenges in other jurisdictions because they have not been injured there, then they have no standing here either, because Florida's Ballot-Order Statute is not the cause of their purported injury in fact. *See supra* at 15-17.[12] If they are incorrect and they *can* bring these challenges elsewhere, then they are constitutionally estopped. In either event, their claims must be dismissed.

[12] To the extent that the Plaintiffs argue that constitutional estoppel does not apply because the primacy effect is not derived by governmental action, they concede that Florida's Ballot-Order Statute does not cause their alleged injury. *See supra* at 15-17.

III. FLORIDA'S BALLOT-ORDER STATUTE IS CONSTITUTIONAL, NO MATTER THE ANALYTICAL FRAMEWORK UNDER WHICH THE COURT EXAMINES IT.

A. Because the Plaintiffs' claims have nothing to do with voter access to the franchise, candidate access to the ballot, or the voting process, *Anderson-Burdick* does not apply.

Right-to-vote claims that trigger *Anderson-Burdick* balancing include challenges to laws governing, *e.g.*, "voter qualifications, candidate selection, or the voting process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring). Florida's Ballot-Order Statute, however, has nothing to do "voter qualifications, candidate selection, or the voting process." *Id.* Instead, Florida's Ballot-Order Statute routinizes the way in which Statewide ballots are ordered. Facially neutral and favoring no party or person, Florida's Ballot-Order Statute, according to the Plaintiffs' theory, incidentally dilutes their vote because a slight (yet statistically significant) percentage of disinterested voters will reflexively cast their ballot for the candidate listed first.

Because vote-dilution claims, however, turn not on whether a voter is *burdened* in casting a ballot or a candidate is *burdened* in receiving a ballot but instead on how a particular ballot is *valued* for purposes of winning and losing elections, the *Anderson-Burdick* burden-versus-benefit test makes no sense in this context.[13] Simply put, this case is not about the "voting process" at all, and indeed,

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[13] *See also New Alliance Party*, 861 F. Supp. at 295 n.15 ("[T]here are election law regulations which do not burden constitutional rights and as such render the

even the case on which the Plaintiffs rely most heavily suggests a divide between the "voting process" and partisan election fairness. In *Anderson v. Celebrezze*, the Supreme Court held only that "not all restrictions imposed by the States *on candidates' eligibility for the ballot* impose constitutionally suspect burdens on voters' rights." 460 U.S. 780, 788 (1983) (emphasis added). Because an unfair partisan electoral advantage is the injury alleged by the Plaintiffs, their purported injury, assuming it is legally cognizable, arises only *after* the "voting process" (which includes, *e.g.*, a "candidates' eligibility for the ballot," *Anderson*, 460 U.S. at 788) concludes.

Without *Anderson-Burdick*, the Plaintiffs' vote-dilution claim crumples. Necessarily implicit in their vote-dilution argument is that the third-party voters creating the primacy effect (those reflexively selecting the first-listed candidate) are not only irrational but their votes are so worthless that they should not be counted as legitimate; if this were not the case, then the Plaintiffs would have no reason to construe the primacy effect as a "windfall" or to allege that their presumably more-worthy votes are being "diluted" by the less worthy votes. This premise, however, seals the fate of their claims, which, by their nature, ask the Court to cast "aspersions upon citizens who expressed their civic right to participate in an election and made

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Anderson[*-Burdick*] test superfluous.") (citing *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989)).

a choice of their own free will." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 718 (4th Cir. 2016). The Plaintiffs have no license to "demean [a voter's] decision," *id*., nor should they ask this Court to do so. No party has a right to demand a "rational election, based solely on a reasoned consideration of the issues and the candidates' positions, and free from [what the parties deem to be] other 'irrational considerations.'" *Id*.

Because the Plaintiffs have no vote-dilution claim without this premise, they have no vote-dilution claim. If it reaches the merits of the Plaintiffs' claims, the Court should grant judgment in favor of the Secretary on this basis alone.

B. Assuming *Anderson-Burdick* applies, Florida's Ballot-Order Statute satisfies it.

Even accepting as true the district court's finding that "Florida Elections are significantly impacted by ballot order," Pls.' Br. 15, that does not end the inquiry. The question is whether the primacy effect offends the constitution. It does not.

It bears mentioning at the outset that ballot-order challenges are subject to no more than rational basis review. This is because Florida's Ballot-Order Statute is a "'reasonable, nondiscriminatory restriction[]' that impose[s] a minimal burden" and that is "warranted by 'the State's important regulatory interests.'" *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Anderson*, 460 U.S. at 788). Accordingly, it "trigger[s] less exacting review." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Indeed, Florida's facially neutral

Ballot-Order Statute imposes a far "lesser burden on the right to vote" than the type of regulations historically prompting more searching review (*e.g.*, those that "restrict access to the ballot or deny . . . voters the right to vote for candidates of their choice"). *See Alcorn*, 826 F.3d at 718.

Under *Anderson-Burdick*, the Court must (1) "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate'" against (2) "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Because Florida's Ballot-Order Statute is "facially neutral and nondiscriminatory," it levies "only the most modest burdens on [plaintiffs'] free speech, associational, and equal protection rights." *Alcorn*, 826 F.3d at 717. In other words, it "'merely allocates the benefit of positional bias, which places a lesser burden on the right to vote'" then, for instance, a law that "'restrict[s] access to the ballot or den[ies] a[] voter[] the right to vote for candidates of [his] choice'" *Id*. (quoting *Sonneman v. State*, 969 P.2d 632, 638 (Alaska 1998)).

The State interests served by Florida's Ballot-Order Statute far outweigh the (at best) negligible burden it imposes. For instance, it "emphasize[s] voter familiarity and more predictable order," *id*. at 719, which minimizes confusion and the long lines that deter voters from participating in the voting process. It also efficiently maintains party-order symmetry by making "the ballot more easily decipherable,

especially for voters looking for candidates affiliated with a given party." *Id*. Finally, and most critically, it serves the State's "strong interest in the stability of [its] political system." *Id*. (quoting *Timmons*, 520 U.S. at 366).[14]

The Plaintiffs' attempt to besmirch the unbroken line of precedent highlights their disregard for voters they do not agree with. In their view, the cases upholding ballot-order statutes are all distinguishable because those challenges were brought by "minor party . . . candidates who s[ought] to be treated as major party candidates." Pls. Br. 48. But at no point do the Plaintiffs explain why their preferred candidates suffer an injury of constitutional severity by virtue of the primacy effect while minor-party candidates do not.

As a matter of jurisprudence, this distinction is entirely unsound; if a paltry, yet statistically significant, primacy effect hurts one candidate who is not listed first on the ballot, it *must* follow that it affects *all* candidates who are not listed first on the ballot, irrespective of the candidates' respective political parties. But as legally fallacious as this distinction is, it is consistent with the theme of Plaintiffs' case—a belief that votes not cast in favor of their favored political party, for any reason, are

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[14] *See also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1322 (11th Cir. 2019) (State has "legitimate and strong interest[]" in "protecting public confidence in" election legitimacy and "important interest in structuring and regulating its elections to avoid chaos and to promote the smooth administration . . . ."); *Bd. of Election Comm'rs. of Chi.*, 591 F.2d at 26 (ballot-tier scheme advanced voter convenience and convenient tallying).

worth less than votes that are cast in favor of their favored political party, *see* Sec.'s In. Br. 55. However understandable this position might be as matter of politics, the Plaintiffs' pretension makes no difference as a matter of jurisprudence. For that reason, cases like *Alcorn* are on all fours against the Plaintiffs.

At the end of the day, the primacy effect (assuming it exists) will provide a slight, yet statistically significant, benefit to *some* candidates of *some* political parties in *some* elections. But Florida's Ballot-Order Statute does not control which political party receives this benefit, nor does it reflexively favor incumbents. Nor does Florida's Ballot-Order Statute allow room for the Secretary to exercise any discretion whatsoever to the detriment of any political party.[15]

Florida's Ballot-Order Statute is not subject to any of the legitimate constitutional criticisms discussed in the intentional-discrimination or incumbent-entrenching cases on which the Plaintiffs rely. For that reason, the Court should follow the lead of the Fourth Circuit and find that "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern." *Alcorn*, 826 F.3d at 719 (internal quotes omitted).

[15] This undermines the Plaintiffs' attempt to close the gap between their case and political-discrimination cases on grounds that the Secretary is appointed by the Governor. Nothing about her appointment suggests that she is fulfilling her role in a way that discriminates in favor of her own political party.

CONCLUSION

The Court should reverse the district court's final order and remand for dismissal. Alternatively, it should reverse the district court's final order and remand for entry of judgment in favor of the Secretary.

Respectfully submitted: *<u>/s/ Mohammad O. Jazil</u>*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this brief contains 6,465 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: February 4, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on February 4, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 4, 2020

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