UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

S.P.S., *ex rel.* SHORT, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

CIVIL ACTION NO.
1:19-CV-04960-AT

PLAINTIFFS' RESPONSE TO DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs submit this response to the Secretary's Notice of Supplemental Authority (Doc. 64), regarding a decision from the U.S. District Court for the Western District of Texas in *Miller v. Hughs*, in which the District court granted the Texas Secretary of State's motion to dismiss for lack of standing based on lack of injury and the court's conclusion that the case presented a nonjusticiable political question. *Miller* is in error on both counts.

First, the *Miller* court entirely ignored the doctrine of competitive standing when a state's election law results in a systematic advantage for one political party over another. The court failed to address this basis for standing despite binding Fifth Circuit precedent. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006) (holding party had "direct standing" based on "harm to its election prospects"). This basis for standing is also the law in six other Circuits. *See Green*

Party of Tenn. v. Hargett, 767 F.3d 533, 544 (6th Cir. 2014) (concluding political parties "subject to" state's ballot-ordering provision had standing to challenge it); *LaRoque v. Holder*, 650 F.3d 777, 786-87 (D.C. Cir. 2011) (holding candidate had standing to challenge election law that "provid[es] a competitive advantage to his … opponents" "even if 'the multiplicity of factors bearing on elections' prevents [him] from establishing 'with any certainty that the challenged rules will disadvantage [his] … campaign[]'") (quoting *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 90-91 (D.C. Cir. 2005)); *Smith v. Boyle*, 144 F.3d 1060, 1062 (7th Cir. 1998) (holding Republican Party had standing to challenge at-large method of electing judges that disadvantaged Republicans); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding Conservative Party had standing to challenge opposing candidate's position on the ballot where opponent "could siphon votes from the Conservative Party line and therefore adversely affect the interests of the Conservative Party"); *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981) (holding Republican committee members had standing where they "seek to prevent their opponent from gaining an unfair advantage in the election process"); *Schiaffo v. Helstoski*, 492 F.2d 413, 422 (3d Cir. 1974) (holding candidate had standing to challenge opponent's right to send constituent mail postage-free because damage to his "electoral prospects constitutes a noneconomic harm").[1]

[1] Indeed, another federal district court found many of the same parties here to have standing on this basis in the ballot order context just last month. *Pavek v. Simon*, No. 19-CV-3000 (SRN/DTS), 2020 WL 3183249, at *12-14 (D. Minn. June 15, 2020)

Second, the *Miller* Court's conclusion that Plaintiffs failed to demonstrate diversion of resources was both incorrect and based on an evidentiary record different from the one here. As Plaintiffs noted in their supplemental brief (Doc. 57 at 3-5), the elements of standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1349 (11th Cir. 2009). At the current stage of this litigation, organizational Plaintiffs have demonstrated sufficient evidence to show that the Ballot Order Statute will cause them to divert resources away from other states to Georgia, "perceptibly impair[ing]" their ability to carry out their purposes of supporting Democratic candidates nationwide. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Each organizational Plaintiff has adequately detailed these diversions. *See* Doc. 17 ¶ 23 (Priorities USA); *id*. ¶ 19 (DNC); Doc. 24-5 ¶¶ 18-19 (DNC); Doc. 24-6 ¶ 8 (DSCC); Doc. 24-7 ¶ 9 (DCCC); *see also Pavek*, 2020 WL 3183249, at *12 (noting DSCC and DCCC had established standing at preliminary injunction stage "by explaining that the diverted resources are coming *from* their resource expenditures that would normally be used in other states").

Third, the *Miller* court's conclusion that Plaintiffs did not demonstrate associational standing because they did not demonstrate that Texas's ballot order statute has prevented any of their members from voting or has caused any of their candidates to lose was in error. Standing demands only the smallest, "identifiable

(finding DSCC and DCCC have standing based on ballot order statute's harm to their candidates' electoral prospects).

trifle" of an injury, *Hallums v. Infinity Ins. Co.*, 945 F.3d 1144, 1147 (11th Cir. 2019) (quotation marks and citation omitted); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) ("We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax.") (citations omitted). Plaintiffs have more than met that bar in this litigation, demonstrating through expert evidence the significant impact of Georgia's Ballot Order Statute on their candidate members' electoral prospects, *see* Doc. 24-2 at 5 (estimating that the Ballot Order Statute provides an average advantage of 4.2 percentage points in Georgia), and its impact on the ability of their members who are voters to "associate together to express their support" for candidates and their views, *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983), a harm shared by the Voter Plaintiffs. *See also Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.").

Finally, the *Miller* court's holding regarding the effect of *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), is entirely misplaced. As Plaintiffs detailed in their response to the Secretary's Motion to Dismiss, *Rucho*'s plain terms limit it to the partisan gerrymandering context. (Doc No. 41 at 10-15). The *Miller* court entirely ignored this limiting language. Further, unlike the unique context of partisan

gerrymandering, where federal courts had agonized over the proper legal test to apply for decades, federal courts have been easily and ably deciding ballot order challenges under First and Fourteenth Amendments for decades, more recently using the *Anderson-Burdick* balancing test. *See, e.g.*, *Mann v. Powell*, 314 F. Supp. 677, 678-79 (N.D. Ill. 1969) (finding assignment of first position based on incumbency to be an "unlawful invasion of plaintiffs' Fourteenth Amendment right to fair and evenhanded treatment" and requiring the use of a "nondiscriminatory means by which [similarly situated] candidates shall have an equal opportunity to be placed first on the ballot"), *aff'd* 398 U.S. 955 (1970); *McLain v. Meier*, 637 F.2d 1159, 1166 (8th Cir. 1980) (holding unconstitutional a ballot order system that prioritized candidates whose party won the last congressional election); *Sangmeister v. Woodard*, 565 F.2d 460, 467-68 (7th Cir. 1977) (holding practice of excluding plaintiffs from top ballot position "worked a substantial disadvantage to them in violation of the Fourteenth Amendment to the United States Constitution" and enjoining any "procedure that invariably awards the first position on the ballot to the County Clerk's party, the incumbent's party, or the 'majority' party"); *see also* Doc No. 41 at 12 (citing ballot order cases decided using *Anderson-Burdick* since the test's inception). *Rucho* has no applicability here.

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Dated: July 15, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a point size of 14.

Dated: July 15, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 15, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: July 15, 2020

Adam M. Sparks
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