No. 18-14758

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DEMOCRATIC EXECUTIVE COMMITTEE OF FLORIDA, *et al.*,

Plaintiffs-Appellees,

v.

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,

Defendants-Appellants.

On Appeal From The United States District Court
For The Northern District of Florida, Tallahassee Division
No. 4:18-cv-00520-RH-MJF

DEFENDANT-APPELLANT NATIONAL REPUBLICAN SENATORIAL COMMITTEE'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE RESPONSE TO DEFENDANTS-APPELLANTS' JURISDICTIONAL BRIEFS

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Defendant-Appellant National Republican Senatorial Committee certifies that it is not publicly traded and has no parent corporation and that no publicly held corporation owns more than 10% of its stock.

The following persons and entities have an interest in the outcome of this appeal:

1. Andreassen, Ezekiel, Declarant
2. Agarwal, Amit, Esq., Counsel for Intervenor-Defendant Attorney General of the State of Florida
3. Bardos, Andy, Esq., Counsel for Intervenor-Defendant-Appellant
4. Bill Nelson for U.S. Senate, Plaintiff-Appellee
5. Blohm, Jennifer S., Esq., Counsel for Plaintiffs-Appellees
6. Bondi, Pamela J., Esq., former Attorney General of the State of Florida, Intervenor-Defendant
7. Callais, Amanda, Esq., Counsel for Plaintiffs-Appellees
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9. Daniel, Stephanie Allison, Esq., Counsel for Intervenor-Defendant Attorney General of the State of Florida
10. Davis, Ashley E., Esq., Counsel for Defendant
11. Democratic Congressional Campaign Committee, Plaintiff

12. Democratic Executive Committee of Florida, Plaintiff-Appellee

13. Democratic Senatorial Campaign Committee, Plaintiff

14. Detzner, Kenneth, former Florida Secretary of State, Defendant

15. Diot, Kristin C., Esq., Counsel for Defendant

16. DNC Services Corporation/Democratic National Committee, Plaintiff

17. Dupree, Thomas H. Jr., Esq., Counsel for Intervenor-Defendant-Appellant National Republican Senatorial Committee

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27. Hinkle, The Honorable Robert L., United States District Judge for the Northern District of Florida

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INTRODUCTION

This Court instructed "[t]he parties" to respond "**simultaneously**" within thirty days to the question whether this appeal of the district court's preliminary injunction order is moot, and the Court made plain that it would proceed to resolve the issue after the conclusion of the thirty-day period. Notice to Counsel/Parties, No. 18-14758 (11th Cir. Feb. 22, 2019) ("Notice") (emphasis in original); Jurisdictional Question, No. 18-14758 (11th Cir. Feb. 22, 2019). Defendants each complied with these clear instructions and filed timely responses explaining why the Court has jurisdiction over this appeal. Plaintiffs chose a different approach, skipped the March 25 deadline for simultaneous responses, and two weeks later moved for permission to file a response to Defendants' submissions.

This Court should deny Plaintiffs' motion. Plaintiffs' excuses for failing to file their response on time and disrupting the process established by this Court lack merit, and their failure will cause them no harm because they are free to brief and argue the jurisdictional question to a merits panel. If the Court does permit Plaintiffs to file their response, then Defendants are entitled to a reasonable opportunity to respond to Plaintiffs' arguments too. Thus, if the Court grants Plaintiffs' motion, then it should also allow Defendants a reasonable amount of time to file reply briefs. And in light of the importance of the constitutional questions in this case—including the jurisdictional question—the Court should consider deferring the question to a

merits panel so that it can be decided after full briefing and argument.

BACKGROUND

Plaintiffs filed this lawsuit on November 8, 2018—just days after Election Day—alleging that Florida's signature-match laws are unconstitutional. A mere seven days later, the district court entered a preliminary injunction requiring the Secretary of State of Florida to extend the statutory cure deadline for ballots that were rejected because of a signature mismatch. ECF 46 at 33–34.

The same day the district court issued the preliminary injunction, Defendant National Republican Senatorial Committee ("NRSC") and the other Defendants filed notices of appeal. NRSC also filed an emergency motion to stay the preliminary injunction, which this Court denied a few hours later. Order Denying Emergency Motion for a Stay Pending Appeal, No. 18-14758 (11th Cir. Nov. 15, 2018). Three months later, the motions panel issued a lengthy published opinion explaining its order denying a stay. Order, No. 18-14758 (11th Cir. Feb. 15, 2019).

Shortly thereafter, this Court issued a jurisdictional question to the parties, asking whether this appeal is moot. Included with the jurisdictional question was a letter laying out the procedure for filing responses. The letter specifically requested that "[t]he parties" file their responses "**simultaneously** . . . within thirty (30) days from the date of this letter." Notice at 2 (emphasis in original). The letter added that "[r]equests for extensions of time to file a response are disfavored," and that after

March 25 "this court will consider any response(s) filed and any portion of the record that may be required to resolve the jurisdictional issue(s)." *Id.*

Pursuant to the Court's instructions, Defendants NRSC, the Secretary of State of Florida, and the Attorney General of Florida each filed their responses on March 25. Plaintiffs did not file a response at that time. Instead, two weeks after the deadline, Plaintiffs filed a motion seeking leave to file a "response to the arguments raised in Defendants-Appellants' jurisdictional briefs." Motion at 2–3.

ARGUMENT

I. The Court Should Deny Plaintiffs' Motion

This Court's jurisdictional question and its instructions to the parties were clear. "The parties"—all of them—were "requested to **simultaneously** advise the court" of their positions regarding the question whether this appeal is moot. Notice at 2 (emphasis in original). The letter specifically emphasized that all responses should be filed *at the same time*, presumably to prevent any party from attempting precisely what Plaintiffs seek to do here—get the last word on an important jurisdictional question without allowing the other side an opportunity to respond—and to avoid multiple rounds of briefing. Similarly, the Court was crystal clear that after March 25 the Court would proceed to "consider any response(s) filed." *Id.* Regardless of whether Plaintiffs' failure to file a response before that date was a

simple lack of diligence or a deliberate act of gamesmanship, the Court should not allow them to flout its unambiguous, specific instructions.

The only excuse Plaintiffs offer in response is that they misunderstood the Court's instructions. Specifically, Plaintiffs contend that they misinterpreted the Court's docket entry, which referenced a "JURISDICTIONAL QUESTION issued as to Attorney General, State of Florida, National Republican Senatorial Committee and Secretary of State." Jurisdictional Question, No. 18-14758 (11th Cir. Feb. 22, 2019). Similarly, Plaintiffs contend that they were misled by the fact that the Notice included the addresses of counsel for Defendants, but not counsel for Plaintiffs. According to Plaintiffs, they interpreted these references to mean that *only* Defendants were supposed to state their positions on the Court's jurisdiction by March 25.

These excuses lack merit. As an initial matter, Plaintiffs fail to acknowledge the Court's clear instruction that "*[t]he parties*" should file simultaneous responses stating their positions on jurisdiction. *See* Notice at 2 (emphasis added). Even if the docket entry or the addresses listed on the Notice were confusing standing alone, Plaintiffs have no excuse for failing to follow the clear instructions in the body of the Notice. *Cf. Two-Way Media LLC v. AT&T, Inc.*, 782 F.3d 1311, 1316–17 (Fed. Cir. 2015) (counsel could not show excusable neglect where they relied on ECF notices but "fail[ed] to read all of the underlying orders they received"). Nor do

Plaintiffs even attempt to explain why they failed to seek clarification of the instructions with the Clerk's Office, which affirmed that all responses were due at the same time, until 10 days *after* Defendants had filed their responses, despite the Court's plain statement that briefing would be complete on March 25. The time to seek clarification was before the deadline, not weeks later.

Nor will Plaintiffs suffer any prejudice from their failure to file a timely response to the Court's jurisdictional question. If the Court allows this appeal to move forward, as it should, then Plaintiffs (and Defendants) can brief and argue the question whether this Court still has jurisdiction to a merits panel. The Court need not definitively resolve the question now.

In short, the Court should reject Plaintiffs' attempt to file an untimely and procedurally inappropriate response to Defendants' arguments in support of the Court's jurisdiction. Instead, the Court should allow this appeal to move forward so that the important constitutional issues in this case—including mootness—can be decided in an orderly manner after full briefing and argument.

II. If The Court Allows Plaintiffs To File Their Untimely Brief, Then Defendants Should Have An Opportunity To Respond

If the Court does allow Plaintiffs to file their untimely response, then the Court should not further reward Plaintiffs' failure to follow the Court's instructions by allowing them to have the last word. The Court plainly did not contemplate allowing Plaintiffs to be the *only* party able to respond to the other side's arguments.

Accordingly, if the Court grants Plaintiffs' motion for leave to file an untimely response, then it should allow NRSC and the other Defendants a reasonable amount of time to file reply briefs.

Doing so would be particularly important in light of the legal errors in Plaintiffs' proposed brief. Plaintiffs argue, for example, that the mootness exception for issues that are capable of repetition yet evade review does not apply here because this appeal arises from the district court's interlocutory order granting a preliminary injunction. Plaintiffs' Proposed Jurisdictional Brief at 6. But this Court has already applied the exception to an appeal from the grant of a preliminary injunction in an election case, explaining that "[t]he Supreme Court has recognized that often in cases challenging rules governing elections there is not sufficient time between the filing of the complaint and the election to obtain judicial resolution of the controversy before the election." *Teper v. Miller*, 82 F.3d 989, 992 n.1 (11th Cir. 1996).

Similarly, Plaintiffs contend that the issues in this case will not evade review because litigation is ongoing in the district court. Plaintiffs' Proposed Jurisdictional Brief at 7. But Plaintiffs fail to meaningfully distinguish this Court's holding in *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997), which was in the same procedural posture as this case. And Plaintiffs also fail to acknowledge that trial in this case is scheduled to occur just two months before Florida's 2020 presidential

preference primary, which does not leave nearly enough time for the case to be "fully litigated" on appeal before the votes are counted. *See id.*

Plaintiffs also fail to grapple with the fact that one of the key issues in this appeal—whether the district court should have granted an emergency injunction after the votes had been cast and in the midst of an ongoing recount—is by definition a question that cannot be litigated fully before it becomes moot. *See* Florida Attorney General's Jurisdictional Brief at 6–7. This issue is certain to recur in future elections. The Court should address the problem now, rather than await yet another last-second (indeed, after-the-last-second) rush to the courthouse in November 2020 or earlier.

Plaintiffs further argue that the Court lacks authority to vacate the district court's and motions panel's emergency orders. Here, too, their arguments are flawed. For example, Plaintiffs contend that when an interlocutory appeal is moot, vacatur is inappropriate. Yet they concede that this Court has vacated interlocutory orders on several occasions. *See* Plaintiffs' Proposed Jurisdictional Brief at 16–17 & n.3. That includes cases where, as here, vacatur was necessary because of the "precedential consequences" of an opinion that a party was unable to litigate fully. *Ethredge v. Hail*, 996 F.2d 1173, 1177 (11th Cir. 1993); *see also Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1258 & n.10 (11th Cir. 2001).

Plaintiffs do not seriously dispute the continuing influence that the district court's and motions panel's emergency orders will have on judges and election officials throughout the Eleventh Circuit. Indeed, the continuing impact of those orders is exactly why Plaintiffs seek to file an untimely brief asking the Court to cement the emergency orders in place, without further review pursuant to the ordinary appellate process. It may serve Plaintiffs' interests to allow those orders to loom large over future elections, but this Court should first have the chance to determine whether they properly should.

Remarkably, Plaintiffs insist that the ongoing impact of the emergency orders counsels *against* vacatur, citing *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). Plaintiffs' Proposed Jurisdictional Brief at 14–15. Plaintiffs' argument badly misreads the Supreme Court's decision in *U.S. Bancorp*. There, the party seeking vacatur voluntarily forfeited further review by agreeing to a settlement that made the case moot. *See* 513 U.S. at 20. Vacatur was inappropriate under those circumstances, in part because "judicial precedents are . . . not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* at 26 (quotation marks omitted). Were it otherwise, parties could use vacatur as a "refined form of collateral attack" on a court's decision and "disturb the orderly operation of the federal judicial system." *Id.* at 27.

Here, unlike in *U.S. Bancorp*, Defendants continue to seek a decision from this Court on the merits and have not taken any unilateral action to moot the case. Instead, it is *Plaintiffs* who seek to block the Court from reviewing the district court's and motions panel's emergency orders. And here, the "public interest would be served" by preventing these orders from disrupting "the orderly operation of the federal judicial system." *U.S. Bancorp*, 513 U.S. at 26–27. The constitutionality of Florida's signature-match laws—and similar laws throughout the Eleventh Circuit—should not be determined based on emergency proceedings, amidst the chaos of an ongoing recount.

The problems described above are just a few of the problems in Plaintiffs' proposed response. Accordingly, if the Court allows Plaintiffs to file an untimely response to the question whether this Court has jurisdiction, then NRSC will respectfully request a reasonable opportunity to reply to Plaintiffs' arguments.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for leave to file an untimely response to Defendants' submissions in support of the Court's jurisdiction. If the Court grants Plaintiffs' motion, then it should allow Defendants a reasonable amount of time to reply to Plaintiffs' response. The Court should also consider

deferring the jurisdictional question to a merits panel so that the question can be decided after full briefing and argument.

Dated: April 17, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 32 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 27-1(a), I certify that this brief contains no more than 5,200 words. Based on the word count of the word processing system used to prepare this document, the word count, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), is 2,127.

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced font that includes serifs using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2019, I electronically filed the foregoing Response to Jurisdictional Question and Conditional Motion to Vacate Prior Orders with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the Court's appellate CM/ECF system. I further certify that service was accomplished on all participants in the case via the Court's CM/ECF system.

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