No. 18-14758

In the United States Court of Appeals for the Eleventh Circuit

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

Plaintiffs–Appellees,

v.

FLORIDA SECRETARY OF STATE, ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Defendants-Appellants,

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Intervenor Defendant–Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NO. 4:18-CV-520-MW-MJF

PLAINTIFFS-APPELLEES' REPLY TO DEFENDANTS-APPELLANTS' RESPONSES TO MOTION FOR LEAVE TO FILE RESPONSE TO JURISDICTIONAL BRIEFS, OR, IN THE ALTERNATIVE, TO RESPOND OUT OF TIME TO JURISDICTIONAL QUESTION

Marc E. Elias
Elizabeth Frost
Uzoma N. Nkwonta
Sarah L. Schirack
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
(202) 654-6200

Ronald G. Meyer
Jennifer S. Blohm
Meyer, Brooks, Blohm and Hearn, P.A.
131 North Gadsden Street
Post Office Box 1547
Tallahassee, FL 32302-1547
(850) 878-5212

Attorneys for Appellees Democratic Executive Committee of Florida and Bill Nelson for U.S. Senate

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Appellees Democratic Executive Committee of Florida and Bill Nelson for U.S. Senate certify that they are not publicly traded and have no parent corporation or corporations and that no publicly held corporation owns more than 10% of their stock.

CERTIFICATE OF INTERESTED PERSONS

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

1. Agarwal, Amit, Esq, *Attorney for Intervenor-Defendant/Appellant Attorney General of the State of Florida*
2. Andreassen, Ezekiel, *Declarant*
3. Bardos, Andre, *Attorney for Intervenor-Defendant/Appellant National Republican Senatorial Committee*
4. Bill Nelson for U.S. Senate, *Plaintiff/Appellee*
5. Blohm, Jennifer S., Esq., *Attorney for Plaintiffs/Appellees*
6. Bondi, Pam, *Attorney for Intervenor-Defendant/Appellant Attorney General of the State of Florida*
7. Brown, Joseph A., Esq., *Attorney for Defendant/Appellant Laurel M. Lee*
8. Callais, Amanda, Esq., *Counsel for Plaintiffs/Appellees*
9. Daniel, Stephanie A., Esq., *Attorney for Intervenor-Defendant/Appellant Attorney General of the State of Florida*

10. Davis, Ashley E., Esq., *Attorney for Defendant/Appellant Laurel M. Lee*

11. Democratic Executive Committee of Florida, *Plaintiff/Appellee*

12. DeSantis, Ron, *Governor of Florida*

13. Dupree, Thomas H. Jr., Esq., *Attorney for Intervenor-Defendant/Appellant National Republican Senatorial Committee*

14. Early, Mark, *Leon County Supervisor of Elections*

15. Elias, Marc E., Esq., *Attorney for Plaintiffs/Appellees*

16. Ferro, Daniela, *Declarant*

17. Frost, Elizabeth, Esq., *Counsel for Plaintiffs/Appellees*

18. Gibson, Dunn & Crutcher LLP, *Attorney for Intervenor- Defendant/Appellant National Republican Senatorial Committee*

19. Gray Robinson, P.A., *Attorney for Intervenor-Defendant/Appellant National Republican Senatorial Committee*

20. Hinkle, The Honorable Robert L., *United State District Judge for the Northern District of Florida*

21. Holtzman Vogel Josefiak Torchinsky, PLLC, *Attorney for Intervenor-Defendant/Appellant National Republican Senatorial Committee*

22. Hopping Green & Sams, P.A., *Attorney for Defendant/Appellant Laurel M. Lee*

23. Jazil, Mohammad O., Esq., *Attorney for Defendant/Appellant Laurel M. Lee*

24. Khanna, Abha, Esq., *Counsel for Plaintiffs/Appellees*

25. Lee, Laurel M., *Florida Secretary of State, Defendant/Appellant*

26. Levesque, George T., Esq., *Attorney for Intervenor-Defendant/Appellant National Republican Senatorial Committee*

27. Madduri, Lalitha D., Esq., *Attorney for Plaintiffs/Appellees*

28. McVay, Bradley R., Esq., *Attorney for Defendant/Appellant Laurel M. Lee*

29. Means, Malcolm N., *Attorney for Defendant/Appellant Laurel M. Lee*

30. Meyer, Brooks, Demma and Blohm, P.A., *Counsel for Plaintiffs/Appellees*

31. Meyer, Ronald G., Esq., *Attorney for Plaintiffs/Appellees*

32. Mohammed, Linton A., Ph.D.

33. Moody, Ashley, Esq., *Attorney General of the State of Florida, Intervenor/Defendant-Appellant*

34. Murphy, The Honorable Patrick, *Declarant*

35. Murrill, Elizabeth B., Esq., *Attorney for Amici Curiae State of Louisiana, State of Texas, State of Alabama and State of Georgia*

36. Nkwonta, Uzoma, *Attorney for Plaintiffs/Appellees*

37. Perko, Gary V., *Attorney for Defendant/Appellant Laurel M. Lee*

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

39. Schirack, Sarah L., *Attorney for Plaintiffs/Appellees*

40. Spiva, Bruce V., Esq., *Attorney for Plaintiffs/Appellees*

41. State of Alabama, *Amicus Curiae*

42. State of Georgia, *Amicus Curiae*

43. State of Louisiana, *Amicus Curiae*

44. State of Texas, *Amicus Curiae*

45. Torchinsky, Jason B., *Attorney for Intervenor-Defendant/Appellant National Republican Senatorial Committee*

46. Velez, Alexi M., Esq., *Attorney for Plaintiffs/Appellees*

47. Walker, Helgi C., *Attorney for Intervenor-Defendant/Appellant National Republican Senatorial Committee*

48. Walker, The Honorable Mark E., *United State District Judge for the Northern District of Florida*

49. Wenger, Edward M., *Attorney for Intervenor-Defendant/Appellant Attorney General of the State of Florida*

50. Weiss, Eric J., *Attorney for Plaintiffs/Appellees*

51. Winship, Blaine H., *Attorney for Intervenor-Defendant/Appellant Attorney General of the State of Florida*

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INTRODUCTION

The Secretary of State, Attorney General, and National Republican Senatorial Committee's (collectively, "Defendants") responses to Plaintiffs-Appellees' ("Plaintiffs") Motion[1] suggest that Plaintiffs' jurisdictional arguments are time barred—at least for now—because the Court's jurisdictional question asked "the parties" to respond simultaneously. But Defendants do not dispute that the "Jurisdictional Question issued as to Attorney General, National Republican Senatorial Committee, and Secretary of State" and the accompanying "Notice to Counsel/Parties" (hereinafter, "the letter") were addressed specifically to Defendants and their counsel. And their objections fail to acknowledge that a party may alert the Court to jurisdictional issues independently, even outside of a formal request. Thus, even if the Court ultimately agrees that the jurisdictional question was directed to *all* parties in the case, Plaintiffs interpreted the directive and filed their Motion in good faith, and Defendants' responses provide no legitimate basis to suggest otherwise. As a result, this Court should grant Plaintiffs' Motion.

[1] Plaintiffs' "Motion," as referenced in this Reply refers to Plaintiffs-Appellees' April 8, 2019 Motion for Leave to File Response to Defendants-Appellants' Jurisdictional Briefs, or, in the Alternative, to Respond Out of Time to Jurisdictional Question.

ARGUMENT

I. The Court Should Grant Plaintiffs' Motion.

Defendants' responses to Plaintiffs' Motion maintain that the Court's February 22, 2019 Jurisdictional Question and accompanying instructions were unambiguously directed to Plaintiffs, yet Defendants fail to identify any portion of the docket entry or accompanying letter that addressed any parties other than the Attorney General, National Republican Senatorial Committee ("NRSC"), or the Secretary of State. Defendants side-step, but do not dispute, that the February 22, 2019 docket entry listed only the Defendants ("Jurisdictional Question issued as to Attorney General, State of Florida, National Republican Senatorial Committee and Secretary of State"), nor do they contest that the accompanying "Notice to Counsel/Parties" that provided instructions for the responses was addressed solely to Defendants' counsel. *See* Feb. 22, 2019 Notice to Counsel/Parties ("Notice Letter"). The only aspect of the Court's directive that Defendants have identified as a possible reference to Plaintiffs is the letter's use of the phrase, "the parties," which Defendants claim "unambiguous[ly]" means "all parties." *See* Secretary of State & Attorney General Mot. at 2; NRSC Mot. at 3. But within the context of the letter, the phrase "the parties" would naturally refer to the Attorney General, NRSC, and the Secretary of State—the parties to which the letter *and* docket entry were explicitly addressed.

Indeed, a letter addressed solely to specific parties is an indication by itself that the contents of that letter are similarly targeted. But this is made even more plain when the letter accompanies a docket entry directed explicitly to those same parties, as was the case here. *See* Feb. 22, 2019 Dkt.; Notice Letter at 1. By contrast, notices accompanying the Court's February 15, 2019 Amended Order, or its January 30, 2019 Order staying the briefing schedule in this case, for example, were addressed to all counsel of record, and all parties by extension. *See* Feb. 15, 2019 Notice to Counsel (notice accompanying Amended Order, addressed to *all* counsel); Jan. 30, 2019 Notice to Counsel (notice accompanying Order staying briefing, addressed to *all* counsel). If anything is unambiguous, it is that the Court's directive, including the accompanying letter requesting that "the parties" respond simultaneously, was directed specifically to the Attorney General, NRSC, and the Secretary of State. Plaintiffs, in turn, requested leave to respond to Defendants' jurisdictional arguments.

Defendants also mischaracterize Plaintiffs' Motion by suggesting that Plaintiffs unduly delayed in seeking "clarification" of the Court's directive. But, as explained above, the directive itself presented no ambiguity as to its intended target, and no cause for clarification. Plaintiffs' Motion primarily seeks leave to respond to Defendants' jurisdictional briefs, which was the purpose of Plaintiffs' inquiry to the Clerk's Office in the first place. *See* Pls.' Mot. ¶ 2. And Plaintiffs have requested, in

the alternative, that the Court accept their proposed brief as an out-of-time response to the jurisdictional question only to the extent that the Court's directive was meant to require *all* parties to address the jurisdictional question by March 25, 2019 (Pls.' Mot. ¶ 6)—a position which Plaintiffs maintain is not reflected in the docket entry or the accompanying letter. As such, even if the Court denies Plaintiffs' request to respond to Defendants' jurisdictional briefs, Plaintiffs have nonetheless demonstrated good cause to submit their proposed brief, in the alternative, as an out-of-time response to the jurisdictional question.

Granting Plaintiffs' Motion and accepting Plaintiffs' proposed brief imposes no prejudice on Defendants, who are neither guaranteed nor entitled to prevent another party from providing the last word on questions related to the Court's jurisdiction. This Court has recognized that "[q]uestions of subject matter jurisdiction may be raised at any time," *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1001 (11th Cir. 2016), whether by the Court's request or by litigants. *See, e.g.*, *Ingram v. CSX Transp., Inc.*, 146 F.3d 858, 861 (11th Cir. 1998) (addressing subject matter jurisdiction argument first raised by party during oral argument). Plaintiffs submitted their Motion in good faith to alert the Court to the legal errors in Defendants' submissions—which fail to address adequately the jurisdictional defects created by Defendants' decision to proceed with this appeal—and not to "flout" the Court's instructions or retain the "last word" as Defendants' argue. In

fact, Plaintiffs do not oppose Defendants' requests to file a reply should this Court accept Plaintiffs' proposed response.

Now is the time to resolve these jurisdictional issues. Plaintiffs submitted their Motion and proposed brief at a time when the merits briefing schedule had already been stayed. *See* Jan. 30, 2019 Order. Thus, the jurisdictional issues raised by Defendants' appeal need not be deferred until the merits panel's review of the merits briefs as NRSC suggests. Rather, a court "must dismiss the cause *at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking*." *Fitzgerald v. Seaboard Sys. R.R., Inc.*, 760 F.2d 1249, 1251 (11th Cir. 1985) (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)) (emphasis in original); *see also Green v. Dep't of Commerce*, 618 F.2d 836, 839 (D.C. Cir. 1980) ("[I]t is the duty of this court to dismiss whenever it becomes apparent that we lack jurisdiction."). Once it is apparent that this Court lacks jurisdiction, the Court can and should dismiss this appeal accordingly; no purpose is served by deferring any action on jurisdiction until after all parties have briefed the merits of a moot appeal.

II. The Purported "Legal Errors" That NRSC Cites in Its Response Are Unfounded.

Although Plaintiffs do not oppose Defendants' request to file a reply, the purported legal errors that NRSC cites in support of that request are meritless. For instance, NRSC relies on *Teper v. Miller* as an example of an election case in which the Court applied the "capable of repetition yet evading review" exception in

considering an appeal of a preliminary injunction order. 82 F.3d 989, 992 n.1 (11th Cir. 1996). The appealed order in that case, however, enjoined the enforcement of a state statute—as applied to federal elections—on the ground that the statute was pre-empted by federal campaign finance laws. *See id*. at 992. As Plaintiffs noted in their proposed brief, there is no reason to believe that the preliminary injunction in *Teper* had an expiration date and would not impose identical restrictions on future candidates. *See* Pls.' Jurisdictional Br. at 8 n.2. As such, it is distinguishable from the expired injunction at issue in this appeal.

Similarly, NRSC's continued reliance on the precedential effect of prior orders as grounds for vacatur is legally-flawed in light of the Supreme Court's recognition in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership* that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." 513 U.S. 18, 26 (1994). In fact, one of the cases upon which NRSC relies to advance its precedential-effect theory, *Clarke v. U.S.*, 915 F.2d 699 (D.C. Cir. 1990), has been called into doubt *because* of the Supreme Court's subsequent ruling in *U.S. Bancorp*. *See Mahoney v. Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997). *U.S. Bancorp*, moreover, was decided after this Court's discussion of the precedential-effect rationale in *Ethredge v. Hail*, 996 F.2d 1173 (11th Cir. 1993). And NRSC's reliance on *Dow Jones & Co., Inc. v. Kaye* is misplaced because, as Plaintiffs' note in their proposed brief, the Court in that case actually acknowledged

its practice of leaving prior interlocutory orders intact in instances where "the preliminary injunction by its own terms had expired." 256 F.3d 1251, 1258 (11th Cir. 2001). The vacated injunction order in *Dow Jones* did not present such a scenario, but this case does. *See id*.; *see also* Pls.' Jurisdictional Br. at 16-17.

Finally, NRSC's attempt to equate the emergency order in this case to the preliminary injunction in *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997) is flawed for the reasons summarized in Plaintiffs' proposed brief. *See* Pls.' Jurisdictional Br. at 10-11. Namely, the environmental-based injunction in *Sierra Club* was necessarily limited to a four-month nesting season, which meant another similar, temporary injunction was likely. *See Sierra Club*, 110 F.3d at 1553-54; Pls.' Jurisdictional Br. at 10-11. Here, Defendants merely speculate but have not demonstrated that the same controversy is either reasonably likely to occur or evade review in Plaintiffs' ongoing lawsuit, which seeks permanent injunctive relief. *See* Pls. Jurisdictional Br. at 10-11.

Plaintiffs' proposed brief addresses these among other jurisdictional arguments that NRSC has asserted in its response to Plaintiffs' Motion. The proposed brief makes plain that there is no reasonable likelihood of repetition of the emergency injunction at issue in this appeal; that any further relief granted by the district court will most likely be subject to review; and that the Court should not vacate any prior orders upon dismissal of this interlocutory appeal for lack of

jurisdiction.

CONCLUSION

Therefore, for these reasons, the Court should grant Plaintiffs leave to file their proposed brief in response to Defendants' jurisdictional briefs, or, in the alternative, accept Plaintiffs' proposed brief as an out-of-time response to the Court's jurisdictional question.

Dated: April 19, 2019

Respectfully submitted,

/s/ *Uzoma Nkwonta*

Marc E. Elias
Email: MElias@perkinscoie.com
Elizabeth Frost
Email: EFrost@perkinscoie.com
Uzoma N. Nkwonta
Email: UNkwonta@perkinscoie.com
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Sarah L. Shirack
Email: SShirack@perkinscoie.com
PERKINS COIE LLP
1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
(907) 279-8561

RONALD G. MEYER
Florida Bar No. 0148248
Email: rmeyer@meyerbrookslaw.com
JENNIFER S. BLOHM
Florida Bar No. 0106290
Email: jblohm@meyerbrookslaw.com
Meyer, Brooks, Demma and Blohm, P.A.
131 North Gadsden Street
Post Office Box 1547
Tallahassee, FL 32302-1547
(850) 878-5212

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

1. This document complies with the length limits pursuant to Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1693 words.

2. This document complies with the formatting requirements of Fed. R. App. P. 27(d)(1), as well as the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Uzoma Nkwonta
Uzoma N. Nkwonta

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 19th day of April 2019, a true copy of the foregoing Reply to Defendants-Appellants' Responses to Plaintiffs' Motion was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by e-mail a notice of docketing activity to all counsel of record.

/s/ Uzoma Nkwonta
Uzoma N. Nkwonta

General Information

Court	United States Court of Appeals for the Eleventh Circuit; United States Court of Appeals for the Eleventh Circuit
Federal Nature of Suit	Civil Rights - Voting[3441]
Docket Number	18-14758
Status	OPEN