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' JURISDICTIONAL BRIEF

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*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page**

TABLE OF AUTHORITIES

Case **Page**

TABLE OF AUTHORITIES

Case **Page**

OTHER AUTHORITIES

INTRODUCTION

This appeal is moot, and no exception to the mootness doctrine applies, therefore the Court should dismiss this appeal. In doing so, the Court should leave all prior orders intact as vacatur is unwarranted.

It is well settled law that when a preliminary injunction order expires on its own terms, an appeal of that order becomes moot, divesting an appellate court of jurisdiction and requiring dismissal. *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1118 (11th Cir. 1995); *see North Carolina v. Rice*, 404 U.S. 244, 246 (1971). While limited exceptions to the mootness doctrine exist, none apply here. The issues underlying the now-expired preliminary injunction are currently being litigated in the Northern District of Florida—with trial scheduled to begin on January 21, 2020—where the plaintiffs seek a permanent injunction that is reviewable on appeal. Appellants have not shown that there is a reasonable probability, or even remote likelihood, that the same controversy will recur, involving the same complaining party, and resulting in an emergency order that will evade review. Rather, Appellants' arguments fail to distinguish between the underlying legal challenge, which is not moot, and the now-expired preliminary injunction that is.

Finally, in dismissing this appeal as moot, the Court should follow the usual practice—recognized by this Court and other jurisdictions—and leave in place all prior orders. *Brooks*, 59 F.3d at 1122; 13C Charles Alan Wright, *et al.*, Federal

Practice and Procedure § 3533.10.3 (3d ed. 2008). Neither equity nor applicable law requires vacatur, as preliminary injunction proceedings, unlike final judgments, do not preclude Appellants from litigating Plaintiffs' constitutional challenges on the merits, and any precedent created by prior orders counsels against, and not in favor of, vacatur. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). As such, this Court should dismiss this appeal and leave the underlying orders intact.

BACKGROUND

On November 15, 2018, the district court granted Plaintiffs-Appellees' Motion for Preliminary injunction. *See Democratic Exec. Comm. of Fla., et al. v. Detzner, et al.*, Case 4:18-cv-00520-MW-MJF, ECF No. 46 (N.D. Fla. Nov. 15, 2018) [hereinafter *District Court Litigation*]. In particular, the court ordered Defendant-Appellant the Florida Secretary of State "to issue a directive to the supervisors of elections (with this Order attached) advising them (1) Florida's statutory scheme as it relates to curing mismatched-signature ballots has been applied unconstitutionally; and (2) in light of this Court's order, they are required to allow voters who have been belatedly notified they have submitted a mismatched-signature ballot to cure their ballots by November 17, 2018, at 5:00 p.m. The supervisors of elections shall allow mismatched-signature ballots to be cured in the same manner and with the same proof a mismatched-signature ballot could have

otherwise been cured before November 5, 2018, at 5:00 p.m." *Id*. at 33. The Order Granting Preliminary Injunction therefore granted less than 48 hours of temporary relief, and the preliminary injunction expired on its own terms at 5:00 p.m. on November 17, 2018.

Also, on November 15, 2018, Defendant-Intervenor-Appellant the National Republican Senatorial Committee ("NRSC") filed an Emergency Motion for a Stay and Motion to Expedite. *Democratic Exec. Comm., et al v. Nat'l Republican Senatorial Comm.*, Case No. 18-14758 (11th Cir. Nov. 15, 2018). Defendant-Appellant the Florida Secretary of State (the "Secretary") and Defendant-Appellant the Attorney General of the State of Florida also appealed but did not join the Motion for Stay. That same day, this Court denied NRSC's Motion. *Id*.

On February 15, 2019, this Court issued a published opinion explaining its reasons for denying the Motion for Stay. *Id*. And on February 22, 2019, this Court issued a "Jurisdiction Question issued as to Attorney General, State of Florida, National Republican Senatorial Committee and Secretary of State." *Id*. Therein, this Court asked Appellants to respond to the following question:

> Is the appeal of the National Republican Senatorial Committee, Attorney General of Florida, and Florida Secretary of State appealing the district court's November 15, 2018, preliminary-injunction order moot?

Appellants filed their responses on March 25, 2019. *Id.*

Meanwhile, litigation before the district court is ongoing, and the matter is scheduled for a full trial on the merits to begin on January 21, 2020. *See District Court Litigation*, ECF No. 111 at 8.

DISCUSSION

This appeal is moot as the preliminary injunction at issue expired by its own terms months ago and no exception to the mootness doctrine applies. The issues presented are not capable of repetition yet evading review because, among other things, litigation on Plaintiffs' claims seeking permanent injunction is ongoing in the Northern District of Florida, and trial is scheduled to begin on January 21, 2020. The Court should therefore find that this case is moot and dismiss Appellants' appeal. In doing so, the Court should leave all prior orders intact, as vacatur is unwarranted when an interlocutory appeal is rendered moot by the expiration of the underlying preliminary injunction order.

I. Because the Challenged Preliminary Injunction Expired by Its Own Terms Over Four Months Ago, This Appeal Is Now Moot.

Under the mootness doctrine, this Court must "dismiss any appeal that no longer presents a viable case or controversy," absent an applicable exception. *Brooks*, 59 F.3d at 1118; *see Rice*, 404 U.S. at 246 ("our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy'") (citing *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3 (1964)). An appeal is moot when

"by virtue of an intervening event, a court of appeals cannot grant any effectual relief whatever in favor of the appellant." *United States v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1223, 1228 (11th Cir. 2015) (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996)). It is well settled law that the expiration of a preliminary injunction that is being challenged qualifies as such an intervening event, rendering an appeal moot. *Id.* at 1228-29 (citing *Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367 (1960)). And this Court has "consistently held that the appeal of a preliminary injunction is moot where the effective time period of the injunction has passed." *Brooks*, 59 F.3d at 1119.

Likewise, here, "'no meaningful relief remains for [this court] to provide' because 'the injunction [this Court is] asked to review has expired by its own terms.'" *Brooks*, 59 F.3d at 1119. The preliminary injunction at issue provided specific groups of provisional and vote-by-mail voters an opportunity to cure signature mismatches during a two-day window following the November 2018 election, between November 15 and 17, 2018. *District Court Litigation*, ECF No. 46 (Nov. 15, 2018) at 32-33. Absent any prospect of relief from this now-expired Order, this appeal is now moot, and as discussed further below, no exception to the mootness doctrine permits review of this case.

II. The "Capable of Repetition, Yet Evading Review" Exception to the Mootness Doctrine Does Not Apply to This Interlocutory Appeal of an Expired Preliminary Injunction Order.

The exception to the mootness doctrine reserved for controversies that are capable of repetition, yet evading review does not apply in this case. Rather, it is limited to disputes where:

> (1) there is a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party," and (2) the 'challenged action was in its duration too short to be fully litigated prior to its cessation or expiration.' [1]

A dispute or controversy "is not capable of repetition if there is only 'a mere physical or theoretical possibility' of recurrence." *C & C Prods., Inc. v. Messick*, 700 F.2d 635, 637 (11th Cir. 1983) (citations omitted). When a case does not manifest "a demonstrated probability that the same controversy will recur, involving the same complaining party," then the exception is inapplicable. *Murphy*, 455 U.S. at 482 (quoting *Weinstein v. Bradford*, 423 U.S. 149 (1975)).

This exception, moreover, is rarely applied to interlocutory appeals of expired preliminary injunction orders, and for good reason. This Court has recognized that "if there exists some alternative vehicle through which a particular policy may effectively be subject to a complete round of judicial review, then courts will not

[1] *Brooks*, 59 F.3d at 1120 (quoting *The News–Journal Corp. v. Foxman*, 939 F.2d 1499, 1507 (11th Cir.1991) (quoting *Murphy v. Hunt*, 455 U.S. 478 (1982) (per curiam)).

generally employ this exception to the mootness doctrine." *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004) (citing *Sierra Club v. EPA*, 315 F.3d 1295, 1303 n.11 (11th Cir. 2002)).

Here, that alternative vehicle is the underlying litigation, which will most likely result in a final, appealable judgment on the merits. The preliminary injunction Order that is the subject of this appeal was issued in response to an emergency motion, and provided limited relief to "allow voters who should have had [but were denied] an opportunity to cure their [ballots] in the first place" a chance to cure their ballots "before the second official results [were] fully counted" during the recount. *District Court Litigation*, ECF No. 46 at 32. There is no reasonable probability that the same controversy will recur. The lawsuit is ongoing, and the plaintiffs below seek permanent injunctive relief, which, if granted, would not escape review.

Appellants' attempts to invoke this exception gloss over the distinction between the legal challenge to the signature match laws (which is still ongoing) and the expired interlocutory order that is the subject of this appeal. Their arguments rely primarily on election law cases that involve appeals either from final judgments or from cases that had otherwise been terminated in the trial court before the appellate court determined that the legal challenge was not moot.[2] Applying the "capable of

[2] *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 728 (1974) (appealing the dismissal of appellants' complaints); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1339 (11th Cir.

repetition yet evading review" exception in those cases simply demonstrates that the underlying lawsuit itself is not moot; but the expired preliminary injunction is, particularly when the lawsuit is ongoing. *See Bourgeois*, 387 F.3d at 1307.

Other jurisdictions have also recognized the distinction between the underlying action, and the interlocutory order being challenged, when determining whether an appeal is moot—even in the election law context. Indeed, the Seventh Circuit's ruling in *Gjertsen v. Bd. of Election Comm'rs of City of Chi.*, 751 F.2d 199 (7th Cir. 1984) is on all fours with the issue at bar. There, candidates and voters obtained a preliminary injunction of Illinois's statutory minimum signature requirement for placing candidates' names on the ballot. *See id*. at 201. The district court issued an order preventing enforcement of the requirement as applied to one

---

2014) (involving appeal following district court's entry of judgment in favor of Secretary Detzner); *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1216 n.5 (11th Cir. 2009) (involving appeal in which district court dismissed the case before ruling on appeal) *Porter v. Jones*, 319 F.3d 483, 487 (9th Cir. 2003) (challenging district court's decision staying plaintiffs' claims under *Pullman* abstention doctrine); *Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1322 (11th Cir. 2001) (challenging district court's ruling upon entry of final judgment); *The News-Journal Corp.*, 939 F.2d at 1506 (challenging district court's decision to abstain from exercising jurisdiction under *Younger* and subsequent dismissal). *Teper v. Miller*, 82 F.3d 989, 992 (11th Cir. 1996) involved an appeal from a preliminary injunction against the enforcement of a statute prohibiting members of the Georgia General Assembly from accepting certain campaign contributions while the General Assembly was in session. While the General Assembly Session ended before the Court's ruling, there was no indication that the preliminary injunction expired or was otherwise subject to other temporal limitations. And in *Hall v. Secretary, State of Alabama*, 902 F.3d 1294 (11th Cir. 2018), the Court ultimately determined that the appeal was moot.

election only, and an appeal was taken while the underlying litigation continued before the district court. *See id*. The Seventh Circuit held that the appeal was moot since the election had already occurred, and explained that a preliminary injunction might have satisfied the capable of repetition exception *only if* the trial "judge, while granting just a preliminary injunction, decided that there would be no further proceedings—that the case would be treated as dismissed as soon as the preliminary injunction was complied with—in which event the injunction, as the last act in the case, would be final for purposes of appellate review, and the appeal might not be moot" if the dispute was "capable of repetition but avoiding appellate review." *Id.* at 202.

The court even addressed the "strong probability that some of the candidate plaintiffs will be in the same position three and a half years from now as they were last March—trying to collect signatures on their nominating petitions and frustrated by what they contend is an unconstitutional law," yet rejected the argument that this fact satisfied the capable of repetition yet evading review exception to the mootness doctrine. *Id.* ("[T]he [underlying] case [still pending before the district court] has not become moot—only one order in the case has become moot, the preliminary injunction under appeal.") *Id.*

The Second Circuit has similarly held that "[t]o apply the 'capable of repetition yet evading review' exception to otherwise moot appeals of preliminary

injunctions would, moreover, impermissibly evade the ordinary rule, pursuant to 28 U.S.C. § 1291, that appellate courts review only 'final decisions' of a lower court." *Indep. Party of Richmond Cty. v. Graham*, 413 F.3d 252, 256 (2d Cir. 2005) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 & n. 8 (1978)). The court further explained that "[i]nterlocutory appeals of preliminary injunctions are authorized under 28 U.S.C. § 1292(a)(1) in order to prevent the injustice of burdening a party with a manifestly erroneous decree while the ultimate merits of a dispute are being litigated." *Id.* But "[w]here the event giving rise to the necessity of preliminary injunctive relief has passed, the harm-preventing function cannot be effectuated by the successful prosecution of an interlocutory appeal from the denial of interim injunctive relief." *Id.* at 256-57 (citations omitted).

Finally, this Court's ruling in *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997), is inapposite and does not warrant an expansion of the narrow exceptions to the mootness doctrine. The statute at issue in *Sierra*, the Migratory Bird Treaty Act ("MBTA" or "the Act"), "ma[de] it unlawful to 'take' or 'kill'" certain species of neotropical birds which, due to their migratory patterns, returned to Georgia only during the approximately four-month nesting season. *See id*. at 1553-55. Thus, any prospective injunctions on tree-cutting (which, according to plaintiffs' claims, directly killed birds in violation of the Act) would have been necessarily limited to the months in which the birds were present. *See id*. This temporal limitation on the

scope of injunctive relief required to protect the neotropical birds led this Court to conclude that the injunction was likely to recur, while evading review. *See id*. at 1554.

The same cannot be said of the district court's limited preliminary injunction order in this case, which did little more than extend the window for "a limited number of affected voters" to cure their rejected ballots before the second official results were finalized during the November 2018 recount. *See District Court Litigation*, ECF No. 46 at 32. The trial in this matter is scheduled to begin on January 21, 2020 (assuming the case is not resolved on dispositive motions) well before the next statewide general election, and Appellants have not shown that there is any reasonable likelihood that the district court will seek to resolve Plaintiffs' claims through successive, piecemeal emergency orders—as opposed to the permanent injunction that Plaintiffs have requested, which will provide ample opportunity for appellate review. *See C & C Products*, 700 F.2d at 637 ("'[M]ere physical or theoretical possibility' of recurrence" is insufficient to satisfy the capable of repetition yet evading review exception) (citing *Weinstein v. Bradford*, 423 U.S. 147 (1975)); *see also Murphy*, 455 U.S. at 482 ("The Court has never held that a mere physical or theoretical possibility [of recurrence] was sufficient to satisfy the test stated in *Weinstein*. If this were true, virtually any matter of short duration would be reviewable."). The Court should therefore dismiss this appeal as moot.

III. The Court Should Not Vacate Prior Orders.

When an interlocutory appeal is rendered moot, the "usual practice" as noted by this Court "is just to dismiss the appeal . . . and not vacate the order appealed from." *See, e.g., McColligan v. Vendor Res. Mgmt.*, --- Fed. Appx. --- 2019 WL 1163839, at *2 (11th Cir. Mar. 13, 2019); *Brooks*, 59 F.3d at 1122; 13C Charles Alan Wright, *et al.*, Federal Practice and Procedure § 3533.10.3 (3d ed. 2008) ("The general practice on appeal from final judgments need not carry over to interlocutory appeals . . . if the case remains alive in the district court, it is sufficient to dismiss the appeal without directing that the injunction order be vacated."). While appellate courts typically vacate final judgments when a case becomes moot on appeal, this Court and other circuits have recognized that preliminary injunction orders serve different ends, such that when an interlocutory appeal from a preliminary injunction is at issue, the extraordinary remedy of vacatur is unwarranted. *See*, *e.g.*, *Brooks*, 59 F.3d at 1122.

Appellate courts for instance generally vacate the district court final judgment "in order to prevent the district court's unreviewed decision from having a preclusive effect in subsequent litigation between the parties." *Mitchell v. Wall*, 808 F.3d 1174, 1176 (7th Cir. 2015); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). But a preliminary injunction order does not have the same preclusive effect. *See Wall*, 808 F.3d at 1176. Indeed, where a prior preliminary injunction order

resolves no disputed issues of fact, "the risk of any prejudice resulting from preclusion" is virtually nil. *Mahoney v. Babbitt*, 113 F.3d 219, 224 (D.C. Cir. 1997).

The Supreme Court's decision in *Munsingwear* does not suggest otherwise. There, the Court referenced the general practice of vacating the judgment below when the case becomes moot on appeal, but that discussion occurred in the context of a final judgment—specifically, a district court order dismissing the complaint. 340 U.S. at 106-107. And while the Court acknowledged that vacatur of the district court judgment would "clear[] the path for future relitigation," that path in this case—and others involving interlocutory appeals of preliminary injunction orders—remains unimpeded because a court's findings in a preliminary injunction proceeding are not necessarily binding in a subsequent trial. *See David Vincent, Inc. v. Broward Cty.*, 200 F.3d 1325, 1331 n.8 (11th Cir. 2000) (citing *Univ. of Tex. V. Camenisch*, 451 U.S. 390, 395 (1981)). Litigation before the district court is ongoing; Appellants have the opportunity to present their case on the merits, including their argument that the signature match laws are constitutional. The preclusive effect of the final judgment in *Munsingwear* is simply absent here and does not warrant vacatur.

Nor is it appropriate to vacate this Court's or the district court's rulings in this case simply to negate their precedential effect. While courts have at times justified vacatur in mooted interlocutory appeals as a means of avoiding "spawning

precedential consequences," *see, e.g.*, *Ethredge v. Hail*, 996 F.2d 1173, 1177 (11th Cir. 1993), the Supreme Court's ruling in *U.S. Bancorp* has all but rejected this rationale, recognizing that " [j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They 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." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 26 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 510 U.S. 27, 40 (1993).

The D.C. Circuit's ruling in *Mahoney* confronted a similar procedural posture and is instructive here. In that case, the D.C. Circuit granted an emergency motion for an injunction pending appeal that barred the National Park Service and its agents from interfering with Appellants' preplanned sign-bearing protest during an inaugural parade that would take place the following day. 113 F.3d at 220. Several weeks after the parade, the D.C. Circuit explained its reasons in a published opinion. *See id*. The National Park Service then filed a petition for rehearing and sought vacatur of the D.C. Circuit's prior opinion, arguing, among other grounds, that the injunction was moot since the parade had already occurred. *See id*. at 221.

In denying the request for vacatur, the D.C. Circuit explained that:

> While it is generally accepted that a mooted judgment should not preclude the litigants in future litigation, preclusion is not the same thing as *stare decisis*, and it is not self-evident that the precedential effects of a mooted

> judgment should be any less persuasive than if the mooting events had not occurred . . . Precedent, more often than not, is drawn from cases not involving either of the parties for or against whom the precedent is offered.

Id. at 222. Rejecting the "precedential effect" rationale that it had previously advanced in *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990)—a case upon which NRSC relies—the court acknowledged that "the Supreme Court [in *U.S. Bancorp*] has since come down on the other side," and that "the precedential power of an opinion is a reason arguing against vacatur." *Mahoney*, 113 F.3d at 222-23 (noting that *Clarke*'s reliance on the precedential effect of interlocutory orders in granting vacatur "may no longer be good law.")

The D.C. Circuit is not alone in this view. Several other appellate courts have recognized that vacatur is unwarranted when applied to interlocutory orders that do not "preclude the litigants in future litigation," notwithstanding any precedent those orders may create. *See id*.; *see also Wall*, 808 F.3d at 1176 ("[B]ecause a preliminary injunction has no preclusive effect on the district court's deciding whether to issue a permanent injunction . . . orders vacating the underlying order should not typically issue with respect to preliminary injunctions that become moot on appeal.") (internal quotations omitted); *Hous. Works, Inc. v. City of N.Y.*, 203 F.3d 176, 178 (2d. Cir. 2000) (holding "the [preliminary injunction] does no more than any interlocutory ruling accompanied by an opinion with negative observations about a party's case" and "following the usual practice and . . . leaving them in place."); *SEIU Local 1 v.*

Husted, 531 Fed. Appx. 755, 756 (6th Cir. 2013) (citing cases) (denying vacatur of order on emergency motion for stay pending appeal and holding no final judgment resulted from preliminary injunction or order on emergency stay, and stay order served jurisprudential purpose justifying denial of vacatur); *see also McLane v. Mercedes-Benz of N. Am., Inc.*, 3 F.3d 522, 524 n.6 (1st Cir. 1993) ("In the case of interlocutory appeals, however, the usual practice is just to dismiss the appeal as moot and not vacate the order appealed from.") (internal quotations omitted). These authorities, moreover, are consistent with this Court's "usual practice" of leaving prior decisions intact when an interlocutory appeal is rendered moot by the expiration of the underlying preliminary injunction order.

To be sure, prior decisions from this Court have indeed vacated district court orders upon dismissing an interlocutory appeal as moot, but none should control the Court's decision in this case. In *Ethredge*, 996 F.2d at 1177, for instance, the Court granted vacatur of a preliminary injunction order to "prevent the district court's opinion from spawning precedential consequences," a rationale—as noted above—that has been all but repudiated by the Supreme Court. *See U.S. Bancorp*, 513 U.S. at 27; *Mahoney*, 113 F.3d at 222. In *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1258 (11th Cir. 2001), the Court acknowledged its practice of dismissing moot appeals of preliminary injunction orders without vacating the underlying orders, but distinguished those decisions, by noting that "in those situations, the preliminary

injunction by its own terms had expired." That is precisely what happened to the preliminary injunction order in this case, which expired, by its own terms, on November 17, 2018. In other cases, this Court has at times vacated the underlying orders once the interlocutory appeal became moot,[3] without addressing prior rulings that denied vacatur of such orders or explaining the departure from what the Court has referred to as its "usual practice" of leaving the prior orders intact. These cases, as a result, do not undermine rulings in which this Court has expressly refused to vacate underlying orders upon dismissal of an interlocutory appeal. *Cf. Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1231 (11th Cir. 2007) (noting exception to prior precedent rule for "implicit jurisdictional holdings").

Finally, the equities in this case counsel against, not for, vacatur. Following the district court's preliminary injunction order, the Secretary of State—the party bound by the order—did not join NRSC's request for a stay pending appeal. Nor did the Attorney General. In fact, neither party briefed the NRSC's stay request, even though the district court issued its Order on an expedited timeline "to afford the parties a meaningful opportunity to seek a stay of [the preliminary injunction]." *District Court Litigation*, ECF No. 46 at 1, n. 1. In *Mahoney*, the D.C. Circuit noted, similarly, that "the losing parties . . . elected not to seek further relief upon the entry

[3] *See, e.g.*, *Sec'y, Fla. Dep't of Corr.*, 778 F.3d at 1229-30; *Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen*, 586 F.3d 908, 918 (11th Cir. 2009).

of [the D.C. Circuit's] order," even though "their time for doing otherwise was short," and thus the controversy "did not become moot due to circumstances unattributable to any of the parties." 113 F.3d at 221-22 (internal quotation marks omitted). And as the Supreme Court explained in *U.S. Bancorp*: "It is the petitioner's burden . . . to demonstrate . . . entitlement to the extraordinary remedy of vacatur. Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been." 513 U.S. at 26. Appellees, for their part, filed their lawsuit just over a year after the Florida legislature amended the signature match statute, and just three days after the close of the cure period for vote by mail ballots rejected for signature mismatch, during the first contested statewide election involving former Senator Bill Nelson[4] since the amended signature match law was implemented. In fact, Appellant NRSC argued in the district court that Plaintiffs "have not alleged that an individual who wanted to cure a signature mismatch in her ballot has been unable to do so . . ." which suggests that NRSC would have challenged Plaintiffs' standing had the lawsuit been filed before the cure deadline. *District Court Litigation*, ECF No. 27 at 9. Any suggestion that Appellees unreasonably delayed in filing the lawsuit is not credible. Neither the equities nor applicable law favors vacatur.

[4] Bill Nelson for U.S. Senate is the duly organized political campaign in support of Bill's Nelson's re-election to the United States Senate. Senator Nelson was unopposed in the 2018 Democratic Primary.

CONCLUSION

The Court should dismiss this appeal of the district court's preliminary injunction order, which is now moot. The injunction expired by its own terms and the Court cannot fashion any remedy that would provide Appellants any meaningful relief. When an interlocutory appeal of a preliminary injunction order becomes moot, the usual practice of this Court, and the general practice of federal courts, is to dismiss the appeal only, and deny vacatur.

Therefore, for the reasons explained above, the Court should dismiss this appeal as moot and leave the prior orders intact.

Dated: April 8, 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 type-volume limits of Fed. R. App. P. 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,709 words.

2. This document complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and 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 8th day of April 2019, a true copy of the foregoing brief 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