UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 18-14758

DEMOCRATIC EXECUTIVE COMMITTEE OF FLORIDA, BILL NELSON FOR SENATE,

Plaintiffs-Appellees,

v.

NATIONAL REPUBLICAN SENATORIAL COMMITTEE

Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO.: 4:18-CV-00520-RH-MJF

RESPONSE IN OPPOSITION TO INTERVENOR-DEFENDANT-APPELLANT'S EMERGENCY MOTION FOR A STAY AND MOTION TO EXPEDITE

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Democratic Executive Comm. of Florida, et al. v. Nat'l Republican Senatorial Comm., Appeal No. 18-14758

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, neither Appellee Democratic Executive Committee of Florida nor Bill Nelson for U.S. Senate has any parent companies, subsidiaries, or affiliates, that have any outstanding securities in the hands of the public. *See* Fed. R. App. 26.1. In addition to the persons listed in the certificate of interested persons contained in Appellant's Emergency Motion for a Stay and Motion to Expedite, the following persons and entities have an interest in the outcome of this appeal.

1. Callais, Amanda, Perkins Coie LLP, Counsel for Plaintiffs-Appellees
2. Frost, Elisabeth C., Perkins Coie LLP, Counsel for Plaintiffs-Appellees
3. Schirack, Sarah, Perkins Coie LLP, Counsel for Plaintiffs-Appellees
4. Khanna, Abha, Perkins Coie LLP, Counsel for Plaintiffs-Appellees
5. Weiss, Eric J., Perkins Coie LLP, Counsel for Plaintiffs-Appellees

/s/Marc E. Elias
Marc E. Elias

STATEMENT REGARDING APPELLANT'S REQUEST FOR EXPEDITED APPEAL

Appellees agree that an expedited appeal and oral argument in this case is appropriate. This case involves the fundamental right to vote of thousands of lawful Florida voters who will be entirely disenfranchised if the decision below is suspended or reversed for no other reason than their ballots were arbitrarily flagged for exclusion due to entirely unreliable and arbitrary signature "matching" processes. The parties, the Court, and the impacted voters of Florida would all benefit from oral argument on these critically important issues.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

INTRODUCTION

"The precise issue in this case is whether Florida's law that allows county election officials to reject vote-by-mail and provisional ballots for mismatched signatures—with no standards, an illusory process to cure, and no process to challenge the rejection—passes constitutional muster. The answer is simple. It does not." ECF No. 46 at 3. Because it does not, the District Court issued a preliminary injunction that provides a small window for voters whose votes were determined to have mismatched signatures but who were not—in violation of Florida law—notified of that mismatch until after the period to cure, to do so over a roughly two-day window.

Defendants disingenuously assert that the District Court's order "direct[s] the Florida Secretary of State to hold a new Election Day by reopening the polls statewide for several days." Br. at 1. The District Court's order does nothing of the sort. Rather, the relief it grants is razor thin, just like the margins in Florida's November 6, 2018 general election for U.S. Senate. That narrow relief does not allow the polls to be re-opened, nor does it even allow county canvassing boards to count every mismatched vote, as the Order makes clear at ECF No. 46 at 32. Instead, it directs county supervisors of elections "to allow those voters who should have had an opportunity to cure their ballots in the first place to cure their vote-by-mail and provisional ballots" until November 17, 2018 at 5 p.m. *Id.* The Order could not be

clearer that it is "a limited order providing limited relief for a limited number of affected voters." *Id.* "Across 45 of Florida's 67 counties, there are just over 4,000 rejected ballots for mismatched signatures," *id.*, so *only* those roughly 4,000 votes are subject to the District Court's relief.

Turmoil will not ensue if this Court denies Appellant's motion to stay the District Court's order. In the same way that voters were able to call or log onto their local county elections websites to request vote-by-mail ballots, they are able to do so now to verify the status of their vote-by-mail ballot. If a voter is told via phone or sees on their county elections website that their ballot was received but not tabulated, they are able to call or visit their local county elections office to determine why, and to provide the necessary credentials to cure if due to signature mismatch and the Supervisor of Election's failure to notify them of that determination "immediately" as required by Florida law.[1] Fla. Stat. § 101.68(4)(a). Appellant's assertion that it is somehow voters' burden to prove whether they were belatedly notified, Br. at 4, if they were notified at all, of the opportunity to cure turns the right to vote on its head and seeks to patently disenfranchise voters through no fault of their own.

[1] Appellees attempted to streamline this process by asking the District Court to "order the Secretary of State to immediately produce, both to Plaintiffs and publicly, a list of all voters whose ballots were determined to contain a mismatched signature and have not yet been cured, and/or that the Secretary of State require that supervisors of elections produce such lists, both to Plaintiffs and publicly, for their respective counties by 1 p.m. on November 15, 2018," ECF No. 52, but the District Court denied that emergency motion.

If there is any "turmoil" to be found in this case, it is the result of the Secretary's inconsistent and arbitrary procedures for determining signature matches, which vary wildly from county to county and have no uniform requirements or procedures, and from its failure to notify voters of a signature mismatch determinations "immediately" (and decidedly before the cure period expired) as required by Florida law. It is inconceivable that Appellants even suggest that there could be a "straightforward application of existing Florida law," Br. at 1, in the absence of any uniform parameters to guide application of signature matching in each county and the timeline for notifying voters of mismatch determinations.

Because of the "highly subjective" (ECF No. 46 at 2) nature of signature matching, it is critical that all voters have a reasonable period to cure any ballots that were deemed invalid as a result of a signature mismatch determination. That relief—a reasonable cure period—is the crux of the District Court's preliminary injunctive relief. Nothing more. Existing law simply does not provide for a reasonable cure period because it prematurely ends the period to cure at 5 p.m. on the day *before* Election Day, Fla. Stat. § 101.68(4)(a), which defies all logic and must be remedied. The District Court did just that, and appropriately ruled that "[t]here are no exceptional circumstances justifying the stay pending appeal in this case." ECF No. 46 at 31.

STANDARD OF REVIEW

In reviewing an application for a stay, this Court considers four factors to "ensure that courts do not grant stays pending appeal improvidently." *Chafin v. Chafin*, 742 F.3d 934, 937 n.7 (11th Cir. 2013) (per curiam). The Court's decision to deny or grant a stay is guided by: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987)). These same factors apply when "deciding whether to grant a stay of a preliminary injunction." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008). "The factors to be considered in deciding whether to stay an order pending appeal are virtually the same as the factors used by a court in deciding whether to issue a preliminary injunction." *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 893 (5th Cir. 2012).

The party requesting a stay bears the burden of showing that the stay is justified. *Nken*, 556 U.S. at 433-434. "The plaintiffs are not required to carry any burden in connection with the question of whether this court should stay the district court's judgment. As the Supreme Court has repeatedly held, the stay applicant, here the Secretary, bears the burden of proving all four of the factors required for a stay—

irreparable injury to [himself], the stay's lack of substantial injury to the plaintiffs, the Secretary's strong likelihood of success on the merits, and the stay's lack of injury to the public." *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 908 (5th Cir. 2012) (Dennis, J., dissenting).

"The first two factors . . . are the most critical." *Nken*, 556 U.S. at 434. "A finding that the movant demonstrates a probable likelihood of success on the merits on appeal requires that [this Court] determine that the trial court below was clearly erroneous." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). "In considering defendants' motion for a stay of the district court's preliminary injunction, [this Court is] deciding whether the defendants are likely to be able to show that the district court abused its discretion in granting the preliminary injunction. . . . [Appeals Courts] review de novo the legal conclusions made by the district court, and [they] review its factual findings for clear error, but [their] review of the district court's ultimate decision regarding injunctive relief is reviewed under the highly deferential abuse-of-discretion standard." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008) (internal quotation marks and citations omitted).

A stay pending appeal "is an intrusion into the ordinary process of administration and judicial review." *Nken*, 556 U.S. at 427 (quotation omitted). "A stay, in other words, is meant to be used only in extraordinary circumstances." *Hand*

v. Scott, 888 F.3d 1206, 1216 (11th Cir. 2018). The circumstances here do not warrant this extraordinary relief.

ARGUMENT

A denial of a stay is warranted where "the district court has determined that staying the preliminary injunction would likely put individual voters at risk of disenfranchisement." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 387 (6th Cir. 2008). Here, absent the preliminary injunction issued below, roughly 4,000 voters are *guaranteed* disenfranchisement.

I. DEFENDANTS ARE UNLIKELY TO SUCCEED ON APPEAL

To justify a stay pending appeal, Defendants must show "a strong likelihood of success on appeal." *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987).

They cannot. To the contrary, as the district court correctly concluded, the State's signature-match "scheme unconstitutionally burdens the fundamental right of Florida citizens to vote and have their votes counted." Order at 27.

A. The Doctrine of Laches or the "*Purcell* Principle" Is Plainly Inapplicable

As a threshold matter, the doctrine of laches does not bar Plaintiffs' claim. Laches does not apply when a plaintiff seeks prospective relief for continuing constitutional violations. *See* Order at 13 (citing *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990), and *Peter Letterese & Assocs. Inc., v. World Inst. of Scientology Enters. Int'l*, 533 F.3d 1287, 1321 (11th Cir. 2008)). Nor has laches

prevented courts in this Circuit from entering prospective injunctive relief in the time immediately before or after an election. Order at 13 (citing *Ga. Coal. for the People's Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345-46 (S.D. Ga. 2016); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005); *Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943 at *9-*10 (N.D. Fla. Oct. 16, 2016)).

Further, the district court exercised its sound discretion to conclude that any delay "is excusable based not only on the period of the delay, but the reasons for the delay." Order at 13-14. Plaintiffs sought relief as soon as the injuries materialized. The deadline for curing vote-by-mail ballots was 5:30 p.m. the day before election day, and the deadline to cure provisional ballots was 5:00 p.m. three days later. Plaintiffs filed their action merely hours thereafter. Tellingly, one of the intervenors argued below that Plaintiffs did not have standing because they did not identify a specific voter who was unable to cure their rejected ballot. Had Plaintiffs filed before the end of the cure process, Appellants undoubtedly would have claimed that the lawsuit was premature. Indeed, the laches doctrine does not require plaintiffs to file lawsuits based on hypothetical facts in order to preserve their rights, which is what Plaintiffs would have to been forced to do if they filed before Election Day.

Regardless, Appellants cannot point to any prejudice or voter confusion likely to result from an order enjoining the rejection of ballots for signature mismatch, so

neither laches, the "*Purcell* principle," nor any other principle of equity prohibits this Court's intervention. Putting aside the fact that there has been no delay in challenging the ongoing disenfranchisement of Florida voters, "laches depends on more than inexcusable delay in asserting a claim; it depends on inexcusable delay causing undue prejudice to the party against whom the claim is asserted." *See Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98, 101 (5th Cir. 1978) (emphasis added); *see also id.* (holding that to establish prejudice, a party "must show a delay which has subjected him to a disadvantage in asserting and establishing his claimed right or defense, or other damage caused by his detrimental reliance on his adversary's conduct"); *In re Legel Braswell Gov't Sec. Corp.*, 695 F.2d 506, 515 (11th Cir. 1983) (holding that prejudice sufficient to justify laches must be "substantial").

Here, Appellant's claims of prejudice are both unavailing and inconceivable. Plaintiffs' requested relief simply demands that absentee ballots removed for mismatched signatures based on an unconstitutional process be counted. Efforts to count and recount the votes in this election are currently proceeding, and Plaintiffs merely seek that these votes, previously unconstitutionally denied, be appropriately recorded. Indeed, since this lawsuit was filed, county boards have been making similar determinations, despite the Secretary's seeming contention that adding such votes to the count imposes an insurmountable administrative difficulty. It simply

cannot be the case that a ruling for Plaintiffs in this matter will increase the administrative burden on the state or on county officials in any meaningful sense.

The "*Purcell* principle" similarly relies on a showing of voter confusion entirely absent here. *Purcell* instructs courts to carefully consider court orders issued shortly before elections because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). There is no such concern here. If anything, granting a stay here and reverting to the system in which voters' ballots are rejected under a standardless regime would breed voter confusion and uncertainty. Voters can vote using the same signature for decades and then have their ballots denied simply due to one election official's subjective and untrained signature analysis. It cannot be the case that removing this arbitrary and deeply flawed system could result in more voter confusion, so *Purcell* is plainly inapplicable here.

In addition, it is cynical at best for the NRSC to contend that it will suffer prejudice because it allegedly "must restart its get-out-the-vote operations on a tilted playing field." Br. 16. There is no new get-out-the-vote initiative because no new votes will be cast as a result of the district court's order and no votes will be changed; instead, timely and validly cast votes will now be counted, including votes for the

NRSC's preferred candidate. No one is prejudiced when lawfully cast ballots are counted, least of all the public.

B. Florida's Signature-Matching Requirement Unconstitutionally Burdens the Right to Vote.

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court outlined a "flexible standard" to resolve constitutional challenges to state election laws that burden voting rights. *See Anderson*, 460 U.S. at 789. When a regulation subjects the right to vote to a "severe" restriction, the restriction "must be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 280 (1992). Less severe burdens remain subject to balancing, but "[h]owever slight" the burden on the right to vote "may appear," "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality) (quoting *Norman*, 502 U.S. at 288-89).

A denial of the right to vote, as here, amounts to a severe burden on the franchise. *See, e.g., Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (holding that "because Florida's statutory [voter registration deadline] framework would categorically deny the right to vote to those individuals [displaced by a hurricane], it is a severe burden that is subject to strict scrutiny") (citing *Burdick*, 504 U.S. 434); *see also Ayers-Schaffner v. DiStefano*, 860 F. Supp. 918, 921 (D.R.I. 1994), *aff'd*, 37 F.3d 726 (1st Cir. 1994) ("A complete denial of the

right to vote is a restriction of the severest kind."); *Ne. Ohio Coal. For Homeless v. Husted*, 696 F.3d 580, 585-87 (6th Cir. 2012) ("summary" and "automatic" nature of disqualification of right-place, wrong-precinct ballots suggests burden on right to vote is "substantial"). *Compare League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015) ("[T]he basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many[.]"), *with* Appellants' Motion to Stay at 12 ("The fact that some tiny subset of vote-by-mail voters were unable to cure a signature-mismatch because of a delay in receiving notice or submission of their ballot after the cure deadline does not make the law unconstitutional.").

As the district court correctly concluded, "the injury is the deprivation of the right to vote based on a standardless determination made by laypeople that the signature on a voters' vote-by-mail or provisional ballot does not match the signature on file with the supervisor of elections." Order at 24. There are "dozens of reasons" a signature may not match the on-file signature "even when the individual signing is in fact the voter. *Id.*

The outright rejection of the votes of thousands of qualified voters based on a subjective, standardless comparison of signatures by untrained lay persons, unquestionably imposes a severe burden on the constitutional right to vote. *See Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *6

(N.D. Fla. Oct. 16, 2016) ("If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does."). Indeed, the burden on the right to vote is particularly severe when, as here, it is a result of government error and outdated technology. *Stewart*, 444 F.3d at 860-61 (emphasizing that the "technological burden is not within the control of the voters" and prohibiting "different types of voting equipment with *substantially different levels of accuracy*").

Despite the severe burden on the franchise imposed by the signature-matching requirement, the State cannot point to any sufficient state interest justifying this drastic result. The Secretary and Intervenors seeks to justify these regulations through often-cited but unsubstantiated claims of voter fraud, which they have yet to support with any evidence. *See Fla. Democratic Party v. Detzner*, No. 4:16cv607, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016) (noting the absence of any evidence that mismatched signatures were signed fraudulently); *see also* Sarah Blaskey and David Smiley, *State Elections Observers Have Seen No Evidence of Criminal Activity in Broward County*, Miami Herald, Nov. 10, 2018, available at https://www.miamiherald.com/news/local/community/broward/article221469215.html.

The evidence instead points to properly registered voters, such as former Congressman Patrick Murphy, having their ballots incorrectly denied based on

erroneous determinations. *See* Steve Contorno, *Former Florida Congressman: My Vote Wasn't Counted Because of Signature Law*, Tampa Bay Times, Nov. 10, 2018, *available at* https://www.tampabay.com/florida-politics/buzz/2018/11/09/former-florida-congressman-my-vote-wasnt-counted-because-of-signature-law/. Former Congressman Murphy had voted in Florida for 15 years with the same signature. *See id*. However, this year his ballot was rejected due to a purported "[i]nvalid signature," *id*., a fact the former Congressman Murphy only discovered after the cure deadline by proactively checking the Palm Beach County elections website. And this was by no means an isolated incident. *See* G. Thrush et al., Mohammed Decl. ¶¶ 3-4N.Y. Times, November 14, 2018, available at https://www.nytimes.com/2018/11/14/us/voting-signatures-matching-elections.html (identifying voter who found signature-mismatch "rejection notice in her mailbox at 7 p.m. the night before the Nov. 6 election, two hours after the deadline for appeal had passed" and "learned that the culprit was a driver's license signature, hastily squiggled on an electronic signature pad two years earlier").

Such a far-sweeping, inadequately implemented regulation is unreasonable and cannot survive minimal, let alone strict, scrutiny. *See Norman v. Reed*, 502 U.S. 279, 280 (1992); *see also* Order at 26 ("The only way such a scheme can be reasonable is if there are mechanisms in place to protect against arbitrary and

unreasonable decisions by canvassing boards to reject ballots based on signature mismatches.").

Plaintiffs have therefore demonstrated that the burden imposed by Florida's signature-matching requirement for VBM and provisional ballots "outweighs the state's reasons for the practice" and is therefore constitutionally infirm. *See* Order at 27.

C. The Lack of an Adequate, Uniform Procedure for Determining the Validity of Signatures on VBM Ballots Violates the Equal Protection Clause

"Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 905 (E.D. Ohio 2012) (reminding that the "Supreme Court has reiterated time and again the particular importance of treating voters equally" (citing cases)). Moreover, "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *Bush*, 531 U.S. at 104. "[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

Florida's differing signature standards are also unlawful under the Equal Protection Clause. As the district court concluded, election officials do not follow

any predetermined standards or other regulations that ensure accurate, uniform processes when comparing signatures. Rather, "[w]hat makes Florida's signature matching process even more problematic is the fact that counties have discretion to apply their own standards and procedures." Order at 25; *see also Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016 ("[Counties] employ a litany of procedures . . . using their collective best judgment as to what constitutes a signature match."). The opportunity for a voter to have their vote count cannot vary simply because of the county in which they live or the vigilance (or lack thereof) exercised by their local canvassing board.

It is all but certain that thousands of voters will be disenfranchised because their ballots were rejected due to a determination that the signature on the ballot envelope did not "match" the signature on file. In fact, because of "issues with their signature, eligible registrants in Florida who are younger—particularly first-time voters—and who are racial or ethnic minorities are much more likely to have their ballot rejected by a county canvassing board." Dr. Daniel A. Smith, ACLU Florida, Vote-By-Mail Ballots Cast in Florida (2018) (District Court ECF No. 4-1) ("Smith Report"). Evidence of the law's disproportionate burden—in this case, the disproportionate rejection of the ballots of certain classes of voters—is more than sufficient to demonstrate a severe burden on the right to vote under the *Anderson-*

Burdick framework. *See Ohio Organizing Collaborative v. Husted*, 834 F.3d 620 (6th Cir. 2016).

The canvassing board's signature-match determinations are inherently error-prone and highly unreliable. Laypersons with little to minimal training will mistakenly classify a valid signature as invalid (i.e., a mismatch). Declaration of Linton A. Mohammed (District Court ECF No. 4-2) ¶¶ 10-12, 18, 21 ("Mohammed Decl."). Further, there are numerous factors outside a voter's control that may cause their ballot to be rejected for signature-mismatch. For example, a person's signature varies based on a variety of common factors, including the person's body position when signing, the person's physical and psychological state, the material of the writing surface, and environmental factors such as noise and luminance. Mohammed Decl. ¶¶ 15, 17. Indeed, a presentation given by a Forensic Document Examiner at the 2015 annual conference for the Florida State Association of Supervisors of Elections noted that eyesight, illness, pen type, surface, paper quality, distress, depression, and nervousness are among the many factors that affect handwriting. Mohammed Decl. ¶¶ 14, 17-18.

Moreover, signatures systematically change with age for even healthy individuals. Mohammed Decl. ¶¶ 14, 17-18. Because voters need not regularly re-register to vote, their signature on file is likely outdated, further increasing the likelihood of an erroneous finding of mismatch. Mohammed Decl. ¶ 18. Maintaining

a consistent signature is also a struggle for voters suffering from arthritis, stroke, and similar ailments. Most troubling, these voters are most likely to cast a VBM ballot because of the physical difficulties presented by voting in person.

Because there are not standards for signature matching, the risk of canvassing board error—deeming authentic signature inauthentic or non-matching—is incredibly high. Mohammed Decl. ¶¶ 3-4, 18, 21-22. Even though detecting forgery is a challenging task demanding expert review, untrained canvassing board members are statutorily obligated to make such assessment—without any guiding standards—making it all but certain that they will conduct signature comparisons using inconsistent metrics and disparate guesswork. Mohammed Decl. ¶¶ 3-4, 18, 21-22.

As the Florida Division of Elections has explained, the Florida legislature did not incorporate a scientific standard of handwriting comparison when charging canvassing boards with their duty to compare signatures. Mohammed Decl. ¶¶ 3-4. Instead, the legislature left it to the canvassing boards to use collective best judgment when assessing signatures. In other words, the statutory scheme affords canvassing boards complete discretion over signature comparison with no statewide oversight or standards, even if a particular county used signature-verification technology to aid in the signature matching decision process. *Id.*

Such variance further amplifies the Equal Protection Clause violation because VBM voters in some counties are "less likely to cast effective votes" than VBM

voters in other counties. *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006). Where, as here, the use of voting technologies "result in a greater likelihood that one's vote will not be counted on the same terms as the vote of someone in a notice county," the practice is "hardly justifiable." Stewart, 444 F.3d at 871; *see also Wexler*, 452 F.3d at 1233 n.10 (citing approvingly to *Stewart*).

Relying on similar principles of constitutional fairness, other courts have found standardless signature-match procedures to be constitutionally infirm. *See, e.g.*, *Martin v. Kemp*, No. 1:18-cv-4776, 2018 WL 5276242, at *9 (N.D. Ga. Oct. 24, 2018) ("[G]iven that a single election official—who is not trained in handwriting analysis—has unchecked discretion to determine whether two signatures match. . . [t]here is simply no guarantee that such voters' signatures might match on a second absentee ballot or absentee ballot application."); *Saucedo v. Gardner*, No. 17-CV-183-LM, 2018 WL 3862704, at *15 (D.N.H. Aug. 14, 2018) ("Such discretion becomes constitutionally intolerable once other factors are taken into account: the natural variations in voters' signatures combined with the absence of training and functional standards on handwriting analysis, and the lack of any review process or compliance measures."); *League of United Latin Am. Citizens of Iowa v. Pate*, No. 18-1276, 2018 WL 3946147, at *1 (Iowa Aug. 10, 2018) (affirming injunction prohibiting use of signature-matching provisions for absentee ballots); *La Follette v Padilla*, No. CPF-17-515931, 2018 WL 3953766, at *1 (San Francisco Cty., Cal.

Super. Ct. Mar. 05, 2018) (granting writ of mandate finding absentee signature-matching provision unconstitutional); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *7 (N.D. Ill. Mar. 13, 2006), *vacated as moot sub nom Zessar v. Keith*, 536 F.3d 788, 793–95 (7th Cir. 2008); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354 (D. Ariz. 1990).

Accordingly, Florida's inconsistently applied signature-mismatch requirement violates the Equal Protection Clause.

D. The District Court's Order Is Narrow, Clear, and Enforceable

The District Court's equitable relief is limited in time and scope and narrowly tailored to address the severe burden the State has imposed on voters whose ballots were rejected by the signature-mismatch requirement. Contrary to Appellant's assertion, the court has not ordered "a new Election Day" or ordered all canvassing boards to "count every mismatched vote, sight unseen." Order at 32. The court, balancing the equities at issue and exercising its sound discretion, has merely extended to voters whose otherwise valid ballots were rejected because of a signature mismatch the time to cure the signature. As the court explained, "[T]his is the only constitutional cure that takes into account all the parties' concerns." Order at 32.

Turmoil will not ensue if this Court denies Appellants' motion to stay. In the same way that voters were able to call or log onto their local county elections websites to request vote-by-mail ballots, they are able to do so now to verify the

status of their vote-by-mail ballot. If a voter is told via phone or observes on their county-elections website that their ballot was received but not tabulated, they are able to call or visit their local county elections office to determine why, and to provide the necessary credentials to cure a signature mismatch. No votes will be changed. No new voter will be given a fresh opportunity vote. And the same standards the counties have already been applying to cure allegedly mismatched signatures will remain.

II. NEITHER THE STATE NOR APPELLANT CAN SHOW IRREPARABLE HARM

The burden of demonstrating irreparable harm rests with the party seeking a stay. *See LLeiva-Perez* v. *Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (moving party must make a threshold showing that irreparable harm is probable). "The stay applicant bears the burden of showing both factors: that its own irreparable injury is likely if a stay is not issued, and that the plaintiffs will not be substantially injured if the stay is granted." *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 908 (5th Cir. 2012) (Dennis, J., dissenting) (citing *Nken*, 556 U.S. at 433-34). "[S]imply showing some possibility of irreparable injury fails to satisfy the second factor. . . .[T]he 'possibility' standard is too lenient." *Nken*, 556 U.S. at 434-35.

Neither the State nor the Appellant suffers any harm, much less, irreparable harm by the Court's injunction of Florida's faulty signature matching process. As an

initial matter, a State has no interest in enforcing unconstitutional laws. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). And as explained, *supra*, Florida's rejection of these duly eligible votes is plainly unconstitutional. Further, courts have recognized that changes such as this one—which affects only a small fraction of the state's voting population (just over 4,000 voters as compared to 21 million total Florida citizens)—are "not [] 'precipitate' alteration[s] to the state's entire voting methodology." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 387 (6th Cir. 2008). Thus, contrary to the parade of horribles argued by the Appellant, the injunction is plainly easy to implement and causes minimal harm. Further, it is clear that the election will not be restarted, nor will thousands of voters will not be knocking on any one county supervisor's door, as impacted voters are spread throughout the State. Indeed, as discussed *supra*, the relief awarded was narrow. And, in fact, the State already has a process in place for counting and curing signatures on ballots that the counties are well versed in, *see* Fla. Stat. Ann. § 101 - § 102, *et seq.*, and they can count and cure signatures on all ballots by this process. Moreover, allowing the injunction to remain in place is likely to confer a substantial benefit on the State and counties in the form of the public's increased confidence in the election system as they now know that their duly eligible and properly cast votes are being counted. *Cf. M.R. v. Dreyfus*, 697 F.3d 706, 738 (9th Cir. 2012) (balance

of hardship favors plaintiffs who challenge cuts to state programs when the record suggests that the cut to be enjoined would actually cost the state money whereas maintaining the status quo who actually benefit the state).

In truth, the Appellant's purported concerns come down to one thing: money. It argues that it will be irreparably harmed due to the potential loss of money or resources that it—a political committee, not the State—will have to spend chasing voters and encouraging them to cure their ballots. To be clear, any money spent or resources allocated by Appellant is its choice, and if it would prefer that its voters be disenfranchised by not having the opportunity to cure faulty signature mismatches, that is also Appellant's choice. But all voters, regardless of party or preference, will be disenfranchised absent the district court's injunction. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"). And there is simply no argument that voluntary spending by the Appellant amounts to or outweighs the irreparable harm faced by the voters impacted by this unconstitutional law. *Shays v. Fed. Election Comm'n*, 340 F. Supp. 2d 39, 51 (D.D.C. 2004) (no irreparable harm where agency expended resources later deemed to be unnecessary); *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) (noting that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay,

are not enough" to demonstrate irreparable harm."). Thus, it is Plaintiffs-Appellees and the voters they represent, not the State or Appellant who will suffer irreparable injury if this Court stays the injunction.

III. SUBSTANTIAL INJURY WILL RESULT IF THE COURT'S ORDER IS NOT ENFORCED.

If the Court agrees that Appellant has failed to demonstrate a likelihood of success on the merits or has failed to show irreparable injury absent a stay, then the Court may end its inquiry and need not consider the final two factors. *See Mount Graham Coal.* v. *Thomas*, 89 F.3d 554, 558 (9th Cir. 1996). Nevertheless, it is clear that these factors weigh in Plaintiffs-Appellees' favor.

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres*, 695 F.3d at 1002 (quoting *Elrod*, 427 U.S. at 373). And courts have long recognized that restrictions on the right to vote fall into that category. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *Obama for America, et al. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Alt. Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986). The instant case is no different. As discussed, absent the injunction ordered by the District Court, thousands of duly registered and eligible voters across Florida will be disenfranchised through no fault of their own, but rather due to a faulty and

inconsistent signature matching process over which they have no control. ECF No. 43 (approximately 5,000 voters disenfranchised due to signature mismatch). There can be no more substantial harm than that. *See Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) ("If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does."). As a consequence, this result is out of line with the Fourteenth Amendment and unacceptable for Florida voters. In contrast, as discussed *supra*, neither the State nor the Appellant suffers any harm (much less irreparable harm) by counting these voters votes.

IV. PUBLIC INTEREST FAVORS ENFORCING THE COURT'S ORDER.

"'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" *Melendres v. Arpaio*, 695 F.3d at 1002 (quoting *Elrod v. Burns*, 427 U.S. at 373). And it is equally well established that "[t]he public has a 'strong interest in exercising the fundamental political right to vote.'" *League of Women Voters of N.C.*, 769 F.3d at 248 (quoting *Purcell*, 549 U.S. at 4); *Obama for America*, 697 F.3d at 437 ("The public interest . . . factors permitting as many qualified voters to vote as possible.'"). "A stay pending appeal is contrary to the public interest because, as the Supreme Court has stated, 'voting is of the most fundamental significance under our constitutional structure.'" *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 925 (5th Cir. 2012) (Dennis, J., dissenting) (quoting

Burdick v. Takushi, 504 U.S. 428, 433(1992)). Indeed, Florida voters deserve to have a swift outcome in a case such as this, where it is unquestionably clear that the law at issue is unconstitutional and that the voters whose votes are at issue here should be counted. Further delay in counting these votes, even waiting completion of an appeal, is not in the public interest.[2]

CONCLUSION

For the aforementioned reasons, Plaintiffs-Appellees respectfully request that Appellant's motion to stay be denied. Plaintiffs-Appellees consent to the request that the appeal be expedited on the merits and agree that oral argument is appropriate.

Respectfully Submitted,

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[2] For this reason, the statutory contest procedure cited by Appellant is also inadequate as it would cause not just minimal, but extended delay in the counting of these plainly constitutionally cast votes, and would prolong the burdens placed on the fundamental rights of these voters.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal R. App. P. 32(a)(7)(B). This brief uses Times New Roman 14-point typeface and contains 6,002 words.

/s/ Marc E. Elias
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CERTIFICATE OF SERVICE

I hereby certify that, on November 15, 2018, I electronically filed the foregoing Brief with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit using the CM/ECF system.

/s/ Marc E. Elias
Marc E. Elias

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]
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