No. 18-14758

In the United States Court of Appeals for the Eleventh Circuit

DEMOCRATIC EXECUTIVE COMMITTEE OF FLORIDA AND BILL NELSON FOR U.S. SENATE,

Plaintiffs-Appellees,

v.

KEN DETZNER, IN HIS OFFICIAL CAPACITY AS FLORIDA SECRETARY OF STATE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida

BRIEF FOR THE STATES OF LOUISIANA, TEXAS, ALABAMA, AND GEORGIA AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND A STAY PENDING APPEAL

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Certificate of Interested Persons and Corporate Disclosure Statement

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for amici curiae the States of Louisiana, Texas, Alabama, and Georgia hereby furnish this certificate of persons and parties that may have an interest in the outcome of this case:

1. All interested persons listed in appellants' and appellees' certificates of persons and parties as filed in their motion and response of November 15, 2018.
2. State of Louisiana, amicus curiae in support of appellants
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No party or party's counsel authored any part of this brief. And no person or entity, other than amici, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

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Interest of Amici Curiae

Amici curiae are the States of Louisiana, Texas, Alabama, and Georgia.[1] The United States Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Art. I, § 4, cl. 1. The Supreme Court "therefore has recognized that States retain the power to regulate their own elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). States undoubtedly have a "substantial interest in the manner in which [their] elections are conducted." *Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 125 (1981); *see also Duke v. Massey*, 87 F.3d 1226, 1233 (11th Cir. 1996) ("States do have an interest in regulating the time, place and manner of elections.").

One "responsibility emanating from that interest," *Duke*, 87 F.3d at 1233, is defending state procedures from eleventh-hour challenges mounted after all votes have been cast and the likely winner is known. Such *ex post* challenges to agreed-upon procedures have the potential to damage the integrity and perceived legitimacy of the election results and of the ultimate winner. After all, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

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[1] Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2), which excuses the need for leave of court or consent of the parties.

The amici States write to highlight how the public interest favors a stay of the district court's order promoting such a problematic challenge to election procedures.

Statement of the Issue

Whether the Court should grant a stay of the district court's preliminary-injunction order.

Summary of the Argument

Plaintiffs' attempts to change the rules, *after* the election, because they are unhappy with the outcome, must be rejected. The public interest is served by an electoral system in which we "lay out election rules in advance, rather than making on-the-fly (and predictably partisan) post hoc judgments." Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 Wm. & Mary L. Rev. 851, 914 (2002). To allow otherwise risks undermining public confidence in both the political process and the judiciary. Protracted *ex post* litigation also risks denying voters the benefit of elected representation in Congress. Plaintiffs give no explanation why their challenges could not have been brought and resolved *before* the election—as plaintiffs and their allies have done in the past. The clear implication of their failure to seek timely relief is that the statutes they now challenge only became problematic when they came up short in a close, tightly fought election. Such rank political maneuvering, at the cost of an orderly and efficient election process, should not be rewarded.

Argument

The Court should grant a stay pending appeal of the district court's order. Elections are not analogous to a game of football. *Cf.* Order Granting Prelim. Inj., *1-*2, *Democratic Exec. Comm. of Fla. v. Detzner*, No. 4:18-cv-520-MW/MJF (N.D. Fla. Nov. 15, 2018), ECF No. 46. Elections are at the core of our system of self-governance, and the duty to establish their time, place, and manner is a duty expressly assigned to States. Federal courts are not assigned a duty to referee the States' execution of their duties, absent an extraordinary showing not present here.

The traditional standard for a stay pending appeal balances four factors: the likelihood of success on the merits and three equitable factors centering on injury, including injury to the public interest. *Nken v. Holder*, 556 U.S. 418, 425-26 (2009). The amici States agree that appellants are likely to succeed on appeal. There is no equal-protection or free-speech violation from the State of Florida's neutral, generally applicable procedures—including, for instance, whether the requirement that a mail-in ballot be received by a 7:00 p.m. deadline to be counted, and that the signature on such a ballot must match the elector's signature on the voting rolls or be cured by a specified affidavit with a matching signature. *See generally* Appellants' Mot. for Stay (Nov. 15, 2018). The amici States focus on the equitable factors supporting a stay. Indeed, the public interest strongly favors "order, rather than chaos," and order flows only from "substantial regulation." *Burdick*, 504 U.S. at 433. The Court should stay the district court's order.

I. The Public Interest Is Undermined by Plaintiffs' After-the-Election Complaints About Established Election Procedures.

The public interest is harmed by post-election challenges like those here. Challenges complaining about established election procedures only *after* election day—when the likely winner and loser are known—harm the public's interest in the legitimacy of elections. And when federal courts permit such challenges to interrupt the orderly operation of vote-counting pursuant to state law, public confidence in the integrity of the courts may also suffer.

Allowing a party to raise foreseeable complaints about election procedure after an election essentially gives that party an "option" that encourages speculation: sit on its complaint until the party sees the election results, and then, if the party does not like those results, use the complaint as an excuse to bring about the preferred outcome either directly or by forcing a recount. "Courts should see it as in the public interest in election law cases to aggressively apply laches so as to prevent litigants from securing [such results-based] options over election administration problems." Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 998 (2005); *cf., e.g.*, *NCR Corp. v. NLRB*, 840 F.3d 838, 843 (D.C. Cir. 2016) (noting that elections should not be "converted from a definitive resolution of preference into a protracted resolution of objections"). To allow otherwise would incentivize political parties, campaigns, and their allies to use "election law as political strategy." Hasen, *supra*, at 993.

Ex post challenges like these negatively affect the public interest in at least four ways. First, they undermine the public interest in the legitimacy of the election process. Each State has an important goal of "fostering certainty and finality in its election." Joshua A. Douglas, *Discouraging Election Contests*, 47 U. Rich. L. Rev. 1015, 1037 (2013); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008) ("The public interest in the maintenance of order in the election process is not only important, it is compelling.") (citing *Green v. Mortham*, 155 F.3d 1332, 1334 (11th Cir. 1998)).

States do this by laying out neutral and generally applicable rules, such as Florida's time, place, and manner laws at issue here that specify that mail-in ballots must be received by the close of the polls on election day and that mail-in ballots must be authenticated by a matching signature. *Cf., e.g.*, U.S. Const. art. I, § 4. The Supreme Court has repeatedly recognized the important role States play in regulating elections—all the more so for regulations such as these, designed as they were to provide "certainty and reliability" to the election process, *Diaz*, 541 F. Supp. 2d at 1335, and to protect those elections from any hint of fraud. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters [or in] orderly administration."); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); *see also Burdick*, 504 U.S. at 433 ("Common sense, as well as constitutional law, compels the conclusion that

government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" (citation omitted). Indeed, the statutory policy of a Legislature "is in itself a declaration of public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937).

When such legislative decisions are second-guessed by parties only after election day—after reported vote counts and the likely winner and loser are predicted—the public's confidence in the electoral process is undermined. Political parties, campaigns, and their allies cannot be allowed to sit idly by while the campaign is underfoot, only to rush to the courthouse when election results fail to meet their expectations. Raising a complaint about election procedures only after initial results are reported inevitably heightens the partisan atmosphere surrounding a procedural critique. When partisan advantage is perceived as animating a challenge to the legislatively agreed-upon neutral procedure for an election, the public's faith in the electoral process suffers. *See, e.g.*, Douglas, *supra*, at 1038 ("Election contests can undermine the goals of finality, certainty, and legitimacy of the democratic process."); Hasen, *supra*, at 993 (finding the public "perilously close" to expecting "that no close election results are considered final until the courts have had their say").

Second, *ex post* challenges to established election procedures can undermine public faith in the judiciary. No matter how faithfully judges attempt to resolve election-law questions, *ex post* timing and the fact that the likely outcome is known may, regretfully, cause the public to question the motives of judicial decisionmakers. *See,*

e.g., *id.* at 993 ("Putting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts.").

Third, drawn-out election contests undermine the public's ability to have full representation in the federal government. For instance, almost six months elapsed during which Minnesotans had representation from only one U.S. Senator while an election contest unfolded. *See* Monica Davey, *Sole Minnesota Senator Has Problems Built for 2*, N.Y. Times, Apr. 8, 2009, at A20; P.J. Huffstutter & James Oliphant, *Franken Win Alters Power Equation*, L.A. Times, July 1, 2009, at A1. Florida is among the many States whose citizens may lack representation in Congress due to delays in resolving post-election challenges to established procedures. *See* Fla. Stat. §§ 102.111(2), 102.112. Citizens are entitled to representation in Congress and that public interest suffers unnecessarily when unjustified *ex post* challenges to election procedures delay a final election outcome.

And fourth, eleventh-hour changes to established procedures disenfranchises voters. Such changes constitute a "post-election departure from previous practice" that would have at least two deleterious effects on "the fundamental fairness and the propriety of the election." *Roe v. Alabama,* 43 F.3d 574, 581 (11th Cir. 1995) (citing *Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978)). "First, counting ballots that were not previously counted would dilute the votes of those voters who met the requirements [of the contested provisions] as well as those voters who actually went to the polls on election day." *Id.* And "[s]econd, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for

the inconvenience imposed by the [contested provisions]." *Id.* (citing *Brown v. O'Brien*, 469 F.2d 563, 569 (D.C. Cir. 1972)). If the requirements had been struck prior to election night, the candidates could have adjusted their campaign strategies, and voters might have preferred different candidates. *See id.* Changing the rules after an election is unfair not only to the candidates who might adjust their campaign strategies but also to the voters.

II. Enjoining Implementation of a State's Duly Enacted Election Laws Causes Irreparable Injury to that State.

"The presumption of constitutionality which attaches to" a state law "is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). States necessarily suffer irreparable harm when their statutes are enjoined. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers).

As to competing equities, plaintiffs' complaints are not so novel or dependent on election-day actions that plaintiffs could not have raised those complaints in legislative debate or, indeed, in litigation before election day. For example, the signature-matching issue raised here was previously raised in 2016 federal litigation, in which the Democratic Party sought and obtained a preliminary injunction. *See Fla. Democratic Party v. Detzner*, No. 4:16-cv-607-MW/CAS, No. 2016 WL 6090943, at *9 (N.D. Fla. Oct. 16, 2016). That injunction was obtained over three weeks before

the 2016 election, with the Democratic Party emphasizing the need for a speedy ruling so that it could be awarded *prospective* relief "before the canvassing period[] begins." Pl.'s Emergency Mot. for Preliminary Inj. at ¶ 6, *Fla. Democratic Party v. Detzner*, No. 4:16-cv-607-MW/CAS (N.D. Fla. Oct. 16, 2016). That timing strongly suggests that plaintiffs' current complaint about the signature-matching procedure—a judicially approved procedure that resulted from the 2016 litigation[2]—could have been either raised in that litigation or, at the least, raised before this 2018 election. Equity need not take cognizance of any claim of harm raised only now, after votes have been cast.

The same goes for plaintiffs' *ex post* challenges to other Florida statutes regulating the time, place, and manner of the State's elections through neutral, generally applicable provisions. For instance, the 7:00 p.m. deadline for the receipt of mail-in ballots is part of longstanding Florida law and creates a bright-line rule not susceptible of discretion in its election-day administration. Accordingly, any complaints about that rule should have been raised before the election—not *ex post*, after votes were cast on election day.

[2] The 2016 injunction obtained by the Florida Democratic Party was unanimously codified into Florida law in June 2017, *see* 2017 Fla. Sess. Law Serv. Ch. 2017-45—in one of the very statutory provisions now challenged by plaintiffs, *see* Fla. Stat. § 101.68(2)(c)(1). Far from opposing that effort, 15 of the 17 co-sponsors of the Florida House bill were Democrats. *See* Florida Senate, CS/HB 105: Canvassing of Vote-by-mail Ballots, https://www.flsenate.gov/Session/Bill/2017/105/?Tab=BillHistory.

Finally, although plaintiffs may assert injury to nonparties who wish for their mail-in ballots to count despite being noncompliant with established election procedure, that assertion too must be balanced against the timing of such a complaint—and against the "innocents on the other side as well," namely, "the people who will be harmed if a last-minute injunction disrupts" the finality of the election and their representation in Congress. *Nader v. Keith*, 385 F.3d 729, 737 (7th Cir. 2004) (rejecting injunctive relief where plaintiffs' timing would have disrupted the State's *preparation for* the election, not even the actual *conclusion* of the election as here).

Conclusion

The Court should grant the motion to stay the district court's order pending appeal.

Date: November 15, 2018

Respectfully submitted.

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Certificate of Service

I hereby certify that on November 15, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Elizabeth Murrill
Elizabeth Murrill

Certificate of Compliance

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