Case Nos. 18-14758, 18-14765, 18-14766

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Democratic Executive Committee, et al.,

Plaintiffs-Appellees,

v.

National Republican Senatorial Committee, et al.,

Defendant-Intervenor-Appellants.

On Appeal from the U.S. District Court for the
Northern District of Florida, Case No. 4:18-cv-00520-MW-MJF

SECRETARY'S RESPONSE TO COURT'S FEBRUARY 22, 2019 ORDER POSING JURISDICTIONAL QUESTION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with the Federal Rules of Appellant Procedure 26.1 and the Local Rules of the Eleventh Circuit, Rule 26.1-1, the Florida Secretary of State, Laurel M. Lee, notes that she is being sued only in his official capacity, and the following is a list of all judges, attorneys, persons, association of persons, firms, partnerships, corporations, and other legal entities that have an interest in this case:

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/s/ Mohammad O. Jazil

SECRETARY'S RESPONSE TO COURT'S FEBRUARY 22, 2019 ORDER POSING JURISDICTIONAL QUESTION

I. Introduction

This case is not moot. The district court rewrote Florida's election code to remedy an allegedly unconstitutional burden on the right to vote *after* all votes had been cast. The district court's ability to craft such a remedy—to change a *statutory* deadline by adding two more days to cure mismatching signatures for vote-by-mail ballots—is among the issues on appeal.

Article I, Section 4 and Article II, Section 1 of the U.S. Constitution charge the Florida Legislature—not the courts—with establishing the rules concerning the time, manner, and place of elections. These provisions should cabin a district court's traditional discretion to craft preliminary injunctive relief because judicial fine-tuning of the election code intrudes on the Florida Legislature's prerogative. But no court has squarely addressed the issue. This Court can.

This appeal satisfies the two-prongs of the "capable of repetition yet evading review" exception to mootness: (1) there was too short a duration to fully litigate the issues, and (2) there remains a reasonable expectation of repetition of the issues involving the same complaining party. The preliminary injunction on appeal lasted for only two days before expiring on its own terms. This two-day window was too short a duration to fully litigate important constitutional concerns implicating the separation of powers and federalism. And history has already repeated itself

because it was another election in Florida, involving the Secretary, that forced the U.S. Supreme Court to admonish the Florida Supreme Court against rewriting the State's election code *after* all votes had been cast.

II. Relevant Legal Standards

Specifically, according to this Court, "a case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (citations omitted). Cases that are "capable of repetition, yet evading review" fall into an exception to the mootness doctrine. *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). The exception applies when "(1) the challenged action [i]s in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the same complaining party w[ill] be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Both prongs of the exception have been met.

III. Argument

First, despite the admonition against "post-election departure[s] from previous practice," *Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995), the district court's order below found the statutory cure period for Florida's signature-matching requirement inadequate *after* all votes had been cast and extended that cure period by two days "to allow voters who ha[d] been belatedly notified that

they ha[d] submitted a mismatched-signature ballot to cure their ballots." Order Granting Prelim. Inj. (ECF 46) p. 33. Those two days failed to give the Secretary and Attorney General the time needed time to assess the district court's order and solicit input from Florida's duly-elected executive branch officials before seeking further review before this Court or the U.S. Supreme Court. In those two days, the Secretary was also responsible for defending against an ever multiplying number of other state and federal lawsuits,[1] preparing for three statewide election recounts, and working with county officials to conduct the recounts.

If, as prior courts have held, three years, two years, eighteen months, and one year are too short a duration to fully litigate issues, then surely two days is too short to fully litigate before this Court and the U.S. Supreme Court the appropriateness of a preliminary injunction that expired while the State was in the middle of compiling election results and defending the election code from piecemeal attacks. *See, e.g., Turner v. Rogers*, 564 U.S. 431, 440 (2011) (finding

[1] These were the eight federal lawsuits filed together with requests for preliminary relief after all votes had been cast: *Nelson v. Detzner*, No. 4:18-cv-536 (N.D. Fla. Nov. 16, 2018); *Nelson v. Detzner*, No. 4:18-cv-535 (N.D. Fla. Nov. 16, 2018); *Democratic Senatorial Campaign Comm., et al. v. Detzner, et al.*, No. 4:18-cv-528 (N.D. Fla. Nov. 13, 2018); *Bonfiglio v. Detzner*, No. 4:18-cv-00527 (N.D. Fla. Nov. 13, 2018); *Democratic Senatorial Campaign Comm., et al. v. Detzner, et al.*, No. 4:18-cv-526 (N.D. Fla. Nov. 13, 2018); *Vote Vets Action Fund, et al. v. Detzner*, No. 4:18-cv-524 (N.D. Fla. Nov. 12, 2018); *Fox, et al. v. Detzner*, No. 4:18-cv-529 (N.D. Fla. Nov. 11, 2018); *Democratic Nat'l Comm. v. Lee*, No. 4:18-cv-520 (N.D. Fla. Nov. 8, 2018).

one year incarceration for failure to pay child support too short a duration); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978) (finding eighteen months too short to challenge constitutionality of referendum proposal); *S. Pac. Terminal Co.*, 219 U.S. at 514–16 (finding two years too short to challenge cease and desist order); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010) (finding three years too short); *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2000) (finding agency actions with duration of two years or less to be too short).

Second, there is a reasonable expectation that the State parties will be subject to the same actions again. This is the second time that the State generally and the Secretary specifically have been parties to a case where a court rewrote the State's election code *after* all the votes had been cast. There should not be a third.

The U.S. Constitution gives the Florida Legislature—not the courts, state or federal—the responsibility to manage elections. Article I, Section 4 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. Article II, Section 1 provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be

entitled in the Congress" when electing the President and Vice President of the United States. *Id.* art. II, § 1, cl. 2.[2]

But, as the panel opinion recognized, "[c]rafting a preliminary injunction is an exercise of discretion and judgment," and "it is axiomatic that a district court 'need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case.'" *Democratic Exec. Comm. of Fla. v. Lee*, 2019 U.S. App. LEXIS 4585, *31–32 (Feb. 15, 2019) (quoting *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)).

Thus, there is tension between the constitutional text and the district court's traditional discretion in crafting relief. This Court should resolve whether the former limits the latter in an election dispute.

The U.S. Supreme Court came close in *Bush v. Gore*, 531 U.S. 98 (2000). There, the Florida Supreme Court rewrote the deadline for submission of election results to the Secretary during the 2000 Presidential Election. *Id.* at 101. The U.S. Supreme Court granted certiorari and then vacated and remanded the Florida Supreme Court's decision. *Id.* Next, the Florida Supreme Court interpreted the State's recount standards to fashion new ad hoc standards. *Id.* at 102. The U.S. Supreme Court again granted certiorari to address the following questions:

[2] While 2018 was not a presidential election year, 2020 will be. Put another way, Article II, Section 1 is triggered every four years and is relevant for the same reasons as Article I, Section 4; if one limits the district court's discretion, then the other does too. The Secretary thus discusses both provisions.

"whether the Florida Supreme Court established new standards for Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution, . . . and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses." *Id.* at 103.

In the per curiam opinion, the U.S. Supreme Court did not decide the Article II, Section 1 question. The U.S. Supreme Court concluded that "it [wa]s not necessary to decide whether the Florida Supreme Court had the authority under the [state] legislative scheme for resolving election disputes to define what a legal vote [wa]s and to mandate a manual recount implementing that [judicial] definition," because the "recount procedures the Florida Supreme Court ha[d] [ultimately] adopted" violated the Equal Protection Clause. *Id.* at 105, 105–10.

In his concurring opinion, joined by Justices Scalia and Thomas, Chief Justice Rehnquist provided a framework for this Court to follow. Citing "the legislature's Article II powers," he said that "the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change" the statutes. *Id.* at 113–14 (Rehnquist, C.J., concurring). After "examin[ing] the law of the State as it existed prior to the action of the [Florida Supreme C]ourt," he concluded that the "Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II." *Id.* at 114–15. According to the Chief

Justice's concurring opinion, a court cannot interpret—and clearly cannot rewrite—the election code for this infringes on "the constitutionally prescribed role of state *legislatures*." *Id.* at 115 (emphasis in original).

The logic of Chief Justice Rehnquist's concurring opinion dictates that the district court in this case could not have extended the statutory cure deadline by two days without violating Article I, Section 4 and Article II, Section 1 of the U.S. Constitution and the Florida Legislature's prerogative to establish time, place, and manner restrictions for elections. Whether the concurring opinion or its logic should control is a question for this Court to decide *after* the parties have an opportunity to brief this and other related issues. *Cf. Democratic Exec. Comm. of Fla.*, 2019 U.S. App. LEXIS 4585, *80–82, 81 n. 42 (Tjoflat, J., dissenting) (collecting Florida cases for the proposition that "[t]he Florida Supreme Court would not usurp the legislative prerogative and rewrite a significant part of the Election Code" because this would violate Florida's separation of powers doctrine, and collecting U.S. Supreme Court cases for the proposition that, as a general matter, "federal courts are limited to refusing to apply the provisions they find unconstitutional" rather than "fine-tuning [the] provisions here and there").

The importance of resolving this question on appeal cannot be understated. Courts, the Secretary, the Attorney General, and the voters in "the [N]ation's largest swing state" should know whether constitutional constraints limit a district

court's discretion to tailor injunctive relief in election-related litigation *before* the next round of election-related litigation begins. Frances Robles & Patricia Mazzei, *Florida Begins Vote Recounts in Senate and Governor's Races*, N.Y. Times (Nov. 11, 2018).[3] This question is likely to reoccur because, well, it already has. And as this Court previously recognized:

> In election cases, we have stated that there is often 'not sufficient time between the filing of the complaint and the election to obtain judicial resolution of the controversy before the election.' Election cases also frequently present issues that will persist in future elections, and resolving these disputes can simplify future challenges.

Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1343 (11th Cir. 2014) (quoting *Teper v. Miller*, 82 F.3d 989, 992 n.1 (11th Cir. 1996)); *see also Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001) (quoting *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1496–97 (11th Cir. 1993) for the proposition that "we have held that in cases involving disputes over election-related laws, it is appropriate to invoke the 'capable of repetition yet evading review' exception" to mootness); *Nat. Law Party of the U.S. v. FEC*, 111 F. Supp. 2d 33, 41 (D.D.C. 2000) (quoting *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) for the proposition that "legal challenges to procedures affecting the conduct of an election do not become moot after the election because they are 'capable of repetition yet evading review'").

[3] A corrected version of the article is available at available at https://www.nytimes.com/2018/11/10/us/florida-senate-governor-votes-recount.html.

IV. Conclusion

The case is not moot. Alternatively, if this case is moot, this Court should vacate both the panel opinion and the district court's order consistent with *United States v. Munsingwear*, 340 U.S. 36 (1950). The panel opinion stems from the National Republican Senatorial Committee's request for an emergency stay of the district court's order. Neither the Secretary nor the Attorney General joined in that request. Neither the Secretary nor the Attorney General briefed that request. But it is the Secretary and Attorney General who are charged with defending the constitutionality of the State's signature-matching statutes the panel suggested are unconstitutional. Similarly, as Judge Tjoflat notes in his dissent, the district court's order focusing on the adequacy of the State's cure period for mismatching signatures is an issue untethered to the then operative complaint in the matter or the plaintiffs' continuing assault on the signature-matching requirement as a whole, with or without a cure.[4] At the very least, the Secretary and Attorney General should have an opportunity to defend state statutes before thousands of words, each carrying a judicial imprimatur, impugn the validity of those statutes and especially

[4] Notably, neither the initial complaint nor the amended complaint before the district court challenges the adequacy of the cure period itself. Instead, the plaintiffs maintain that the statutory requirement to match signatures on the mailing envelope (for vote-by-mail ballots) or the secrecy envelope (for provisional ballots) with the signature on file is unconstitutional irrespective of any cure period. *See* Compl. for Injunctive and Declaratory Relief (ECF 1); First Amended Compl. for Injunctive and Declaratory Relief (ECF 100).

so when the underlying preliminary injunction has "passed on to injunction heaven." *United States v. Sec'y., Fla. Dep't of Corr.*, 778 F.3d 1223, 1229 (11th Cir. 2015) (vacating orders entering and clarifying preliminary injunction).

Respectfully submitted by:

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Dated: March 25, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 25, 2019, the undersigned electronically filed the forgoing with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit via the appellate CM/ECF system. The participants in this case are registered CM/ECF users and will receive electronic notification of this filing.

/s/ Mohammad O. Jazil
Attorney