

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
(NAACP), as an organization and representative
of its members; *et al.*;

Plaintiffs,

v.

CASE NO. 4:07-cv-402-SPM/WCS

KURT S. BROWNING, in his official capacity as
Secretary of State for the State of Florida,

Defendant.

**SECRETARY OF STATE'S MOTION FOR STAY
OF PRELIMINARY INJUNCTION ORDER PENDING
APPEAL AND REQUEST FOR EXPEDITED TREATMENT**

Defendant Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida (the "Secretary"), respectfully moves this Court for entry of an order staying the effect of the Court's Preliminary Injunction Order pending appeal. Pursuant to Local Rule 7.1(E), the Secretary seeks expedited treatment of this Motion.

Memorandum of Law

On December 18, 2007, the Court entered its Order Granting Motion for Preliminary Injunction (doc. 105), which enjoins the Secretary from enforcing Section 97.053(6), Florida Statutes. On December 19, 2007, the Secretary timely filed his notice of appeal. The Secretary will seek expedited resolution of the appeal.

Federal Rule of Civil Procedure 62(c) provides that this Court may suspend or modify the injunction during the pendency of the appeal in its discretion. The Court should do so in this case to maintain the status quo pending the appeal, to prevent last-minute amendments to Florida's election regulation before the January 29, 2008, Presidential Preference Primary, and to preclude any resulting inconsistent application or confusion. At a minimum, the Court should temporarily stay its order to give the Eleventh Circuit sufficient time to consider whether it will expedite the appeal or stay the order pending appeal.

The preliminary injunction unquestionably alters the status quo—Subsection 6 has been in effect since January 1, 2006, and through each election since then, including numerous special and municipal elections and the 2006 general election. By altering the status quo—and by doing so while elections officials are focused on conducting a federal election—the order invites confusion and distraction to both voters and elections officials. Moreover, in the event the order is reversed on appeal, or stayed by the Circuit Court pending appeal, the rapid succession of changing rules would exacerbate the harm and confusion. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”).

Having granted Plaintiffs' Motion for Preliminary Injunction, this Court has concluded that Plaintiffs have satisfied the elements for entry of a preliminary injunction. But this conclusion does not preclude the entry of an order staying enforcement pending

appeal. If it did, the Federal Rules of Appellate Procedure would not require appellants ordinarily to request a stay in the District Court before proceeding in the Circuit Court:

If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue. The stay procedure of Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a) affords interim relief where relative harm and the uncertainty of final disposition justify it.

Ruiz v. Estelle, 650 F.2d 555, 565-66 (5th Cir. 1981)¹; *see also Washington Metropolitan Area, etc. v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977) (“Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.”).

In this case, interim relief is necessary and the status quo ought to be maintained while the Secretary pursues his appeal. As the Secretary has argued, and as this Court recognized in its order, the state has a particularly strong interest in maintaining both the order and integrity of elections. This includes not only ensuring that ineligible or fraudulent voters are not permitted to participate, but also ensuring that each independent component of each election runs smoothly, efficiently, and to the benefit of individual voters and the electorate at large. These components start with voter registration,

¹ Decisions of the former Fifth Circuit rendered before October 1, 1981, are binding Eleventh Circuit precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

continue with early voting, absentee voting, and election-day voting, and end with canvassing, certification, and reporting. By staying its order pending review by the Eleventh Circuit, either indefinitely or temporarily, the Court will allow established elections mechanisms to operate without sudden and drastic interruption. On the other hand, by declining to stay its order, unverified applicants will become registered before the Eleventh Circuit has an opportunity to review the validity of Section 97.053(6), Florida Statutes.

The Court's preliminary injunction order will require applicants—both past and future—to be registered without regard to whether their identification data was verified. This change will require procedural and systemic changes by the Secretary's office and in all sixty-seven counties.² Making such changes on an expedited basis in time for the January election will cause disruption, the level of which will likely differ from county to county. For example, of the approximately 14,000 applications currently pending because unmatched, more than 5,000 are from Miami-Dade County, while there are many counties with far fewer. The state's and Supervisors' focus on altering procedures to comply with the Court's order will necessarily detract from their other critical election tasks in connection with the upcoming Presidential Preference Primary.

² The Secretary is already taking substantial steps to ensure compliance with the Court's order. Among other things, the Secretary has met with staff from his various departments, has met telephonically with information technology vendors, and is preparing procedural guidance documents for the sixty-seven supervisors of election. The Secretary is taking the necessary steps to ensure that, absent a stay of the Court's order, applicants who have failed to match will be registered in time to vote in the January election.

The book-closing deadline for the January 29, 2008 election is December 31, 2007—less than two weeks away. § 97.055(1), Fla. Stat. The parties agree that the volume of applications received increases shortly before book-closing, and Supervisors must timely enter all applications received by the book-closing deadline, § 97.053(7), Fla. Stat., assign the voter to the appropriate precinct, § 98.461, Fla. Stat., and mail a Voter Information Card to the new voter, § 97.071, Fla. Stat. The Supervisors must send absentee ballots to electors no later than four days prior to the election. § 101.62(2), Fla. Stat. They must conduct early voting beginning January 14. § 101.657(1)(d), Fla. Stat. In addition, they must recruit and train sufficient numbers of poll workers to conduct the election, some of whom are beginning the first of the year. § 102.014(1), Fla. Stat. And they must prepare complete and accurate precinct registers for use at the polls. § 98.461(2), Fla. Stat. The disruption caused by a change in election procedure and voter rolls shortly before a federal election will undoubtedly interfere with officials' ability to carry out these duties. As a prudential matter, this risk should not be run unless the Eleventh Circuit has reviewed and affirmed the Court's order or has declined expedited review.

The balance of these equities requires some time before the preliminary injunction should take effect, particularly when the Plaintiffs did not timely challenge the provision at issue.³ Furthermore, by staying the order's effect, the Court will eliminate the

³ The challenged law was passed thirty-one months ago, signed into law thirty months ago, and has been an integral part of Florida's Election Code for the 2006 general election and numerous special and municipal elections in 2006 and 2007. Counsel for the Plaintiffs filed a similar challenge in Washington state—featuring the identical claim that

possibility of conflicting orders requiring the process to be stopped and then started—all on the eve of a federal election.

For these reasons, the Secretary respectfully requests the entry of an order staying enforcement of the preliminary injunction order pending appeal. In the alternative, the Secretary requests an order staying enforcement until the Eleventh Circuit determines whether it will expedite the appeal and implement a stay of its own.

Request for Expedited Treatment

The Secretary seeks expedited treatment of this Motion pursuant to Local Rule 7.1(E). The Secretary is seeking expedited consideration of his appeal. Because of the upcoming election, an expedited determination of the status of Subsection Six is appropriate.

Conference with Opposing Counsel

The Secretary has conferred with counsel for Plaintiffs, who do not consent to the relief requested in this Motion.

HAVA preempts all matching requirements—more than a year before they chose to initiate this case. *See Washington Ass'n of Churches v. Reed*, No. 06-0726 (W.D. Wash.).

WHEREFORE, the Secretary respectfully requests entry of an order staying enforcement of the preliminary injunction.

/s/ Allen Winsor

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by Notice of

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