

**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.*,

Case No. 4:07-cv-402-SPM-WCS

Plaintiffs,

vs.

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

Defendant.

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION
FOR STAY OF PRELIMINARY INJUNCTION**

The Secretary's motion for stay of this Court's preliminary injunction should be denied because it fails to meet any of the criteria for obtaining such extraordinary relief under Rule 62(c), Federal Rules of Civil Procedure.

The factors to be applied in determining whether such a stay is warranted are: (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. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 532 F.2d 1001, 1001-1002 (5th Cir. 1976) (citing *Beverly v. United States*, 468 F.2d 732, 741 n.13 (5th Cir. 1972));¹ see also *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (applying factors and denying stay of order striking redistricting plan because, among other things, the “mere administrative convenience ... Florida elections officials will face in redistricting simply cannot justify denial of Plaintiffs’ fundamental rights.”). This Court has already applied a balancing of these factors in the context of issuing the preliminary injunction and has found them to fall in favor of the Plaintiffs. See Order Granting Motion for Preliminary Injunction, dated 12/18/07 (“Order”), pp. 25-27 (Doc. # 105). The result should be no different three days later.

By preliminarily enjoining Subsection 6, this Court has already determined that (i) the Plaintiffs -- not the Secretary -- have demonstrated a strong likelihood of success on the merits (Order, 13, 15); (ii) the Plaintiffs -- not the Secretary -- will suffer irreparable harm absent the injunction (*id.*, at 25-26); (iii) any claimed harm to the Secretary is outweighed by the more than 14,000 people being disenfranchised as a direct result of Subsection 6 (*id.*, at 26);² (iv) the lack of an injunction will lead to irreparable harm to

¹ Former Fifth Circuit decisions rendered before October 1, 1981, are binding Eleventh Circuit precedent. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

² In addition, the Secretary’s “concerns of voter fraud can be properly addressed through identification requirements that are consistent with HAVA and other federal law.” Order, p. 26.

disenfranchised voters that “would be impossible to repair” (*id.*, at 25); and (v) the “public interest is strongly in favor of ensuring that every eligible person in Florida is guaranteed the right to vote.” (*id.*, at 27). These findings apply with equal vigor to the instant motion and, by any measure, demonstrate that the Secretary cannot satisfy the requirements for staying the injunction under Rule 62(c).

Recognizing his inability to meet any of these criteria, the Secretary continues to offer the same vague notions of (i) confusion and disruption, (ii) the need to “verify” numbers on an application to prevent fraud, and (iii) a fundamentally flawed conception of Florida election law and procedure rejected by the Court in issuing the injunction. Each of these fails for the following reasons:

First, the State already has and utilizes a common sense procedure for registering persons without the matching process that can easily be implemented here in a manner that will comply with the injunction. This process, under Section 97.0535, is employed every time a new applicant registers by mail and indicates on the registration form that she does not have a driver’s license or social security number. In such a case, the applicant is registered to vote, but required to provide one of the statutorily prescribed forms of “current and valid identification” before voting. § 97.0535(1)-(2), Fla. Stat. Those forms of identification, which include both photographic and documentary evidence, are set forth in Section 97.0535(3) and are consistent with the Help America Vote Act of 2002 [“HAVA”].

The process under Section 97.0535 complies with HAVA and other applicable federal law. The Secretary has never alleged that this procedure is accompanied by

confusion or fear of fraud, nor has he indicated that any of the 67 county Supervisors of Elections have had any difficulty in administering this process. While the Secretary has studiously avoided this provision of Florida law throughout the course of this litigation, there is no good reason as to why this already existing mechanism cannot be used to register (and verify) the more than 14,000 people currently kept off the registration rolls as a direct result of Subsection 6, as well as any new applicants.³

Second, compliance with the Order and omitting the matching requirement reduces confusion and disruption to the counties. The county Supervisors of Elections do not do the initial matching under Subsection 6; rather, they must undergo efforts to resolve failed matches that cannot be resolved by the Secretary. The injunction eliminates the time and effort that the State and counties would otherwise expend to attempt to resolve failed matches, precisely during the period when the counties are engaged in so many “other critical election tasks in connection with the upcoming Presidential Preference Primary.” Sec’y of State’s Mot. for Stay of Prelim. Inj. Order Pending Appeal and Request for Expedited Treatment at 4; *see also id.* at 5. The Defendant’s vague claim of disruption and confusion is, at best, exaggerated, particularly in light of the existing mechanism under 97.0535 discussed above.⁴ Moreover, as conceded by the Secretary, the

³ This is, of course, just one easily implemented option for the Secretary to comply with this Court’s order in a manner consistent with federal law and without undue confusion or imposition. There may well be others.

⁴ In fact, it appears that the injunction does not cause confusion and disruption in the counties. *See, e.g.*, Bill Kaczor, *State Appeals Voter Registration Ruling, Still Trying to Comply*, MIAMI HERALD, Dec. 20, 2007, at <http://www.miamiherald.com/775/story/352078.html> (reporting that the president of the State Association of Supervisors of Elections believes that once “the state clears

number of registration applications is going to spike in the coming weeks as the election approaches. Delaying enforcement of the preliminary injunction will only ensure a greater number of applicants will be put through, and potentially disenfranchised by, the Subsection 6 matching process. Requiring more people to run that gauntlet (as well as the Supervisors of Elections who must pick up the ball where the State leaves off on failed matches) will only exacerbate the situation.

Johnson, above, is instructive. There, this Court denied a motion to stay an order striking a redistricting plan. This Court, in doing so, recognized that the “[d]eprivation of a fundamental right, such as limiting the right to vote in a manner that violated the Equal protection Clause, constitutes irreparable harm.” 926 F. Supp. at 1543. As such, this Court concluded: the “mere administrative convenience ... Florida elections officials will face in redistricting simply cannot justify denial of Plaintiffs’ fundamental rights.” *Id.*, at 1542. Moreover, given the short time before the Presidential preference primary, there is great risk in delaying enforcement of the injunction and ensuring Florida’s compliance with Federal law. *See, e.g., Sandusky County Democratic Party v. Blackwell*, 340 F. Supp.2d 810, 814 (N.D. Ohio 2004) (“The time between now and the November 2, 2004, election is short. If this Court’s mandate to the defendant to promptly draft a [HAVA] compliant directive to Ohio’s election officials is stayed, even less time will be available for him to do so if [the court’s] decision is upheld in whole or in part. . . . There is no

the applicants affected by the matching law, supervisors could quickly and easily add them to the registration rolls.”).

reason to delay the process of formulating a directive that complies with HAVA, and much risk if delay occurs. The public interest clearly favors denial of the stay.”). Those same concerns govern here and counsel for the denial of the stay.

The Secretary offers no new justification to continue the admitted disenfranchisement of thousands of Floridians occasioned by Subsection 6. Because of the undeniable irreparable harm to thousands of eligible citizens absent the injunction, the lack of any harm to the Secretary, and the public interest to be served by enjoining Subsection 6, the instant motion should be denied. Moreover, because there already exists a common sense, easily implemented and legally compliant means to accomplish the registration and verification of unmatched registrants, there is no need to stay the injunction.

CONCLUSION

For all of the foregoing reasons the motion for stay of the preliminary injunction should be denied.

Dated: December 21, 2007.

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CERTIFICATE OF SERVICE

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