

13 MR. BARDOS: Your Honor, this is Andy Bardos. And we
14 have Pete Antonacci and Allen Winsor.

15 THE COURT: And you're on a speaker phone?

16 MR. BARDOS: Yes.

17 THE COURT: And the third attorney is Allen Winsor.

18 All right. First motion to take up is Document 37.

19 It's the Secretary of State's Motion for a Protective Order.

20 So that this hearing may go more quickly, please know
21 that I've read everything that's been filed and am aware of
22 what's in it, and if you've got new things to tell me, that
23 would be great. If you want to emphasize one or two points,
24 that would be fine too. Defendants may start.

25 MR. BARDOS: Thank you, Your Honor. We think the

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1 motion raises a question on the issue of fundamental fairness.
2 At the beginning of this proceeding when the plaintiffs moved
3 for an expedited schedule, the Secretary stipulated to that on
4 the premise that the discovery would be limited and it would
5 have some predictable, finite balance. The plaintiffs
6 represented to the court that they would take five or six
7 depositions of county officials, besides the deposition of the
8 Division of Elections. They went ahead and noticed six
9 depositions. They've taken some of those already.

10 The Secretary has, in one instance, already
11 accommodated one -- one deviation from the strict letter of
12 what the plaintiff has represented to the court; when the Palm
13 Beach Supervisor of Elections was ill on the day of the
14 deposition, the Secretary consented to the deposition of his
15 operations manager, as well as some limited questioning of the
16 Supervisor.

17 So now the plaintiffs have deposed Jim Reid and Sharon
18 Smith. And depending on how you count it, brings the number of
19 depositions to ten, if you include the operations manager from
20 Palm Beach County. And that goes well beyond what the
21 plaintiffs represented to the court in September. It goes
22 beyond what they represented to the court in their motion to
23 expedite discovery. It's contrary to what they allowed the
24 Secretary to believe when the Secretary stipulated to a motion
25 to -- to their expedited scheduling order.

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1 And really, Your Honor, we think there's no basis for
2 this deviation. The plaintiff's counsel have deposed the
3 Supervisor of Hillsborough County in a related case, and they
4 were dissatisfied with his answers there as well.

5 They knew that there was a possibility that they would
6 not get the information that they wanted from him in this case.
7 There's always that risk. They aren't pleased that they didn't
8 get those answers that they wanted, but we don't think that
9 justifies the deviation from the basic premise that there would
10 be limited discovery in this case, and that was the premise
11 that led the Secretary to agree to an expedited schedule.

12 THE COURT: When you filed your motion, you said that
13 these two depositions would be the eighth and the ninth
14 depositions. Has that changed?

15 MR. BARDOS: Your Honor, in computing that, they were
16 not including Charmaine Kelly's deposition. She's the
17 operations manager in Palm Beach County whose questioning the
18 Secretary consented to when the Palm Beach Supervisor of
19 Elections was ill that day. So depending, again, on how it's
20 computed, if we consider her questioning separately from the
21 Palm Beach Supervisor of Elections question.

22 THE COURT: Was there a deposition of the
23 ill supervisor?

24 MR. BARDOS: There was questioning of him, yes, Your
25 Honor.

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1 THE COURT: So that means that would be ninth and
2 tenth?

3 MR. BARDOS: That's correct.

4 THE COURT: Okay, anything further?

5 MR. BARDOS: Well, just the bottom line, Your Honor,
6 we think it's a fundamental fairness issue. We think we agreed
7 to an expedited scheduling order based on five or six
8 depositions, and we think it's not the right time to change the
9 rules of the game now that we've gone well into discovery.

10 THE COURT: Okay. Plaintiffs, did you agree to five
11 to six depositions?

12 MR. BURHANS: Your Honor, this is Glenn Burhans. And
13 we, in fact, represented to counsel and the court that we would
14 seek to depose, in addition to the Secretary of State, five to
15 six county supervisors of elections. That is correct. And
16 agree with Mr. Bardos that this is an issue of fundamental
17 fairness.

18 However, when we -- we are not seeking to take other
19 counties. We're limiting it to the six counties we're seeking
20 the information from. However, what Mr. Bardos does not tell
21 you, which we've made clear in our papers, is that the
22 Hillsborough Supervision of Elections was represented to us as
23 being capable of providing testimony upon the topics relating
24 to our request for documents.

25 THE COURT: Okay, let me ask you. This is

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1 Mr. Burhans?

2 MR. BURHANS: Yes, sir.

3 THE COURT: So you thought you would just be taking
4 depositions of each of the supervisors, is that correct?

5 MR. BURHANS: That's correct. After it became --

6 THE COURT: The Motion for Protective Order is denied.
7 I think it is no big deal. You can get these two depositions;
8 and you didn't get much out of the Hillsborough Supervisor, so
9 you may proceed.

10 MR. BURHANS: Thank you, Your Honor.

11 THE COURT: Let's take up the next one. And that's
12 the Secretary of State's Motion to Compel answers to
13 Interrogatories. I've read it thoroughly, and I would like to
14 hear from plaintiffs. What's going on here?

15 MR. BURHANS: Well, Your Honor, this motion is
16 premature and it's based upon a faulty premise. And I'll
17 reverse the order a little bit. It's a faulty premise because
18 the issue is not that we are refusing to provide material that
19 has been designated as confidential. We understand that the
20 protective order is in place and we will abide by it. But the
21 motion is premature.

22 THE COURT: Let me start with Interrogatory No. 1.
23 Have you given an answer to that?

24 MR. BURHANS: We did, Your Honor.

25 THE COURT: It's printed right here in the motion,
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1 isn't it?

2 MR. BURHANS: That's correct.

3 THE COURT: Let me take up each of your objections.
4 First, you say that it's not appropriate to inquire about
5 injury in the past. Tell me why a question of what's
6 appropriate at trial is going to govern this discovery?

7 MR. BURHANS: Well, I understand your point. The
8 point, Your Honor, that we're trying to make is that the --

9 we're not required to establish necessarily that we suffered
10 injury in the past. what we're seeking to do is enjoin the
11 practice that is going to --

12 THE COURT: Okay, let me give you some instruction.
13 when you object to an interrogatory and then you say, "Subject
14 to that I am going to answer the interrogatory," what you've
15 done is you've hidden the ball. That doesn't help me to know
16 what you're withholding or what you're actually doing.

17 Now, if you had a good objection here, and I don't
18 think you have, because whether or not you have to show injury
19 is going to be a trial issue -- I think probably you're going
20 to have to show some injury somewhere, but you can't do that.
21 And too many lawyers do it, and every time I see it, I want to
22 conduct a course on how to do this. It's not appropriate to
23 say, "Subject to my objections, I'm giving you some discovery,"
24 because then your opponent doesn't know what is there. You
25 don't waive an objection by not asserting it. So that's not a

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1 good one.

2 MR. BURHANS: Your Honor, that's fair, and I accept
3 the responsibility for that answer.

4 THE COURT: Let's move on down your answer. You then
5 say that you have reason to believe that there are some people
6 who have been injured, and you think that Secretary of State or
7 Supervisor has the information. I think what you're saying
8 there is you don't have any information yet, but you think you
9 might get some in discovery. Is that where you are?

10 MR. BURHANS: That's pretty much where we are. We
11 think we are circling in on that type of information, but
12 frankly, there's a very crucial piece that's missing, and
13 that's what the Secretary has acknowledged as having, has
14 acknowledged in his interrogatory responses as reviewing and
15 relying upon to admit that, you know, as for the period of
16 January 1st of '06, through October 11th of '06, that there
17 were more than 34,000 unmatched people, perhaps, impacted by
18 subsection 6. Without that underlying data, we are pretty much
19 hamstrung in being able to respond more fully to the --

20 THE COURT: And is this what you were saying you
21 thought was premature?

22 MR. BURHANS: That's correct, Your Honor.

23 THE COURT: Let me hear from the Secretary of State.
24 Is it Mr. Bardos?

25 MR. BARDOS: Bardos. Yes, Your Honor. Well, the

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1 question, I think, is pretty straightforward. It asks whether
2 the plaintiffs are aware of anybody -- any of their members
3 that have been substantially burdened by the subsections or
4 whether their right to vote has been violated.

5 THE COURT: well, I think I know where we're headed
6 here. And I think Mr. Bardos is correct; it was a
7 straightforward question and it should have been answered. And
8 what the plaintiff should have said is, we are fresh out of
9 evidence at the moment, but we are going to get some, which is
10 fine. You can't have a summary judgment against you at this
11 point just simply because you're trying to find some. So I
12 would like you to amend your answer to Interrogatory No. 1 and
13 simply state that fact.

14 Now, I think that will take care of everything in this
15 motion to compel, because I think that's what happened with
16 everything. Isn't that right Mr. Burhans?

17 MR. BURHANS: well, I think that's right, Your Honor.
18 The nature of the objection for the two interrogatories at
19 issue were the same, so we'll go ahead and we will amend it.

20 THE COURT: I just will grant that and ask you to
21 amend. Frankly, let's not incur that expense. This is a
22 representation by an officer of the court. We've got a court
23 reporter taking it down, and I think that I've granted it, but
24 you don't have to do anything further on those two
25 interrogatories.

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1 Is there anything else in in that -- no, that's it.
2 Isn't it?

3 MR. BURHANS: Your Honor, may I raise a related point
4 to this motion? It's not directly tied to the motion, but it
5 is related in that we did request the FDRS data that the
6 Secretary has admitted that he relied upon in formulating his
7 interrogatory responses.

8 We had a meet-and-confer yesterday with counsel and
9 have had no response, and we're on the verge of filing our own
10 motion to compel. And if we could short-circuit that with some
11 sort of agreement by counsel that they're going to produce the
12 requested information, we can avoid another hearing, you know,
13 within the next couple of days.

14 THE COURT: Let me -- when I get through with the next
15 motion to compel, I think it's a motion -- yes, then let's take
16 that up if it's possible. But I -- I've granted the motion to
17 compel as to these two interrogatories, but the admitted answer
18 has been stated on the record. Needs to be supplemented as you
19 go along.

20 MR. BURHANS: Understood.

21 THE COURT: Next is the Document 48. And that's the
22 Plaintiff's Motion to Compel. That's not the one you're
23 talking about, is it?

24 MR. BURHANS: No, Your Honor. This is actually a
25 separate one. The one that we're talking about now is directed

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1 towards non-party supervisors of elections, the sixth of those
2 that have been in this action.

3 THE COURT: Now there's some complications in the
4 Document 48 here, that what you're wanting to get is something
5 that will satisfy the supervisor in Orange County, because that
6 person doesn't want to turn over confidential records unless
7 the court has ordered it. And I think -- is that a fair
8 statement of where we are?

9 MR. BURHANS: That's correct. And that's the only
10 supervisor to present that situation, or require it.

11 THE COURT: Mr. Bardos, why can't y'all agree to that?

12 MR. BARDOS: Your Honor, we do agree to that, if it's
13 limited, as to appears to be, to those supervisors who have
14 consented to this consent order -- I'm sorry, to the motion to
15 -- order to compel. The -- and we so informed plaintiff's
16 counsel earlier this afternoon.

17 We are fine with an order compelling the supervisors,
18 if those supervisors consent to it. But we are not going to
19 consent to such an order if the supervisors are objecting to
20 it. So essentially, we're accepting whatever position the
21 supervisors want to take on this, and we are not going to
22 contradict the supervisors. But again, if it's directed only
23 towards Orange County, and Orange County has consented to this,
24 then we have no objection to it.

25 THE COURT: It's my memory is the supervisors are

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1 elected, and they are not under the Secretary of State in any
2 kind of master/servant relationship; is that -- I'm sure that's
3 true.

4 MR. BURHANS: Yes, sir.

5 THE COURT: And so that's the complexity that I was
6 talking about.

7 MR. BURHANS: Your Honor, if I could clarify perhaps.

8 THE COURT: Yes.

9 MR. BURHANS: I have been in discussions with
10 Orange County Supervisor --

11 THE COURT: This is Mr. Burhans.

12 MR. BURHANS: I'm sorry, Your Honor. I have been in
13 contact with counsel for the Orange County Supervisor, who in
14 fact had requested that -- requested the Secretary's counsel to
15 include this type of language in the protective order.

16 THE COURT: I read it. I read the e-mails.

17 MR. BURHANS: And he actually called me a few minutes
18 before this hearing, and I explained to him what was happening,
19 and I can represent to you as an officer of the court that he
20 was in agreement with this approach.

21 Now with respect to the other supervisors, I think
22 there are two ways to address that. The first is that none of
23 them have objected to the subpoenas, and certainly the time
24 limitations under Rule 45 have run in that regard.

25 THE COURT: Let's just let it run. I think -- I hear

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1 where you're going. And if they haven't objected, then they've
2 waived their objections; they've got to produce the documents.
3 And if they don't, I'll compel it and make them pay costs.

4 But what you're representing to me now is Orange
5 County consents to me granting an order even though they're not
6 present here in the courtroom?

7 MR. BURHANS: That's correct.

8 THE COURT: That would require them to produce what
9 has been demanded by a Rule 45 subpoena, is that right?

10 MR. BARDOS: Yes, Your Honor.

11 THE COURT: Okay, all right. So -- and that gets the
12 Secretary off the hook for that one. Does that work it out?

13 Any other problem, Mr. Bardos?

14 MR. BARDOS: That's fine, Your Honor.

15 THE COURT: All right. Okay, now, those are the three
16 issues that I had set for hearing, and I do appreciate everyone
17 being ready to talk about them.

18 And tell me, Mr. Burhans, about this looming issue.
19 what's that?

20 MR. BURHANS: That is a Motion to Compel. We've met
21 and conferred with opposing counsel, and I can tie it to a
22 specific interrogatory and document request, Your Honor, but at
23 bottom, we are seeking information from what is known as the
24 FDRS database, and that is a database that contains names,
25 addresses, date of birth, social security numbers, drivers

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1 license number and so on and so forth of voters. And we have
2 requested information relating to these voters that we believe
3 are in that database. However, we haven't gotten it.

4 We initially tried to narrow the scope to what we felt
5 was a core issue as to the information relating to voters who
6 ultimately were -- who were initially unmatched because of
7 subsection 6, but were later able to vote a provisional ballot.

8 Secretary's response was that -- they can correct me
9 if I'm wrong -- but generally the response was, well, we don't
10 drill down into which people were ultimately able to vote by
11 provisional ballot, but when you look at their interrogatory
12 responses, they make it clear, that they certainly have
13 reviewed and relied upon the FDRS data that we are seeking with
14 respect to unmatched applicants.

15 And in fact our document request No. 6, among others,
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16 requests the production of documents that they've reviewed and
17 relied upon in formulating their interrogatory response.
18 We had a meet-and-confer yesterday, and in fairness to
19 secretary's counsel, they advised us that they were going to
20 speak to their client and see if we could work out a
21 resolution. I haven't heard back yet, and I'm not screaming or
22 jumping up and down, but I do want to hear from counsel, if
23 they do have a position that we can resolve this amicably
24 without having to file yet another motion. I think there have
25 been too many motions filed as it is.

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1 THE COURT: Mr. Bardos?

2 MR. WINSOR: Your Honor, this is Allen Winsor, and
3 I'll address this issue because I was on the meet-and-confer
4 yesterday with Mr. Burhans. We are very open to resolving this
5 outside of court. And as I indicated to Mr. Burhans yesterday,
6 I was going to talk to our client, which I have done, and
7 continuing to do, to see what kind of capabilities are there.

8 The problem is, one, I don't have the materials in
9 front of me because we weren't aware this was going to be
10 addressed on the call today. The plaintiffs have asked -- to
11 back up a little bit, there was a scheduling order entered that
12 had a deadline for document requests, and the deadline has long
13 passed.

14 The plaintiffs have now asked for, by way of a letter
15 that we received late last week, a bunch of data out of this
16 FDRS database that they had never asked for, and that would be
17 tremendously burdensome to get.

18 Mr. Burhans is talking about a limited subset of data
19 that was used to compile the interrogatory answers. So they've
20 asked for a much broader cut of data that goes way beyond what
21 was ever used in creating the interrogatory responses.

22 Having said all that, we are hoping to provide them
23 with some data that will get to their needs, but -- even though
24 it was not requested in the -- in their document request. But
25 what they have asked for by way of letter late last week, that

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1 we've responded to, that was addressed at the meet-and-confer
2 yesterday, was a volume of data that would be nearly impossible
3 to put together in the limited time frame of this case.

4 They've asked for every data image of every
5 application that was submitted that relates an unmatched
6 applicant. Those are things that were not used to compile the
7 summary numbers that were in the interrogatory responses.

8 So that's a long way, Your Honor, of saying that we
9 will be glad to work and continue to work with Mr. Burhans to
10 address their needs, but what they've asked for, and what they
11 may ask for in a motion to compel, is something they did not
12 ask for in a document request and is something that would be
13 very difficult to produce in this condensed schedule that the
14 plaintiff's --

15 THE COURT: Okay. Well -- and that obviously means
16 that I can't do anything to help at this point, and you folks
17 need to work on it. I think that my way to help you -- what is
18 your expedited schedule going to do for you to get -- are you
19 moving this to summary judgment before Judge Mickle?

20 MR. BURHANS: There will be a motion for preliminary
21 injunction, Your Honor, to be heard --

22 THE COURT: This is Mr. Burhans?

23 MR. BURHANS: Yes, Your Honor. -- a motion for
24 preliminary injunction to be heard upon the court's
25 availability during the first few weeks of December.

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1 THE COURT: Okay. So you really are under the gun to
2 get some information for that. Okay.

3 MR. BURHANS: I will note that there is a
4 November 14th deadline to make supplemental submissions
5 obtained through discovery concerning the pending motion for
6 preliminary injunction.

7 THE COURT: Well, there certainly are good lawyers on
8 both sides of this, and I will -- I'm available to help you
9 move through this day by day. I will -- and I think the
10 lawyers here in Tallahassee already know that. So I think what
11 you need to do is meet and confer and try to get it resolved.

12 If you don't have it resolved, I can have another
13 hearing tomorrow at 3:30. I can have a hearing every day. And
14 I'm certainly available and willing to do that, to try to keep
15 the thing moving.

16 I hope that you don't delay bringing something to me
17 because that will -- that just simply will result in a
18 resolution not being had in time.

19 So I am available on a phone call to just simply set
20 up a hearing. You don't have to even do more than file a short
21 something or other that will get me aware of what the problem
22 is.

23 MR. BURHANS: Your Honor, this is Mr. Burhans. I
24 greatly appreciate that.

25 THE COURT: It goes both ways; it goes for the

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1 Secretary of State too.

2 MR. BURHANS: I understand. And we will meet and
3 confer with counsel. It sounds like perhaps we can resolve
4 this, and we'll get together in short order and see if we can't
5 just do that.

6 THE COURT: And again, I know that there's a tendency
7 to want to defend and to prosecute at every level that you
8 possibly can, but you're on a schedule where it isn't going to
9 work that way. These things have got to be decided every 24
10 hours. So -- so anyway that's what I'm going to do. I'm here.
11 I'm available, and I will not be ordering any expenses or
12 sanctions unless things really get out of hand.

13 Anything else from anybody?

14 MR. WINSOR: Judge, this is Allen Winsor. We just
15 received right before the hearing plaintiff's motion to conduct
16 a deposition after November 7th. This deposition deadline was
17 November 7th, but --

18 THE COURT: That's the kind of thing that I think you
19 guys ought to work out.

20 MR. WINSOR: Well, it's a procedural curiosity because
21 the order entered an order yesterday granting -- what it called
22 the plaintiff's request, and we're just now getting the motion.
23 So it appears that the plaintiff is seeking relief outside of
24 the motion practice, and be helpful just to keep everything
25 going through the proper channels so that we can be apprised of

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1 what's going on.

2 MR. BURHANS: Well, Your Honor, the plaintiffs have
3 not been seeking relief outside of the motion practice
4 channels. This is an issue that I think has been addressed by
5 Judge Mickle. In fact, we were directed to file the motion. I
6 think there was probably a miscommunication in chambers.

7 THE COURT: And it will probably go to Judge Mickle,
8 then, to resolve that unless he directs that I deal with it.
9 But -- since he set the tight schedule. But I probably will
10 talk with him to see what he wants me to do.

11 okay, anything further from anybody?

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MR. WINSOR: Not from us, Your Honor, Allen Winsor.

THE COURT: Mr. Winsor, Mr. Burhans and Mr. Bardos, my take on what has been before me today is that a lot of this should have been worked out. And I think you sense that that's my feeling. And I just encourage you to do so this next go-round.

All right, than concludes the hearing.

MR. BURHANS: Understood, Your Honor. Thank you very much.

(Proceedings concluded at 3:57 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

LISA GIROD JONES, RPR, RMR, CRR
Official Court Reporter

Date

S/Lisa Girod Jones