UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-21243-CIV-ALTONAGA/Brown

League of Women Voters of Florida, *et al.*,	:
Plaintiffs,	:
vs.	:
Kurt S. Browning, in his official capacity, and Donald L. Palmer, in his official capacity,	:
Defendants.	:

PLAINTIFFS' MOTION AND INCORPORATED MEMORANDUM OF LAW TO STRIKE *DIAZ* TESTIMONY AND FACTUAL FINDINGS FROM DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs League of Women Voters of Florida, Florida AFL-CIO, and Marilynn Wills respectfully submit this motion for an order striking Exhibit C to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction; striking portions of that brief that rely on the factual findings of *Diaz v. Cobb*, 541 F. Supp. 2d 1319 (S.D. Fla. 2008) ("*Diaz*") as substantive proof in this case; and excluding any further deposition and trial testimony from the *Diaz* case that Defendants seek to introduce as substantive evidence.

ARGUMENT

This case stands on its own, but Defendants have tried to use the inadmissible, irrelevant and poorly developed and inapplicable record of *Diaz* to avoid confronting the merits. In their opposition to Plaintiffs' Motion for Preliminary Injunction, Defendants improperly ask the Court to rely on the trial testimony of several witnesses and the findings of fact in *Diaz* as proof of

facts relevant to their defense of Fla. Stat. §§ 97.021(36) and 97.0575, as amended by Laws of Florida, Ch. 2007-30 (the "Amended Law"). The *Diaz* findings and record are irrelevant and inadmissible, do not provide a basis for collateral estoppel, and cannot be judicially noticed as substantive proof in this case. Defendants' effort to replace the facts of this case with those of *Diaz* should be rejected.

I. The Factual Record and Findings of *Diaz* Cannot be Judicially Noticed or Considered as Substantive Evidence in this Case.

Basic principles of law, the Federal Rules of Evidence and the Court's May 27 Order make it abundantly clear that the record in this case consists of the affidavits of the witnesses, their deposition testimony, and their testimony at the hearing. *See* Fed. R. Evid. 802; May 27, 2008 Order [D.E. 45] ("The parties are permitted to call live witnesses and must exchange witness lists by June 10, 2008. Any witness a party wishes to call by affidavit must be indicated on the witness list and must be made available for deposition prior to the hearing."). Flouting both the rules and the clear order of this Court, the Defendants have repeatedly sought to create a hybrid procedure to have the Court adopt the *Diaz* factual findings and to introduce the *Diaz* record.[1] Specifically, they assert that they need not meet their evidentiary burden in defending the challenged statute because they have "already done so," namely, in *Diaz*. Def. Opp. at 19. Accordingly, they quote extensively from the *Diaz* factual findings in their brief opposing preliminary injunction, *see* Def. Opp. at 18, 19 and n. 26, and submit excerpts from testimony of

[1] *See, e.g.*, Defendants' Motion for an Order Establishing Parameters for the Hearing on Plaintiffs' Motion for Preliminary Injunction at 3, 6-8 [D.E. 35] (the "Parameters Motion"); Tr. of Telephonic Conference of May 27, 2008 at 14:21–16:9 [D.E. 44]; Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction [D.E. 49] at 2, 18, 19 and 19 n.26 ("Def. Opp.").

witnesses in *Diaz* as Exhibit C to that brief. The Court should flatly reject these efforts by striking the portions of the brief that quote the *Diaz* findings and striking Exhibit C.

Courts may not take judicial notice of either factual findings or the record of a different case, including testimony, as substantive proof. *See U.S. v. Jones*, 29 F. 3d 1549, 1552-53 (11th Cir. 1994) (holding that "findings of fact and references to witness' testimony" from prior case were inadmissible and not subject to judicial notice "for the truth of the matters asserted in the other litigation") (internal quotation marks and citations omitted). *See also* 21B Wright, Miller & Cooper, Fed. Practice & Proc. § 5106.4 (2008) (hereinafter "Wright & Miller") (a court "cannot take judicial notice of truth of facts found in another case"); *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (testimony from separate case was not susceptible to judicial notice "for the truth of the matters asserted in the other litigation"); *Wyatt v. Terhune*, 315 F. 3d 1108, 1114 & n.5 (9th Cir. 2003) ("a court may not take judicial notice of findings of fact from a different case for their truth") (collecting cases); *Int'l Star Class Yacht Racing Assn. v. Tommy Hilfiger U.S.A., Inc.*, 146 F. 3d 66, 70-81 (2d Cir. 1998) (courts "may not take judicial notice of a document filed in another court … for the truth of the matters asserted in the other litigation") (internal quotations and citations omitted); *Autonation, Inc. v. O'Brien*, 347 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004) (same). Thus, Defendants cannot use *Diaz* record to establish the truth of the factual findings or of the assertions made in the excerpted testimony.

In the face of this clearly established precedent, Defendants have suggested that (*i*) some form of collateral estoppel should apply, or (*ii*) that the Diaz findings constitute "legislative facts" subject to "judicial notice." *See* Parameters Motion at 6-8; Def. Opp. at 19 & n.25. Neither suggestion has any merit. *See* Pl. Opp. to Parameters Motion [D.E. 41] at 7-14; Pl. Reply Memorandum in Support of the Motion for Preliminary Injunction [D.E. 55] at 13-14.

As previously argued, none of the preconditions for issue preclusion are met. Pl. Opp. to Parameters Motion at 8-12.[2] On the contrary, binding plaintiffs in this case to the findings of *Diaz*—a case to which Plaintiffs were not parties and which involved a different statute and different constitutional rights burdened in different ways and to a lesser degree than in this case—would plainly violate due process. *See Holloway v. A.L. Lockhart*, 813 F. 2d 874,878-79 (8th Cir. 1987). If the Court were to introduce any factual findings outside of these proceedings, it should look to the earlier version of this case, which involved nearly identical facts and an identical procedural posture (and which Defendants have totally ignored). *See League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1316-31 (S.D. Fla. 2006) ("*LWVF I*").

The *Diaz* findings also are not "legislative facts," as Defendants suggest. *See* Parameters Motion at 7-8; Def. Opp. at 19 n. 25. Legislative facts are "non-evidence facts" which judges "assume" without the fact having been proved. Fed. R. Evid. 201, Advisory Note. They are "socio-political facts not specific to the parties" and are often "generalized, opinion-like, and not susceptible to exacting proof." Wright & Miller, § 5103.2 (internal quotations and citations omitted). In contrast, the *Diaz* factual findings are just that: "findings of fact" made by a trial judge on the basis of an evidentiary record and credibility determinations. Likewise, the Court in *LVWF I*, F. Supp. 2d at 1316-31, made findings of fact that conflict with the *Diaz* findings. *Cf. U.S. v. Bowers*, 660 F. 2d 527, 531 (5th Cir. 1981) (defining legislative facts as those that "do not change from case to case but apply universally.").

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[2] Collateral estoppel is appropriate only if all the following conditions are met: "(1) the issue must be identical in the pending case to that decided in the prior proceeding; (2) the issue must necessarily have been decided in the prior proceeding; (3) the party to be estopped must have been a party or have been adequately represented by a party in the first proceeding; and (4) the precluded issue must actually have been litigated in the first proceeding." *Blohm v. Commissioner*, 994 F.2d 1542, 1553 (11th Cir. 1993). *None* of these prerequisites is present here.

Defendants' statement of their position refutes itself. They state that "[r]e-proving these legislative facts should not be necessary—particularly not at the preliminary injunction stage." Def. Opp. at 19 n.25. That the facts in question needed to be "proved" in *Diaz* places them outside the scope of legislative facts, as does the suggestion that they can be treated as legislative facts at the preliminary injunction stage but be subject to evidentiary proofs later on. *See also* Pl. Opp. to Parameters Motion at 12-14.

Defendants have submitted portions of the *Diaz* record apparently as a substitute for or proof of the *Diaz* findings. They ask the Court to adopt the *Diaz* findings as proof of "facts supporting a need for the Law" and suggest that Exhibit C can be used for the same purpose in the event the Court declines to judicially notice these facts. *See id.* at 19 & n.25. Defendants' witness list also states that several witnesses will appear, at least in part, "by … prior trial testimony." But Defendants have not demonstrated why the Court is permitted to, or indeed should, take notice of or rely upon the *Diaz* findings or testimony. They have not submitted affidavits from the witnesses whose *Diaz* testimony they have submitted.[3] Their opposition brief does not quote the transcripts or even name the witnesses. And Defendants have not explained how the testimony is independently relevant to this case. In fact, the transcripts submitted as Exhibit C are only mentioned once in Defendants' opposition brief, in a footnote that seems to assert that the factual findings of *Diaz* are binding in this case and need not be "[r]e-prov[ed]." *See* Def. Opp. at 19 n.25. In short, the transcripts are submitted solely as evidence from *Diaz* in support of the *Diaz* findings, not as evidence in *this case*.

[3] Defendants assert that Plaintiffs have "called" five of the *Diaz* witnesses. Def. Opp. at 19 n.25. That is false. Plaintiffs have noticed and begun taking depositions of a number of *Diaz* witnesses because Defendants listed them as persons having discoverable information in their Rule 26(a) disclosures and because Plaintiffs anticipated that Defendants would call them as witnesses.

As a matter of law and logic, the *Diaz* findings cannot be binding in this case and the transcripts are not competent evidence here. Defendants cannot use one to bootstrap the other into the case. Therefore, the portions of their opposition brief that rely on the *Diaz* findings as substantive proof should be stricken, as should the *Diaz* testimony appended to the brief.[4]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully seek an order striking *Diaz* testimony from Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction; striking the portions of that Memorandum of Law that quote from or cite to the *Diaz* factual findings as binding in this case or as substantive evidence of facts in this case; and excluding any further deposition or trial testimony from the *Diaz* case that Defendants seek to introduce.

CERTIFICATE OF PREFILING CONFERENCE

Counsel for Plaintiffs certify that they conferred by email with Defendants' counsel regarding the propriety of relying on testimony from *Diaz*. Defendants declined to withdraw the Exhibit C. Counsel also conferred, but failed to agree, on the admissibility and susceptibility to judicial notice of the *Diaz* findings and record.

[4] Insofar as Defendants have formally requested that the Court take judicial notice of any aspect of *Diaz* for the truth of the assertions in that litigation, or make such a request in the future, Plaintiffs respectfully submit that that request should be denied.

Date: June 12, 2008

s/Robert Harris
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 12, 2008, I caused to be electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below by transmission of Notices of Electronic Filing generated by CM/ECF.

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