

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

SUE M. COBB, Secretary of State of  
The State of Florida,

Appellant,

v.

Case No. 1D06-\_\_\_\_\_  
L.T. Case No. 2006-CA-002619

KAREN THURMAN, as Chairman of the  
FLORIDA DEMOCRATIC PARTY; and the  
FLORIDA DEMOCRATIC PARTY, *et al.*

Appellees.

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**SECRETARY OF STATE'S EMERGENCY MOTION TO EXPEDITE**

Sue M. Cobb, in her official capacity as Secretary of State of the State of Florida (the "Secretary"), respectfully requests this Court to expedite proceedings in this matter and states:

1. The question presented by this emergency appeal is whether election officials may post factual, neutral informational notices at polling places at the General Election scheduled to take place on November 7, 2006. Due to the nature of this action and the imminence of the General Election, Appellant urges this Court to expedite proceedings so that all parties may be heard and this case adjudicated before November 7, 2006.

2. On September 29, 2006, Mark Foley, a Republican member of

Congress representing Florida's 16th Congressional District, resigned his office and withdrew as a candidate for reelection. Three days later, the Republican State Executive Committee designated Joe Negron as its substitute nominee. It is uncontested that Florida law requires the general election ballot to display the name of the withdrawn candidate—not the name of the lawful candidate—and that all votes cast for the withdrawn candidate will be counted for the substituted candidate.

3. In the interests of transparency and in anticipation of voter confusion and uncertainty that will give rise to numerous voter inquiries at hundreds of polling places concerning this race, the Secretary and the Florida State Association of Supervisors of Elections recommended that the Supervisors of Elections of the eight counties comprising the 16th Congressional District post informational notices at each polling place, informing voters of the fact that a vote for the withdrawn candidate will be counted as a vote for the lawful candidate.

4. On October 13, 2006, Appellees Thurman and the Florida Democratic Party filed this action, seeking an injunction prohibiting the posting of the proposed notices, and, on October 18, 2006, the circuit court issued the requested injunction. The Court's Order provides in pertinent part:

ORDERED AND ADJUDGED that the Plaintiffs' request for issuance of an injunction is GRANTED. The Defendants are therefore ordered not to post the proposed notice, and may not deliver the notice to individual voters posing questions about the race in

question. **Any requests for assistance from voters should be handled in the same manner that they usually are, which would preclude discussion of individual candidates, or nominees, in any particular race.** (emphasis added)

On the day the Court issued its Order, Appellants filed their Notice of Appeal, a copy of which is attached hereto as Exhibit A.

5. The exigent circumstances of this case compel expedited scheduling. The General Election takes place 19 days from today. Thereafter, its subject matter becomes moot. And, not only is the case inherently urgent, it is critical to the conduct of fair and valid elections, presenting the critical question of whether election officials may even inform voters of the proper method of casting a vote for the legal candidate.

6. Finally, and perhaps most importantly, the last sentence of the Court's Order enjoins election officials from responding to voters' requests for assistance if the response may include names of individual candidates or nominees contrary to the letter and spirit of the Voter's Bill of Rights and Voter Responsibilities. § 101.031(2), Fla. Stat. (2006). The staggering breadth of this confusing limitation raises critical issues of permissible communication at polling places in the affected counties and indeed throughout the state.

WHEREFORE, Appellant respectfully moves this Court to expedite these proceedings so that all parties may be heard and this case adjudicated before November 7, 2006.

RESPECTFULLY SUBMITTED,



for

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail and facsimile/electronic transmission this 19th day of October, 2006, to the following:

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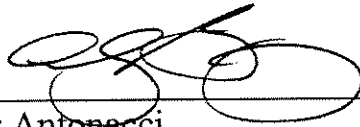
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**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT**

I certify that the font used in this motion is Times New Roman 14 point and  
in compliance with the Florida Rules of Appellate Procedure.

  
for Peter Antonacci  
Florida Bar No. 280690

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA

KAREN THURMAN, as Chairman of the  
FLORIDA DEMOCRATIC PARTY; and the  
FLORIDA DEMOCRATIC PARTY,

Plaintiffs,

v.

Case No. 2006-CA-002619

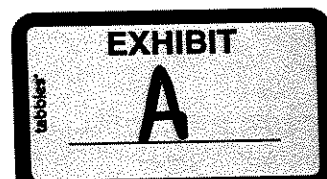
SUE M. COBB, Secretary of State of  
The State of Florida; *et al.*,

Defendants.

NOTICE OF APPEAL

NOTICE IS GIVEN that Sue M. Cobb, in her official capacity as Secretary of State of the State of Florida, appeal to the First District Court of Appeal, the Order of this Court rendered October 18, 2006, by Judge Janet E. Ferris. A copy of the Order is attached hereto. The nature of the Order is an order granting an injunction.

FILED  
CIRCUIT COURT CIVIL DIV.  
06 OCT 18 PM 4:56  
CLERK OF CIRCUIT COURT  
LEON COUNTY FLORIDA



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail and facsimile/electronic transmission this 18th day of October, 2006, to the following:

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA

KAREN THURMAN, as Chairman  
of the FLORIDA DEMOCRATIC  
PARTY, and the FLORIDA DEMOCRATIC  
PARTY,

Plaintiffs,

CASE NUMBER 2006-CA-2619

vs.

SUE M. COBB, Secretary of State of  
The State of Florida; et al.,

Defendants.

FINAL JUDGMENT GRANTING INJUNCTIVE RELIEF

This cause having come before the Court on the Complaint and motion for temporary injunctive relief, and the Court having considered the motion and pleadings, the arguments of counsel, and being otherwise fully advised in the premises, finds as follows:

The hearing on the Plaintiffs' motion for temporary injunction proceeded with the understanding and agreement of the parties that the Court's order on the motion will be entered as a final judgment in this case. Mr. Joseph Negron's motion to intervene was granted at the hearing. Apart from two affidavits admitted into

evidence on behalf of the Supervisors of Elections, and two exhibits submitted by the Plaintiffs, there are no facts essential to resolution of the issue described in the Complaint or the responses filed by the Defendants. This case presents the narrow question of whether a notice, attached to the Complaint as Exhibit B and entered into evidence at the hearing as Plaintiffs' Exhibit 2, can be provided to electors presenting themselves at polling places in Congressional District 16. The congressional district reaches from the east coast of Florida to the west coast, and includes eight counties. The incumbent in the position, who was unopposed in the primary, was Congressman Mark Foley. Mr. Foley recently withdrew from the race, which then, by operation of law, provided the Republican Party of Florida the opportunity to replace Mr. Foley with another candidate. The Republican Party did so, nominating Mr. Joseph Negron as Mr. Foley's replacement. The Plaintiffs do not contest the propriety of the replacement, and agrees that all statutory procedures were properly followed in nominating Mr. Negron. What the Plaintiffs object to is the posting of notices at the polling places informing electors that a vote for Mr. Foley is, in fact, a vote for Mr. Negron.<sup>1</sup> The precise text of the notice is that provided in Plaintiffs' Exhibit 2.

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<sup>1</sup>Six of the eight supervisors of elections have indicated their intention to post the notices inside the polling place. The Supervisor of Elections for Palm Beach County, Arthur Anderson, has said that he will not post the notice, but will provide it to any elector with a question about the race; Supervisor Gertrude Walker of St. Lucie County does not appear to have made a final decision about whether to use the notice or not.

The procedure for addressing vacancies that occur after a primary election is found in Section 100.111(4), Florida Statutes (2005). In addition to providing a mechanism for political parties to replace a candidate in the event of death, resignation, withdrawal or removal, the statute also says the following:

If the name of the new nominee is submitted after the certification of the results of the primary election, however, *the ballots shall not be changed and the former party nominee's name will appear on the ballot.* Any ballots cast for the former party nominee will be counted for the person designated by the political party to replace the former party nominee. [emphasis supplied]

Section 100.111(4)(a), Fla. Stat.

The Defendants collectively argue that since this particular race has generated considerable media attention, especially in regard to Mr. Foley's withdrawal, the electors will be confused by the appearance of his name on the ballot. They also correctly point out that the proposed notice is truthful, and does not misstate anything about the Congressional District 16 race. Plaintiffs assert, however, that there is no authority for the posting of such notices, however correct they may be, and that the Supervisors of Elections should be prohibited from doing so. This Court must agree.

It should first be stated, very clearly and definitively, that the Court perceives no improper motive on the part of the Defendants to influence the outcome of the Congressional District 16 election by providing the proposed notices. The

Supervisors are anticipating numerous questions from electors about the race, and hoped to uniformly address such questions by reference to the notice. Although the Court is not convinced that the notices will adequately answer all questions posed by voters, the notices will at least address one. By reflecting that a vote cast for Mr. Foley will, in reality, be a vote cast for Mr. Negron, the notices might clarify that particular issue. The problem with posting or delivering such notices at polling places, which would speak only to the District 16 Congressional race, is that the Legislature did not authorize them. Section 100.111(4) controls the result here, because it deals specifically with the issue raised by the Plaintiffs. In addressing what should appear on the ballot in the event of a vacancy in nomination, the Legislature could have adopted various options: it could have required that the name of the new nominee be included on the ballot, or could have mandated the posting of a notice informing electors of the replacement, as the Kentucky Legislature did. See Section 118.227(3), Ken. Rev. Stat. Anno. (2006). Instead, Florida's Legislature specifically directed that "...the ballot shall not be changed, and the former party nominee's name will appear on the ballot." This provision of the statute refutes the Defendants' argument that Section 100.111(4) is "silent" on the issue of what should be done. Although Section 100.111(4) does not specifically preclude the posting of notices, it does specifically require that the person no longer seeking the office appear on the

ballot. The Legislature has therefore acknowledged the issue of whose name should appear when another candidate has been nominated, but, for whatever reason, decided to require that the former candidate's name appear on the ballot. The Court is not at liberty to question the Legislature's decision, or its judgment, in enacting the statute, and there can be little doubt that it understood the confusion likely to result where voters know that the person reflected on the ballot is no longer seeking the position.

The Defendants have defended their proposed use of the notice as part of their responsibilities, as Secretary of State and Supervisors of Elections, to educate and inform the public. There is no question that the Legislature has also addressed such activities and, in some instances, specifically prescribed exactly what the Defendants should do to properly advise voters of certain issues. Those statutory prescriptions include Section 97.012(6) [authorizing the Secretary of State to provide voter education assistance to the public]; Section 97.012 (4) [authorizing the Secretary of State to provide technical assistance to the Supervisors of Elections on voter education]; Section 101.031(1) [providing for dissemination of "cards" containing "instructions for the electors to use in voting"]; and Section 101.5611(1) [authorizing the Supervisors of Elections to provide "instruction at each polling place regarding the manner of voting with the system"]. The Court acknowledges these statutes, but cannot agree that they provide the authority to post notices regarding a particular race.

A review of the above-cited statutes reflects that they encourage, and in some cases require, the Defendants to properly inform voters about an election by distributing sample ballots, posting the Voter's Bill of Rights and Voter Responsibilities at polling places, specifying a procedure for assisting voters who "...ask for further instructions concerning the manner of voting," and providing "instruction" at each polling place "...regarding the manner of voting with the system...[and] the arrangement of candidates and questions to be voted on." See Sections 101.031 and 101.5611(1).

The Defendants' extrapolation of the clear language of these statutes carries the Legislature's mandates into uncharted territory. Read literally, the aforementioned statutes recognize that instructions on "the manner of voting" and "the manner of voting with the system" may be necessary, due to the recent introduction of electronic touch screen machines and other new voting paraphernalia. These mandates do not, however, suggest that the phrase "manner of voting" can be interpreted to mean that the Supervisors can provide guidance as to the "manner of voting" in a particular race. Nothing in these statutes even suggests that such an interpretation is appropriate. Instead, the language used in these provisions consistently returns to instruction regarding how to use voting systems, rather than instruction regarding what will happen in a particular race.

One other issue bears mention. At the hearing, counsel for the Supervisors indicated that they, with one exception, had read Section 101.62(6) to preclude mailing the proposed notices with the absentee ballots, due to that section's direction that "[n]othing other than the materials necessary to vote absentee shall be mailed or delivered with any absentee ballot." Although the Supervisors felt that this law prevented them from including the notices with the absentee ballots, the Secretary of State disagreed with their interpretation. Although the Secretary's position is consistent, it disregards the Legislature's use of the word "nothing." The issue of whether to include the notices in the absentee ballots is therefore instructive, since it points out that the Secretary and the Supervisors of Elections differ on the proper interpretation of an important statute, and that venturing into explanations regarding the ballot itself is fraught with problems.

Florida has the dubious honor of having its election laws scrutinized and debated regularly in our courts, with the most thorough discussion of those laws taking place in the 2000 general election. We understand that candidates do not resort to litigation lightly, and likely do so only when a problem is significant and unresolvable. We also understand our obligation to respect the integrity of the voting process, while addressing important legal concerns about that process. The responsibility, then, to interpret the statutes enacted by the Legislature in a manner

that effectuates their plain meaning is perhaps even more obvious when dealing with a process that is held so dear in this country. To interpret the election statutes relevant here as permitting the proposed intrusion into the polling place, no matter how well-intentioned that proposal may be, is an extrapolation far beyond the Legislature's words. It is also a slippery slope, calling into question the logical boundaries of the Defendants' efforts to "inform" voters. If a constitutional amendment is confusing or obtuse, could a clarifying notice assist voters? Certainly. Is such a notice permissible? The Legislature has enacted no law suggesting that it would be. Here, because Section 100.111(4) actually addresses what must appear on the ballot when a candidate withdraws, it provides clear guidance that cannot be contravened by general voter education, or voting system information, statutes.

Since the Plaintiffs seek injunctive relief, the Court must address the predicates for issuance of an injunction. First, the Court finds that irreparable injury will occur if the unauthorized notices are posted or delivered to individual voters. Since the issues here involve elections, the ballot, and the sanctity of the voting booth, there can be little debate that interference with that process, especially in a manner not contemplated by the Legislature, would cause irreparable harm. There is also no adequate remedy at law to address the complained of activity. Finally, because the Court finds that the proposed notices are not authorized, the Plaintiffs have

demonstrated that it has a clear legal right to the injunctive relief requested. By precluding the use of the notices, the Legislature's statement of policy is respected, as is the voters' right to vote without interference. Since the parties have agreed to allow the Court to enter a final judgment in this matter, it should not be necessary to address predicates for temporary injunctive relief. Suffice it to say, however, that the considerations of the public interest certainly require the result here. It is therefore

ORDERED AND ADJUDGED that the Plaintiffs' request for issuance of an injunction is GRANTED. The Defendants are therefore ordered not to post the proposed notice, and may not deliver the notice to individual voters posing questions about the race in question. Any requests for assistance from voters should be handled in the same manner that they usually are, which would preclude discussion of individual candidates, or nominees, in any particular race.

DONE AND ORDERED on October 18, 2006, at Tallahassee, Leon County, Florida.

  
JANET E. FERRIS  
Circuit Judge

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