IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

ELVIN McCORVEY,

Plaintiff,

v. CASE NO. 4:08cv218-RH/WCS

KURT BROWNING, etc., et al.,

Defendants.

_________________________________/

ORDER DISMISSING CLAIMS AGAINST ATTORNEY GENERAL, DENYING OTHER MOTIONS, AND STAYING FURTHER PROCEEDINGS

This action challenges the constitutionality of a Florida statute, § 103.101, that changed the date of the Florida presidential primary for 2008 and later years. For 2008, the new date was before the earliest date permitted by the rules of the national Democratic and Republican parties. At least as things now stand, the rules violations will result in a reduction in the Florida delegates' voting strength at the upcoming Democratic and Republican national conventions. The plaintiff in this action is a Democrat and challenges the statute as it applies to Democrats.

Named as defendants are the Florida Attorney General and Florida Secretary

of State in their official capacities. Each has moved to dismiss. The plaintiff has moved for summary judgment and for expedited consideration of the motion. This order grants the Attorney General's motion to dismiss, denies without prejudice the Secretary of State's motion to dismiss and the plaintiff's motion for summary judgment, and stays the remainder of the case until after the 2008 general election.

The Attorney General asserts that he does not have the power to enforce the challenged statute. In *Socialist Workers Party v. Leahy*, 145 F.3d 1240 (11th Cir. 1998), the court held that "where the plaintiff seeks a declaration of the unconstitutionality of a state statute and an injunction against its enforcement, a state officer, in order to be an appropriate defendant, must, at a minimum, have some connection with enforcement of the provision at issue." *Id.* at 1248. The court affirmed a summary judgment for county supervisors of election (in contrast to Florida's Secretary of State) because state law did not authorize the county supervisors to enforce the election laws at issue.

The same principle is fully applicable here. The Florida Secretary of State enforces the election statute at issue. The Attorney General may serve as the state's lawyer in litigation concerning the statute, but he does not have separate enforcement authority. The plaintiff has cited no authority for any different conclusion. The plaintiff's claims against the Attorney General thus will be dismissed.

The other issues are best left for resolution after the 2008 general election. Another case raising the same or similar issues is currently under a stay. *See Ausman v. Browning*, No. 4:07cv519-RH/WCS (N.D. Fla. Mar. 10, 2008) (unpublished order). Among the reasons for the stay are these. First, no meaningful relief could be afforded with respect to the 2008 election, even if otherwise appropriate; there is thus no reason to go forward more rapidly. Second, the national parties may or may not take action at their national conventions that would moot or otherwise affect the plaintiff's claims as applicable to future elections. The prudent course is to wait until after the 2008 election to see whether there remains a controversy calling for judicial resolution. *Cf. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341, 345-46, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring) (setting forth fundamental principles of constitutional adjudication, including that, "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'") (quoting earlier authorities in part); *see also Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."), *quoted with approval in United States v. $242,484.00*, 318 F.3d 1240, 1242 n.2 (11th Cir. 2003); *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 1 L. Ed. 436

(1792) (forbidding federal courts from rendering advisory opinions or making determinations that are subject to revision by the executive branch).

As a matter or orderly case administration—and because the issues raised in the motions may be affected by intervening developments—the prudent course also is to deny the Secretary of State's motion to dismiss and the plaintiff's motion for summary judgment, without prejudice to their renewal when the case is reactivated. Any renewed motion to dismiss or for summary judgment may incorporate portions of the prior motions by reference, to the extent the same materials remain pertinent.

For these reasons,

IT IS ORDERED:

1. The defendant Attorney General's second motion to dismiss (document 11) is GRANTED. All claims against the Attorney General are dismissed with prejudice. I do *not* direct the entry of judgment under Federal Rule of Civil Procedure 54(b).

2. The defendant Secretary of State's motion to dismiss (document 14) is DENIED without prejudice to renewal upon expiration of the stay effected by this order. Unless modified by further order, the deadline for the Secretary of State to move to dismiss or answer is extended to 14 days after the status conference to be held pursuant to paragraph 5 below.

3. The plaintiff's motion (document 20) to expedite consideration of his motion for summary judgment is DENIED.

4. The plaintiff's motion for summary judgment (document 17) is DENIED without prejudice to renewal upon expiration of the stay effected by this order.

5. Further proceedings are stayed until the earlier of (1) November 10, 2008, or (2) entry of an order lifting the stay. A party may move to lift the stay at any appropriate time for good cause. The clerk must set a status conference by telephone for the first available date on or after November 10, 2008.

SO ORDERED on July 13, 2008.

s/Robert L. Hinkle
Chief United States District Judge