

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

ELVIN McCORVEY,

Plaintiff,

vs.

CASE NO.: 4:08cv218-SPM/WCS

KURT BROWNING, in
his official capacity as
Secretary of State of the
State of Florida; and BILL
McCOLLUM, in his official
capacity as Attorney General
of the State of Florida,

Defendants.

_____ /

DEFENDANT BROWNING'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff has filed a motion for summary judgment seeking relief from this court in the form of a declaration that § 103.101, Fla. Stat., is unconstitutional and a mandatory injunction ordering Defendant, Browning, to hold another election.

For the reasons set forth below, such relief should be denied.

PLAINTIFF'S CLAIMS ARE MOOT

Plaintiff filed his complaint in this case on April 7, 2008, over two months after Florida held its Presidential Preference Primary pursuant to § 103.101, Fla.

Stat., on January 29, 2008. His claims for a declaration that the statute is unconstitutional and for an injunction against its enforcement are moot. There is no relief this court can give that will change anything with regard to that election. The court's ability to grant effective relief lies at the heart of the mootness doctrine. *County of Morris v. Nationalist Mvmt.*, 273 F.3d 527, 533 (3rd Cir. 2001). Even if the court were to rule in Plaintiff's favor on these two claims, it would still be up to the credentials committee at the convention to decide whether to seat the delegates. No relief is available to Plaintiff and therefore he fails to state a claim, and this case should be dismissed.

This case is moot because any retrospective relief sought by Plaintiffs is no longer available. The relief requested by Plaintiff - a new election - cannot be accomplished in time to provide any relief. Rule 11A of the 2008 Delegate Selection Rules for the Democratic National Convention prohibits primaries after the second Tuesday in June. [Exhibit A, p. 12] This Court can take notice of the fact that it would be impossible to hold an election prior to that date. In addition, it would be impossible as a practical matter to hold an election prior to the one already in preparation for August 26, and even in the absence of rule 11A, this date would be too late to afford any relief to plaintiff. [Affidavit of Kurt Browning, Exhibit B]

It is axiomatic that an actual controversy must exist at all stages of federal court proceedings, and in the absence of such a controversy, the case should be dismissed as moot. *See, e.g., United States Parol Commn. v. Geraghty*, 445 U.S. 388, 397 (1980) (explaining that "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)") (citations omitted). In short, a case is moot when there is no longer an actual controversy, such as when a federal court decision would have no effect. *See Church of Scientology of California v. United States*, 506 U.S. 9, 11 (1992).

Here, there can be no dispute that effective relief as to the 2008 Presidential Preference Primary is impossible and therefore any claims as to that primary are moot. This court should accordingly dismiss the Plaintiffs' complaint to the extent it states claims relating to the now-completed January 29, 2008 election.

PLAINTIFF'S CLAIMS ARE NOT YET RIPE

Moreover, although Plaintiff does not seek specific relief for any election other than the 2008 cycle, he does allege in paragraph 12 of his complaint that he "seeks a declaration that the statute [§ 103.101, Florida Statutes (2007)] violates the Constitution of the United States." As discussed, this claim is moot as to the 2008 election, but to the extent Plaintiff alleges that the statute is unconstitutional

with respect to any election other than the one just completed, such future claim is not ripe for adjudication. The rules of the national Democratic party with which the statute allegedly conflicts were adopted by the party only for the 2008 election cycle. [Dec. of McNamara¹, para. 7, 8, exhibit C] Therefore, until such time as the party adopts rules for the next Presidential election cycle (2012), it cannot be determined whether the Florida statute is in irreconcilable conflict with those rules.

The Supreme Court has held that "[r]ipeness is particularly a question of timing" that is meant to "prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agricultural Products Co. et al.*, 473 U.S. 568, 579 (1985), quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). As such, whether defined as constitutional or prudential, ripeness is lacking with respect to the 2012 election because the party's rules have not been adopted for that cycle. Accordingly, the issues in relation to 2012 are not yet fit for judicial consideration, and there would be no hardship to the Plaintiff in withholding consideration of those issues until future party rules

¹ This is a declaration initially filed on behalf of the defendants in *Nelson v. Dean*, case no. 4:07cv427-RH/WCS (N.D. Fla.)

are adopted. *See Abbott Laboratories*, 387 U.S. at 148-49. To the extent the Plaintiff states constitutional claims in relation to the statute's speculative future conflicts, this court should dismiss or abate consideration of those claims as not yet ripe. (A motion to dismiss is currently pending, docket number 14)

PLAINTIFF'S CLAIMS ARE BARRED
BY THE ELEVENTH AMENDMENT

Plaintiff also seeks nominal damages and a mandatory injunction requiring “the State, as an equitable remedy, to hold a new Presidential delegate selection process at state expense in a manner that will allow meaningful and effective voter participation[.]” Both of these claims for relief are barred by the Eleventh Amendment. It is beyond cavil that the State of Florida cannot be sued in federal court for money damages. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)(“[T]he Eleventh Amendment bars suits in federal court "by private parties seeking to impose a liability which must be paid from public funds in the state treasury.”) Defendant, Browning, sued in his official capacity, is the state for these purposes. *Hafer v. Melo*, 502 U.S. 21, 25 (1991)([T]he real party in interest in an official-capacity suit is the governmental entity and not the named official.)

Under *Ex parte Young*, 209 U.S. 123 (1908). a state official can be sued for prospective injunctive relief only. Plaintiff’s claims for nominal damages and

mandatory injunctive relief are barred by the Eleventh Amendment because *Ex parte Young* only provides for prospective injunctive relief to enjoin an ongoing violation of federal law. *Seminole Tribe v. Fla.*, 517 U.S. 44, 73 (1996)(Eleventh Amendment does not bar federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to "end a continuing violation of federal law.") Plaintiff does not seek to end a continuing violation of federal law through an order *stopping* the Defendant from doing anything; rather he seeks an order requiring the State to hold another election.² Rather than prospective relief against Defendant Browning, this is clearly relief against the State. The Secretary of State cannot hold an election - only the State can. Plaintiff even seems to acknowledge this point by pleading for his equitable

² Plaintiff relies on *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), for the proposition that *Ex parte Young* permits the relief requested because any expenditure of state funds would be an "ancillary effect" of compliance with the court order. The requested relief in this case is not within the *Young* doctrine, but not because of the expenditure of state funds. Rather, such relief is impermissible because holding another election is a remedy for a past wrong. It does not address Defendant's actions under the challenged statute going into the future. In *Lucky*, "Appellants [sought] an order to compel appellees to provide indigent defense services that meet minimum constitutional standards." *Id.* at 1015. State expenditure of money to conform to constitutional standards *in the future* is the ancillary effect allowable. "[W]hen a suit seeks equitable relief or money damages from a state officer for injuries suffered in the past, the interests in compensation and deterrence are insufficiently weighty to override the State's sovereign immunity." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 89 (U.S. 1989). *See also, Cory v. White*, 457 U.S. 85, 88 (1982).

remedy against the “State.” Because the Eleventh Amendment bars the relief requested, this court should dismiss this case for lack of jurisdiction. *Seminole Tribe v. Fla.*, 517 U.S. 44, 76 (1996)(case dismissed on Eleventh Amendment grounds for lack of jurisdiction.)

SECTION 103.101, FLA. STAT., IS CONSTITUTIONAL

In his complaint, Plaintiff asserts that the 2007 amendment of § 103.101, Fla. Stat., having the effect of moving the date of the Florida Presidential Preference Primary to January 29, 2008, violates his rights of free speech and association and the right to vote. This is so, he alleges, because the new primary date does not comply with the rules for delegate selection of the National Democratic Party and the Florida statute attempts to require the party to accept the delegates chosen at this early primary. Because of this noncompliance, Plaintiff alleges, the party will not recognize delegates selected by this primary.³

³ The Democratic Party has determined that no Florida delegates will be seated. [Dec. of Phillip McNamara, at ¶¶ 55, 59]. While this was true when the declaration was signed, this court should take judicial notice that negotiations are ongoing as to whether and how the Florida delegation will be seated. Rule 201(b). Fed. R. Evid. (facts generally known within the territorial jurisdiction of the trial court).

During its 2007 session, the Florida legislature amended § 103.101, Fla.

Stat., as follows:⁴

Each political party other than a minor political party shall, on the last ~~second~~ Tuesday in January ~~March~~ in each year the number of which is a multiple of 4, elect one person to be the candidate for nomination of such party for President of the United States or select delegates to the national nominating convention, as provided by party rule.

On May 21, 2007, the governor signed the bill amending § 103.101, Fla. Stat., into law. [Dec. of Philip McNamara at ¶ 49]

Florida law does not attempt to *force* the parties to accept delegates determined by the January 29 Presidential Preference Primary. Section 103.101, Fla. Stat., provides in pertinent part:

(1) Each political party . . . shall . . . select delegates to the national nominating convention, as provided by party rule.

* * *

(5) The state executive committee of each party, by rule adopted at least 120 days prior to the presidential preference primary election, shall determine the number, and establish procedures to be followed in the selection, of delegates and delegate alternates from among each candidate's supporters.

* * *

(7) All delegates shall be allocated as provided by party rule.

Although the primary does not comply with party rules, the State parties are free to engage in delegate selection procedures consistent with party rules separate and

⁴ Added language underlined; removed language stricken out.

apart from the state run primary. The statute *does not* require that delegations to the national convention be apportioned consistent with the outcome of the State's primary election. This is the current and historical interpretation of the statute by the Secretary of State's office in recognition of the fact that the state cannot dictate to the national party how to choose its delegates. To the extent the statute can be construed to require the party to use the primary election results, this court should adopt the Secretary's interpretation in order to avoid constitutional problems.

McConnell v. FEC, 540 U.S. 93 (2003) (Court has an obligation to construe a statute, if possible, in such a way as to avoid constitutional questions.) It was the decision of the state party to make the Florida primary binding and to refuse to engage in procedures to choose delegates consistent with party rules.

The manner in which each state Democratic party chooses delegates to the national convention is determined by the *State party*. § 103.101(5) and (7), Fla. Stat. The State party adopts a process that is then submitted to the National Party. If the submission complies with national party rules, it is approved. [Dec. of Philip McNamara at ¶¶ 5, 9] Failure to comply with the national rules will subject the state party to sanctions. [Dec. of Philip McNamara at ¶¶ 31 - 33] Working with the national party, the Florida Democratic Party developed a delegate selection process that complied with party rules; however, on June 10, 2007, the

Florida State Democratic Executive Committee voted to make the Florida primary binding and submitted a delegate selection plan based on that primary. [Dec. of Philip McNamara at ¶ 51] The National party continued to try to “work it out” with the Florida party by suggesting a Party-run caucus that would comply with the rules and, in an unprecedented move, offered to cover the entire cost. [Dec. of Philip McNamara at ¶ 52] In spite of the efforts of the national party to find a way to seat Florida’s delegates in compliance with Party rules, the Florida State Party adopted a delegate selection plan based on the January 29 primary and submitted it to the national party. [Dec. of Philip McNamara at ¶ 54] Even after a finding of non-compliance triggering the reduction of delegates, the Florida Party was given another 30 days in which to submit a compliant plan. [Dec. of Philip McNamara at ¶ 60] It did not. [Dec. of Philip McNamara at ¶ 62]

In a situation where a state run primary does not comply with party rules, the state party can easily avoid sanctions by adopting a party-run process for delegate selection that does comply with national party rules. [Dec. of Philip McNamara at ¶ 34] This has been done on more than one occasion in more than one state: Vermont in 1984; South Dakota in 1988; Arizona, Delaware and Washington in 2000. [Dec. of Philip McNamara at ¶¶34 - 36]

After the State Democratic Party triggered the sanctions by failing to adopt available compliant delegate selection processes, and after the election occurred, Plaintiff brought this action seeking to have this court order the State of Florida to hold another election to comply with national party rules. There is no basis for such an order. As shown by the facts outlined above, Plaintiff was not aggrieved by the action of the State of Florida.

Plaintiff asserts that Florida “has made the entirely valid choice to require a primary election as opposed to some other process. *New York State Board of Elections v. Lopez Torres*, 128 S.Ct. 791, 798 (2008) (“We have, for example, considered it to be ‘too plain for argument’ that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot.”)” [Pl. Memorandum in Support of Motion for Summary Judgment at 5] Although Florida has decided to hold a primary election, the statute as set forth above does not require that the party utilize the results of that election to choose delegates. The *Lopez Torres* case addressed primaries for *state* elections and cited *Am. Party of Tex. v. White*, 415 U.S. 767 (1974), another case addressing state elections. Although it may be “too plain for argument” that the state can prescribe methods for state elections, these holdings have no relevance to the issues in this

case. The state cannot tell the national party how to choose its delegates and the Florida statute does not. It is therefore constitutional.

PLAINTIFF'S RIGHT OF POLITICAL
ASSOCIATION HAS NOT BEEN IMPAIRED

Plaintiff asserts that the movement of Florida's primary has disenfranchised voters thereby denying him his First Amendment rights of free speech and political association. The cases addressing these claims in other circumstances do not support his claim.

California Democratic Party v. Jones, 530 U.S. 567 (2000), was a challenge to the "blanket" primary system adopted by the people of California through an initiative. The primary in question was not a presidential preference primary, but was a primary for state officials. In that system, any person can vote for any candidate in any race regardless of party affiliation. In *Jones*, the Supreme Court held the "blanket" primary unconstitutional because:

Proposition 198 forces political parties to associate with -- to have their nominees, and hence their positions, determined by -- those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.

Id. at 577. The Court further stated:

In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process -- the "basic function of a political party," *ibid.* -- by opening it up to persons wholly unaffiliated with the party.

Such forced association has the likely outcome -- indeed, in this case the intended outcome -- of changing the parties' message.

Id. at 581-82. In other words, California was attempting to moderate the views of elected officials by *forcing* the parties to associate with those they sought to exclude.

Similarly, in another case involving state primaries rather than presidential preference primaries, the court in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), was faced with a case somewhat the reverse of the California case. The Connecticut Republican Party wanted to open its primary to independent voters, but Connecticut law permitted only voters who had registered with a party to vote in its primary. Rather than forcing a party to associate with voters it chose not to welcome, here the state attempted to prevent the party from associating with those it desired. The District Court concluded that "[any] effort by the state to substitute its judgment for that of the party on . . . the question of who is and is not sufficiently allied in interest with the party to warrant inclusion in its candidate selection process . . . substantially impinges on First Amendment rights." The Court of Appeals affirmed, holding that § 9-431 "substantially interferes with the Republican Party's first amendment right to define its

associational boundaries, determine the content of its message, and engage in effective political association." The Supreme Court held:

The statute here places limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. *Kusper v. Pontikes*, supra, at 58. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Id. at. 216. In both of these cases involving state primaries, the court struck down the primary systems because the State parties' associational rights were affected by the mandatory requirements of the state laws.

In contrast to the cases involving state primaries, in cases involving presidential preference primaries, the Court does not strike down the State laws governing primary elections, but rather holds that the state cannot mandate that the national parties accept delegates selected in violation of the national parties' rules. This was the case in *Cousins v. Wigoda*, 419 U.S. 477 (1975), where two slates of delegates from Chicago were vying for seats at the Democratic convention. One slate was selected pursuant to state law and the other was selected pursuant to party rule. The two processes were inconsistent and the question before the Court was which process - state law or party rule - governed the seating of the delegates. The state appeals court held that state law held primacy and the Supreme Court

reversed. The party's First Amendment associational rights gave it the power to determine the eligibility of delegates to its convention and the State could not interfere with the internal workings of the party by forcing it to accept delegates chosen in a way contrary to its rules.

Perhaps the most informative case in which the Supreme Court further clarifies the relationship between national party rules and state election law is *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981). There, the laws of Wisconsin providing for an open primary were in conflict with the party rules requiring a closed primary. The Court stated:

The question in this case is not whether Wisconsin may conduct an open primary election if it chooses to do so, or whether the National Party may require Wisconsin to limit its primary election to publicly declared Democrats. Rather, the question is whether, once Wisconsin has opened its Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules.

Id. At 120. The Court did not question the holding of the Wisconsin Supreme Court that the open primary was constitutional; that was not the issue. The issue was whether the State could force the Party to seat the delegates chosen in a

manner inconsistent with party rules.⁵ It held that question was determined in *Cousins* and that the State could not force its wishes on the party.

What these case stand for is the proposition that there is no constitutional requirement that the state's election laws be consistent with party rules. It would be a novel, and remarkable, proposition for the court to hold that the *State* is *required* to comply with *Party* rules. Rather, the constitutional infirmity set forth in the presidential primary cases was that the state laws attempted to *force* the parties to accept delegates chosen in violation of party rules. The Florida statute does not similarly interfere with the internal rules and procedures of the parties or affect the parties associational rights.

CONCLUSION

For the reasons set forth above, this Plaintiff's motion for summary judgment should be denied and this case dismissed.

⁵ “[U]nder Wisconsin law state delegates are bound to cast their votes at the National Convention in accord with the open primary outcomes.” *Democratic Party of United States v. Wis.*, 450 U.S. 107, 126 (U.S. 1981)

Respectfully submitted this 27th Day of May, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served by filing with the Court's ECF system this 27th Day of May, 2008, on:

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