

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

Elvin McCorvey,

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Plaintiff,

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vs.

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CASE NO. 08-138

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,

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Defendants.

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**PLAINTIFF'S OPPOSITION TO DEFENDANT BROWNING'S
MOTION TO DISMISS**

Plaintiff respectfully replies as follows in opposition to Defendant Browning's Motion to Dismiss.

1. By this suit, Plaintiff contends that the Florida statute governing the timing of Presidential primary elections is unconstitutional. The statute purports to require the selection of delegates to the Democratic Party's nominating convention, by means of an election held in January. But the rules of the Democratic Party forbid the seating of delegates chosen at an election held at such an early date. The Party rules make exceptions for some States, but Florida is not among them. The crux of the suit, therefore, is that the statute purports to require the selection of delegates in a manner that

the Party rules do not recognize as legitimate. As Plaintiffs will explain in a motion for summary judgment, the statute is therefore unconstitutional under such authorities as *Democratic Party v. Wisconsin*, 450 U.S. 107, 101 S.Ct. 1010 (1981).

2. Defendant Browning, sued only in his official capacity, is the Secretary of State. His motion to dismiss does not attack the theory of this suit on the merits. His arguments are instead (a) that some part of the case is moot, and (b) that any non-moot aspect of the case is jurisdictionally barred by the Eleventh Amendment. *See* Defendant Browning's Memorandum of Law, incorporated in his motion, pp. 2-4. But the case is not moot, and there is no Eleventh Amendment bar.

3. The case is not moot in any respect, and certainly not in its entirety. The case still has live controversies not only about the 2008 election, but also about the future. As to the 2008 election, there is the possibility of the prospective equitable relief that we discuss in paragraph 4 below, as well as the possibility of declaratory relief. There will be arguments eventually as to whether that equitable relief is appropriate; but it is a live issue and the case is therefore not moot, even as to the 2008 election. *See Sheely v. MRI Radiology Network*, 505 F.3d 1173, 1182 n.10 (11th Cir. 2007) (noting that the question of whether requested relief will ultimately issue is quite distinct from, and not dispositive of, the question of mootness). Likewise, the case is not moot as to the future. The statute at issue remains on the books. Defendant Browning does not suggest that it will be repealed, and he has no authority to say that it will be. Nor has he demonstrated that any other change in circumstances will make the issue moot in the future. Therefore the issue

of the statute's constitutionality is not moot. "The party asserting mootness bears the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1175 (11th Cir. 2006) (internal quotation marks omitted).¹ Defendant Browning has not met his burden.

4. The case is also not barred by the Eleventh Amendment in any respect, and certainly not in its entirety. Defendant Browning does not claim that the Eleventh Amendment would bar declaratory judgment as to the unconstitutionality of the statute. Nor does he argue that the Eleventh Amendment would bar an injunction prohibiting any implementation of it in future election cycles (i.e., those after 2008). Thus the suit can proceed in those respects, at the very least.

5. Defendant Browning contends that the Eleventh Amendment would bar the additional equitable relief that Plaintiff seeks, i.e., an order requiring a new delegate selection process for the 2008 Presidential election at state expense. But Defendant Browning's view of the Eleventh Amendment is too expansive. The Eleventh Amendment permits prospective equitable relief against State officials sued in their official capacities, in suits (like this one) based on constitutional rights. Such relief is allowed, even though compliance with such a prospective equitable order will cost

¹ Relatedly, election law issues are recognized as falling under the "capable of repetition yet evading review" doctrine that forecloses a mootness argument. *See, e.g., Swanson v. Worley*, 490 F.3d 894, 903 n. 10 (11th Cir. 2007); *Florida Right to Life v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001).

money. In a case like this one, the relief that we are seeking is not the payment of money to remedy a completed wrong. It is instead an order about what must be done in order to protect a present constitutional entitlement; and such an order is permissible under the Eleventh Amendment even if it causes expense to the State. *See, e.g., Luckey v. Harris*, 860 F.2d 1012, 1014-15 (11th Cir. 1988).

6. Finally, if Defendant Browning is suggesting that he is not the proper official-capacity defendant, this argument too is meritless. He does not deny, in his Motion or Memorandum, that he is the State's chief elections official as a matter of fact and law. Under Title IX, Section 97.012, he has the State's highest level of responsibility regarding the interpretation and implementation of the election laws. He is therefore an appropriate defendant in his official capacity. *See Luckey*, 860 F.2d at 1015-16. If he believes that there is some other State official who is more properly the official-capacity defendant for some or all of the relief we are seeking, he can so argue. But until and unless he does so, then any attempt to evade liability on this basis would be mere shell-game that should not stand in the way of enforcement of the United States Constitution.

7. In short, this Court will have ample opportunity in the course of this litigation to decide what relief is appropriate. But the case is not moot, and it is not barred by the Eleventh Amendment. The Court should deny the motion to dismiss.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Respectfully submitted,

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