

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

FLORIDA STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
(NAACP), as an organization and representative
of its members; *et al.*,

Civil No. 4:07CV402 SPM/WCS

vs.

KURT S. BROWNING, in his official capacity as
Secretary of State for the State of Florida,

Defendant.

**PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY AND ENTRY OF
SCHEDULING ORDER AND INCORPORATED MEMORANDUM OF LAW**

Plaintiffs file this motion simultaneously with their Complaint and Motion for Preliminary Injunction ("Complaint" and "PI Motion," respectively). As detailed in the Complaint and PI Motion, this action is brought to prevent the wrongful disenfranchisement of thousands of eligible Florida voters that will result if Subsection 6 of Section 97.053, Florida Statutes, is not enjoined prior to December 31, 2007 -- the registration deadline for the January 29, 2008 presidential preference primary election. Subsection 6, in clear violation of the United States Constitution and numerous federal election laws, precludes otherwise eligible voters from registering to vote if certain identifying information cannot be matched or otherwise verified by the Secretary of State through a process riddled with error.

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In order to prevent such disenfranchisement and ensure that Plaintiffs' claims can be resolved before the December 31st deadline, it is necessary for Plaintiffs to conduct targeted discovery on an expedited basis before a hearing on the PI Motion can be had. Entry of a Scheduling Order that clearly establishes discovery and disclosure deadlines, as well as sets this matter for hearing on the PI Motion will serve the interests of justice, promote judicial economy and conserve party resources by enabling the parties to quickly and efficiently identify and litigate those core issues in dispute. Accordingly, pursuant to Rules 16(b), 26(d), 30(a)(2)(C), 33(a), 33(b)(3), and 34(b) of the Federal Rules of Civil Procedure, as well as N.D. Fla. Loc. R. 16.1, Plaintiffs move the Court for an Order permitting expedited discovery and setting a scheduling order.

Because of the exigent circumstances and this Court's broad discretion in directing discovery and managing its docket -- particularly in the preliminary injunction context -- expedited discovery and hearing of the PI Motion are warranted. Conscious of the time constraints and the inherent burdens of discovery, Plaintiffs will carefully tailor their discovery requests to ensure the full, fair and efficient development of the factual record necessary to adjudicate this matter. In fact, Plaintiffs' counsel has conducted pre-litigation fact investigation over the course of more than one year -- including obtaining information via public records requests to the Secretary of State as well as numerous county supervisors of elections -- and are thus able to focus discovery on only those issues for which investigation cannot be completed absent by means of this litigation. Illustrating the targeted scope of discovery, Plaintiffs' proposed Interrogatories and Requests for Documents are attached to the accompanying Memorandum of Law as Exhibits A & B, respectively.

Plaintiffs believe that the PI Motion can be heard on November 29 and, if necessary, November 30, 2007. In order to prepare for the hearing within this time frame, the Plaintiffs propose the following schedule:

October 1, 2007 - deadline for Parties to serve document requests, interrogatories and requests for admissions (collectively the "Discovery Requests"), if any;

October 8, 2007 - deadline for Parties to object to the production of any documents;

October 9, 2007 - earliest date to schedule depositions;

October 17, 2007 - date by which the Parties shall complete their production of documents (subject to previously served objections if not otherwise resolved) and serve written responses and objections, if any, to the Discovery Requests;

October 26, 2007 - deadline to complete all depositions; if necessary, Plaintiffs will agree to multi-track depositions and appearances by telephone;

November 9, 2007 - deadline for Defendant to file and serve any opposition to Plaintiffs' Motion for Preliminary Injunction, including supporting affidavits and documentary evidence;

November 16, 2007 - date by which Plaintiffs shall take any depositions of affiants or declarants that have submitted any affidavit or declaration in opposition to the motion for preliminary injunction;

November 21, 2007 - deadline for Plaintiffs to file and serve their Reply in support of their Motion for Preliminary Injunction, including any additional supporting affidavits and documentary evidence gained through discovery.

In the event the parties will seek to introduce in-person testimony at the hearing, it is proposed that the parties will each disclose the identity of the witnesses and subject matter of the testimony they intend to present no later than **5 days** prior to such hearing.

A proposed order granting expedited discovery and setting forth a hearing schedule is attached at Exhibit C. Plaintiffs' arguments and legal authority in support of this motion are more fully discussed in the following Memorandum of Law.

MEMORANDUM OF LAW

BRIEF BACKGROUND

Florida law imposes few, yet concrete, qualifications to become a registered voter. Provided a proposed elector has not been adjudicated mentally incapacitated or convicted of a felony and has not had their right to vote restored, *see* § 97.041(2), a person may become a registered voter if that person: (i) is at least 18 years of age; (ii) is a citizen of the United States; (iii) is a legal resident of the State of Florida; and (iv) is a legal resident of the county in which that person seeks to be registered, *see* art. VI, §§ 2, 4, Fla. Const. (discussing qualifications and disqualifications of electors, respectively). A person who is not registered may not vote. § 97.041(3).

Despite these clearly defined eligibility requirements, Subsection 6 prohibits the registration of otherwise eligible voters if the Secretary of State for the State of Florida (the “State”) is unable to match or verify the driver’s license number or Social Security digits on the voters’ registration applications against records maintained by certain state and federal agencies. As described more fully in the Complaint and PI Motion, Subsection 6 establishes an error-filled process, beginning with a notoriously unreliable procedure for “matching” information contained in multiple state and federal databases. This process operates as an artificial and improper barrier to registration and voting that has already disenfranchised thousands of eligible Florida voters and will disenfranchise thousands more during the 2008 election cycle. If not enjoined, enforcement of Subsection 6 will bar potentially tens of thousands of eligible voters from Florida’s registration rolls; many of these rejected applicants will be the result of *the State’s* own data entry errors, typographical errors, and ministerial mistakes, not to mention spelling

changes, imperfect handwriting, computer glitches, and other factors that are unrelated to a voters' actual eligibility as established by long-standing Florida law.¹

As alleged in the Complaint and as will ultimately be demonstrated in these proceedings seeking a preliminary injunction, Subsection 6: (i) violates and is preempted by the Help America Vote Act of 2002; (ii) violates and is preempted by that section of the Voting Rights Act which provides that no person shall be denied the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election," 42 U.S.C. § 1971(a)(2)(B); and (iii) violates voters' rights protected by the First and Fourteenth Amendments to the United States Constitution.

Plaintiffs in this action are (1) organizations whose members include eligible but unregistered Florida voters who will attempt to register to vote prior to the registration deadline for the January 29, 2008 presidential preference primary election, the August 26, 2008 federal primary election, or the November 4, 2008 federal general election, but will be excluded from the official list of registered voters and, therefore, will be unable to cast a ballot that will be counted; and (2) organizations that seek to register voters and to reduce barriers to voter registration in Florida, especially for low-income voters or voters from certain ethnic communities, whose resources will be diverted and whose missions will be frustrated by Subsection 6. Plaintiffs seek a declaratory judgment, a preliminary injunction and a permanent injunction that will take effect by December 31, 2007 (the

¹ In 2006 alone, Subsection 6 caused the State to unduly delay or deny the applications of close to 20,000 voters — all of whom submitted forms before the voter registration deadline — as a result of problems with the "matching" process.

registration deadline for the upcoming presidential preference primary election) prohibiting the Secretary of State from implementing Subsection 6, and directing that — as in 2004 and before — supervisors be allowed to accept otherwise eligible applicants as registered even if an administrative number on a registration form cannot be verified.

LEGAL ARGUMENT

This Court has broad discretion to manage the timing of discovery, especially where a request for a preliminary injunction makes it infeasible to wait for the Rule 26(f) conference to serve discovery requests. *See Integra Bank N.A. v. Trans Continental Airlines, Inc.*, 2007 U.S. Dist. LEXIS 7781, *7 (M.D. Fl. Feb. 2, 2007) (the Federal Rules of Civil Procedure “expressly provide that a Court may shorten the time for a party to provide discovery”); *see also* Fed.R. Civ.P. 26(d) (permitting deviation from normal rule when “authorized . . . by order”); *id.*, Advisory Committee Notes (“This subdivision is revised to provide that formal discovery . . . not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized . . . by . . . order This will be appropriate in some cases, such as those involving requests for a preliminary injunction”); Fed.R. Civ.P. 30(a)(2)(C), 33(a), 33(b)(3), and 34(b).

Expedited discovery is particularly appropriate in the preliminary injunction context, *see, e.g., Fimab-Finaziaria Maglificio Biellese Fratelli Fila S.p.A. et al. v. Helio Import/Export, Inc., et al.*, 601 F.Supp. 1, 3 (S.D. Fla. 1983) (“*Fimab*”); *Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841 (D.D.C. 1996), in part because such discovery “better enable[s] the court to judge the parties’ interests and respective chances for success on the merits.” *Educata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn.) (granting expedited discovery), *aff’d in part and appeal*

dismissed in part, 746 F.2d 429 (8th Cir. 1984). Motions for expedited discovery are appropriate where the movant demonstrates a need to obtain inspection of documents in a shortened time period. *See Integra Bank N.A.*, 2007 U.S. Dist. LEXIS 2007 at *7-8. Here, the need for expedited discovery is apparent: absent expedited proceedings, Plaintiffs and their members will suffer irreparable harm. *See Fimab*, 601 F. Supp. at 3.

Moreover, both parties, and the public, share a strong interest in conducting orderly primary and general elections next year. As reflected in Plaintiffs' Interrogatories and Requests for Documents, attached hereto as Exhibits A & B, respectively, Plaintiffs have narrowed their discovery requests to those limited issues on which Plaintiffs have been unable to gain sufficient information through public record requests that they have served on Defendant, and various county election officials, in preparation for this lawsuit. Plaintiffs seek to take fewer depositions than they are entitled under the federal and local rules, and will carefully target those depositions to minimize the burdens in time and effort. Simply put, Plaintiffs do not seek overly broad or burdensome discovery: they seek only the discovery that is necessary for them to demonstrate to the Court that they have a likelihood of success on the merits of their claims, and that the public interest weighs heavily in favor of enjoining Subsection 6.²

In short, because application of the ordinary discovery timetable in the context of impending elections will cause undue and irremediable prejudice to Plaintiffs, the Court

² Plaintiffs are aware that some of the discovery they are likely to obtain from the Secretary of State will include private information and are willing to enter into an appropriate stipulation or agreement to ensure that that information is handled confidentially.

should issue an order directing expedited discovery and hearing of the PI Motion in the form proposed by Plaintiffs.

CONCLUSION

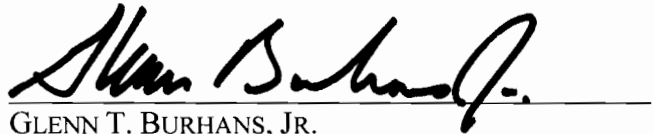
For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion and set an expedited discovery and hearing schedule in the form of the proposed order attached as Exhibit C. In the alternative, Plaintiffs are available at the Court's convenience for a status conference to set such a schedule.

N.D. FLA. LOC. R. 7.1 CERTIFICATION

Pursuant to N.D. Fla. Loc. R. 7.1(B), undersigned counsel states that this motion has been filed contemporaneously with service of process and the Complaint in this matter and that, because counsel for defense has not made an appearance, undersigned counsel has not been able to resolve by agreement the issues raised in the motion.

Dated: September 17, 2007.

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* *Pro Hac Vice* application to be filed

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the foregoing *Motion for Expedited Discovery and Entry of Scheduling Order* was served via HAND DELIVERY this 17th of September , 2007 upon the following:

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