

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA

**BILL NELSON, ALCEE L. HASTINGS,  
CORRINE BROWN, JANET B. TAYLOR,  
EUGENE A. POOLE, SAM OSER,  
CARLOS DE ZAYAS and LUIS FERNANDEZ,**

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*Plaintiffs,*

v.

Case No. 4:07CV427 RH/WCS

**HOWARD DEAN, THE DEMOCRATIC  
NATIONAL COMMITTEE, and KURT S.  
BROWNING** in his official capacity as  
Secretary of State of the State of Florida,

*Defendants.*

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**SECRETARY OF STATE'S MOTION TO DISMISS  
AND INCORPORATED MEMORANDUM OF LAW**

Defendant Kurt S. Browning, Secretary of State of Florida (“Secretary”), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves to dismiss the Plaintiffs’ Amended Complaint because the claims against him are barred by the Eleventh Amendment to the United States Constitution and because the claims fail to state a basis for holding the state responsible for the conduct of a private party.

**The Allegations**

In this action, Plaintiffs challenge the decision by the Democratic National Committee (“DNC”) to forfeit all of Florida’s delegates to the Democratic National Convention. According to the Plaintiffs’ Amended Complaint, DNC rules allow only four states, not including Florida, to conduct presidential primaries or caucuses in January, 2008. (Amended Complaint ¶ 34). The DNC’s rules specify that any state which fails to comply with this schedule shall forfeit 50% of its

delegates to the national convention. (*Id.*) After Governor Crist signed into law a bill scheduling Florida's presidential primary for the last Tuesday in January, 2008, "the DNC . . . [chose] to punish the completely innocent Democratic electorate of Florida by stripping away not only 50% of Florida's delegation—the sanction explicitly designated for offending the DNC's calendar by scheduling a January 29th primary – but all 210 of Florida's delegates to the Democratic National Convention." (*Id.* ¶ 35). Plaintiffs allege that the DNC's plan to forfeit Florida's delegates to the national convention violates the Equal Protection and Due Process clauses of the United States Constitution. (*Id.* pp. 24-28). Plaintiffs further contend that the DNC's forfeiture of Florida's delegates to the national convention, as well as a related ban on campaigning in Florida, violate the Voting Rights Act. (*Id.* pp. 28-31).

Significantly, Plaintiffs do not allege that the Secretary has had or will have any involvement in the forfeiture of the delegates to the Democratic National Convention. The following are the only factual allegations regarding the Secretary:

- The Secretary is responsible for the enforcement of state election laws and the implementation and oversight of state-wide elections, including the Florida presidential primary. He also is responsible for compiling and reporting vote totals for state-wide elections in Florida. He is named as a Defendant in this action solely in his official capacity and because he is a proper party to this action in light of the relief being requested. The Office of the Secretary of State is headquartered in Tallahassee, Leon County, Florida. (*Id.* ¶ 13).
- The Democratic Party submits to the Secretary a list of candidates to be placed on the Presidential preference primary ballot or candidates entitled to have delegates appear on such ballot. The Secretary submits this list to the State of Florida Presidential Candidate Selection Committee. The Presidential Candidate Selection Committee, of which the Secretary is a member, meets and announces the names of candidates who shall appear on the ballot. (*Id.* ¶ 17, citing Fla. Stat. § 103.101 (2007)).
- The names of candidates or delegates appearing on the ballot shall be listed as directed by the Secretary. (*Id.* ¶ 18, citing Fla. Stat. § 103.101 (2007)).
- The Secretary, with others, will spend time and significant taxpayer funds to conduct a primary election. (*Id.* ¶ 20).

- The Secretary continues with efforts to conduct a Presidential preference primary on January 29, 2008, even knowing that such action will disenfranchise several million Democrats and expend more than \$18 million of taxpayers' money for what will be, in substance, a Republicans-only primary election. (*Id.* ¶ 41).
  - The Secretary intends to conduct a primary election on January 29, 2008 for which Democratic candidates will not be campaigning and Democratic voting will be futile. (*Id.* ¶ 59).
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### Argument

The court may dismiss a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure “when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action.” *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). Dismissal is appropriate as to the Secretary in this case because (1) he is entitled to Eleventh Amendment Immunity, and (2) Plaintiffs have failed to state a claim upon which relief can be granted as to the Secretary because Plaintiffs have failed to sufficiently plead that the state should liable for the actions of the DNC.

#### 1. Eleventh Amendment Immunity

The Eleventh Amendment prohibits private citizens from bringing suit against a state in federal court. U.S. Const. amend. XI; *e.g.*, *Hutto v. Finney*, 437 U.S. 678, 700 (1978). The Eleventh Amendment similarly prohibits suits against state officials where the state is the real party in interest. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-102 (1984) (a suit against a state official that is in fact a suit against a state is barred regardless of whether it seeks damages or injunctive relief).

A limited exception to this prohibition exists when a state official is sued for prospective declaratory or injunctive relief to end a continuing violation of federal law. *Ex parte Young*, 209 U.S. 123 (1908); *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); *Summit Medical Assocs. v. Pryor*,

180 F.3d 1326, 1336-37 (11th Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000). The *Ex parte Young* exception rests on the principle that a sovereign state cannot commit an unconstitutional act; therefore, if a state officer is acting unconstitutionally, he cannot be acting for the sovereign state and is not entitled to Eleventh Amendment protection. *E.g.*, *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Summit Medical Assocs.*, 180 F.3d at 1336-37.

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Importantly, however, the *Ex parte Young* exception applies only when the named state officer is connected with the enforcement of the act alleged to be unconstitutional. The Supreme Court explained in that case that for a state officer to be a proper defendant in a suit seeking to enjoin enforcement of an unconstitutional act, “it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.” 209 U.S. at 157; *see also Fitts v. McGhee*, 172 U.S. 516, 529-30 (1899) (because neither state officer named held any “special relation” to the particular statute alleged to be unconstitutional, claim was barred by Eleventh Amendment immunity). Therefore, “[o]nly if a state officer has the authority to enforce an unconstitutional act in the name of the state can the Supremacy Clause be invoked to strip the officer of his official or representative character and subject him to the individual consequences of his conduct.” *Summit Medical Assocs.*, 180 F.3d at 1341; *see also Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998); *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc) (“[T]he necessary fiction of *Young* requires that the defendant state official . . . at least have the ability to act. . . . Without at least the ability to commit the unconstitutional act by the official defendant, the fiction cannot be sustained. . . . Indeed, if there is no act, or potential act, of the state official to enjoin, an injunction would be utterly meaningless.”) (citations omitted); *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1342-43 (Fed. Cir. 2006) (“[The *Ex parte Young*

exception] cannot be applied to any random state official. . . . A nexus between the violation of federal law and the individual accused of violating that law requires more than simply a broad general obligation to prevent a violation.”).

In this case, Plaintiffs’ do not challenge the constitutionality of a state statute; rather they challenge the decision by a political party to carry out its rules regarding allocation of delegates to a national political convention. The Secretary takes no position on the merits of Plaintiffs’ challenge to the DNC’s actions, but simply asserts that those actions have no connection to him. Plaintiffs do not contend that the Secretary has any role in carrying out the DNC’s decision to disallow Florida’s delegates to the Democratic National Convention;<sup>1</sup> indeed, Florida law conclusively refutes any such contention. Florida law expressly leaves to the political parties the method of selecting and allocating party delegates. Fla. Stat. § 103.101(1) (each political party shall elect one person to be the candidate for nomination for President, *or select delegates to the national nominating convention, as provided by party rule*) (emphasis added); § 103.101(4) (if party rule requires delegates’ names to be printed on the ballot, the ballot may reflect the presidential candidate to whom the delegate is pledged); § 103.101(5) (state executive committee of each party shall determine the number, and establish procedures to be followed in the selection, of delegates and delegate alternates from among each candidate’s supporters); § 103.101(7) (all delegates shall be allocated as provided by party rule).

Florida law clearly does not confer upon the Secretary any enforcement authority over the DNC’s decision to forfeit Florida’s delegates, and Plaintiffs Amended Complaint does not allege

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<sup>1</sup>Although Plaintiffs broadly allege that the defendants’ functions are “intertwined,” “close,” and “interdependent,” (e.g., ¶¶ 15, 16), the Court need not accept these conclusory allegations as true for purposes of a motion to dismiss. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (“conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal”), *cert. denied*, 540 U.S. 872 (2003).

otherwise. Although the Secretary does not dispute that he is responsible for “the enforcement of state election laws and the implementation and oversight of state-wide elections, including the Florida presidential primary” and for “compiling and reporting vote totals for state-wide elections in Florida” (Amended Complaint ¶ 13), these duties are not challenged in this suit. General oversight of election laws does not constitute a sufficient “connection” to the forfeiture of delegates so as to fit within the *Ex parte Young* exception to the Eleventh Amendment.

Furthermore, although Plaintiffs assert the Secretary is a proper defendant “in light of the relief being requested” (Amended Complaint ¶ 8), no relief is requested against the Secretary. Plaintiffs’ prayers for relief for the constitutional claims seek “judgment declaring that the forfeiture of Florida’s delegates to the Democratic National Convention is unconstitutional and violates 42 U.S.C. § 1983 . . . [and] such injunctive relief, preliminarily and permanently, as is appropriate to remedy the violations of Plaintiffs’ constitutional rights.” (*Id.* pp. 22, 23, 25). Plaintiffs seek similarly ambiguous relief on their Voting Rights Act Claim. (*Id.* p. 28). These vague assertions do not warrant suspension of the Eleventh Amendment. There is no act or potential act of the Secretary to enjoin that would confer Plaintiffs the relief they seek; i.e., restoration of the delegates. Thus, an injunction against the Secretary would be “utterly meaningless.” *Okpalobi*, 244 F.3d at 421. Accordingly, the Amended Complaint against the Secretary should be dismissed.

## 2. Nexus/Joint Action

Additionally, Plaintiffs’ Amended Complaint should be dismissed because the allegations fail to state a basis for holding the state responsible for a private party’s actions. Where a lawsuit seeks to hold state officials liable for the actions of private parties, the plaintiff must show that “there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.” *Blum v.*

*Yaretsky*, 457 U.S. 991, 1004 (1982); *Patrick v. Floyd Med. Ctr.*, 201 F.3d 1313, 1315 (11th Cir. 2000) (nexus/joint action is found where the State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

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Furthermore, a State can be held responsible for a private decision only when it has “exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *Blum*, 457 U.S. at 1004. Thus, where the challenged decision is made by a private party, and there is no suggestion that the decision was influenced by the State, a suit against the state will not stand. *Id.* at 1006.

As set forth above with respect to the Eleventh Amendment argument, Plaintiffs have not alleged that the Secretary has participated or will participate in the DNC’s decision to forfeit Florida’s delegates. Nor have Plaintiffs alleged that the Secretary has exercised “coercive power” related to the delegates or provided any “encouragement” for this decision, much less “significant encouragement.” Although Plaintiffs rely upon the Secretary’s general responsibilities surrounding the Presidential primary election, this general responsibility is insufficient:

If a thread of commonality is to be drawn from the various forms in which [S]tate action can manifest itself through the conduct of private parties, it is that attribution is not fair when bottomed solely on a generalized relation with the [S]tate. Rather, private conduct is fairly attributable only when the [S]tate has had some affirmative role, albeit one of encouragement short of compulsion, *in the particular conduct underlying a claimant’s civil right’s grievance.*

*Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001) (emphasis in original) (quoting *NBC, Inc. v. Commc’ns Workers of Am.*, 860 F.2d 1022, 1025 n.4 (11th Cir.1988)). Accordingly, Plaintiffs have failed to state a claim upon which relief can be granted as to the Secretary, and the Amended Complaint should be dismissed.

WHEREFORE, the Secretary respectfully requests that this Court enter an order dismissing Plaintiffs' Amended Complaint, with prejudice, and grant such further relief as the Court deems appropriate.

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Respectfully submitted,

/s/ Lynn C. Hearn

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing was served via the Court's CM/ECF electronic filing system this day, November 1, 2007, to the following:

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