

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,**

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.

**SECRETARY OF STATE'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Kurt S. Browning, Secretary of State of Florida ("Secretary"), pursuant to Rules 7.1(C) and 56.1(B), N.D. Fla. Loc. R., submits this response to Plaintiffs' Motion for Partial Summary Judgment (Dkt. 10).

Plaintiffs' motion primarily argues that Defendants Dean and the Democratic National Committee ("DNC") acted under "color of law" in applying DNC rules to exclude Florida's delegates to the Democratic National Convention. The Secretary takes no position on the merits of this argument. Plaintiffs' motion makes no express argument in support of summary judgment against the Secretary. Furthermore, Plaintiffs acknowledge in their response to the Secretary's Motion to Dismiss that the Secretary had a "limited" role in the actions leading to the lawsuit and suggest that the Secretary is named as a defendant purely for purposes of prospective relief. However, because Plaintiffs' Motion for Partial Summary Judgment does not expressly

exclude the Secretary from the scope of its request for a declaration that the actions of “Defendants” violate Equal Protection and Due Process (Dkt. 10 at 25), in an abundance of caution, the Secretary responds to Plaintiffs’ Motion for Partial Summary Judgment.

The Secretary maintains that Plaintiffs are not entitled to summary judgment against him for the reasons set forth in the Secretary’s Motion to Dismiss (Dkt. 9), which is incorporated herein by reference. Specifically, the Secretary submits he is entitled to Eleventh Amendment immunity and that Plaintiffs have failed to state a basis for holding the Secretary responsible for the DNC’s actions. The Secretary makes just three additional points in this response.

First, it must be emphasized that neither the summary judgment motion nor the underlying amended complaint seek prospective declaratory or injunctive relief against the Secretary so as to fall within the *Ex parte Young* exception to the Eleventh Amendment. The summary judgment motion asks the Court to declare that Defendants’ actions violate the Equal Protection and Due Process Clauses, and requests the Court to “schedule any appropriate further proceedings concerning remedies for these violations.” (Dkt. 10 at 25). The amended complaint as to the Equal Protection and Due Process claims similarly requests a judgment declaring that the forfeiture of the delegates to the national convention is unconstitutional, and asks the Court to enter “such injunctive relief, preliminarily and permanently, as is appropriate to remedy the violations of Plaintiffs’ constitutional rights.” (Dkt. 5 at 24, 25). This case is thus wholly unlike the case relied upon by Plaintiffs, *Papasan v. Allain*, 478 U.S. 265 (1986) (Dkt. 15 at 2), in which the Secretary of State was alleged to have “deliberately, intentionally, purposefully, and with design” denied plaintiffs’ equal protection, and the Court ruled that the Secretary’s action could be enjoined under *Ex parte Young* “[t]o the extent that the respondent Secretary of State is acting in a manner that violates the Equal Protection Clause.” *Id.* at 281-82 and 282 n.14.

Second, to the extent Plaintiffs contend they are entitled to declaratory relief against the Secretary because he “might” be needed as a party for subsequent equitable relief fashioned by the Court, such contention must fail. It would be an extraordinary reading of the *Ex parte Young* exception to the Eleventh Amendment if a suit could be maintained against a state official whose conduct is not implicated and against whom relief is not sought, solely on the theory that a court “might” at some point order prospective equitable relief against the state official. Furthermore, it is unclear that the theoretical relief identified by Plaintiffs—moving the primary date—would be an appropriate exercise of the Court’s equitable powers absent a finding that Florida’s act of setting the primary date in January, 2008 was itself unconstitutional. *LaMarca v. Turner*, 995 F.2d 1526, 1542-43 (11th Cir. 1993); *Milliken v. Bradley*, 433 U.S. 267, 281-83 (1977) (federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation). Accordingly, summary judgment is not warranted as to the Secretary on a hypothetical theory not expressly sought in either the complaint or motion for summary judgment.

Third, to the extent Plaintiffs implicitly suggest they are entitled to summary judgment against the Secretary based upon their theory that the *other* Defendants—Dean and the DNC—engaged in “state action,” this argument must also fail. Again, the Secretary takes no position as to whether the action by Defendants Dean and the DNC constitutes state action. However, even if the Court finds state action by Defendants Dean and the DNC, the Secretary is aware of no precedent holding that this finding would automatically render him an appropriate party in the absence of any allegation that he participated in such action or is necessary to afford the relief sought by the plaintiffs. Indeed, the cases cited by both parties in this case demonstrate that

courts have often adjudicated state action questions against private actors in the absence of a state defendant. *See, e.g., Wymbs v. Republican State Executive Committee of Fla.*, 719 F.2d 1072 (11th Cir. 1983); *Ripon Society, Inc. v. Nat'l Republican Party*, 525 F.2d 548 (D.C. Cir. 1975). Therefore, any suggestion that a finding of "state action" against Defendants Dean and the DNC automatically renders the Secretary an appropriate party in this case must be rejected.

Conclusion

For the reasons set forth in this response and in the Secretary's Motion to Dismiss (Dkt. 9), the Secretary respectfully requests that this Court enter an order denying Plaintiffs' Motion for Partial Summary Judgment as to the Secretary and dismissing Plaintiffs' Amended Complaint as to the Secretary, with prejudice, and grant such further relief as the Court deems appropriate.

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 19, 2007, to the following:

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