

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,

vs.

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

Defendants.

Case No. 4:07cv427-RH/WCS

**PLAINTIFFS' RESPONSE TO DEFENDANT
BROWNING'S MOTION TO DISMISS**

Plaintiffs, BILL NELSON, ALCEE L. HASTINGS, CORRINE BROWN, JANET B. TAYLOR, EUGENE A. POOLE, SAM OSER, CARLOS DE ZAYAS, and LUIS FERNANDEZ, respond to the Motion to Dismiss filed by Defendant Browning, the Florida Secretary of State, in his official capacity.

Plaintiffs acknowledge the limited role of the Secretary of State in the actions leading up to this lawsuit. Plaintiffs also recognize that the Eleventh Amendment to the United States Constitution bars suits for damages, but it does not preclude seeking declaratory and injunctive relief to end continuing violations of federal law. Therefore, Plaintiffs' claims come within the prospective compliance exception to the Eleventh

Amendment, recognized by Defendant Browning, which allows injunctive and declaratory relief to prevent ongoing constitutional violations. For example, in *Papasan v. Allain*, 478 U.S. 265, 281-82 & n.15 (1986), the Supreme Court held that the Mississippi Secretary of State was a proper party to an equal protection claim challenging the disparate distribution of land grant revenue among school districts by virtue of his statutory responsibility to “supervise” the administration of local schools.

In requesting dismissal, Browning makes the same argument rejected in *Papasan* that no state official could grant the relief requested: “there is no act or potential act of the Secretary to enjoin that would confer Plaintiffs the relief they seek.” Motion to Dismiss at 6. Browning’s argument fails, however, to recognize the breadth of the Court’s powers to remedy a constitutional violation once found. “Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.” *Swann v. Charlotte-Mecklenburg Board of Education, et al.*, 402 U.S. 1, 15 (1971). In applying equitable principles, federal courts focus on three factors: 1) the nature and scope of the constitutional violation; 2) placing the victims of the unconstitutional conduct in the position they would have been in the absence of such conduct; and 3) the interests of state and local authorities in managing their own affairs. *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977). The Supreme Court has thus instructed that the federal judiciary, in using its equitable authority, should fashion a remedy that is “reasonable, feasible and workable.” *Swann v. Charlotte-Mecklenburg Board of Education, et al.*, 402 U.S. at 31. In discussing the breadth of these remedial powers, the Court emphasized that “words

are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern...” *Id.*

Federal courts have exercised their equitable powers, finding creative and, at times, dramatic remedies once constitutional violations have been identified. For example, they have desegregated faculty and staff according to mathematical criteria. *See e.g. United States v. Montgomery County Bd. of Ed.*, 395 U.S. 225 (1969). They also have ordered school busing and set racial targets for school populations. *Swann v. Charlotte-Mecklenburg Board of Education, et al.*, 402 U.S. 1, 15 (1971). Federal Courts have used injunctions to reform prisons. *See Hoptowit v. Ray*, 682 F.2d 1237, 1265 (9th Cir. 1982) *citing Hutto v. Finney*, 437 U.S. 678, 687 n. 9 (1978); *Milliken v. Bradley*, 433 U.S. 267, 281-283 (1977). Equitable remedies have also been used to improve mental hospitals. *Thomas S. v. Flaherty*, 902 F.2d 250 (4th Cir.), *cert. denied* 498 U.S. 951 (1990). They have also been used to remedy housing violations. *Baltimore Neighborhoods, Inc. v. Lob. Inc.*, 92 F.Supp.2d 456 (D. Md. 2000). Clearly, there is ample precedent giving this Court the wide-ranging powers to fashion the appropriate remedy to cure any constitutional violation it identifies.

In this case, Plaintiffs are initially asking for declaratory relief, which, if granted, would afford both the DNC and Browning a brief opportunity to address how best to remedy the violation. In that scenario, as Browning correctly points out, one obvious cure would be for the DNC to allocate delegates in accordance with the results of the Florida primary. Just as plainly, though, if declaratory relief were ordered, the Court may take another view of remedy – the DNC and Dean suggest moving the election date - in

which case action by the Secretary of State might be needed to satisfy the constitutional requirements.

While the gist of Browning's motion is that the DNC, and not the Florida Secretary of State, is the responsible party here, to the extent that Browning's motion at 6-7 suggests there is no state action in this case, that contention would fail. As described at length in Plaintiffs' pending motion for partial summary judgment there is plainly state action in this case, or, put another way, it is evident that the DNC and Dean acted "under color of state law." See Plaintiffs' motion, 9-17. Thus, as the Eleventh Circuit explained these principles:

[A]n entity may, however, become "so impregnated with the governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1996). When, as here, this state empowers its officials to exclude presidential aspirants from the Presidential primary ballot, the power exercised is directly attributable to the state. *Smith v. Allwright*, 321 US 649, 664- 65 (1944).

Duke v. Smith, 13 F.3d 388 (11th Cir. 1994).

As another leading case emphasized, "The Equal Protection Clause, as we have indicated above, embraces within its protection proceedings intimately connected with the progression of the elective process." *Bode v. Democratic National Party*, 452 F.2d 1302, 1306 (D.C. Cir. 1971); *accord: Georgia v. National Democratic Party*, 447 F.2d 1271, 1275-76 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971) ("every step in the nominating process" is state action insofar as "those activities touch upon the machinery whereby candidates are nominated by the parties to seek election to local or national

office”). The ample record evidence in this case as submitted in connection with the Plaintiffs’ motion for partial summary judgment shows that the actions of the DNC are intertwined with the actions of the State in relation to the primary. Thus, Browning does not correctly describe Plaintiffs’ position in stating that Plaintiffs are attempting to “hold[] the state responsible for [the DNC’s] actions.” Motion at 6. Instead, Plaintiffs contend that the actions of the DNC are “state action” as they relate to its state-sanctioned and state-mandated role in the State’s primary election machinery, under numerous precedents, including *Duke v. Smith*, supra.

We think these provisions show that **the state**, through the managers it requires, **collaborates in the conduct of the primary and puts its power behind the rules of the party**. It adopts the primary as part of the public election machinery. **The exclusions of voters made by the party by the primary rules become exclusions enforced by the state.**

Gray v. Sanders, 372 U.S. 368, 374 (1963) (emphasis added).

In this case, the Court’s decree, if necessary, might create a sufficient remedy as Browning suggests solely by an order directed to the DNC. On the other hand, if the Court takes a different view of the case and its decree includes the Florida Secretary of State, there would be no violation of the Eleventh Amendment.

Thus, because there may well be a remedy directed to Defendant Browning for the constitutional violation Plaintiffs allege in this case, Browning’s motion to dismiss should be denied.¹

¹ For obvious reasons, the results in non-election cases such as *Blum v. Yaretsky*, 457 U.S. 991 (1983)(addressing the actions of private nursing homes) are not pertinent to the issues in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 16, 2007, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the Mailing Information for Case No.: 4:07cv427-RH/WCS. Counsel of record currently identified on the Mailing Information list to receive e-mail notices for this case are served via Notices of Electronic Filing generated by CM/ECF. Counsel of record who are not on the Mailing Information list to receive e-mail notices for this case have been served via U.S. Mail.

By: /s/ Kendall Coffey