

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA  
CIVIL DIVISION

CHRISTINE JENNINGS, a nominee of the  
Democratic Party for Representative in Congress  
from the State of Florida's Thirteenth Congressional  
District,

CASE NO. 2006 CA 2973

Plaintiff,

v.

ELECTION CANVASSING COMMISSION  
OF THE STATE OF FLORIDA, et. al.,

Defendants.

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ELLEN FEDDER, et. al.,

CASE NO. 2006 CA 2996  
(Consolidated)

Plaintiffs,

v.

TOM GALLAGHER, et. al.,

Defendants.

\_\_\_\_\_ /

**RESPONSE OF VOTER PLAINTIFFS TO PLAINTIFF CHRISTINE JENNINGS'S**

**MOTION TO STAY PROCEEDINGS**

Plaintiff Christine Jennings ("Jennings") has moved to stay proceedings in her case  
contesting the November 2006 Congressional election. Plaintiffs' Ellen Fedder, et al.  
(collectively, "Voter Plaintiffs") case contesting that same election has been consolidated before

this court with Jennings's case. To the extent that a stay in Jennings's case would necessitate a stay in Voter Plaintiffs' consolidated case, Voter Plaintiffs oppose such a stay.

First, it must be noted that not one party in the Voter Plaintiffs' case (Fedder, et al. v. Gallagher, et al., Case No. 2006 CA 002996) has requested a stay, and indeed, all oppose such a stay. If a stay in Plaintiff Jennings's case is to be granted, it would be appropriate to de-consolidate the cases, and permit Voter Plaintiffs' case to proceed, as all parties to that case desire. Should this Court determine that severance is proper, then the Voter Plaintiffs respectfully suggest that referral to the judge originally assigned to their case would be appropriate.

The Voter Plaintiffs' case is not the same as Jennings's case and should not be carried with it *carte blanche*. Voter Plaintiffs are not party to Jennings' election contest in Congress. In fact, the Federal Contested Elections Act differs from Florida law in that it only provides for proceedings brought by unsuccessful candidates, not disenfranchised voters. 2 U.S.C. §§381 *et seq.* The Voter Plaintiffs' case retained its independent status even after consolidation with Jennings's case. *See, e.g., Wagner v. Nova Univ., Inc.*, 397 So. 2d 375, 377 (Fla. 4<sup>th</sup> DCA 1981). In *Wagner*, the court held that each suit in consolidated proceedings retains its independent status and that the trial court cannot take action with respect to one case that would prejudice the rights of the parties in the other. *Id.* The appeals court reversed a trial court's ruling transferring venue of both cases, when the transfer would prejudice the interests of a party to one of the cases. *Id.* It remanded and ordered the trial court to consider whether severance of the cases was proper. *Id.* Similarly, as no parties to Voter Plaintiffs' case have requested a stay, and since such a stay would prejudice all parties' interests in that case, and since this court is the *sole venue* available to Voter Plaintiffs, no stay in that case should be granted.

Even if this Court were to grant Jennings's motion, it should not allow that grant to cause any delay in the Voter Plaintiffs' case. Because stays of proceedings frustrate public policy favoring prompt resolution of cases, they are the exception rather than the rule under Florida law. This is particularly so when, as here, the Voter Plaintiffs have an express statutory right to expedited treatment. § 102.168(7), *Fla. Stat.* The case of *Neale v. Aycock*, 340 So. 2d 535 (Fla. 1<sup>st</sup> DCA 1977), is instructive. In *Neale*, the trial court granted a stay of proceedings until a related dispute in another forum was concluded. *Id.* at 536. The First District Court of Appeal reversed, finding an abuse of discretion. *Id.* The appeals court noted that when a party to the stayed action is not party to the now-dominant action, and cannot protect itself or pursue its interests in the other proceeding, "[i]t is manifestly unjust to require appellant to await the whims and delays" caused by the stay. *Id.*

The same is true here. The Voter Plaintiffs are not party to Jennings' election contest in Congress. Therefore, even if this Court were to stay the Jennings contest, that stay should in no way be allowed to interfere with the prompt resolution of the Voter Plaintiffs' independent contest.

Further, many of the defendants assert the state's strong interest in seeing that proper deference is paid to the rule of law as interpreted by the state courts. While it may be arguable the degree to which Congress will pay any deference to the judgment of the state's courts,<sup>1</sup> one thing that is not arguable is that Congress will only take final judgments of the state courts into account. However, we are not yet at the final judgment stage in these cases. This was one of the main reasons that Congress acted to begin its own investigation into the 18,000 disappeared votes in Sarasota County.

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<sup>1</sup> And we agree that the state has a legitimate interest in seeing that its final judgments are considered by Congress.

Indeed, Congress has made clear that they intend not only to investigate the loss of votes fully, but also to independently examine the source code, software, and voting machines at the center of the disenfranchisement. Contrary to the assertions of some defendants, the Congressional Task Force charged with the Florida-13 election contest voted at its public meeting to assign the nonpartisan Government Accountability Office (“GAO”) the responsibility of conducting an independent investigation, *including examination of the reliability of the machines and code*. Indeed, the Task Force unanimously voted to require GAO to submit “testing protocols” to the Task Force for approval.<sup>2</sup> Additionally, at least one member of the majority on the Task Force, Rep. Zoe Lofgren (D-CA), indicated that she expected that the investigation by GAO could be completed within 45 days.

While Congress intends to move forward to obtain an independent review -- one not conducted solely by one of the parties in these cases -- of the voting machines and software,<sup>3</sup> the Voter Plaintiffs agree with the defendants that the state has a strong interest in seeing its election contest laws applied by its courts. The Voter Plaintiffs again state their hope that a full, independent examination of the voting machines and software be ordered conducted under oversight of this court, as expeditiously as possible, so that Congress may give due deference to this court’s findings.

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<sup>2</sup> While it appears a transcript of the meeting is still not available, the press release issued by the House Committee on House Administration is located here -- [http://cha.house.gov/index.php?option=com\\_content&task=view&id=196&Itemid=40](http://cha.house.gov/index.php?option=com_content&task=view&id=196&Itemid=40). The release states in relevant part:

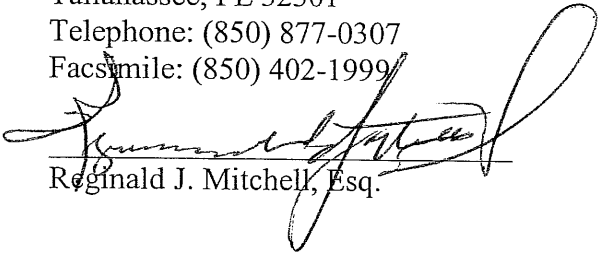
[T]he Government Accountability Office ... shall be requested to design and propose testing protocols to determine the reliability of the equipment used in the FL-13 election, taking into account recommendations by the contestant and contestee. The Task Force shall approve any testing protocols prior to execution by the GAO.

<sup>3</sup> The Chair of the Task Force, Rep. Charlie Gonzalez (D-TX), a former judge himself, indicated at the meeting that such an examination solely by one party does not satisfy the traditional notions of fairness that one expects from our adversarial litigation system.

For the above-stated reasons, Voter Plaintiffs respectfully oppose the motion to stay the consolidated cases, and in the alternative, support severing the cases to permit Voter Plaintiffs' case to proceed with all due diligence.

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