

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

DNC SERVICES CORPORATION /
DEMOCRATIC NATIONAL
COMMITTEE, DEMOCRATIC
EXECUTIVE COMMITTEE OF
FLORIDA, DSCC a/k/a DEMOCRATIC
SENATORIAL CAMPAIGN
COMMITTEE, and DCCC a/k/a
DEMOCRATIC CONGRESSIONAL
CAMPAIGN COMMITTEE,

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity
as Florida Secretary of State, *et al.*,

Defendant and Defendant-Intervenors.

Case No. 4:18-cv-520 (MW/MJF)

REPORT OF RULE 26 INITIAL CONFERENCE

Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure and this Court's January 16, 2019 Order (ECF No. 92), the following counsel of record conducted a Rule 26(f) meeting by telephone on February 14, 2019, and reconvened on February 27, 2019:

Counsel	Parties
Uzoma Nkwonta	Plaintiffs
Mohammad Jazil	Defendant
Edward Wenger	Defendant-Intervenor Attorney General of Florida

Helgi Walker Jason Torchinsky Andy Bardos	Defendant-Intervenor National Republican Senatorial Committee
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The parties hereby submit this joint report and proposed discovery plan concerning matters set forth in Federal Rule of Civil Procedure 26(f) and the Court's Order, all of which were addressed during the parties' telephone conference.

I. Magistrate Judge Jurisdiction

The parties have conferred regarding this issue.

II. Nature and Bases of Claims and Defenses

A. Plaintiffs' Claims

Plaintiffs' action challenges the constitutionality of Florida election laws that require election officials and/or canvassing boards to reject a validly cast vote-by-mail and provisional ballot upon determining that the signature on the voter's certificate does not match the signature on file with election authorities. Plaintiffs contend that this signature matching exercise is highly error prone, which is exacerbated by the fact that Florida has neither provided training in signature verification nor issued any uniform standards or guidance for individuals tasked with reviewing the signatures and determining whether a vote-by-mail or provisional ballot should be counted. The result is a standard-less, inconsistent, and unreliable mechanism for counting votes that results in the arbitrary rejection of validly cast ballots, and subjects voters to diverging signature-matching standards and practices depending on the county in which they reside.

Plaintiffs further contend that Florida's election laws fail to provide a meaningful opportunity for all voters to cure erroneous signature match determinations. For instance, voters who submit their vote-by-mail ballots between 5 p.m. on the day before Election Day and 7 p.m. on the day of the election are denied any opportunity to cure a signature mismatch, Fla. Stat. § 101.68(4), as are voters who cast provisional ballots, *see* Fla. Stat. § 101.048(2)(b)(1), and voters who are belatedly notified of the signature mismatch.

As a result, Plaintiffs allege that Florida's signature matching requirement imposes an undue burden on the right to vote under the First and Fourteenth Amendments to the U.S. Constitution; subjects voters (and their right to vote) to arbitrary and diverging standards depending on the county in which they reside in violation of the equal protection clause of the Fourteenth Amendment; and results in the arbitrary and erroneous deprivation of the right to vote in violation of the procedural due process clause of the Fourteenth Amendment. Plaintiffs further state that in addition to the above summary, the nature and bases of Plaintiffs' claims are detailed in Plaintiffs' First Amended Complaint (ECF No. 100).

The principal factual and legal issues in dispute are: (1) whether the signature match requirement imposes an undue burden on the right to vote that is not sufficiently justified by the state's interests, in violation of the First and Fourteenth Amendments; (2) whether the signature match process subjects voters to diverging

standards and practices employed by the counties in violation of the equal protection clause of the Fourteenth Amendment; (3) whether the signature match process in Florida is error prone and results in the erroneous deprivation of the right to vote; and (4) whether the signature match process, and the absence of an opportunity to cure for certain categories of voters, violates the procedural due process clause of the Fourteenth Amendment.

B. Secretary of State's Defenses

- i. The Plaintiffs fail to state a valid cause of action or claim for relief.
- ii. The Plaintiffs lack standing under Article III of the U.S. Constitution.
- iii. The Secretary asserts the defense of Eleventh Amendment immunity to all claims to which that defense applies.
- iv. The Secretary asserts the defense of laches to all claims to which that defense applies.
- v. The Secretary asserts the defense of statute of limitations to all claims to which that defense applies.
- vi. The Secretary asserts the defense of unclean hands to all claims to which that defense applies.

C. Attorney General of Florida's Defenses

Plaintiffs challenge Florida's signature-match requirement for vote-by-mail ("VBM") and provisional ballots. *See* §§ 101.048, 101.68, 101.6923, Fla. Stat. They allege that Florida's signature-match practices impose an unconstitutional burden on the right to vote; violate the Equal Protection Clause; and violate principles of procedural due process. Their claims focused on alleged disuniformity among the counties in administering the signature-match standard; they raise no claim premised on a lack of opportunity to cure signature mismatches. And these apparently facial claims are accompanied by a demand for facial relief: declaratory and injunctive relief preventing the State from enforcing its signature-match requirement.

The Attorney General believes that Plaintiffs' First Amended Complaint is subject to dismissal based on laches, res judicata, the statute of limitations, and lack of Article III standing. Regarding the Attorney General's laches and statute-of-limitations arguments, the Plaintiffs' earlier filings demonstrate that they were aware of alleged issues with Florida's signature-match procedures no later than 2012. Regarding the merits, the Attorney General believes that Florida's signature-match provisions are constitutional, for the reasons set out in its earlier briefing and by its codefendants. Additionally, Plaintiffs have cited no appellate precedent invalidating a signature-verification requirement. The only federal appellate precedent addressing the issue—*Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008)—

unanimously upheld a signature-match requirement against a similar equal-protection and unconstitutional-burden challenge; in so doing, it also rejected a similar county-by-county variation argument. Indeed, by analyzing the signature of each ballot and by affording some cure period for VBM mismatches, Florida has afforded more procedural protections than the Oregon scheme upheld in *Lemons*, which employed a sample-and-extrapolate method for rejecting ballots and provided no notice of rejection.

D. National Republican Senatorial Committee's Defenses

Florida's signature-match requirements are constitutional. States have a compelling interest in preventing fraud and maintaining public confidence in elections. The signature-match requirements serve both interests by verifying the identity of voters who cast their ballots by mail or provisional ballot. Moreover, Florida law provides numerous safeguards to ensure that voters understand the process and have a fair opportunity to cure mismatch errors. And Florida law does not violate the Equal Protection Clause by allowing local authorities to carry out the signature-match requirements. The statutory cure deadlines are not unconstitutional either. Requiring cures to occur before 5 p.m. the day before an election is a reasonable way to avoid overburdening election officials on Election Day and the days immediately afterwards.

Florida's signature-match laws do not violate the First or Fourteenth Amendments, so Plaintiffs are not entitled to any relief. Plaintiffs' claims are also barred by the doctrines of res judicata, collateral estoppel, estoppel, and laches. The NRSC respectfully reserves the right to raise additional defenses based upon legal theories, facts, or circumstances that may be discovered during this litigation.

The principal factual and legal issues in dispute are: (1) whether the signature-match requirements are a permissible exercise of Florida's authority to regulate its elections; (2) whether Florida law violates the Equal Protection Clause by allowing local governments to manage elections; and (3) whether signature matching violates the Due Process Clause.

III. Settlement and Alternative Dispute Resolution

A. Settlement

The parties agree that settlement is unlikely at this time.

B. Alternative Dispute Resolution

The parties agree that mediation (or other forms of alternative dispute resolution) is not likely to be helpful in settlement until the Court decides the merits of Plaintiffs' claims.

IV. Proposed Schedule

The parties have agreed to the following proposed schedule:

Initial Disclosures:	March 14, 2019
Amended Pleadings and Joinder of Parties:	March 28, 2019
Deadline for Discovery Requests	May 15, 2019
Disclosure of Expert Reports Plaintiffs: Defendant and Intervenor: Plaintiffs' Rebuttal:	April 30, 2019 May 30, 2019 June 13, 2019
Motions to Compel	June 28, 2019
Discovery Deadline:	July 29, 2019
Dispositive Motions:	August 19, 2019
Daubert/other Motions:	August 26, 2019
Meeting to Prepare Joint Final Pretrial Statement:	August 26, 2019
Final Pretrial Statement:	September 3, 2019
Objections under Federal Rule of Civil Procedure 26(a)(3):	September 10, 2019
Final Pretrial Conference:	September 17, 2019
Trial Term Begins:	October 1, 2019

Estimated Length of Trial:	3 – 6 days
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V. Discovery Plan

During the parties' Rule 26(f) Conference, Defendant-Intervenor NRSC made an informal proposal to Plaintiffs that the parties consider moving to convert the Court's November 15, 2018 Preliminary Injunction Order into a permanent injunction, with all parties preserving their right to appeal to the Eleventh Circuit. Although Plaintiffs have indicated that they oppose this idea, the NRSC remains interested in exploring the possibility of converting the Court's Order into a final judgment because that could provide an efficient resolution of the litigation in this Court and potentially avoid unnecessary discovery.

Plaintiffs oppose Defendant and Defendant-Intervenors' proposal to convert the Court's November 15, 2018 Preliminary Injunction Order into a permanent injunction. The Order, as described by the Court, provided "limited relief for a limited number of affected voters," and expired after the termination of the additional cure period provided by the Court (November 17, 2018 at 5 p.m.). ECF 46 at 32-33. The Court further noted that "it may consider additional relief" when the case "proceeds to the merits." *Id.* at 32. Plaintiffs here seek permanent relief (including remedies that were not included in the Court's preliminary injunction

Order), which will require full discovery and an adjudication on the merits with the benefit of a complete record.

A. Subjects of Discovery

Plaintiffs anticipate conducting fact and expert discovery on the following topics: the number of vote-by-mail and provisional ballots rejected for signature mismatch by each county in prior elections; the accuracy of the signature match process; the extent to which voters are provided timely notice of a signature mismatch and an opportunity to cure; and the standards and procedures applied by counties in connection with the signature match process. This list of discovery topics is not exhaustive, and Plaintiffs reserve the right to conduct discovery on additional issues or topics as needed.

At this time, Defendant-Intervenor NRSC anticipates conducting fact and expert discovery on: (1) the reasons that some voters allege that they were unable to cure their signature mismatches before the cure deadline; and (2) the use of signature matching to verify a person's identity. NRSC reserves the right to conduct discovery on additional subjects as needed.

B. Electronic Discovery

The parties have discussed issues relating to disclosure or discovery of electronically stored information ("ESI"), including pre-discovery initial disclosures, and agree to the following: (1) Disclosure or production of electronically

stored information will be limited to data reasonably available to the parties in the ordinary course of business; (2) the parties do not anticipate seeking data beyond what is reasonably available in the ordinary course of business; (3) the parties agree to produce electronically stored information in native format where feasible; (4) the parties represent that they have taken reasonable measures to preserve potentially discoverable data from alteration or destruction; (5) the parties will comply with Federal Rule of Civil Procedure 26(b)(5)(B) regarding the inadvertent production of privileged information; and (6) the parties do not at this moment anticipate that any other problems will arise in connection with electronic or computer-based discovery.

C. Timing of Discovery and Trial

The parties agree that the deadline for discovery should be July 29, 2019, and the case will likely be ready for trial by October 2019. The parties submit that an October trial will ensure that this matter is resolved expeditiously and with sufficient time to implement any remedy ordered by the Court, while allowing sufficient time to conduct discovery in connection with the claims and allegations asserted in Plaintiffs' First Amended Complaint, filed on February 14, 2019. The parties further submit that an October 2019 trial will avoid conflicts with trial schedules in other actions involving some of the parties and counsel in this case.

D. Forms of Discovery

The parties anticipate all forms of written discovery and depositions may be appropriate as provided by the Federal Rules of Civil Procedure. The parties at this time do not seek any restrictions on discovery beyond the limitations of the Federal Rules of Civil Procedure; however, the parties agree to confer in good faith as needed regarding any proposed limitations on discovery.

E. Discovery in Phases

The parties agree that it would not be useful to conduct discovery in phases.

VI. Manual for Complex Litigation

The parties agree that this case should not be made subject to the Manual for Complex litigation.

Respectfully submitted,

/s/ Uzoma Nkwonta

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**Pro Hac Vice Application

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Dated: February 28, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Uzoma Nkwonta

Uzoma N. Nkwonta