No. 18-14758

In the United States Court of Appeals for the Eleventh Circuit

DEMOCRATIC EXECUTIVE COMMITTEE OF FLORIDA, BILL NELSON FOR U.S. SENATE,

Plaintiffs–Appellees,

v.

FLORIDA SECRETARY OF STATE, ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Defendants-Appellants,

NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Intervenor Defendant–Appellant.

FLORIDA ATTORNEY GENERAL'S JURISDICTIONAL BRIEF

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NO. 4:18-CV-520-MW-MJF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Defendants–Appellants certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

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44. Williams, Fallon, *Declarant*

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RESPONSE TO JURISDICTIONAL QUESTION

This appeal is not moot: The Court continues to have jurisdiction over Defendants' appeal from the district court's expired preliminary injunction. The capable-of-repetition-yet-evading-review exception to mootness applies.

BACKGROUND

Florida's statutory signature-match requirement was first challenged by the Florida Democratic Party leading up to the 2016 general election. *See Fla. Democratic Party v. Detzner*, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016). In the 2016 suit, the district court was asked to decide "whether Florida's statutory scheme, which provides an opportunity to cure no-signature [vote-by-mail] ballots yet denies that same opportunity for mismatched-signature ballots, is legally tenable." *Id*. at *1. After finding that the Plaintiffs in the 2016 suit had standing to maintain their pre-election challenge, *id.* at *4, the district court concluded that the scheme was not "legally tenable" and required Florida's election officials "to allow mismatched-signature ballots to be cured in precisely the same fashion as currently provided for non-signature ballots," *id*. at *9.

In the wake of that holding, the Florida legislature amended the statutory scheme for curing mismatched-signature vote-by-mail ("VBM") ballots. Before late 2018, no lawsuits were brought challenging the revamped signature-match regime.

On the evening of November 6, 2018, the general election polls closed across the country. In Florida, preliminary results indicated that then-Governor Rick Scott had defeated then-Senator Bill Nelson in the race for U.S. Senate, but that Governor Scott's estimated margin of victory was close enough to trigger a mandatory recount. Senator Nelson's campaign and the Democratic Executive Committee of Florida responded to this news by filing *eight* federal lawsuits and multiple state lawsuits challenging a broad swath of Florida's election laws.[1]

In the suit giving rise to this appeal—which was filed two days after the election was held—the Plaintiffs challenged Florida's signature-match requirement for VMB and provisional ballots. *See* §§ 101.048, 101.68, 101.6923, Fla. Stat. They alleged that Florida's signature-match practices impose an unconstitutional burden on the right to vote; violate the Equal Protection Clause because they are "standardless" and "var[y] by county"; and "result[] in the disparate treatment of similarly situated voters including racial minorities and young voters," also in violation of the Equal Protection Clause. DE1:16–17. Their claims focused on

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[1] *See Nelson v. Detzner*, No. 4:18-cv-536 (N.D. Fla. Nov. 16, 2018); *Nelson v. Detzner*, No. 4:18-cv-535 (N.D. Fla. Nov. 16, 2018); *Democratic Senatorial Campaign Comm., et al. v. Detzner, et al.*, No. 4:18-cv-528 (N.D. Fla. Nov. 13, 2018); *Bonfiglio v. Detzner*, No. 4:18-cv-00527 (N.D. Fla. Nov. 13, 2018); *Democratic Senatorial Campaign Comm., et al. v. Detzner, et al.*, No. 4:18-cv-526 (N.D. Fla. Nov. 13, 2018); *Vote Vets Action Fund, et al. v. Detzner*, No. 4:18-cv-524 (N.D. Fla. Nov. 12, 2018); *Fox, et al. v. Detzner*, No. 4:18-cv-529 (N.D. Fla. Nov. 11, 2018); *Democratic Nat'l Comm. v. Lee*, No. 4:18-cv-520 (N.D. Fla. Nov. 8, 2018).

alleged disuniformity amount the counties in administering the signature-match standard.

The relief Plaintiffs sought was unambiguous—declaratory and injunctive relief striking Florida's signature-match requirements on constitutional grounds and directing that the State count all ballots containing mismatched signatures as valid votes. DE1:19. The temporary relief granted by the district court, however, bore little resemblance to the relief Plaintiffs sought then (or, for that matter, the relief they seek now in the proceedings still pending before the district court). Instead, the district court imposed a new set of extra-statutory cure deadlines. Specifically, the district court ordered the Secretary of State:

> [T]o issue a directive to the supervisors of elections . . . advising them (1) Florida's statutory scheme as it relates to curing mismatched signature ballots has been applied unconstitutionally; and (2) in light of this court's order, they are required to allow voters who have been belatedly notified they have submitted a mismatched-signature ballot to cure their ballots [in the otherwise statutorily-applicable manner] by November 17, 2018, at 5:00 p.m.

DE46:33. This appeal followed.

DISCUSSION

The general rule is that an appeal from an expired preliminary injunction is moot. *See Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1119 (11th Cir. 1995). This rule does not apply, however, where the case is capable of repetition, yet evading review. *See*, *e.g.*, *Teper v. Miller*, 82 F.3d 989, 991-92 & n.1 (11th Cir.

1996). This exception to the mootness doctrine is satisfied when (1) there is a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party," and (2) "the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration." *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997) (citations omitted).

These requirements are often satisfied in election cases, as this Court has routinely recognized. *See Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001) (citing *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1496-97 (11th Cir. 1993)) ("we have held that in cases involving disputes over election-related laws, it is appropriate to invoke the 'capable of repetition yet evading review' exception").[2] As this Court has noted, "[e]lection cases . . . frequently present issues that will persist in future elections, and resolving these disputes can simplify future challenges." *Arcia*, 772 F.3d at 1343 (citing *Teper*, 82 F.3d at 992 n.1).

Both elements are satisfied in this election case: the district court's decision to retroactively apply a new set of election rules to votes that had already been cast raises issues that are likely to occur again, and—as the expiration of the district court's short-lived preliminary injunction in this case makes clear—the limited timeframe for resolving such issues makes meaningful appellate review impossible.

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[2] *See also Arcia v. Fla. Secretary of State*, 772 F.3d 1335, 1342-43 (11th Cir. 2014) (invoking the exception in an election case); *Swanson v. Worley*, 490 F.3d 894, 903 n.10 (11th Cir. 2007) (same); *Teper v. Miller*, 82 F.3d 989, 992 n.1 (11th Cir. 1996) (same).

A. The issues in this case are capable of repetition.

The issues in this appeal are "capable of repetition" because there is a "reasonable expectation" that Florida's Secretary of State will be subjected to future litigation raising the same controversy—including the propriety of a preliminary injunction that alters the State's election laws and requires that such alterations be applied retroactively to an election that has already occurred. *See Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

A key issue in this appeal was raised by most—if not all—of these lawsuits and is particularly likely to arise during future elections: whether the extraordinary emergency relief granted by the district court is beyond the equitable powers of federal courts. *See*, *e.g.*, Attorney General's Br. in Opp'n to Pls.' Emergency Mot., ECF No. 31. A preliminary injunction is "a matter of equitable discretion," and a court must consider, among, other things, whether the "equities tip in the [movant's] favor." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944–45 (2018). Plaintiffs cannot make this showing because they waited two years and then sought emergency relief two days after the polls had closed. *See id.* at 1944 ("[A] party requesting a preliminary injunction must generally show reasonable diligence . . . . That is as true in election law cases as elsewhere."). This is particularly true in light of the extraordinary relief granted by district court—essentially rewriting Florida's election code after the polls

had closed, without any such request from the Plaintiffs. *Compare* Mem. of Law in Support of Emergency Mot., DE4:21, *with* Order Granting Prelim. Inj., DE46:33–34. Any post-election lawsuits filed by Plaintiffs challenging an existing statutory framework—rather than allegations of post-election misconduct—are likely to raise these issues regarding a court's equitable discretion to fashion emergency relief.

B. The issues in this case will evade meaningful appellate review.

The issue presented by Plaintiffs' pursuit of emergency relief after the polls have closed evades review because "[e]lection periods are too short to fully litigate the constitutionality of [a law] before a given election ends." *Bourgeois*, 387 F.3d at 1308–09 n.5 (quoting *Lamar*, 273 F.3d at 1324 n.6); *see also Arcia*, 772 F.3d at 1343 (quoting *Teper*, 82 F.3d at 992 n.1) ("there is often 'not sufficient time between the filing of a complaint and the election to obtain judicial resolution of the controversy before the election'"). For example, this Court in *Bourgeois* found *one year* to be "insufficient . . . for a district court, circuit court of appeals, and Supreme Court to adjudicate the typical case." 387 F.3d at 1309. Here, by contrast, the district court's preliminary injunction expired by its own terms within *a matter of days*. Order Granting Prelim. Inj., DE46:33–34.

Questions regarding a court's equitable discretion to grant emergency relief in post-election lawsuits will, by their very nature, only ever be litigated in an emergency relief posture. For example, if this case is litigated to final judgment, the

district court will decide—and this Court will likely have the opportunity to review—whether the challenged statutory requirements are unconstitutional. In contrast, this Court will not have any occasion to pass on the propriety of the district court's preliminary injunction—including the critical question whether the district court abused its discretion insofar as it granted emergency relief that Plaintiffs did not request and that had the practical effect of rewriting Florida's election code and applying a new set of election rules to an election after the polls had already closed. Thus, Defendants' only opportunity to litigate these important questions is on appeal from the district court's preliminary injunction. When the same issues are raised in the next election, Defendants will face the same barriers to meaningful appellate review.

That the district court may ultimately resolve the issue of the constitutionality of the signature-match regime does not alter the conclusion that the issues in this case will evade meaningful review. The capable-of-repetition-yet-evading-review exception applies to interlocutory appeals as to other appealable orders. *Citizens for Police Accountability Political Comm'n v. Browning*, 572 F.3d 1213, 1216 n.5 (11th Cir. 2009); *Sierra Club*, 110 F.3d at 1554; *NBC v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1023-24 (11th Cir. 1988). And even where proceedings continue in the district court following expiration of the preliminary injunction, the question is whether those proceedings "raise the same underlying legal questions." *See*

Stevenson v. Blytheville Sch. Dist. No. 5, 762 F.3d 765, 770 (8th Cir. 2014). Where a given issue can only be decided in a preliminary injunction posture, the issue is one that evades meaningful review after final judgment is entered. *See Sierra Club*, 110 F.3d at 1554 (relying on the "seasonal nature of migratory bird nesting" to conclude that the Forest Service was likely to face additional emergency injunctions that would expire before an appeal was possible); *Browning*, 572 F.3d 1216 n.5 (discussing, in an election case, *Sierra Club*, and reaching a similar conclusion).

CONCLUSION

For the foregoing reasons, Defendants' appeal from the preliminary injunction is not moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1837 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 25th day of March, 2019, a true copy of the foregoing brief was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by e-mail a notice of docketing activity to all counsel of record.

/s/ Edward M. Wenger
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