UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 1:12-cv-22282-WJZ
Honorable Judge William J. Zloch

KARLA VANESSA ARCIA, et al.,

Plaintiffs,

v.

KEN DETZNER, in his official capacity as Florida Secretary of State,

Defendant.
_____/

THE SECRETARY'S OPPOSITION TO PLAINTIFFS' MOTION TO EXPEDITE PRELIMINARY INJUNCTION PROCEEDINGS AND FOR TEMPORARY RESTRAINING ORDER

Defendant Florida Secretary of State Kenneth W. Detzner ("Secretary") respectfully submits this Opposition to Plaintiffs' Motion To Expedite Preliminary Injunction Proceedings And For Temporary Restraining Order (DE 66) ("Pls.' Mot."). Plaintiffs filed their Complaint on June 19 (DE 1); attended a status conference with the Court on July 23 (DE 30); and filed Rule 26(f) reports on August 9 (DE 33–35), all without *ever* moving for a preliminary injunction or suggesting they would do so. Plaintiffs also filed a stipulated dismissal of certain counts and a streamlined Amended Complaint on September 12, again without moving for a preliminary injunction on their sole remaining claim. *See* DE 56, 57. Plaintiffs then belatedly filed a hybrid motion for preliminary injunction and summary judgment on September 19, *three months after* filing their Complaint and *one week after* filing their Amended Complaint. *See* DE 65.

Plaintiffs now ask the Court to impose the harm caused by their unilateral delay on the Secretary and to sanction their litigation-by-ambush tactics by expediting proceedings on their

hybrid motion and disrupting the status quo in the interim with a temporary restraining order. *See* Pl.'s Mot. at 1–4. Yet Plaintiffs' delay alone "justif[ies] denial of [the] preliminary injunction" because it conclusively refutes Plaintiffs' eleventh-hour contention that they face irreparable harm. *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *see also RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009); *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001). Indeed, this Court and others have denied preliminary injunction motions due to delays in filing for such relief similar to—or even shorter than—Plaintiffs' delay here. *See, e.g.*, *Burger v. Hartley*, No. 11-62037-CIV, 2011 WL 6826645, *2 (S.D. Fla. Dec. 28, 2011) (denying preliminary injunction motion filed less than 2 months after complaint and 11 days after amended complaint); *Crawford & Co. Medical Ben. Trust v. Repp*, No. 11 Civ. 50155, 2011 WL 2531844, at *7 (N.D. Ill. June 24, 2011) (no irreparable injury where "plaintiff waited almost a month to notice up its Motion for Temporary Restraining Order, demonstrating that there is little urgency by plaintiff"); *Share Corp. v. Momar Inc.*, No. 10 Civ. 109, 2010 WL 933897, at *6 (E.D. Wis. March 11, 2010) (plaintiff's delay of three days between filing a complaint and seeking a TRO "'raises questions' regarding the plaintiff's claim that it will face irreparable harm") (quoting *Ty, Inc.*, 237 F.3d at 903)). As these courts have recognized, "a party cannot 'delay' . . . and then use an 'emergency' created by its own decisions regarding timing to support a motion for preliminary injunction." *U.S. Nat'l Bank Ass'n v. Turquoise Property Gulf, Inc.*, No. 10-0204, 2010 WL 2594866, *4 (S.D. Ala. June 18, 2010).

In all events, fundamental fairness and due process require that Plaintiffs bear the consequences of their failure timely to seek preliminary relief, and that their motion to expedite and for a temporary restraining order be denied. *First*, Plaintiffs' alleged harm is that some unidentified "eligible voters [will be] denied their right to vote on Election Day" as a result of

the Secretary's verification of citizenship information through the Department of Homeland Security's Systematic Alien Verification for Entitlements database ("SAVE"). Pl.'s Mot. at 2. But Plaintiffs recognize that Election Day is "48 days" away on November 6, 2012. *Id.* Thus, even if Plaintiffs could establish some flaw in SAVE that might incorrectly identify a citizen as a non-citizen—which they cannot—there is more than ample time to restore any erroneously removed eligible voter to the voter rolls in time for Election Day. There therefore is no risk of imminent or irreparable harm for the Court to redress and no reason to rush to a preliminary injunction hearing now.

Even more obviously, there is no conceivable basis to grant Plaintiffs' truly extraordinary request for an *ex parte* temporary restraining order until the preliminary injunction hearing, without even providing the Secretary an opportunity to respond. Plaintiffs cannot even articulate how they would be in any way prejudiced in the time until the preliminary injunction hearing. There is no allegation that any citizen will erroneously be removed from the rolls during this time frame or, in the extraordinarily unlikely event that such a mistake does occur, that it cannot easily be remedied well in advance of the election. And surely Plaintiffs are not asserting that this Court should facilitate a federal crime, *see* 18 U.S.C. §§ 611, 1015(f), by requiring Florida to allow *conceded non-citizens* to vote.

Second, Plaintiffs improperly seek temporary and preliminary relief far exceeding the final relief sought in their First Amended Complaint. Although the Amended Complaint addresses only the removal within 90 days of a federal election of voters ineligible on the basis of non-citizenship, Plaintiffs now seek a temporary restraining order "to stop Defendant from removing *any* voters from the rolls while the court considers Plaintiffs' Motion for Preliminary Injunction." Pl.'s Mot. at 4. (emphasis added). Even if Plaintiffs had pled a prayer for this

sweeping relief, their request should be denied outright as plainly inconsistent with the National Voter Registration Act. The NVRA expressly authorizes states to remove the names of ineligible voters from the "official lists of voters" within 90 days of a federal election for, among other reasons, the death or criminal conviction of the voter. 42 U.S.C. § 1973gg-6. Just as Plaintiffs would have no basis for asking this Court to require Florida to allow conceded non-citizens to vote, they cannot reasonably ask this Court to enter a temporary restraining order prohibiting Florida from removing deceased voters and convicted felons from the voter rolls—even within 90 days of an election.

Third, the Secretary cannot meaningfully respond to Plaintiffs' hybrid motion in the seven calendar days that Plaintiffs propose. *See id.* Plaintiffs arrive at their 7-day proposal by citing another court's local rule, *see id.* at 3 (citing D.D.C. Loc. R. 65.1(c))—but they neglect to mention that a party would have an *3 additional days* to respond in that court where, as here, the movant served the motion for preliminary injunction electronically, *see* Fed. R. Civ. P. 6(d).

Moreover, Plaintiffs' hybrid motion is unlike a traditional preliminary injunction motion that another court has subjected to a 7-plus-3-day response period. *See* Pl.'s Mot. at 3. Plaintiffs have interjected significant factual material into the record by joining a motion for summary judgment and filing a statement of undisputed material facts (DE 65-2) and an expert report (DE 65-4). This Court's default approach permits a party 14 days, plus 3 additional days for electronic service, to respond to such a motion. *See* Loc. R. 7.1(c)(1). The wisdom of that approach is evident here: the Secretary requires more time than Plaintiffs propose to analyze and respond to Plaintiffs' factual submissions, and to consult and coordinate with the outside counsel who represented him before Judge Hinkle in *United States v. Florida*, No. 4:12-cv-00285 (N.D. Fla.), and have not yet appeared in this case. Plaintiffs implicitly recognize the complexity of the

issues presented in their hybrid motion because they have requested five days for their reply, even though that reply is "strictly limited to rebuttal of matters raised in the memorandum in opposition" and subject to a shorter ten-page limit than the twenty-page limit for the Secretary's response. Loc. R. 7.1(c).

Plaintiffs' suggestion that their hybrid motion nonetheless is timely when measured from the filing of their Amended Complaint on September 12 (*see* Pls.' Mot. at 3) fails for two simple reasons. In the first place, the Amended Complaint establishes that Plaintiffs knew about the Secretary's efforts to obtain access to SAVE and to commence the SAVE data matching they now challenge as early as the Secretary's May 9 press release and no later than Plaintiffs' *August 3 letter*, *see* Am. Compl. ¶¶ 17–18, 27–33. Plaintiffs nonetheless delayed moving for a preliminary injunction until September 19, at least *47 days* after it was clear that the Secretary was implementing the SAVE data matching. Moreover, even if the Court accepts Plaintiffs' flawed premise that the date they chose to file their Amended Complaint is the proper trigger for judging the timeliness of their motion, Plaintiffs' one-week delay still was unreasonable and requires denial of their motion to expedite and for a temporary restraining order. *See, e.g.*, *Burger*, 2011 WL 6826645, *2 (denying preliminary injunction motion filed 11 days after amended complaint); *Share Corp.*, 2010 WL 933897, at *6 (plaintiff's delay of three days between filing a complaint and seeking a TRO "'raises questions' regarding the plaintiff's claim that it will face irreparable harm") (quoting *Ty, Inc.*, 237 F.3d at 903).

In the interest of quickly resolving Plaintiffs' unmeritorious claim, the Secretary is willing to proceed with briefing and argument on Plaintiffs' hybrid motion along the following schedule, which expedites the Court's default deadlines. The Secretary therefore asks the Court to enter an order directing that:

1. The Secretary shall file his Response to Plaintiffs' Motion for Preliminary Injunction and Summary Judgment on or before Wednesday, October 3, 2012; and

2. The Court will hold a hearing on Plaintiffs' Motion for Preliminary Injunction and Summary Judgment at its convenience during the week of October 8–12, 2012, with Plaintiffs filing a reply (if any) at least three days before the hearing.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion To Expedite Preliminary Injunction And For Temporary Restraining Order (DE 66) and issue an order establishing the briefing and hearing schedule outlined above.

Dated: September 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2012, a true and correct copy of the foregoing will be sent electronically to the registered participants through the Court's CM/ECF system.

/s/ Daniel E. Nordby