

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING

AMERICAN FEDERATION OF LABOR –
CONGRESS OF INDUSTRIAL
ORGANIZATIONS (“AFL-CIO”), *et al*,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of
Florida

Defendant.

**PROPOSED FINDINGS OF
FACT AND CONCLUSIONS
OF LAW PURSUANT TO
F.R.C.P. 52**

INTRODUCTION

Plaintiffs in this case are four unions whose members include otherwise eligible Florida voters who were denied the right to vote in prior elections because their voter registration forms – which were filed in a timely manner – contained errors or omissions that the applicants were not permitted to correct prior to the election for which they were registering.

Florida Statute § 97.055 applies the “close of books” deadline – which is 29 days before the election – to all corrections to voter registration applications, even if an applicant timely submitted his or her original application to election officials prior to the close of books. Accordingly, if an applicant files an incomplete application prior to the close of books but submits the correction after the close of books (but before the

election), the law currently does not permit a Supervisor of Elections to relate back the registration date of the correction to the date of the incomplete application.

This is a civil rights action seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201-2 for violations to the Plaintiffs' voting rights secured by the First and Fourteenth Amendments to the United States Constitution. By way of relief, Plaintiffs respectfully request that this Court enjoin that portion of Fla. Stat. § 97.055 that prohibits updates and corrections to timely submitted applications after the close of books, and that it require the Supervisors of Elections to process such updates and corrections, thereby enabling thousands of Floridians to cast their ballots in the elections for which they intended to register.

PROPOSED FINDINGS OF FACT

The Statutory Scheme And Its Effect On Eligible Florida Voter Applicants

1. Under current Florida law, the deadline for submitting a voter registration application – the close of books – is 29 days prior to an election. Eligible voters who apply on or before the close of books have the right to vote in the upcoming elections.¹ However, Fla. § 97.055 applies the close of books deadline to all corrections to new voter registration applications, even if an applicant has timely submitted his or her application to election officials prior to the close of books.² This means that in a case where a voter submits an application containing errors or omissions prior to the close of books but submits the correction after the close of books, the law currently does not permit a Supervisor of Elections to relate back the registration date of the correction to the date of

¹ Fla. Stat. §§ 97.053, 97.055.

² The statute makes an exception for name changes, address changes and signature updates to existing voter registration applications. These changes are expressly exempted from the book closing deadline.

the original application. Such voter applicants are not permitted to vote in the election for which they intended to register.

2. As a result of Fla. Stat. § 97.055, many eligible voters have been denied the right to vote.

- a. Four members of the Plaintiff-unions testified that they were eligible to vote; filled out, signed and submitted their applications prior to the close of books; subsequently learned that their applications were incomplete because of inadvertent mistakes; then submitted corrected applications; but could not vote in the election for which they intended to register, because the correction came after the close of books.³
- b. Supervisors of Elections from several counties testified that many applicants who submit incomplete applications just before book closing will not receive notice in time to correct their applications in time to vote in the election for which they intended to register.⁴ The vast majority of these applicants would have been otherwise eligible to vote.⁵
- c. In the four weeks prior to the close of books before the November 2006 election, 11,005 voter registration applications were submitted to Florida election officials that were determined to be incomplete. Data summaries in evidence show that in 2006, there were several hundred applicants who submitted timely applications but received notice after the close of books that those applications were incomplete.⁶ The vast majority of these applicants would have been otherwise eligible to vote. And 2006 was an

³ Day 1:62: 16–68:10 (Thompson); Exs. 66 and 67; Day 4: 3:1-10 (Brown); Exs. 48 and 50; Day 3:7:15 – 8:1 (Veal); Exs. 69, 71 and 70; Day 3 88:7–25 (Nickens); Exs. 56 and 57.

⁴ Day 3: 58:23-25 (Anderson); Bedini Tr. 84:25 – 85:7 (Duval County).

⁵ Day 1:132:1-3 (Sancho); Day 2:69:7-10 (Sola).

⁶ Ex. 44.

off-election year during which fewer voters attempted to register than would be the case in a presidential election year. Accordingly, it is reasonable to conclude that even more otherwise eligible applicants will be precluded from voting as a result of the failure of the statute to permit a grace period – that is, to allow voters who submitted updates or corrections to timely submitted but incomplete applications after the close of books – to correct applications that will be timely filed during presidential election cycles. The specific numbers will vary according to the size of the counties (as well as the education level of the voter applicants).⁷

- d. Forty-one applicants in Leon County alone were unable to vote in the January 29, 2008 presidential preference primary because their timely-filed applications were incomplete on the close of books.⁸ The vast majority of these applicants would have been otherwise eligible to vote.

3. Only three states have a longer restriction on corrections to timely submitted applications – Alaska, Hawaii, and Mississippi.⁹

4. If Fla. Stat. § 97.055 is not enjoined, many otherwise will in the future be denied the right to vote.

The Process of Voter Registration in Florida

5. The County Supervisors of Elections bear primary responsibility for voter registration in Florida.¹⁰

6. When Supervisors of Elections receive voter registration applications, they are date stamped, sorted, entered into the county database, sent to the Florida Voter

⁷ Day 2: 123:2-6 (Sola); 130:21-24 (Kolodny); Day 1: 134:19-22 (Sancho).

⁸ Day 1: 111:17-25 (Sancho).

⁹ Ex. 110.

¹⁰ Day 4:50:19-51:8 (Bradshaw).

Registration System (“FVRS”), which returns the applications to the counties by computer link within two to three days, after which either voter registration cards or incomplete notices are issued to applicants.¹¹ It takes only a few minutes for the Supervisors of Elections to process a single application.¹²

7. Corrections to incomplete applications take less time to process than original applications because there is no need to re-input the correct information from the original incomplete voter registration form.¹³

8. Corrections to timely filed voter registration applications that are received after the close of books are typically processed before the election, flagged and held back from being added to the voting rolls for the upcoming election.¹⁴

9. The registration systems used by the counties are flexible, and changes to the voter rolls are made up to and including the day of elections.¹⁵

- a. Supervisors of Elections currently process name, address, and signature updates after the close of books.¹⁶
- b. Supervisors of Elections register certain members of the military and their families up until the Friday before the election, as required by law.¹⁷

¹¹ Day 1:248:25-249:2 (Korman); Day 2: 130:7-10 (Kolodny); Bedini Tr. 54:5 – 12.

¹² Day 1: 252:20-21(Korman); Day 133:22-134:6 (Kolodny); Bedini Tr. 51:24 – 52:9.; Day 1: 231:1-2; 248:25-32 (Korman); Bedini Tr. 47:9-11.

¹³ Day 1: 102:10-20; 253:13-15; Bedini Tr. 115:23 – 116:2.

¹⁴ Day 1: 105:21-25 (Sancho); Day 1: 254:12 - 255:6 (Korman); Day 2: 137:22 - 138:5 (Kolodny).

¹⁵ Day 2: 123:12-124:14 (Sola).

¹⁶ Day 2:30:22-31:7 (Korman); 32:1-(6 (Korman); Day 1 119:10-14; 120:17-121:3 (Sancho); Bedini Tr. 103: 15–17; Cowles Tr. 139: 23 – 140:12 (In Orange, it is not difficult to update name, address and signature after close of books and does not require inordinate amount of resources); Holland Tr. 92:7–15; Snipes Tr. 144:19–23 (Duval County).

¹⁷ Bedini Tr. 101:15–102: 21; Day 4: 111:5-22 (Hollarn).

- c. Precinct registers contain the lists of registered voters for each precinct. Precinct registers are printed during the close of books period and are regularly supplemented up to the day of elections.¹⁸
- d. Book closing reports are not relied on by Supervisors of Elections and their staff for voter registration activities.¹⁹
10. Notwithstanding the undeniable demands placed on the staff of the Supervisors of Elections in the weeks prior to an election, the Supervisors do an admirable job of ensuring that elections are carried out in an orderly and efficient manner.²⁰ Indeed, the staff of the Supervisors of Elections are cross-trained to perform multiple election related tasks and are assigned to tasks as the need arises.²¹

What a Grace Period Would Entail

11. A grace period would increase the number of registered voters, allowing more eligible voter applicants to exercise the right to vote.²²

12. If ordered, a grace period could be implemented in Florida's counties.²³ Such a grace period would not be particularly burdensome or difficult to implement.²⁴ In some counties, doing so would not even require any additional resources.²⁵

¹⁸ Day 1: 112:10-113:3; Bedini Tr. 111:10-20, 112:20-23; Cowles Tr. 164: 7-10 (Orange County); Snipes Tr. 86:19-24 (Broward County); Tanko Tr. 142:19-21 (Orange County).

¹⁹ Cowles Tr. 103:4-12.

²⁰ Holland Tr. 91:19-22; Snipes Tr. 79: 16-80:8.; Day 1: 226:21-227:15(Korman); Day 1: 81:10-17 (Sancho); Cowles Tr. 114:14-18.

²¹ Bedini Tr. 34: 8 -20; Cowles Tr. 121: 23-25; Day 2: 112:1-7 (Korman); Day 2: 53:9-18 (Sweat); Day 2: 152:22-24 (Kolodny).

²² Day 2: 25:9-10 (Korman); 138:14-18 (Kolodny); Day 2: 101:8-10 (Kolodny).

²³ Day 2:41:20-23 (Korman); Cowles Tr. 148: 25 - 26:2; Tanko Tr. 173: 18 - 25; Day 1: 111-112; 125:12-14; Day 3 60: 20-30; Holland Tr. 90:15 - 21; Snipes Tr. 134: 11 - 15, Holland Tr. 90:15 - 21. In Miami Dade County, implementing a grace period would require "filling out a field" Day 2:41:9-13 (Korman).

²⁴ Day 2: 138:23-25 (Kolodny).

²⁵ Day 1: 112:1-3 (Sancho).

13. The technology used by many of the largest counties makes it relatively simple for Supervisors of Elections and their staffs to implement a grace period,²⁶ simply by changing the procedure whereby applications are flagged and held.²⁷

- a. The testimony established that the original date of an application can be entered on the county database for corrected applications.²⁸
- b. Making such a correction would be as simple as filling in a box, or moving an application from one category to another.²⁹
- c. If changes to the computer system did need to be made for a particular county, it would take about a day for a computer programmer to do so.³⁰

14. A grace period would not interfere unduly with other important election-related responsibilities of the offices of the Supervisors of Elections.³¹

- a. A grace period would not interfere with other election activities such as early voting.³²
- b. A grace period also would not interfere with the preparation of precinct registers and their supplementation up to election day.³³
- c. Nor would a grace period interfere with the generation and use of book closing reports.³⁴

15. Grace periods have been implemented in Florida counties in the past without interfering with the orderly administration of elections.

²⁶ Bedini Tr. 136: 18 – 20; Day 3 80: 7–18 (Winchester), Day 3 81: 2-9 (Winchester); Day 3 76: 13-19 (Winchester).

²⁷ Day 2: 138:19-22 (Kolodny); Cowles Tr. 175: 2 – 18.

²⁸ Day 1: 255:18-256:2-9 (Korman); Day 1: 117:5-7 (Sancho).

²⁹ Day 1: 256:10-11 (Korman).

³⁰ Day 3: 78:14-16 (Winchester).

³¹ Day 1: 112:4-9 (Sancho); Day 3 63:4-9 (Anderson).

³² Day 1, 115:23-117:1 (Day 3 79:13 – 80:7(Winchester).

³³ Day 1: 112:10-113:3; Bedini Tr. 111:10–20, 112: 20-23; Day 3 78: 1 – 5, Day 3 81: 14-19 (Winchester); (Cowles Tr. 164:7–10); (Snipes Tr. 86: 19–24,); (Tanko Tr. 142: 19–21.

³⁴ Cowles Tr. 103: 13–18; 104: 4–7; Tanko Tr. 31: 15–32: 9.

- a. In 2004, Manatee County allowed corrections to be made to timely submitted incomplete applications.³⁵ The election in Manatee that year was conducted in an orderly fashion.³⁶
 - b. Leon County allowed corrections after the close of books in the 1990s and in 2004 and it did not burden the orderly administration of elections.³⁷
 - c. In 2004, Duval County made a special effort to notify voters who submitted incomplete applications before the close of books by telephone or mail so that they could provide the missing information and complete their registration. In the 2004 election, Duval County did in fact process corrections to incomplete applications after the close of books.³⁸
 - d. Hillsborough County allowed corrections after the close of books in 2004.³⁹ That election, according to then-Supervisor of Elections, Buddy Johnson, was orderly.⁴⁰
16. A grace period would not increase voter fraud.⁴¹

Standing

17. Members of the Plaintiff-unions have in the past been denied the right to vote as a result of Fla. Stat. § 97.055’s prohibition of a grace period during which time individuals who submitted timely but incomplete applications could make corrections before election day.⁴²

³⁵ Day 2:58:24-59:5 (Johnson); 75:9-20 (Sweat); Day 2:52:16-18 (Johnson).

³⁶ Day 2:58:24-25 (Johnson).

³⁷ Day 1: 82:23-83:24 (Sweat); 99-100 (Sweat).

³⁸ Carlberg Dec. ¶¶ 7-8, 13-18.

³⁹ Day 2: 52:16-18 (Johnson).

⁴⁰ Day 2: 58:24-25 (Johnson).

⁴¹ Day 1:117:8-10 (Sancho); (Day 3 63:4-6 (Anderson); Day 2:25:1-26:189 (Korman); Day 2:76:24:2 (Sweat); Day 2:100:4-6 (Sola); Day 2 139:1-4 (Kolodny); Bedini Tr. 132: 12 -17; Cowles Tr. 145:6 – 10.

⁴² AFL-CIO members Deval Brown and Thomas Veal and SEIU members Thomas Nickens and Anthony Thompson testified that they are eligible voters, timely

18. Part of the Plaintiff-unions' missions is to encourage voting, including by encouraging registration of members and non-members.⁴³ The Plaintiff-unions commit significant resources to voter registration,⁴⁴ and they intend to conduct voter registration activities in 2008.⁴⁵

19. The absence of a grace period allowing corrections to be made to timely submitted but incomplete applications has injured unions and their members by preventing union members who are eligible to vote from becoming registered and voting in past elections, and by preventing the registration of many voters that the unions have spent significant resources assisting to register. And the absence of a grace period will injure unions and their members in the future by preventing union members who are eligible to vote from being registered and voting in the future.⁴⁶

20. Additionally, the Plaintiff-unions have testified that if the statute is not enjoined it will cause them, in the period prior to the 2008 elections, to divert their resources from other pre-election activities to ensure that their members submit

submitted an application before the book closing deadline that was incomplete, and were unable to correct their application and vote in the then upcoming election because of the challenged statute. Day 2:58:21-24, 60:2-5, 60:23-61:11, 62:2-63:11; 65:6-65:8, 65:18-66:4, 66:17-68:21 (Anthony Thompson); Ex. 66, Ex. 67; Day3: 2:25-3:4, 3:18-4:13, 4:25-5:14, 6:11-8:12 (Thomas Veal); Ex. 69, Ex. 70, Ex. 71; Day 3:87:2-87:5, 87:9-87:12, 88:7-88:12, 88:15-88:24 (Thomas Nickens); Ex. 56, Ex. 57; Day 4:2:11-14, 2:21-3:10, 5:10-12, 5:16-18 (Deval Brown); Ex. 47, Ex. 48, Ex. 50.

⁴³ Day 2:164:16-165:11 (SEIU's mission includes registering members and non-members in Florida to vote); Ex. 6;; Feb 7 15:5-16:2 (AFL-CIO's mission includes registering its members to vote; Day 3:30:12-30:15, 31:21-32:4 (core part of AFSCME Council 79's mission is to assist in its members in registering to vote); Feller Tr. 23: 18 – 22 (AFSCME International's mission is to fund voter registration targeting members and non-members).

⁴⁴ Day 2:166:18-168:7 (Sullivan); Day 2:166:18-168:7 (Sullivan) (registration activities of SEIU in 2004 resulted in registration of between 200,000-300,000 voters); Day 3: 18- 19 (Dion); Feller Tr. 27: 20- 28: 9.

⁴⁵ Day 3:17: 14-16 (AFL-CIO will continue to conduct voter registration); Day 2: 173:20-174:1 (Sullivan); Day 3 31:24-32:12 (Gonzalez)

⁴⁶ Day 2:176:7-14 (Sullivan) (SEIU plans to conduct voter registration in 2008); Day 3: 19:15 – 20:2 (Dion); Day 3 32:19- 33:2 (Gonzalez); Feller Tr. 26: 12 – 22.

corrections prior to the book closing deadline. A grace period would benefit the unions because it would permit the unions to assist their members and others in updating and correcting their applications and thereby realizing the full value of their investment in voter registration activities.⁴⁷

PROPOSED CONCLUSIONS OF LAW

I. JURISDICTION

This is a civil rights action seeking declarative and injunctive relief under 42 U.S.C. 1983 and 28 U.S.C. §§ 2201-02. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343(3-4) (civil rights).

II. FLORIDA STATUTE § 97.055 IMPERMISSIBLY BURDENS THE RIGHT TO VOTE

Anderson v. Celebrezze, 460 U.S. 780 (1983), sets forth the legal standard for evaluating whether a state election law violates the First and Fourteenth Amendments of the Constitution. *League of Women Voters of Florida, et al. v. Cobb*, 447 F.Supp.2d 1314, 1331 (S.D. Fla. 2004) (Seitz, J.) (“Constitutional challenges to state election laws are analyzed using the framework established in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d (1982)” and citing cases).

When assessing the constitutionality of an election law, a court “must first consider the character and magnitude of the asserted injury to the rights protected by the

⁴⁷ Day 3:24:12-24:23 (if there were a grace period, the AFL-CIO would seek lists of incomplete voter registration applications and assist those applicants in correcting their applications); Day 3:33:2-33:23, 42:5-44:5 (if there were a grace period, AFSCME Council 79 would be permitted to ensure the correction of any deficiencies in the applications that it submitted, thereby realizing the full value of its investments); *see also* Day 2:127:4-128:18 (SEIU will engage in voter registration activities in 2008); Day 2:134:8-135:6; Feb 6: 124:21-126:21 (SEIU diverted

First and Fourteenth Amendments that the plaintiff seeks to vindicate.” *Anderson* at 789. Next, “[a court] must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* Finally, “[i]n passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.*

A. Character and Magnitude of the Asserted Injury

The right to vote is fundamentally important to our democratic system. *Wexler v. Anderson*, 452 F.3d 1226, 1231 (11th Cir. 2006) (noting that “[t]he right to vote is fundamental, forming the bedrock of our democracy”).⁴⁸ Accordingly, denial of the right to vote is an injury of grave significance. “[B]y finding an abridgement to the voters’ constitutional right to vote, irreparable harm is presumed and no further showing of injury need be made.” *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000). The record is clear that thousands of otherwise eligible voters are being denied the right to vote in the election for which they intended to register by the application of Fla. Stat. § 97.055 and the failure to require a grace period.

B. Interests Put Forward by the State as Justifications for the Challenged Rule and the Extent to Which Those Interests Make It Necessary To Burden the Plaintiff’s Rights

The Defendant Secretary of State has advanced three justifications for the application of Fla. Stat. § 97.055. First, the Secretary contends that permitting corrections of timely filed applications before an election would create an unmanageable

resources in 2004 to assist supervisors in contacting applicants to correct voter registration applications).

administrative burden. Second, he contends that permitting such corrections would increase costs to the counties, which already are strapped for resources. Third, he contends that application of the statute helps to prevent voter fraud. Each is addressed in turn below.

1) *Administrative Burden and Increased Cost*

Defendant has argued that enjoining the provision of Fla. Stat. § 97.055 that prevents processing corrections to timely filed applications after the close of books would create great administrative burdens and increase costs. The record is clear, however, that any additional administrative burden or cost would be minimal.

The testimony by the Supervisors has been uniform that a requirement to process all corrections after the close of books is merely a question of additional manpower. It takes only a few keystrokes to make the corrections. Several Supervisors have testified that they processed corrections after the close of books and placed voters on the rolls in past elections, when it was permitted under the laws. Others already process corrections after close of books but “flag and hold” these registrations, activating them only after the elections. Instead of flagging and holding these registrations they could readily be activated immediately upon entering the correction into the system. Testimony by Miami-Dade election officials, for example, suggests that one method of doing so – apparently without making any changes to their computer system – would be to relate back the date of the correction to the date of the original application simply by entering the date of the original application as the “registration date.” Testimony establishes that the technology used to process applications could easily be adapted to

⁴⁸ See also *Ill. Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (“[V]oting is of the most fundamental significance under our constitutional

allow these applications to be corrected. One of the computer technology vendors use by several counties testified that the changes to the part of the system that he services would take one day to make.

There is no indication in the record that this change to the law would result in a sudden huge increase in the number of applications to be corrected; nor is there an indication that corrections would arrive all at once on the last day before an election. Testimony shows that the Supervisors have sophisticated and efficient operations and succeed in administering orderly elections in spite of the challenges that they face. There is no doubt that the Supervisors could manage to process corrections to timely filed voter applications during the 29 days after book closing.

Furthermore, the goals of administrative convenience and keeping costs down are simply not a sufficient justification for burdening Plaintiffs' fundamental rights. *See Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir. 2006).⁴⁹

2) *Voter Fraud*

Defendant has also argued that Fla. Stat. § 97.055 helps to prevent voter fraud. Plaintiffs do not dispute that preventing voter fraud is a legitimate state interest. However, the law in this Circuit with regard to *Anderson* is clear: to justify an election regulation that burdens fundamental rights, the State must demonstrate that the

structure.”)
⁴⁹ *See also Ferguson v. Williams*, 343 F. Supp. 654, 656 (D. Miss. 1972) (administrative efficiency “may not be invoked to impinge upon the exercise of important constitutional rights,” such as voting); *see generally Jackson v. Godwin*, 400 F. 2d 529, 533 (5th Cir. 1968) (“We must not play fast and loose with basic constitutional rights in the interests of administrative efficiency.”) (citations omitted). Nor is cost efficiency a sufficient justification. *See Tashjian v. Rep. Party of Conn.*, 479 U.S. 208, 218 (1986).

challenged regulation is necessary to achieve a legitimate interest.⁵⁰ If the state cannot establish a clear connection between the regulation and the proffered interest, it will be struck down. *Fulani v. Krivanek*, 973 F.2d 1539, 1544-46 (11th Cir. 1992) (explaining that while “[t]he state asserts interests that are indisputably important,” the “problem is that the state has plucked these interests from other cases without attempting to explain how they justify the discriminatory classification here at issue”); *League of Women Voters v. Cobb*, 447 F.Supp.2d 1314, 1338 (S.D. Fla. 2006) (while the interest advanced by the state – protecting citizens’ right to vote – was indisputably important, the state failed to provide “any evidence much less an explanation for the necessity of the [statute]”).

Here, the state has failed to put forth any evidence indicating that the statute helps to prevent voter fraud. In fact, all of the evidence is to the contrary.⁵¹ Accordingly, the undisputedly important goal of deterring voter fraud cannot justify the provision of Fla. Stat. § 97.055 that prevents permitting corrections after the close of books.

⁵⁰ See *Hand*, 933 F.2d at 1574; *Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992); *League of Women Voters of Florida v. Cobb*, 1314, 1337 (S.D. Fla. 2006).

⁵¹ The testimony from the Supervisors and their deputies at trial was consistent that a grace period would not increase voter fraud (Day 1:117:8-10 (Sancho)); (Day 3 63:4-6 (Anderson)); (Day 2, 18:18 – 19:21 (Korman)); (Day 2.56:6-8 (Sweat)) (Day 2:73:5-7 (Sola)); Day 2 101:14-17 (Kolodny); (Bedini Tr. 132: 12 -17.); (Cowles Tr. 145:6 – 10.)

III. THE STATUTE SHOULD BE ENJOINED TO THE EXTENT THAT IT PREVENTS SUPERVISORS OF ELECTIONS FROM RELATING BACK THE DATE OF A CORRECTION TO THE DATE OF THE ORIGINAL APPLICATION AND THE COURT SHOULD REQUIRE SUPERVISORS TO IMPLEMENT A GRACE PERIOD THAT PROVIDES A LIMITED EXCEPTION PERMITTING CORRECTIONS AFTER THE CLOSE OF BOOKS

The appropriate remedy in this case is to enjoin the book closing statute to the extent that it prevents Supervisors of Elections from relating back the date on which an applicant corrected his or her voter registration application to the date on which the original application was either postmarked (if mailed) or received (if hand delivered to election officials); and to require the Supervisors to implement a grace period.

A party is entitled to an injunction when it can show (1) actual success on the merits; (2) a substantial threat that the party will suffer irreparable injury if the relief is not granted; (3) the threatened injury to the party outweighs the threatened harm injunctive relief may cause to the opposing party; and (4) the issuance of the injunction would not be adverse to the public interest. *Del Pino v. AT&T Info. Sys., Inc.*, 921 F. Supp. 761, 765 (S.D. Fla. 1996); *Panama City Med. Diag. v. Williams*, 13 F.3d 1541, 1545 (11th Cir. 1994); *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n. 12 (1991).

Plaintiffs have established success on the merits by proving, as set forth above, that to the extent Fla. Stat. § 97.055 prevents Supervisors of Elections from permitting corrections before the election to timely filed applications, the statute violates the rights of many would-be voters' constitutional rights under the First and Fourteenth Amendments to the United States Constitution.

Being denied a right to vote is an "irreparable injury." *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1082 (N.D. Fla. 2004). "[B]y finding

an abridgement to the voters' constitutional right to vote, irreparable harm is presumed and no further showing of injury need be made," *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000). Section 97.055 denies union members and thousands of other Floridians who submitted incomplete application forms their right to vote in the election for which they intended to register – in each election cycle.

The record is clear that many voters in each county – and especially in the large counties – would benefit from a grace period. Testimony from the Supervisors of Elections confirms that many additional voters would be able to vote if a grace period were permitted. Data entered into evidence by the Plaintiffs show the numbers could be in the thousands for each of the large counties.

The benefit to voters substantially outweighs the harm, if any, to the Counties. The Secretary did not connect the book closing statute's prohibition of a grace period to any legitimate governmental interest, much less demonstrate how prohibiting a grace period achieves that interest. The record shows that an injunction would have no effect on the State, which does not handle the corrections. As for the counties, there was speculation by some of the Supervisors of Elections about potential additional costs that might require additional staffing during the 29 day book closing period, depending on the numbers of corrections to be processed, but none of these Supervisors gave concrete projections as to numbers or budgetary needs. And the record strongly suggests that any administrative cost imposed on the Counties will be minimal. In any event, administrative efficiency or cost is not a sufficient justification to burden the fundamental right to vote. *See Tashjian v. Rep. Party of Conn.*, 479 U.S. 208, 218 (1986); *Stewart v.*

Blackwell, 444 F.3d 843, 869 (6th Cir. 2006). For these reasons, the balance of harms weighs heavily in Plaintiffs' favor.⁵²

Finally, there is no doubt that enjoining § 97.055 in its present form is in the public interest. The requested relief would not merely benefit the Plaintiff-unions and their members, but thousands of Florida voters during each election cycle, by permitting them to vote in the election for which they intended to register. "The right of voting . . . is the primary right by which all other rights are protected." *Cobb*, 447 F.Supp.2d 1314, 1316 (*citing* Thomas Paine, *Dissertation On The Principles Of Government*, 1795).

IV. STANDING

A. Associational Standing

Plaintiffs in this case have associational standing to bring suit. "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."⁵³

Plaintiffs have established each of these criteria.

Plaintiffs have proven that their members would otherwise have standing to sue in their own right. In particular, representatives for the Plaintiffs testified that if

⁵² See *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005) (affirming grant of plaintiffs' preliminary injunction, where "[t]he associational and franchise-related rights asserted by the Plaintiffs were threatened with significant, irreparable harm, and the injunction's cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest. In contrast, the harm and costs threatened to the state by these registration forms were minimal, if they existed at all.")

⁵³ *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 282 (1986) (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) and upholding associational standing for the UAW).

left uncorrected, Florida's lack of a grace period will inevitably prevent some of their members who are eligible to vote from becoming registered to vote.⁵⁴

Plaintiffs have also proven that the interest that they seek to protect – allowing voting by eligible citizens – is germane to their missions of encouraging their members, and other Floridians, to register to vote and participate in elections.⁵⁵

Finally, because Plaintiffs seek only injunctive and declaratory relief, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (injunctive relief does not require the participation of individual members).⁵⁶

⁵⁴ Plaintiffs AFL-CIO and SEIU presented testimony from particular members who were harmed in past election cycles by the lack of a grace period. *See supra* note 37; *see also* Feb 6 128:19-24 (lack of grace period has denied SEIU members the right to register and vote in past elections); Feb. 7 19:15 – 20:8) (lack of grace period prevents AFL-CIO members from registering and voting in past elections; (Day 3 32:19- 33: 14 (AFSCME Council 79 and its members; Feller: 26: 12 – 22 (AFSCME International.) These past injuries, caused by § 97.055's lack of a grace period, prove that other members of Plaintiffs will be injured if the statute remains uncorrected. *31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003) (holding that future injury is sufficient to confer standing and is significantly more likely to occur when acts that will cause injury are authorized or part of a policy). In constitutional challenges to statutes involving election administration, organizational plaintiffs need not identify a particular member whom the statute will harm in future elections. *See Florida State Conference of the National Association for the Advancement of Colored People (NAACP) v. Browning*, No. 4:07CV-402 (N.D.Fla. Dec. 18, 2007) (order on standing). (plaintiffs established associational standing despite not having identified specific voters who would be harmed by the challenged statute; mistakes cannot be identified in advance but such mistakes will inevitably occur in future elections); *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) (same); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004) (same).

⁵⁵ *See supra* note 38.

⁵⁶ *See also Central Alabama Fair Hous. Ctr., Inc. v. Lowder Realty Co., Inc.*, 236 F.3d 629, 639 (11th Cir. 2000); *Disability Advocates and Counseling Group, Inc. v. Betancourt*, 379 F. Supp. 2d 1343, 1356 (S.D. Fla. 2005) (King, J.) (recognizing that

B. Organizational Standing

Plaintiffs have also established organizational standing. To establish organizational standing, Plaintiffs must show they have suffered “concrete and demonstrable injury” that “constitutes far more than simply a setback to the organization’s abstract social interests.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).⁵⁷ An organization may establish an imminent and concrete injury in fact by proving that a challenged practice will either frustrate its mission or cause it to divert resources to counteract or compensate for the unlawful practices in question. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).⁵⁸

In this case, Plaintiffs have testified and presented documentary evidence that § 97.055’s lack of a grace period has frustrated, and will continue to frustrate, their missions of assisting their members and other Floridians in registering to vote and participating in elections.⁵⁹ Plaintiffs have also testified that the challenged statute, if not enjoined, will cause them, during the period prior to the 2008 elections, to divert

under the third prong of *Hunt* "where only declaratory, injunctive (or some other form of prospective relief) is sought. . . organizations . . . have Article III standing to sue.")

⁵⁷ *Hood*, 342 F. Supp. 2d at 1079 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (organization suffers injury independent of that suffered by individuals when it expends resources as a proximate result of defendant’s illegal conduct that would otherwise have been devoted to other activities). Organizations such as the Union Plaintiffs regularly litigate on their own behalves in voting rights cases. See e.g., *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005) (organization injured by the refusal of officials to accept voter applications that the organization had collected and sent for processing); *Assoc. of Comm. Org’s for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999) (finding genuine issue of material fact that ACORN has expended resources counteracting Louisiana’s failure to make voter registration materials available at public aid offices).

⁵⁸ *See also Crawford v. Marion County Election Bd.*, 462 F.3d 949, 951 (7th Cir. 2007) (citing *Havens*), *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (D. Fla. 2004) (same).

resources from their get-out-the-vote and other pre-election activities to ensure that their members submit corrections prior to the book closing deadline.⁶⁰

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court declare that Fla. Stat. § 97.055 burdens voter registration applicants' right to vote in violation of the First and Fourteenth Amendments of the United States Constitution insofar as it provides: "When the registration books are closed for an election, updates to a voter's name, address, and signature pursuant to ss.98.077 and 101.045 shall be the only changes permitted for purposes of the upcoming election as currently enacted." Plaintiffs also respectfully request the Court enter an order permanently enjoining Defendant and his employees, agents, representatives, and successors in office from implementing the above cited section, and further order that the Florida Supervisors of Elections shall process all updates and corrections for purposes of the upcoming elections, provided that the voter applicant has timely submitted his or her voter registration application prior to the close of books for that election.

A proposed order is attached as Exhibit B.

⁵⁹ See *supra* notes 37, 38, and 41.

⁶⁰ See *supra* note 42.

Dated: Miami, Florida
February 10, 2008

RESPECTFULLY SUBMITTED,

/s/ Sarah Nolan

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent electronically as an email attachment this 10th day of February, 2008, to counsel for the party listed in Exhibit A, attached hereto.

Dated: Miami, Florida
February 10, 2008

By: /s/ Sarah Nolan
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EXHIBIT A

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Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING

AFL-CIO, *et al.*,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of
Florida

Defendant.

[PROPOSED] ORDER GRANTING INJUNCTION

THIS CAUSE comes before the Court on Plaintiffs' Third Amended Complaint, filed July 10, 2006. The Court, upon the papers filed by the parties, evidence and argument presented at the trial, is fully advised of the premises and determines that there is good cause for granting Plaintiffs' request for an injunction.

THE COURT DECLARES AS FOLLOWS:

Section 97.055 burdens voter registration applicants' right to vote in violation of the First and Fourteenth Amendments of the United States Constitution insofar as it provides: "When the registration books are closed for an election, updates to a voter's name, address, and signature pursuant to ss.98.077 and 101.045 shall be the only changes permitted for purposes of the upcoming election as currently enacted."

Accordingly, it is

ORDERED and ADJUDGED that the Plaintiffs' request for an injunction is **GRANTED**; and

Defendant and his employees, agents, representatives, and successors in office are permanently enjoined from implementing the provision in section Fla. Stat. § 97.055 that states: "When the registration books are closed for an election, updates to a voter's name, address, and signature pursuant to ss.98.077 and 101.045 shall be the only changes permitted for purposes of the upcoming election as currently enacted."

IT IS FURTHER ORDERED THAT the Florida Supervisors of Elections shall process all updates and corrections for purposes of the upcoming elections, provided that the voter applicant has timely submitted his or her voter registration application prior to the close of books for that election.

In accordance with Fed. R. Civ. P. 65(d), Defendant **IS FURTHER INSTRUCTED** to provide actual notice of this Order to his officers, agents, servants, employees, attorneys and all those in active concert and participation with them, so as to assure compliance.

DONE AND ORDERED in Chambers at Miami, Florida, this ___ day of February, 2008.

UNITED STATES DISTRICT JUDGE