

UNITED STATES DISTRICT COURT  
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING/O’SULLIVAN

EMMA YAIZA DIAZ; JOHN LANMAN;  
AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS; AMERICAN FEDERATION OF  
STATE, COUNTY AND LOCAL EMPLOYEES,  
AFL-CIO; FLORIDA PUBLIC EMPLOYEES COUNCIL  
79, AFSCME, AFL-CIO; AND SERVICE EMPLOYEES  
INTERNATIONAL UNION, AFL-CIO,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of Florida,

Defendant.

---

**SECRETARY OF STATE’S REPLY MEMORANDUM OF LAW  
IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT**

Kurt S. Browning, in his official capacity as Secretary of State of the State of Florida (the “Secretary”) respectfully submits this Reply Memorandum of Law in Support of his Motion for Summary Judgment (the “Motion”) (doc. 282).

## MEMORANDUM OF LAW

The Union Plaintiffs invite this Court to be the first court to strike down as unconstitutional a voter registration deadline of twenty-nine days or less. They do so based on little more than a purported showing that some lesser deadline could be feasible and that the State could survive such a policy change. In opposition to the Secretary's Motion, the Plaintiffs have not come forward with sufficient evidence to create a genuine triable issue as to whether the State has a legitimate interest in maintaining the statutory book-closing deadline—or as to whether any burden imposed by the existing deadline is sufficient to support a constitutional claim. For these reasons, and because Plaintiffs lack standing, this Court should grant summary judgment to the Secretary.

### **I. THE PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS.**

Last month, this litigation entered its fourth year. Despite ample time, no Plaintiff has presented evidence that a single one of its members was demonstrably harmed by the absence of some “grace period.” This failure not only speaks volumes about the severity of any burden associated with Florida's book-closing deadline, but it also precludes a finding of associational standing. Without demonstrating that one of their members has standing to sue, Plaintiffs lack standing to sue on behalf of their membership. *Friends of the Earth, Inc. v. Laidlaw Env'tl Servs.*, 528 U.S. 167, 181 (2000). And the Union Plaintiffs do not have standing to sue in their own right because they have failed to come forward with any evidence of a particularized harm. *See Nat'l Alliance for the Mentally Ill v. Bd. of County Comm'rs*, 376 F.3d 1292, 1295 (11th Cir. 2004).<sup>1</sup>

#### **A. Plaintiffs Lack Associational Standing.**

To survive summary judgment on the issue of associational standing, the Plaintiffs needed to come forward with evidence that at least one of their members had standing to sue on his own behalf. *Friends of the Earth*, 528 U.S. at 181. They have not done so.

---

<sup>1</sup> Plaintiffs' suggestion that the Eleventh Circuit has already resolved the current standing challenge is unpersuasive. That Court had before it different plaintiffs, defendants, and claims—and at the pleadings stage, as opposed to the summary judgment stage.

At the outset, it is important to note that any past harm cannot confer standing for injunctive relief—the Unions must prove likely future harm. *See Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Nonetheless, the Unions’ failure to find evidence supporting the standing of even one member to sue for past injuries is informative. In response to the Motion, Plaintiffs argue they identified forty-nine Union members “who were likely injured,” and they cite to a list attached to the declaration of their counsel. (Resp. at 4.)<sup>2</sup> But Plaintiffs’ list is not evidence, and it cannot support their opposition to summary judgment. “On motions for summary judgment, we may consider only that evidence which can be reduced to an admissible form.” *See Macuba v. Deboer*, 193 F.3d 1316, 1324-25 (11th Cir. 1999). A simple list of individuals, and attorneys’ corresponding representation that those on the list *might* have been injured, would not be admissible. *See also* Fed. R. Civ. P. 56(e) (“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”).<sup>3</sup>

In his Motion, the Secretary analyzed the Plaintiffs’ list of fifty-eight individuals. The current list includes only forty-nine, as Plaintiffs have abandoned certain individuals on the list. *See* Dec. of E. Westfall, ¶ 1 (doc 293-6). It is unclear how or why Plaintiffs chose the individuals to be removed from the list, and they left on the list eleven individuals who actually voted in 2006, along

---

<sup>2</sup> The declaration’s reference to the list states only that “[a]ttached as Exhibit 51 is a true and correct copy of the Amended Schedule A.” (Abt Dec. ¶ 52, doc 293-6.) The declaration of Dennis Graham is even less helpful. He avers that the list of fifty-eight individuals “includes sixty-nine (69) members of the AFL-CIO unions,” including seven AFSCME members. (Graham Supp. Dec. ¶¶ 6, 8, doc 293-6 at 98-99). Putting aside the issue of how sixty-nine individuals can appear on a list with only fifty-eight names, it is clear that Plaintiffs’ data-gathering techniques left much to be desired. For example, their list included Stephen Haber, a missionary in Africa, who is not a Union Member, and who has no interest in this litigation. *See* Haber Dec., Exhibit “C.” The Plaintiffs’ “lists” are not evidence, and they are not accurate.

<sup>3</sup> This evidentiary disability permeates the Plaintiffs’ response. For example, they rely on the declaration of their counsel, who reports the substance of telephone calls she had with various individuals on the list. *See* Dec. of E. Westfall, ¶¶ 3-8 (doc 293-6 at 117-119). This multi-level hearsay cannot be considered on a motion for summary judgment. *See Macuba*, 193 F.3d at 1324-25 (evidence that is otherwise admissible may be accepted in an inadmissible form at summary judgment stage, but hearsay cannot be reduced to admissible form). Plaintiffs’ other lists, (*e.g.*, those listing other individuals who “may have been injured,” doc. 293-2), and representations of other counsel regarding how they interpret certain data, (*e.g.*, Dec. of Sarah Nolan, doc. 293-2), are likewise not sufficient bases for opposing summary judgment.

with eight who were timely registered and could have voted. *See* Supp. Dec. of D. Roberts, attached as Exhibit “A.” Others had various problems unrelated to checkboxes, such as listing a Mailboxes Etc. business location as a residential address, or omitting driver’s license or last-four digits of their social security number (“SSN”), which is required by federal law.<sup>4</sup> *Id.* Ten submitted driver’s license or last-four SSN that did not match government records, but under Florida law, this did not prevent these individuals from voting. *See* Motion at 5 n.5.

The Plaintiffs now allege that this lawsuit encompasses more than just the checkboxes. This is a new position, as this case has been about the checkboxes since its inception, and throughout its several iterations. Indeed, Plaintiffs’ proposed order on Defendants’ motion to dismiss characterized the current complaint as “asserting constitutional claims based on the mental capacity box and Defendants’ failure to provide Plaintiffs and other applicants with adequate notice of and an opportunity to cure deficiencies in the application relating to the checkboxes.” (Doc. 199 at 5-6.) Their complaint alleged that applicants’ rights will be violated because “they will receive inadequate notice and no opportunity to correct their applications deemed incomplete . . . because one or more of the citizenship, felon status, or mental incapacity boxes were not checked.” (TAC ¶ 140).<sup>5</sup> But even if this Court now permits Plaintiffs to reach beyond the checkboxes, Plaintiffs have failed to proffer evidence that any specific member was harmed by the lack of a “grace period.”

After the Secretary put forth evidence that none of those on Plaintiffs’ list was harmed by the lack of a “grace period,” *see* Dec. of D. Roberts, Plaintiffs responded with declarations from three of their members. None creates a triable issue of material fact. Marie Gayle Kirlew states that

---

<sup>4</sup> The Help America Vote Act, 42 U.S.C. § 15301, *et seq.* (“HAVA”), states that voter registration applications “may not be accepted or processed by a State unless the application includes” a driver’s license number or last four digits of the applicant’s social security number. *Id.* § 15483(a)(5). Plaintiffs’ counsel has challenged Florida’s implementation of HAVA in another case in the Northern District of Florida. *NAACP v. Browning*, 07-402 (N.D. Fla.) (Mickle, J.).

<sup>5</sup> These were not isolated references. *See, e.g.*, Doc. 199 at 3; Doc. 190 at 7; Doc. 190 at 17; Doc. 200 at 3.

she did not believe she could vote. (Kirlew Dec. ¶ 7, doc. 293-6, 111.) She could have. Because her SSN failed to match government records, she was legally entitled to vote a provisional ballot and have it counted if her SSN was correct. *See* § 97.053(6), Fla. Stat. Likewise, Patricia Benvenuto could have voted in 2006, despite her apparent contrary belief. (Benvenuto Dec. ¶ 7, doc. 293-6, 77.) Hardly “beside the point,” as alleged by Plaintiffs, (Resp. at 6), the fact that these individuals could have voted demonstrates that they suffered no real harm as a result of the book-closing deadline.<sup>6</sup> Their “beliefs” notwithstanding, Plaintiffs offer no evidence that they were precluded from voting.

Plaintiffs’ third declaration is perhaps the most telling. Bladimir Hernandez was an active registered voter on election day. Supp. Dec. of D. Roberts ¶ 12. Plaintiffs’ only response is that “[w]hile the card may have been issued, Mr. Hernandez did not receive it until after the election.” (Resp. at 6.) No one needs a “card” to vote in Florida. If Mr. Hernandez had gone to the polls, he could have voted. And even if a “card” were necessary (which is not the case), Plaintiffs do not explain how a “grace period” would have facilitated timely delivery. The Plaintiffs’ reliance on an individual who was timely registered to vote betrays the weakness of their standing (and harm) arguments.<sup>7</sup>

Acknowledging their failure to “identify with absolute certainty which of these members suffered actual injury,” Plaintiffs blame the Secretary, insisting that he provided incomplete information. (Resp. at 4.) That assignment of blame lacks credibility. The Plaintiff Unions are consequential American institutions with substantial resources, and their failure to bring before this

---

<sup>6</sup> Moreover, neither Benvenuto nor Kirlew state that they attempted to amend their applications after book-closing. Even the requested “grace period” would require action by applicants, and it could never benefit applicants not willing to correct their applications. To date, neither Benvenuto nor Kirlew has resolved her failed match by resubmitting an application or otherwise. Supp. Dec. of D. Roberts, ¶ 11 (attached as Exhibit “A”).

<sup>7</sup> Plaintiffs also attempt to rely on the Declaration of D. Roberts, which they contend “confirms” harm to their members. (Resp. at 4.) The Roberts Declaration does no such thing, and Plaintiffs do not explain how it possibly could.

Court injured members is theirs alone.<sup>8</sup> Plaintiffs' failure is not for lack of effort. The reality is that the individuals Plaintiffs seek cannot easily be found.<sup>9</sup> Perhaps Plaintiffs underestimate the success of their registration and education efforts. As they argue, Plaintiffs take substantial steps to ensure that their members submit timely and complete applications. (Resp. at 8.) To Plaintiffs' credit, their membership appears quite capable of navigating Florida's easy registration requirements. Because Plaintiffs have not identified harmed members, they lack associational standing.<sup>10</sup>

B. Plaintiffs Lack Organizational Standing.

Lacking associational standing, Plaintiffs now assert standing to sue on their own behalves. This was not pled, (Motion at 8-9), and there is no evidence to support it. Plaintiffs assert that they "dedicate substantial resources to registering their members to vote," and that the book-closing statute is contrary to each of the Unions' missions. (Resp. at 8.) But "a showing that an organization's mission is in direct conflict with a defendant's conduct is insufficient, in and of itself, to confer standing on the organization to sue on its own behalf." *ACORN*, 178 F.3d 350, 361 n.7 (5th Cir. 1999) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Instead, an organization must show that it has suffered a concrete and demonstrable injury as a direct result of

---

<sup>8</sup> The Eleventh Circuit has rejected the strategy of blaming opponents for failure to satisfy standing. *See Nat'l Alliance for the Mentally Ill v. Bd. of County Comm'rs*, 376 F.3d 1292, 1296 (11th Cir. 2004) ("[Plaintiffs] blame their failure to identify any other injured constituents on the Board. According to them, the Board had sole possession of the identities of individual patients. The district court analyzed this assertion and correctly rejected it. As the district court explained, the Board provided [Plaintiffs] with information pertaining to persons who were eligible for treatment when it tendered discovery materials from the director of the Mental Health Department, Dr. Kenneth Robertson. [Plaintiffs] could have used those materials to ascertain the identities of injured constituents. They did not do so. [Plaintiffs'] failure to identify an injured constituent prevents them from asserting associational standing.").

<sup>9</sup> Of the thousands of names Plaintiffs submit, they could not find one member who would swear that "I registered timely and am eligible; I did not check the boxes; I attempted to amend during the book-closing period; I was legally precluded from voting; and I would have voted absent that legal preclusion."

<sup>10</sup> Plaintiffs' reliance on *Fla. Dem. Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) and *Sandusky CDP v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) is misplaced. Those courts dealt with challenges to a then-new statute, the Help America Vote Act. They concluded that harm in those cases could not be shown in advance. But Plaintiffs in this case cannot even demonstrate evidence of actual harm in the past—much less the future. Plaintiffs filed their current complaint in 2006, alleging that thousands would be substantially harmed during the 2006 election. Now, with the benefit of hindsight to evaluate that allegation, Plaintiffs are unable to support it.

the challenged statute. *Havens Realty*, 455 U.S. at 379 (sufficient injury alleged when actions “perceptibly impaired” organization).

The Plaintiffs have not come forward with evidence that they would suffer any concrete or particularized injury as a result of the book-closing deadline. They state that they expend resources collecting and checking voter registration forms and contacting applicants to assist with correction of any errors or omissions. (Resp. at 9 & n.19.) But they do not suggest that such efforts would be unnecessary with a “grace period.” They merely state—without any citation to evidence—that “Plaintiffs have expended significant resources to conduct voter registration and to counteract the repercussions of Florida’s failure to provide a grace period.” (Resp. at 8.) But even with the relief Plaintiffs seek, applicants would still be required to submit completed applications, so it is unclear how any “grace period” would alleviate Plaintiffs’ need to assist their members with registration. The Plaintiffs advance no evidence that the “millions of dollars [committed] to voter registration efforts” are necessary only in light of the book-closing statute.

Plaintiffs unsuccessfully attempt to distinguish *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1373 (N.D. Ga. 2007), in which the court rejected the plaintiffs’ standing argument because the organization “simply presented testimony indicating that at some undetermined time in the future, it may have to divert unspecified resources to various outreach efforts.” (Resp. at 9.) There is no distinction; that is precisely the case here. Plaintiffs have advanced no evidence of any particularized or concrete injury to be suffered by the Unions themselves, as a result of the book-closing deadline.<sup>11</sup>

---

<sup>11</sup> This lack of evidence distinguishes the present case from those cited by Plaintiffs. (Resp. at 8 n.15.) In *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005), the organizational plaintiffs submitted voter registration applications, which the state rejected. The rejection of those applications was concrete and not speculative, so those plaintiffs had standing. *Id.* Likewise, in *ACORN v. Fowler*, 178 F.3d 350 (5th Cir. 1999), the plaintiff organization survived summary judgment on standing only after it “raised a genuine issue of material fact that it has expended definite resources counteracting the effects of Louisiana’s alleged failure” to implement federal law. *Id.* at 360. In that case, the court specifically rejected plaintiff’s argument that its general voter registration efforts conferred standing because

**II. THE PLAINTIFFS HAVE FAILED TO COME FORWARD WITH EVIDENCE DEMONSTRATING THAT ANY BURDEN ASSOCIATED WITH THE BOOK-CLOSING DEADLINE IS NOT OUTWEIGHED BY THE STATE’S INTERESTS.**

The Plaintiffs now insist that they are not challenging the book-closing deadline. (Resp. at 1, 19.) Rather, they contend they challenge only the absence of a “grace period.” *Id.* But the Plaintiffs cannot challenge the *absence* of a statute that does not exist, and they cite no authority to suggest that they could. Instead, they unquestionably challenge the book-closing statute as it currently exists. Accompanying the Secretary’s Motion is substantial evidence supporting the appropriateness of the legislative determination establishing the twenty-nine-day book-closing deadline. To avoid addressing this evidence—and to obscure their failure to set forth evidence contradicting it—Plaintiffs employ creative semantics to suggest that this case is all about something other than the book-closing statute. They do not point to any other statute that they challenge; indeed there is none.

Plaintiffs do not set forth evidence disputing the necessity for the election tasks set forth in the Hollarn and Browning declarations. Nor do they provide evidence to dispute that the implementation of a “grace period” would require additional administrative resources.<sup>12</sup> Instead, they suggest that this Court should make the determination as to how to appropriately allocate limited administrative resources. But this policy determination should be made by the legislative branch. If the Florida Legislature or Congress decided to implement an amended book-closing deadline or some “grace period,” they could do so. Indeed Plaintiffs’ counsel recently lobbied

---

it had “not made a sufficient showing that it engaged in any of [those activities] as a direct result of Louisiana’s alleged failure.” *Id.*

<sup>12</sup> Their own witness confirms this. *See* Sancho Dep. 66-68 (Exhibit “B”); *see also* Defendant Supervisors’ declaration (noting that grace period would be implemented subject to available resources) (Doc. 293-6 at 13, ¶ 20); Anderson Interrog. Resp. (Doc. 293-6 at 73) (“Allowing for the processing of incomplete applications after the book closing would increase workload on staff. . . . It would or could create workload issues in the last several weeks when those same staff who may have to sustain the workload would be involved in other tasks preparing for the election. The precinct registers are prepared approximately two weeks prior to the election; as such registrations should be completed substantially prior to that time.”).

Congress to do just that.<sup>13</sup> But instead, the Florida Legislature has decided to allocate the state's resources differently.

In arguing that the book-closing deadline is unjustified, Plaintiffs primarily rely on the joint declaration of five Supervisors of Election, made in connection with a settlement agreement. (Doc. 293-6, 10.) Nothing in that declaration disputes the reasonableness of the existing 29-day registration deadline. And it cannot create an issue of triable fact in the face of the Hollarn and Browning declarations, which set forth precise reasons why the book-closing deadline is an essential component of Florida's election regulation, promoting fair and efficient elections. Moreover, the former defendants are from the largest counties in Florida, whose offices have greater resources than smaller counties. (Resp. at 1.) The availability of resources to administer a so-called "grace period" would differ by county, but the Secretary is charged with maintaining uniformity in the application of election laws, *see* § 97.012(1), Fla. Stat., so allowing a "grace period" in some counties but not others would not be workable.<sup>14</sup>

---

<sup>13</sup> The Brennan Center, an advocacy group representing Plaintiffs in another election regulation challenge, recently provided testimony to Congress advocating for the same "grace period" Plaintiffs now argue is constitutionally required. The Brennan Center recommended that Congress "[p]rotect voters who do not provide sufficient information to be registered, by providing notice of the defect and an opportunity to correct the error. Forms submitted before the voter registration deadline should be deemed timely submitted even if the correction is made or the missing information is provided after the voter registration deadline but before the election." Testimony of Brennan Center Director before the Subcommittee on Elections, Committee on House Administration, United States Congress, October 23, 2007 (available at [http://brennancenter.org/dynamic/subpages/download\\_file\\_50749.pdf](http://brennancenter.org/dynamic/subpages/download_file_50749.pdf)). The Brennan Center further advocates for same-day voter registration, which would eliminate registration deadlines altogether. According to their website, "[t]he Brennan Center is now working to enact [same day voter registration] and other measures in states prior to the 2008 election." *See* [www.brennancenter.org](http://www.brennancenter.org) (November 1, 2007). Plaintiff SEIU has also supported same-day voter registration. *See, e.g.*, SEIU Social and Economic Justice Report Summary, 2004 (available at <http://www.seiu.org/docUploads/SEJ%20Report.pdf>) ("[M]any citizens in America do not vote because of barriers that could be removed by same-day voter registration and other reforms."). The Brennan Center is not counsel in this case, but has teamed with the Advancement Project (counsel in this case) to challenge another provision of the Florida Election Code. *See LOWV v. Browning*, 06-21265 (S.D. Fla.) (Seitz, J.). More recently, they joined to challenge yet another provision of the Florida Election Code—also relating to voter registration—in the Northern District of Florida. *NAACP v. Browning*, 07-402 (N.D. Fla.) (Mickle, J.). These three simultaneous actions all challenge the constitutionality of interrelated election provisions relating to voter registration in Florida.

<sup>14</sup> Curiously, Plaintiffs now request an order "*permitting* the County Supervisors to accept corrections after the close of books" and up to and including election day. (Resp. at 1.) By contrast, their complaint sought an order "*directing*" Supervisors to permit applicants who failed to check the boxes, a "grace period" of

Finally, by attempting to characterize their challenge as attacking something other than the book-closing deadline, Plaintiffs appear to ignore other problems that would result from the relief sought. If the registration deadline remained, but a “grace period” were mandated for timely but incomplete applications, then applicants timely submitting applications missing critical, required information, would be more favorably treated than applicants diligently completing applications, but submitting them shortly after the deadline. That would invite a new legal challenge, a new negotiated declaration from Supervisors, and a new assertion that a further (but slight) amendment to the registration deadline is constitutionally required. This would continue chip by chip until the Plaintiffs judicially achieved their policy goal of same-day voter registration. The Plaintiffs’ disapproval of legislative policy determinations cannot give rise to a constitutional claim. Nor can an assertion of feasibility of their preferred policy. The registration deadline, as enacted, is a reasonable regulation, fully justified by Florida’s important regulatory needs. It is constitutional. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (“[T]he State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.”) (footnote omitted).

### **III. THE PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT.**

The Plaintiffs styled their response as cross-motion for summary judgment, notwithstanding the Court’s Order specifically denying the Plaintiffs’ request to submit a summary judgment motion after the deadline and prospectively striking all motions filed after October 8, 2007. (Doc. 287.) The first line of Plaintiffs’ opposition memorandum announced that it “constitutes an opposition in name only,” and they argue that they are entitled to summary judgment. (Resp. at 1.) Given the clarity of the Court’s October 10, order, the Secretary does not believe that the Plaintiffs’ response

---

fifteen days. (TAC at 40-41). If the Plaintiffs wish to let counties determine whether to allow some “grace period,” then uniformity will be lost, and new constitutional challenges will ensue. If they wish to require all counties to provide a “grace period,” then their evidence must go beyond the former defendant large counties. Plaintiffs have not demonstrated the constitutional necessity of a “grace period” in any county—much less all of them.

to the Secretary's Motion is anything more than that.<sup>15</sup> Accordingly, this Court should not grant summary judgment in Plaintiffs' favor. "[S]*ua sponte* summary judgment, without notice to the non-moving party, is wrought with the potential for violations of litigants' procedural rights." *Wingard v. Emerald Venture Fla. LLC*, 438 F.3d 1288, 1296 (11th Cir. 2006) (citing *Massey v. Cong. Life Ins. Co.*, 116 F.3d 1414, 1417 (11th Cir. 1997)). In *Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1202 (11th Cir. 2003), cited by Plaintiffs, the district court had provided ample notice that the non-moving party was to bring forward all of its evidence to support their claims. The Plaintiffs also cite *Massey v. Cong. Life Ins. Co.*, 116 F.3d 1414, 1417 (11th Cir. 2007), which *reversed a sua sponte* grant of summary judgment.<sup>16</sup>

The Secretary has demonstrated above his entitlement to summary judgment. For the same reasons, the Plaintiffs are not entitled to summary judgment. Regardless of this Court's disposition of the Secretary's Motion, the Plaintiffs are not entitled to summary judgment.

### CONCLUSION

For the reasons set forth above, the Secretary respectfully requests that this Court grant summary judgment in his favor.

---

<sup>15</sup> The Plaintiffs also submitted a 41-paragraph "Counterstatement of Material Facts," which is not authorized by the rules of this Court. Plaintiffs' obligation was to set forth "a single concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." L.R. 7.5(B). They contend that there are no disputed facts (Resp. at 1), yet they submitted some 800 pages of documents purportedly supporting their unauthorized "Counterstatement," including some documents referenced in neither their Opposition nor their "Counterstatement." The "Counterstatement" and its associated materials should be stricken. Nonetheless, in an abundance of caution, the Secretary responds to the "Counterstatement" contemporaneously with this Reply.

<sup>16</sup> The Plaintiffs' parenthetical quotation ("District courts unquestionably have the power to trigger summary judgment on their own initiative.") (Resp. at 2) was accurate, but it omitted the next sentence: "At the same time, however, district courts must temper their exercise of that power by the need to ensure that the parties receive adequate notice that they must bring forward all of their evidence." *Massey*, 116 F.3d at 1417. Plaintiffs also failed to note that *Massey* reversed the *sua sponte* grant of summary judgment—the very relief Plaintiffs seek from this Court.

Respectfully submitted, this fifth day of November, 2007.

*/s/ Allen Winsor*

---

Peter Antonacci  
Florida Bar No. 280690  
Allen Winsor  
Florida Bar No. 016295  
GRAYROBINSON, P.A.  
Post Office Box 11189  
Tallahassee, Florida 32302-3189  
Telephone: 850-577-9090  
Facsimile: 850-577-3311  
e-mail: pva@gray-robinson.com  
awinsor@gray-robinson.com

*Attorneys for the Secretary of State*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 5, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

*/s/ Allen Winsor* \_\_\_\_\_

Peter Antonacci

Florida Bar No. 280690

Allen Winsor

Florida Bar No. 016295

GRAYROBINSON, P.A.

Post Office Box 11189

Tallahassee, Florida 32302-3189

Telephone: 850-577-9090

Facsimile: 850-577-3311

e-mail: pva@gray-robinson.com

awinsor@gray-robinson.com

*Attorneys for the Secretary of State*

**SERVICE LIST**

*Diaz, et al. v. Kurt S. Browning, Secretary of State of Florida*  
Case No. 04-22572-CIV-KING/O'SULLIVAN  
United States District Court, Southern District of Florida

Mary Jill Hanson  
email: [mjhanson@hpjlaw.com](mailto:mjhanson@hpjlaw.com)  
Hanson, Perry & Jensen, P.A.  
400 Executive Center Drive, Suite 207  
West Palm Beach, Florida 33401  
Phone: 561-686-6550  
Fax: 561-686-2802  
*Attorney for Plaintiffs*  
Service via Notice of Electronic Filing

David Becker  
email: [dbecker@pfaw.org](mailto:dbecker@pfaw.org)  
People for the American Way Foundation  
2000 M. Street, Suite 400  
Washington, DC 20036  
Phone: 202-467-4999  
Fax: 202-293-2672  
*Attorney for Plaintiffs*  
Service via E-Mail

Judith A. Browne  
Sheila Y. Thomas & Elizabeth Westfall  
email: [ewestfall@advancementproject.org](mailto:ewestfall@advancementproject.org)  
Advancement Project  
1730 M. Street, NW, Suite 910  
Washington, DC 20036  
Phone: 202-728-9557  
Fax: 202-728-9558  
*Attorneys for Plaintiffs*  
Service via E-Mail

Jonathan P. Hiatt  
email: [jhiatt@aflcio.org](mailto:jhiatt@aflcio.org)  
AFL-CIO  
815 Sixteenth Street, NW  
Washington, DC 20006  
Phone: 202-637-5053  
Fax: 202-637-5323  
*Attorney for Plaintiffs*  
Service via E-Mail

Judith A. Scott  
John J. Sullivan  
email: [sullivaj@seiu.org](mailto:sullivaj@seiu.org)  
SEIU, 1313 L. Street, NW  
Washington, DC 20005  
Phone: 202-898-3453  
Fax: 202-898-3323  
*Attorneys for Plaintiffs*  
Service via E-Mail

Manny Anon, Jr.  
email: [m\\_anon@afscmeffl.org](mailto:m_anon@afscmeffl.org)  
Florida Public Employees Council 79  
3064 Highland Oaks Terrance  
Tallahassee, Florida 32301  
Phone: 222-0842  
Fax: 224-6926  
*Attorney for Plaintiffs*  
Service via E-Mail

Michael Halberstam  
Sarah Kroll-Rosenbaum  
Thomas P. Abt  
email: mhalberstam@paulweiss.com  
skroll-rosenbaum@paulweiss.com  
tabt@paulweiss.com Paul, Weiss,  
Rifkind, Wharton, Garrison, LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
Phone: 212-373-3000  
Fax: 202-492-0111  
*Attorneys for Plaintiffs*  
Service via Notice of Electronic Filing

Tracey I. Arpen, Jr.  
Ernst Mueller  
email: tarpen@coj.net  
City Hall, St. James Building  
117 West Duval Street, Suite 480  
Jacksonville, Florida 32202  
Phone: 904-630-1700  
Fax: 904-630-2388  
*Attorneys for Duval County Supervisor of  
Elections*  
Service via Notice of Electronic Filing

Mike Cirullo  
email: mcirullo@cityatty.com  
Orange County Attorney's Office  
3099 East Commercial Boulevard, Suite 200  
Fort Lauderdale, Florida 33308  
Phone: 954-771-4500  
Fax: 954-771-4923  
*Attorney for Orange County Supervisor of  
Elections*  
Service via Notice of Electronic Filing

Jeffrey P. Ehrlich  
email: ehrlich@miamidade.gov  
Miami-Dade County Attorney's Office  
111 N.W. First Street, Suite 2810  
Miami, Florida 33128  
Phone: 305-375-5151  
Fax: 305-375-5634  
*Attorney for Miami-Dade County Supervisor of  
Elections*  
Service via Notice of Electronic Filing

Burnadette Norris-Weeks  
e-mail: bnorris199@aol.com  
100 S.E. 6<sup>th</sup> Street  
Ft. Lauderdale, Florida 33301-3422  
Phone: 954-768-9770  
Fax: 954-768-9790  
*Attorney for Broward County Supervisor of  
Elections*  
Service via Notice of Electronic Filing

Ronald A. Labasky  
email: rlabasky@yvlaw.net  
Young Van Assenderp, P.A.  
225 S. Adams Street, Suite 200  
P.O. Box 1833  
Tallahassee, FL 32302  
Phone: 850-222-7206  
Fax: 850-561-6834  
*Attorney for Palm Beach County Supervisor of  
Elections*  
Service via Notice of Electronic Filing