

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-Civ-King

<p>EMMA YAIZA DIAZ <i>et al.</i>,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>KURT S. BROWNING, Secretary of State of Florida</p> <p style="text-align: right;">Defendant.</p>

**PLAINTIFFS' RESPONSE TO DEFENDANT BROWNING'S
STATEMENT OF MATERIAL FACTS**

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.5, Plaintiffs submit this Response to Defendant Browning's Statement of Material Facts in opposition to Defendant's motion for summary judgment. Plaintiffs further submit a Counterstatement of Material Facts as to which there is no material issue to be tried in support of Plaintiffs' cross-motion for summary judgment.

1. Disputed. Defendant's "fact" contains an incorrect predicate that only "checkboxes" have been challenged by Plaintiffs in this action. Without waiving their rights and objections, Plaintiffs state that they have identified numerous union members, including those who failed to mark the required checkboxes, who were injured by Fla. Stat. § 97.055's failure to provide for a grace period. Amended Schedule A, Ex. 51; Benvenuto Decl., Ex. 6; Hernandez Decl., Ex. 11; Kirlew Decl., Ex. 13; Nolan Decl. ¶¶ 19, 20; Roberts Decl. Ex. 31; Westfall Decl., Ex. 15.

2. Disputed. Defendant's "fact" contains an incorrect predicate that only "checkboxes" have been challenged by Plaintiffs in this action. Without waiving their rights and objections, Plaintiffs state that two of the union members who submitted declarations were affected by the absence of a grace period. The data provided by Defendant does not indicate that

Ms. Benvenuto or Ms. Kirlew are registered voters or corrected their applications in time to vote in the 2006 election. Benvenuto Decl., Ex. 6; Kirlew Decl., Ex. 13; Nolan Decl. ¶¶ 19, 20; Ex. B, C, D of Roberts Decl.; Westfall Decl., Ex. 15.

3. Disputed. Defendant's "fact" contains an incorrect predicate that only "checkboxes" have been challenged by Plaintiffs in this action. Without waiving their rights and objections, Plaintiffs state that Marie Gayle Kirlew submitted an application that was deemed incomplete because of missing checkboxes. The data provided by Defendant includes a record indicating that Ms. Kirlew submitted an incomplete application that did not have the felon or mental incapacity boxes checked. Kirlew Decl., Ex. 13; Nolan Decl. ¶ 19; Westfall Decl., Ex. 15.

4. Disputed. Defendant has not produced information sufficient to substantiate this "fact." The data produced by the Defendant does not purport to include information about whether voters in the data set actually voted. Nolan Decl., ¶ 23.

5. Disputed. Defendant has not produced information sufficient to substantiate this "fact." Additionally, Deval Brown did not become registered to vote prior to the November 2006 elections. Westfall Decl., Ex. 15.

6. Disputed. Defendant's "fact" contains an incorrect predicate that only "checkboxes" have been challenged by Plaintiffs in this action. Without waiving their rights and objections, Plaintiffs state that based on data produced to Plaintiffs by the Defendant, David Fleuriot and Sergio Hrvatin submitted applications that were incomplete with regard to checkboxes. Nolan Decl. ¶¶ 17, 18.

7. Undisputed.

8. Disputed. According to Ion Sancho, Supervisor of Elections for Leon County, "The 29-day time frame is clearly an arbitrary figure at this point developed in the precomputer era in which election officials had limited staffs and would want to do task A and have task A completed before doing task B. Now, that no longer exists today." Sancho Dep., Ex. 41.

9. Disputed. The book-closing deadline cannot give Supervisors of Elections certainty because there is no "freeze" on voter registration, consequently the period between the close of books and Election Day concerns "very fluid and dynamic voter registration activities." FVRS Guide, Ex. 50; Anderson Dep. 81-83; Cowles Dep. 133-34, 135-36; Kelly Dep. 171-73;

Korman Dep. 164-166; Snipes Dep. 84-86; Sola Dep. 74-75; Tanko Dep. 141-42; M. Winchester Dep. 26-28.

10. Disputed. Supervisors of Elections maintain adequate staff to handle all election-related assignments between the close of books and election day. Hollarn Dep. 59-60, 140-41; Anderson Dep. 89; Bedeni Dep. 140-41; Cowles Dep. 114; Holland Dep. 91-92; Johnson Dep 10-12; Kelly Dep. 56, 59; Korman Dep. 59-60; Snipes Dep. 82; Sola Dep. 50-51.

11. Disputed. See response to purported undisputed fact number 10, *supra*.

12. Disputed. Defendant's "fact" contains an incorrect predicate that only "checkboxes" have been challenged by Plaintiffs in this action, and Defendant has not produced information sufficient to substantiate this "fact." Without waiving their rights and objections, Plaintiffs state that Okaloosa county, with 117,269 registered voters, is approximately four times smaller than Orange County, the smallest county at issue in this action. See <http://election.dos.state.fl.us/voterreg/registration.asp>. Okaloosa county also contains an unusually large military population. Hollarn Dep. 29. Accordingly, Okaloosa County is not necessarily representative of other counties.

13. Disputed. Precinct registers and early voting materials are constantly updated during the book-closing period to reflect changes in voter registration, typically until the night before or the morning of Election Day. Anderson Dep. 77; Bedeni Dep. 111, 112; Cowles Dep. 163-64; Kelly Dep. 164, 174-75; Kolodny Dep. 140, 141-42, 147-48; Korman Dep. 166-167, 168; Sancho Dep. 75-77; Snipes Dep 87-88; Watson Dep. 109, 119-120; J. Winchester Dep. 45, 49, 51.

14. Disputed. See response to purported undisputed fact number 13, *supra*.

15. Disputed. See response to purported undisputed fact number 8, *supra*.

16. Disputed. Defendant's "fact" is nothing more than conclusory argument unsupported by facts other than a self-serving declaration submitted by Defendant Browning himself. Without waiving Plaintiffs' rights and objections, see response to purported undisputed fact numbers 8 and 9, *supra*.

17. Disputed. Defendant's "fact" 17 constitutes argument, not a statement of fact, and accordingly is not appropriately included in Defendant's Statement and does not require a response. Moreover, it is conclusory and immaterial, since Plaintiffs have not challenged Florida's book closing deadline in this lawsuit.

18. Disputed. Defendant's "fact" 18 constitutes argument, not a statement of fact, and accordingly is not appropriately included in Defendant's Statement and does not require a response. Moreover, it is immaterial, since Plaintiffs have not challenged Florida's book closing deadline in this lawsuit. Without waiving Plaintiffs' rights and objections, see response to purported undisputed fact number 8, *supra*.

PLAINTIFFS' COUNTERSTATEMENT OF MATERIAL FACTS

1. Supervisors of Elections ("Supervisors") are the principal election officials in their respective counties and are responsible for implementing, administering and enforcing Florida election law. *See* Ex. 1 ¶¶ 1, 2, Defendant's Response to Plaintiff's First Set of Interrogatories at 9, Ex. 2.

2. Defendant Browning and his staff lack personal knowledge with regard to voter registration practices at the county level and defer to the Supervisors' superior knowledge and experience. *See* Defendant's Response to Plaintiff's First Set of Interrogatories at 16, Ex. 2; Bradshaw Dep. 48, 124-26, 128-29, 133; Roberts Dep. 113-14; Taff Dep. 41-42, 42-43, 175-77, 180-82.

3. Under current law, applicants who submit an incomplete application prior to the book-closing date and submit a correction after the book-closing deadline have their applications processed, and are placed on the voting registration system and the voter rolls, but are nevertheless not eligible to vote in the election for which the books have already closed. *See* Ex. 1 ¶ 8.

4. During federal election cycles, the number of voter registration applications that Supervisors' offices receive increases sharply in the weeks shortly before the book-closing deadline. *See* Ex. 1 ¶ 10.

5. Many voter registration applicants who were otherwise eligible to vote submitted incomplete or incorrect voter registration applications in the weeks leading up to the book-closing deadline. Many of these persons were not able to correct their applications in order to be able to vote in the upcoming election. *See* Ex. 1 ¶ 11.

6. During the 2004 and 2006 federal election cycles, in the weeks leading up to the book-closing deadline, the number of voter registration applicants submitting incomplete or

incorrect voter registration applications in the former defendant Counties ranged from the hundreds to thousands in each County. *See* Ex. 1 ¶ 12.

7. Given the current lack of a grace period, many applicants who timely submit an incomplete application for the 2008 federal election cycle, will be unable to correct their application in time to become registered to vote in the 2008 federal election cycle. *See* Ex. 1 ¶ 13.

8. Applicants completing voter registration application forms do not intentionally complete them incorrectly. *See* Bedeni Dep. 96; Bradshaw Dep. 144-45; Kolodny Dep. 169; Korman Dep. 172; Sola Dep. 41-42.

9. The overwhelming majority of applicants are never found ineligible to vote. (*See* Korman Dep. 115, 173-174.)

10. On October 10, 2006, the book-closing date for the 2006 general election, the Miami-Dade Supervisor issued 368 incomplete application notices. Nolan Decl. ¶ 7

11. Broward County sent out almost 400 notice letters within four days of book closing. (Nolan Decl. ¶ 8.)

12. From the time an applicant mails an application, it can take approximately thirty days to receive an incomplete notice, if appropriate, from a Supervisor's office. (Kolodny Dep. 154-55; Korman Dep. 177.)

13. The Miami-Dade Supervisor received 1,514 incomplete voter registration applications in the thirty days prior to book closing in 2006 and 3,052 incomplete voter registration applications within thirty days prior to book closing in 2004. (Nolan Decl. ¶¶ 5,6.)

14. Broward County "searchholds" indicate that at a minimum 1,510 incomplete applications were received by the Broward Supervisors' office in 2004 within thirty days prior to book closing. (Nolan Decl. ¶ 9.)

15. If the law were changed to allow for grace periods, the Supervisors of Broward, Duval, Miami-Dade, Orange and Palm Beach counties would implement such a policy. *See* Ex. 1 ¶ 19.

16. There is no legitimate reason to prohibit a grace period. Ex. 1 ¶ 21; Cowles Dep. 141-42; Holland Dep. 81; Kolodny Dep. 137; Korman Dep. 161-162; Snipes Dep. 116; Sancho Dep. 109-10.

17. In 2004, Supervisors of Elections in Duval, Hillsborough, Leon, and Manatee counties allowed eligible voters to correct missing or incorrect information in their voter registration applications after the book closing date. *See* Carlberg Decl. at ¶¶ 15-19; Johnson Dep. 21; Sancho Dep. 100-01; Sweat Decl. at 2.

18. A grace period would not interfere with the orderly administration of elections, unduly burden Supervisors' resources, or interfere with other election-related activities between the book-closing deadline and Election Day. *See* Ex. 1 ¶ 22; Sola Dep. 92-93; Cowles Dep. 175; Kolodny Dep. 164-67; Korman Dep. 215-17; Sancho Dep. 41; Carlberg Decl. 15-19; Johnson Dep. 27-28; Sweat Decl., Ex. 2; Sancho Dep. 41-42.

19. The Supervisors maintain adequate staffing to perform all registration-related tasks between the book-closing date and Election Day. Anderson Dep. 89; Bedeni Dep. 140-41; Cowles Dep. 114; Holland Dep. 91-92; Johnson Dep. 10-12; Kelly Dep. 56, 59; Korman Dep. 59-60; Snipes Dep. 82; Sola Dep. 50-51; Def. Browning's Decl. at 5 (failing to set forth any facts supporting his conclusory argument that prohibiting a grace period prevents voter fraud).

20. The Supervisors' staffs are cross-trained so that they may switch between tasks as necessary, in a responsive and fluid manner. Bedeni Dep. 34; Cowles Dep. 121-22; Kelly Dep. 45; Korman Dep. 55. Supervisor Hollarn does not dispute this. *See* Hollarn Dep. 59-60, 140-41.

21. Precinct registers and early voting materials are constantly updated. *See* Anderson Dep. 77; Bedeni Dep. 111, 112; Cowles Dep. 163-64; Kelly Dep. 164, 174-75; Kolodny Dep. 140, 141-42, 147-48; Korman Dep. 166-167, 168; Sancho Dep. 75-77; Snipes Dep. 87-88; Watson Dep. 109, 119-120; J. Winchester Dep. 45, 49, 51.

22. There is no technological obstacle to the implementation of a grace period. *See* Watson Dep. 86; J. Winchester Dep. 55-56; M. Winchester Dep. 36.

23. There is no evidence to support the conclusion that implementing a grace period would cause an increase in voter fraud. *See* Ex. 1 ¶ 22, Duval County Resp. to Plaintiffs' Second Set of Interrogatories at Ex. 3 ¶ 8; Orange County Response to Plaintiffs' Second Set of Interrogatories at Ex. 4 ¶ 6; Palm Beach County Response to Plaintiffs' Second Set of Interrogatories at Ex. 5 ¶ 10; *see also* Bedini Dep. 132; Holland Dep. 82-83, 85-86; Korman Dep. 195; Cowles Dep. 145; Kelly Dep. 189, 247; Anderson Dep. 95-96; M. Winchester Dep. 37; Bradshaw Dep. 48, 76-77; Taff Dep. 165-66; Roberts Dep. 172-73.

24. Voter registration is a central component of each union's mission. *See* AFL-CIO Constitution, Ex. 41, AFL 621; SEIU Constitution, Ex.48, SEIU 1029, 1031; AFSCME Constitution, Ex. 44, AFSME 847; Council 79 Constitution, Ex. 46, CL-79.

25. Registering non-members to vote is an important component of Plaintiffs' registration activities. *See* Sullivan Dep. 62; Dion Dep. 41; Feller Dep. 25-26.

26. The prohibition of a grace period has impacted Plaintiffs' mission. Sullivan Dep. 59; *see also* Gonzalez Dep. 83; Dion Dep. 58.

27. Plaintiffs identified forty-nine union members who were likely injured by the failure to provide a grace period. The list of members was generated by relying on the data provided to the Plaintiffs by the Secretary and County Defendants. *See* Nolan Decl. ¶¶ 3-16; Dennis Graham Supp. Decl., Ex. 10; Whittaker Decl., Ex. 16; *See* Amended Schedule A, Ex. 51.

28. In his declaration, Donald Roberts states that twenty-nine of Plaintiffs' union members submitted incomplete applications and were unable to vote in the 2006 elections. Roberts Decl.

29. In his declaration, Donald Roberts states that twenty-nine of Plaintiffs' union members submitted incomplete applications and did not vote in the 2006 elections. Roberts Decl.

30. In his declaration, Donald Roberts states that Plaintiff union members Alida Rodriguez, Thomas Veal and Stephen Haber submitted that were deemed incomplete because of checkboxes and were did not vote in the 2006 elections. Roberts Decl.

31. Contrary to Defendants' assertions, David Fleuriot and Sergio Hrvatin also submitted that were deemed incomplete because of checkboxes and did not vote in the 2006 elections. Nolan Decl , Roberts Decl.

32. Plaintiff union member Marie Gayle Kirlew was unable to correct her timely submitted voter registration application before the close of books before the 2006 general election. *See* Kirlew Decl., Ex. 13.

33. Plaintiff union member Patricia Anne Benvenuto could not vote in 2006 because she received notice of her incorrect application too late to correct it before the close of books. Benvenuto Decl. Ex. 6.

34. Plaintiffs committed millions of dollars to voter registration efforts. *See* (Ex. 43, AFL 1535-36; Dion Dep. 50-60); (Ex. 49). AFASCME International has also funded voter registration in Florida through grants to Council 79, Feller. Dep. 11, 12.

35. Plaintiffs expended resources in tracking, and keeping data on incomplete applications. *See, e.g.*, Ex. 42, AFL 1139 Ex. 47; CL-79 1191-1260.

36. At the AFL-CIO, members were trained to check voter registration forms carefully before submitting them. (Dion Dep. at 52.)

37. At the SEIU in 2004, Carolyn Thompson and other paid staff spent many hours and reviewing thousands of voter registration applications in the Miami-Dade Supervisor of Election's Office to check for errors and contact voters to ensure that they could make corrections before the close of books. (Sullivan Dep. at 15-20).

38. If the prohibition on a grace period were enjoined, SEIU would have more time to correct problems with voter registration applications and could allocate its resources in a more efficient manner to achieve the results that it is seeking to accomplish in an election. Sullivan Dep. at 38.

39. If the prohibition on a grace period were enjoined, the AFL-CIO could continue to register its members and assist them complete voter registration applications, and those registered members would be able to participate in the upcoming elections. Dion Dep. at 45.

40. The lack of a grace period causes SEIU to divert its resources by forcing it to pull large numbers of campaign workers off their regular assignments in order to make phone calls and do mailings to correct problems. Further, if Supervisors of Elections had additional time to process corrections to voter registration applications, SEIU would not need to provide assistance to the Supervisors to contact applicants who submitted incomplete voter registration applications. Sullivan Dep. at 38-39.

41. In past election cycles, the prohibition on a grace period has caused AFSCME Council 79 to divert its resources towards advocacy with election officials in an attempt to persuade them to process applications on which one or more checkboxes was not completed. If the prohibition on a grace period were enjoined, AFSCME Council 79 would be able to assist its members in correcting their applications. Gonzalez Dep. at 73.

Dated: Miami, Florida
October 25, 2007

RESPECTFULLY SUBMITTED,

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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 25th day of October, 2007, to counsel for the parties listed in Exhibit A, attached hereto.

Dated: Miami, Florida
October 25, 2007

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** Pro hac vice motion to be filed.