

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING/O'SULLIVAN

EMMA YAIZA DIAZ, et al.

Plaintiffs,

v.

SUE M. COBB, Secretary of State of Florida,
et al.

Defendants.

**DEFENDANTS SNIPES, HOLLAND, COWLES, AND ANDERSON'S
MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Based on Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, Defendants Brenda Snipes, Broward County Supervisor of Elections; Jerry Holland, Duval County Supervisor of Elections; Bill Cowles, Orange County Supervisor of Elections; and Arthur Anderson, Palm Beach County Supervisor of Elections, jointly move to dismiss Plaintiffs' Third Amended Complaint. Defendants submit the following Memorandum of Law in support thereof.

PRELIMINARY STATEMENT

On April 21, 2006, Defendants Cobb, Snipes, Holland, Cowles, and Anderson moved to dismiss the Plaintiffs' First Amended Complaint (doc no. 128). On May 9, 2006, this Court granted Plaintiffs' Motion for Leave to Substitute Parties and Submit an Amended Complaint (doc. no. 145). That order mooted the Defendants' motion to dismiss the First Amended Complaint. Plaintiffs then filed a Second Amended Complaint. Defendants Cobb, Cowles,

Snipes, Holland and Anderson filed a Motion to Dismiss the Second Amended Complaint, and Defendant Sola filed a Motion for More Definitive Statement.

On June 20, 2006, this Court rendered an Order dismissing all statutory claims, Counts I, II, VI, and VII, with prejudice; dismissing all 2004 claims against Defendant Cobb with prejudice, and granting Defendant Sola's Motion for More Definitive Statement as to the Constitutional claims, Counts III, IV, and V.

On July 10, 2006, the Plaintiff filed a Third Amended Complaint naming as Defendants Supervisor of Elections Snipes, Holland, Sola, Cowles and Anderson and Secretary of State Sue Cobb. On July 14, pursuant to a Motion for Extension of Time filed by Defendant Sola, this Court rendered an Order providing that the responses from all Defendants are due by August 14, 2006.

THE THIRD AMENDED COMPLAINT

In their Third Amended Complaint¹, the Plaintiffs attempt to allege three causes of action, as follows:

- First Cause of Action: Naming as Defendants Anderson, Cowles, Snipes and Sola, related to the 2004 election, alleging violations of the First, Fifth and Fourteenth Amendments for failing to notify applicants of their failure to complete the voter registration application so that it could be corrected before closing dates, and for not providing a "grace period" to permit omissions to be cured after book closing.
- Second Cause of Action: Naming all Defendants, related to the 2006 elections, alleging violations of the First, Fifth and Fourteenth Amendments for failing to notify applicants of their failure to complete the voter registration application so that it could be corrected before closing dates, and for not providing a "grace period" to permit omissions to be cured; and,
- Third Cause of Action: Naming all County Defendants, related to the 2004 elections, and all Defendants relating to the 2006 elections, based on their

¹ References to the Third Amended Complaint shall be as "TAC."

rejection of applications where the mental incapacity box was not checked on the voter registration applications.

I. PLAINTIFFS FAIL TO STATE A COGNIZABLE CONSTITUTIONAL VIOLATION.

Notwithstanding the fundamental nature of the right to vote, states may require certain reasonable and even-handed qualifications and regulations on the exercise of the franchise without violating the Constitution. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959). These regulations play an integral and essential role in our democracy. The Supreme Court in *Storer v. Brown* recognized that:

as a practical matter, there must be a substantial regulation of the elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.

In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, *the registration and qualifications of voters*, and the selection and qualification of candidate.

415 U.S. 724, 730 (1974) (emphasis added).

Given the essential role of such regulations, a provision regulating the registration of voters that does not absolutely disenfranchise a class of individuals does not impinge on the fundamental right to vote as long as it advances a legitimate state interest. *See Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).² In *Rosario*, the Supreme Court upheld a New York law

² This case is not one that implicates strict scrutiny of the voter registration application requirements in question. *See McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969). The application requirements in question are consistent with even-handed regulatory mechanisms to administer elections that have been upheld based on rational basis review. *See id.* (applying rational basis to absentee ballot provision). But even if strict scrutiny were applicable, restrictions intended to prevent election fraud serve a compelling governmental interest. *See Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Kemp v. Tucker*, 396 F. Supp. 737,

that limited participation in a party primary to those voters that registered as members of the party within thirty (30) days of the previous general election. The Court reviewed all prior cases applying strict scrutiny to voting regulations and concluded that “[i]n each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote.” *Id.* at 757. The Court differentiated those cases from a regulation that simply required voters to register to participate in an election within a specified time and that thus “did not absolutely disenfranchise the class to which petitioners belong.” *Id.* The Court found that so long as the questioned regulation advanced an “important state goal” it would pass constitutional muster. *Id.* at 760. In words applicable to this context, the Court admonished the plaintiffs that “if their plight can be characterized as disenfranchisement at all, it was not caused by [the challenged law], but by their own failure to take timely steps to effect their enrollment.” *Id.* at 757. The Court thus upheld the challenged law as advancing the important state interest of preventing party raiding in a primary election.³

Therefore, it is clear that the Plaintiffs' allegations are insufficient to establish or maintain any constitutional claims against the Supervisors of Elections involved. The requirements that the State of Florida has imposed upon those persons seeking to register to vote in Florida and on

739 (M.D. Pa.), *aff'd*, 423 U.S. 803 (1975). Moreover, in light of the direct and minor “burdens” imposed by the state in requiring a voter application registrant to complete a few questions, as compared to their essential purpose with respect to preventing and prosecuting voter fraud, the state’s requirements are narrowly tailored in furtherance of that compelling interest.

³ *Rosario* involved candidate access to the ballot—not voting rights per se. But the Supreme Court has recognized that the same interests apply in both instances. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (“The rights of voters and the rights of candidates do not lend themselves to neat separation.”) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1379 (S.D. Fla. 2004) (“In *Bullock v. Carter*, the

Supervisors of Elections in reviewing those respective applications are nothing more than reasonable time, place and manner restrictions, which are appropriate based upon the State's legitimate interest in both the regulation of elections and ensuring that only properly qualified persons are registered to vote in Florida. No plaintiff or other person is denied the outright opportunity to vote, nor are there any substantial burdens placed on those persons' right to vote. They must merely complete an application timely and demonstrate that they are qualified to be registered, which will result in their registration.

With respect to Plaintiffs allegations concerning a cure period for matters arising in the 2004 elections, the Florida Legislature adopted provisions concerning Florida voter registration, and established that the registration books would be closed on the 29th day before each election. *See* §97.055, F.S. (2004). For the 2004 election cycle, pursuant to §97.073, F.S., the Supervisor of Elections was required to notify each applicant of the disposition of the voter registration application and in the event that an application was incomplete, must request that the applicant supply both the missing information in writing and a signed statement that the additional information is true and correct. *See* §97.073(1), F.S. (2004).

With respect to the 2006 Plaintiff allegations concerning incomplete voter registrations, §97.073(1), F.S., again continues to provide for notification of an applicant concerning the disposition of the applicant's voter registration application and further states that if an application is incomplete, the supervisor must request the applicant supply this information using a voter registration application signed by the applicant. *See* §97.073, F.S. (2006). In addition, amendments adopted by the 2005 Florida Legislature provide that if a voter registration applicant

United States Supreme Court made clear that voting rights cases are relatively indistinguishable from ballot access cases.”).

fails to provide any of the required information on the voter registration application form, the supervisor shall notify the applicant of the failure by mail within five (5) business days after the supervisor has the information available in the voter registration system. *See* §97.052(6), F.S. (2006). The applicant is then provided the opportunity to complete the application and vote in the next election up until the book closing for that next election. *Id.*

In Plaintiffs' complaint they assert that Florida law allows for persons to correct their voter information following the close of the books. However, the Florida Legislature's scheme is not unconstitutional as it relates to the Plaintiffs, as the provision of §97.1031, F.S., allows existing electors to update information on their valid registration. These are changes to valid registrations, whereas, pursuant to §97.053, F.S., failure to execute the checkbox will deem the application incomplete and the person not registered to vote. *See* §97.053, F.S. (2006). Therefore, there is a clear difference in status between the respective parties, and the Legislature, much less the supervisors or this Court, is not required to provide a cure period for Plaintiffs following the closing of the books due to the existence of §97.1031, F.S.

The Legislature has created a non-discriminatory regulatory scheme concerning requirements for voter registration and further provided, both in 2004 and 2006, for notification to persons who file incomplete applications. While these minimal requirements do impose some minor burden on persons seeking to register, they are not severe and meet an important state regulatory interest. As such, they are appropriate and permissible. *See Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059 (1992). As stated by the Seventh Circuit Court of Appeal in *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004):

State legislatures may, without transgressing United States Constitution, impose extensive restrictions on voting, even though any such restrictions is going to exclude, either de jure or de facto, some people from voting, and the

constitutional question is whether the restriction and resulting exclusion are reasonable, given the interest the restriction services.

Griffin 385 F.3d at 1130.

The Florida Legislature has designed a reasonable system to notify persons who have failed to register properly. This system in no way disenfranchises these persons from subsequent elections in the event that they file incomplete applications either by choice, as reflected by the Plaintiffs, or through error.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF PURSUANT TO 42 U.S.C. § 1983

Plaintiffs allege two specific examples of untimely notification of incomplete applications relating to 2004 (¶ 104-106, TAC), but none as to 2006. “It is not every election irregularity, however, which will give rise to a constitutional claim and an action under section 1983.” *See Bodine v. Elkhart County Election Bd*, 788 F.2d 1270, 1271 (7th Cir. 1986) (quoting *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975)). Further, in an official-capacity action like this one, “a governmental entity is liable under § 1983 only when the entity itself is a ‘moving force’ behind the deprivation; thus, in an official-capacity suit the entity’s ‘policy or custom’ must have played a part in the violation of federal law.” *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *accord Cook v. Sheriff of Monroe County*, 402 F.3d 1092, 1116 (11th Cir. 2005).

The Third Amended Complaint includes no allegation that the failure to give timely notice was the result of a policy or custom of the Defendants. Plaintiffs fail to show any basis for relief with respect to a required "cure" period. In the instant case, the Supervisors of Elections involved have adopted no specific directives, policies, or customs, of which Plaintiffs

complain, which violated their rights. Pursuant to Florida law, which the Supervisors of Elections are required to follow, the Supervisors took the actions concerning registration as Florida law requires, did not process any further applications as required by Florida law, and notified individuals who had deficient applications so that they could attempt to cure their problems and be registered for the subsequent election as provided under Florida law.

Based upon the provisions of the Florida Statutes contained in the Florida Election Code, Sections 97-106, Florida Statutes, Supervisors' policies with respect to voter registration are directly and strictly provided for. They do not have any authority to adopt contrary policies nor create waivers for situations based upon their interpretation of that individual voter registration issue. "In general, final policymaking authority is lacking, for the purpose of Section 1983 when officials decisions are subject to meaningful administrative review." *See Caruso v. City of Cocoa, Florida*, 260 F. Supp. 2d 1191 (M.D. Fla. 2003). In the instant case, the authority of the Supervisors to vary from the Florida Legislature's directives does not exist. Pursuant to §97.012, F.S., the Secretary of State is considered the Chief Elections Officer of the State. Further, a Secretary of State is responsible to obtain and maintain uniformity in the interpretation of the election laws. *See* §97.012(1), F.S. Therefore, pursuant to the Florida Legislature's directives and law, individual Supervisors are not authorized to create policy or make administrative determinations contrary to the statutes, and further, their actions are subject to statewide uniformity requirements and oversight by the Florida Secretary of State. *See* §97.012(2), F.S. Nowhere in the pleadings is it demonstrated that the Supervisors of Elections who are named as Defendants herein have the ability to adopt a formal legal policy with respect to the violations which are alleged, nor are there other customs or policies which exist which would constitute final policymaking action by the Supervisors. As demonstrated by the facts and the law in this

case, the Supervisors are not the final policymakers with respect to the actions alleged herein. *See Grech v. Clayton County, Georgia*, 335 F.3d 1326 (11th Cir. 2003).

**III. ALL CLAIMS AGAINST DEFENDANTS
SUPERVISORS OF ELECTION RELATING TO 2004
SHOULD BE DISMISSED DUE TO 11th AMENDMENT IMMUNITY**

The Court dismissed all claims against the Secretary of State relating to 2004 due to 11th Amendment immunity. As no injunctive relief is available for 2004, this left the Supervisor of Election Defendants with defending all claims relating to elections in 2004, and exposed to damages claims and attorney's fees in the event this court finds that conduct in 2004 was unconstitutional. In the Third Amended Complaint, the Plaintiffs apparently do not sue Defendant Holland for 2004 election issues, leaving Defendants Anderson, Cowles, Snipes and Sola as the only defendants as to Plaintiffs' claims for the 2004 election.⁴

The Defendant Supervisors of Election are entitled to Eleventh Amendment immunity since they function as "arms of the state" when it comes to the conduct of elections in Florida. *Manders v. Lee*, 38 F.3d. 1304 (11th Cir., 2003), an *en banc* decision of the 11th Circuit, is the definitive case on analyzing whether an entity is an "arm of the state" and thus entitled to Eleventh Amendment immunity. In that case, the 11th Circuit reviewed whether a Georgia Sheriff was entitled to Eleventh Amendment immunity, and found that he was so entitled. *Id.* at 1328. In so holding, the 11th Circuit receded from earlier decisions that stated or implied that Georgia Sheriffs act for counties, *id.* at 1328, n. 52, and Judge Barkett, in her dissent,

⁴ To the extent Plaintiffs assert that they have included Defendant Holland in their claims for the 2004 election, the arguments herein would apply to him as well.

characterized the decision as altering previous decisions that local sheriffs were not entitled to Eleventh Amendment immunity, *id.* at 1332, n. 1.⁵

In *Manders*, the 11th Circuit held that an individual need not be labeled a “state officer” or “state official” to be entitled to 11th Amendment immunity; rather, the person need only be acting as an “arm of the state.” There are four factors in determining whether an entity is an “arm of the state”: (1) how state law defines the entity; (2) what degree of control the state maintains over the entity; (3) where the entity derives its funds; and, (4) who is responsible for judgments against the entity. *Manders*, 38 F.3d. at 1308. Applying these factors in the instant case, the Defendant Supervisors of Election are clearly arms of the state of Florida, entitled to 11th Amendment immunity.

1. State Law, Not Counties, define the role and responsibilities of Supervisors of Elections.

County Supervisors of Election are established through Article VIII, Section 1(d) of the Florida Constitution. None of the Defendant County Supervisors of Election, except Defendant Sola, are employees of a County or answerable to a County Commission. The duties and obligations of Supervisors of Elections are established by state law. The Secretary of State is the state’s chief elections officer. §97.012, Florida Statutes (2004). Each County has a Supervisor of Elections, collectively comprising Florida’s statewide election system. § 98.015, Florida Statutes. This section lists the duties of the Supervisors of Elections, right down to the minimum days and hours an office must be open. §98.015(4), Florida Statutes. In addition, Florida law

⁵ One such case is *Hufford v. Rodgers*, 912 F.2d. 1338 (11th Cir. 1993), in which the 11th Circuit had found that a Florida Sheriff was not entitled to 11th Amendment immunity. Subsequent to the decision in *Manders*, the 11th Circuit confirmed its decision that a Florida Sheriff is not an “arm of the state,” but only after addressing the four *Manders* factors. *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d. 1298 (11th Cir. 2005).

sets forth the qualifications to register to vote that the Supervisors of Election must use;⁶ administration for voter registration by Supervisors of Elections, including the duty to determine whether an applicant is ineligible;⁷ the Supervisors of Elections' obligation to use voter registration forms developed by the state;⁸ the Supervisor of Elections' acceptance of voter registration applications;⁹ the Supervisors of Elections' closing of registration books prior to elections;¹⁰ direction to the Supervisors of Elections on how to handle first time registrants by mail;¹¹ the form and content of voter registration cards used statewide;¹² and, the procedure for the Supervisors of Elections' disposition of voter registration applications.¹³

State law also sets forth the list maintenance requirements for Supervisors of Elections;¹⁴ directs Supervisors of Elections on updating voter signatures;¹⁵ limits the Supervisors of Elections' ability to permit inspection and copying of the county voter registrations;¹⁶ and, requires the Supervisors of Elections to provide information to the Department of State for the development of the statewide voter registration database.¹⁷ Finally, the Supervisors of Elections' conduct of elections, including the establishment of election boards and poll worker recruitment and training, are governed by Florida Statutes.¹⁸

⁶ §97.041, Florida Statutes (2004)
⁷ §98.045, Florida Statutes (2004).
⁸ §97.015, Florida Statutes (2004).
⁹ §97.053, Florida Statutes (2004).
¹⁰ §97.055, Florida Statutes (2004).
¹¹ §97.0535(2), Florida Statutes (2004).
¹² §97.071, Florida Statutes (2004).
¹³ §97.073, Florida Statutes (2004).
¹⁴ §98.065, Florida Statutes (2004).
¹⁵ §98077, Florida Statutes (2004).
¹⁶ §98.095, Florida Statutes (2004).
¹⁷ §98.0977, Florida Statutes (2004).
¹⁸ §102.012 and 102.014, Florida Statutes (2004).

The counties do not delegate any of their governmental powers to the Supervisors of Election; rather, as set forth herein, Florida's Supervisors of Elections' duties, with the possible exception of Miami-Dade County's Supervisor of Elections,¹⁹ are derived from state law.

2. Degree of Control the State Maintains Over Supervisors of Elections

The same statutes set forth above also illustrate the level of control the state has over Supervisors of Elections. The voter forms, registration practices, book closings, notice requirements, and all other aspects of elections in the state are provided through statutes or rules promulgated by the Secretary of State. Even regarding removal from office, that authority is set forth in Florida's Constitution, and provides for the suspension of officers, including Supervisors of Election, by the Governor with review by the state Senate. Article IV, Section 7, Florida Constitution. With one exception (Miami-Dade County), Counties have no say in the forms, registration practices, list maintenance, discipline, or any other aspect of the office of Supervisor of Elections.

3. Funding for Supervisors of Elections

Much like the funds applicable to the Sheriff in *Manders*, state funding is involved to some extent to particular functions of the Supervisor of Elections. State funding would obviously be involved in the suspension of a Supervisor of Elections and any review by the state senate. State funding pays for the printing of the state form of voter registration application required by §97.052, Florida Statutes (2004). State funding is provided for technical assistance to Supervisors of Elections for voter education and election personnel training services, and

¹⁹ Defendant Sola, Miami-Dade County Supervisor of Elections, is the only Supervisor in the state that is not elected and is appointed by a County Commission.

voting systems. §97.012, Florida Statutes (2004). State funding is provided for purchase of voting systems, poll worker training and voter education.

As in *Manders*, the major burden of funding for a County Supervisor of Elections is with the County. §129.201 and 129.202, Florida Statutes. Moreover, as is the case with the Sheriff in *Manders*, the funding is necessary to permit the Supervisor of Elections to fulfill duties imposed upon that office by state law. *See Manders*, 338 F.3d. at 1323. In Florida, the County sets the Supervisor of Elections' budget, but at the same time Florida law provides that “[t]he independence of the supervisor of elections shall be preserved” in most financial aspects of the office. §129.202(2), Florida Statutes. Florida statutes even establish the salary for Supervisors of Elections. §145.09, Florida Statutes. All of these factors tip this third element in favor of Eleventh Amendment immunity for Defendant Supervisors of Election Anderson, Cowles, Holland, and Snipes.

4. Liability for and Payment of Adverse Judgments.

There is no statute or case law that provides that the state of Florida is required to satisfy a judgment against a Supervisor of Elections. At the same time, there is no case law or authority that mandates a County satisfy a judgment entered against a Supervisor of Elections. As a result, as in *Manders*, a Florida Supervisor of Elections would have to satisfy a judgment from his or her own budget. *Manders*, 38 F. 3d. at 1327.

There is no statute that compels the Supervisor of Elections to include an adverse judgment in his or her annual budget request. §129.201(2), Florida Statutes, lists the expenditure items to be included in the annual budget, and does not list judgments. Moreover, even if such were requested by a Supervisor of Election, there is no requirement that the County fund it. §129.201(4), Florida Statutes. Unlike Sheriffs in Florida, there is nowhere for a Supervisor of

Elections to seek review of County Commission funding decisions other than in Florida Circuit Courts, and then such would be reviewed under an arbitrary and capricious standard. *See Pinellas County v. Nelson*, 362 So.2d. 279 (Fla. 1978).

At the end of the day, if a significant adverse judgment were rendered against a Supervisor of Elections, the result would be increased budget requests to fund the judgment, or a reduced budget remaining after payment of an adverse judgment to meet his or her statutorily obligated responsibilities. At the very least, this scenario would interfere with the state program of conducting elections through its county Supervisors of Elections, and the state's ability to rely on the Supervisors of Elections to perform their duties as required by state law.

It is important to note that the 11th Circuit clearly articulated that exposure to the state treasury alone may trigger the Eleventh Amendment immunity, making analysis of the other factors unnecessary. *Manders* 38 F. 3d. at 1328. Yet, at the same time, the fact that a state treasury is not directly at risk is not a litmus test to per se deny Eleventh Amendment immunity:

The Eleventh Amendment, however, does not turn a blind eye to the state's sovereignty simply because the state treasury is not directly affected. Moreover, the United States Supreme Court has never said that the absence of the treasury factor alone defeats immunity and precludes consideration of other factors, such as how state law defines the entity or what degree of control the State has over the entity. As mentioned earlier, although the state treasury was not affected, the *Hess* Court spent considerable time pointing out how that lawsuit in federal court did not affect the dignity of the two States because they had ceded a part of their sovereignty to the federal government as one of the creator-controllers of the Compact Clause entity in issue. If the state-treasury-drain element were always determinative in itself, this discussion, as well as the other control discussion, would have been unnecessary.

Id.

The claims in this case clearly result from election practices implemented by the Defendant Supervisors of Election pursuant to the duties and obligations imposed upon them by

state law in the conduct of election-related matters. The four *Manders* factors are satisfied in this case. As a result, this Court should dismiss the damages claims against the Defendant Supervisors of Elections for the 2004 election.

IV. DEFENDANTS' INCORPORATION OF CO-DEFENDANTS' ARGUMENT

These Defendants further adopt the argument made with respect to the Plaintiffs' cause of action by adoption and reference of Defendant Sola or Defendant Cobb to the extent they apply to the allegations made against them.

WHEREFORE, based on the foregoing, Defendants move to dismiss Plaintiffs' Third Amended Complaint and request an Order be entered accordingly.

Dated this 14th day of August, 2006.

Respectfully submitted,

ON BEHALF OF DEFENDANTS
SNIPES, HOLLAND, COWLES & ANDERSON

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Email and U.S. Mail on this 14th day of August, 2006, to the following:

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