

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING

EMMA YAIZA DIAZ;
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,

Plaintiffs,

v.

SUE M. COBB, Secretary of State of Florida;
BRENDA SNIPES, Broward County Supervisor of
Elections; JERRY HOLLAND, Duval County Supervisor
of Elections; LESTER SOLA, Miami-Dade
Supervisor of Elections; BILL COWLES, Orange County
Supervisor of Elections; and ARTHUR ANDERSON,
Palm Beach County Supervisor of Elections,

Defendants.

**DEFENDANT SUE M. COBB'S MOTION TO DISMISS
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Sue M. Cobb, Secretary of State of the State of Florida, moves to dismiss Plaintiffs' Third Amended Complaint ("TAC" or the "Complaint"), which was filed on July 10, 2006. In support of this Motion, Defendant Cobb submits the following Memorandum of Law.

MEMORANDUM OF LAW

Seeking to invalidate important election regulations, the Plaintiffs initiated this litigation immediately before the 2004 general election. The Plaintiffs based their claims on the Voting Rights Act, the National Voter Registration Act, and the United States Constitution. *See* Second Amended Complaint. On June 20, this Court dismissed the Plaintiffs' statutory claims and directed the Plaintiffs to more clearly plead any constitutional claims they intended to pursue. (Doc. No. 167.) In response to the Court's order, the Plaintiffs have now filed their Third Amended Complaint, which presents brand new constitutional claims nearly two years after the Plaintiffs first sought emergency relief in this Court. The Plaintiffs' newest complaint, like the ones before it, fails to state a claim upon which relief can be granted. It should be dismissed.

ARGUMENT

The Third Amended Complaint presents three separate causes of action. The first cause of action is expressly limited to Defendants other than the Secretary of State.¹ (TAC ¶ 129-134.) The second cause of action claims that Florida's failure to offer an undefined "grace period" for applicants to submit voter registration applications after the state's book-closing date violates the First, Fifth, and Fourteenth Amendments. (TAC ¶ 140.) The final cause of action alleges that a sentence on Florida's Voter Registration Application is so confusing and has such "inordinately complicated language" that it amounts to a substantial burden on the Plaintiffs' fundamental right to vote. (TAC ¶¶ 144-155.)

I. NO "GRACE PERIOD" IS REQUIRED BY THE CONSTITUTION.

Like nearly all states, Florida has a voter registration deadline. Under Florida law, "[t]he registration books must be closed on the 29th day before each election and must remain closed

¹ The First Cause of Action relates only to conduct occurring in 2004. This Court has already dismissed all claims against the Secretary relating to 2004 conduct. (Doc. 167.)

until after that election.” § 97.055(1), Fla. Stat. There is a separate book-closing date for each election, including primaries. Any applicant wishing to vote in the next election must submit his completed application no later than twenty-nine days before that election. After the book-closing date, the list of registered voters is fixed. Only updates to a voter’s name, address, and signature are permitted for the next election.² *Id.* The Complaint alleges that the voter registration deadline should not be a deadline at all. The Plaintiffs complain that there is no opportunity “after the close of books” to submit completed applications. (TAC ¶ 140.) But if submissions were permitted after the book-closing date, then the book-closing date would no longer function as a true deadline, after which no new voters could be added to the rolls—a deadline that has been repeatedly recognized as an important component of efficient election administration.

A. Voter Registration Deadlines are Constitutionally Permissible.

The Florida Legislature enjoys discretion regarding the time, place, and manner of administering elections. The Supreme Court in *Storer v. Brown* recognized that:

[A]s 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); *accord Burdick v. Takushi*, 504 U.S. 428, 434

(1992) (a state may impose “reasonable, nondiscriminatory restrictions upon the . . . rights of

² The Complaint includes an allegation that allowing registered voters to make these changes after book-closing date “discriminates between applicants” who are “similarly situated.” (TAC ¶ 79.) There is no discrimination. The law allows *registered voters*—not applicants—to make certain changes to their name, address, or signature. None of these changes would alter anyone’s eligibility to vote. Those who are registered to vote and those who are not—because of an incomplete application or for any other reason—are not similarly situated. But, at any rate, none of the Plaintiffs’ causes of action is based on the Equal Protection clause or discrimination.

voters”). Florida is no exception, and it has enacted complex election regulations, including the registration deadline.

The concept of a fixed voter registration deadline is not new, and the United States Supreme Court has addressed the issue several times. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Supreme Court struck down Tennessee’s durational residency requirement, but it wrote favorably about registration deadlines. “The State closes the registration books 30 days before an election to give officials an opportunity to prepare for the election.” *Id.* at 347. The Court did not establish a particular timeframe that would pass constitutional muster, but it approved Tennessee’s thirty-day period. “30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much.” *Id.* at 348.

Shortly after deciding *Dunn v. Blumstein*, the Supreme Court addressed specific challenges to registration deadlines. In *Marston v. Lewis*, 410 U.S. 679 (1973), the Court considered a challenge to Arizona’s fifty-day registration deadline. Recognizing that “a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot,” the Court upheld Arizona’s requirement. *Id.* at 680. “States have valid and sufficient interests in providing for *some* period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible fraud.” *Id.* The Court accepted the legislative judgment “that the period is necessary to achieve the State’s legitimate goals.” *Id.*

The Court next decided *Burns v. Fortson*, 410 U.S. 686 (1973), upholding Georgia’s fifty-day registration deadline. Relying on *Dunn* and *Marston*, the Court concluded that “the 50-day period is necessary to promote . . . the orderly, accurate, and efficient administration of state

and local elections, free from fraud.”³ *Id.* at 686-87 (quoting district court; ellipses in original); *see also Beare v. Briscoe*, 498 F.2d 244, 247 (5th Cir. 1974) (“We acknowledge the state’s right to impose some reasonable cutoff point for registration”). It is clear from these cases that registration deadlines like Florida’s are constitutionally permissible. Indeed “registration requirements . . . are ‘classic’ examples of permissible regulation.” *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 196 n.17 (1999).

B. There is No Independent Constitutional Right to a “Grace Period” to Correct Incomplete or Incorrect Voter Registration Applications.

Although the Complaint describes the Plaintiffs’ desired “grace period” instead of specifically challenging the registration deadline, it is obvious that any “grace period” would have the practical effect of postponing the registration deadline. The Plaintiffs are very careful to avoid detailing the “grace period” in the Complaint. Only in the Prayer for Relief do they assign a duration to the grace period (fifteen days). (TAC at 41.) A fifteen-day grace period would, of course, cut the existing twenty-nine-day book-closing deadline in half. The Plaintiffs’ position, then, appears to be that a fourteen-day book-closing deadline could pass constitutional muster, but a twenty-nine day deadline cannot. This position has been rejected by the Supreme Court, which has repeatedly upheld registration deadlines longer than twenty-nine days. *See supra*.

The fact that an applicant has already submitted an incomplete application does not provide any reason to accept his complete application after the book-closing deadline. The same

³ In the context of primary elections, the Supreme Court has upheld a voter registration cutoff of eleven months. *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973). In that case, voters had to register with a political party three months before a general election to be eligible to vote in the next primary election. *Id.* at 760. The Court noted that “the State is certainly justified in imposing some reasonable cutoff point for registration or party enrollment, which citizens must meet in order to participate in the next election.” *Id.* It then concluded that even the “lengthy” period between the enrollment deadline and the next primary election was connected to an important state goal. *Id.*

justifications for refusing new applicants after the book-closing date—namely providing officials with time to prepare for the election—apply to applicants who are pursuing their second (or third) attempts to register. If an applicant wants some period of time after he submits his application, during which he can correct his incomplete application, his obvious remedy is to submit his application well in advance of the book-closing date. “Many electoral regulations, including voter registration generally, require that voters take some action” *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). In this case, the statutory framework requires individuals seeking a “grace period” to submit their applications in a timely manner. As the Supreme Court said in *Rosario v. Rockefeller*, “if [Plaintiffs’] 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.” 410 U.S. 752, 757 (1973).⁴

II. THE MENTAL INCAPACITY CHECKBOX DOES NOT CONSTITUTE A SEVERE BURDEN ON THE RIGHT TO VOTE.

The Plaintiffs’ third cause of action claims that language on the Florida Voter Registration Application is so confusing that it substantially burdens the Plaintiffs’ fundamental right to vote. (TAC ¶¶ 144-155.) The challenged language accompanies a checkbox, which asks applicants to affirm their eligibility to vote:

⁴ If the Florida Legislature extended the book-closing date from twenty-nine days to forty-four days, it could provide the fifteen-day grace period the Plaintiffs seek without eliminating the twenty-nine-day period for officials to prepare for an election. The forty-four day period would not violate the Constitution; the Supreme Court has upheld fifty-day deadlines. But moving the book-closing date fifteen days would operate to the detriment of applicants who do not require any additional time to correctly submit their applications. In striking a balance between convenience to applicants and administrative needs of elections officials, the Legislature settled on the twenty-nine-day registration deadline. Requiring the grace period sought by the Plaintiffs—without altering the book-closing date—would alter that delicate balance. And requiring the grace period sought by Plaintiffs—and altering the book-closing date—would reduce the opportunities for citizens to timely register. Neither alternative is favored by the Florida Legislature, and neither is required by the Constitution.

I affirm I have not been adjudicated mentally incapacitated with respect to voting or, if I have, my competency has been restored.

(TAC Exh. “B”).⁵ In addition to the mental incapacity checkbox, the application includes other checkboxes to elicit eligibility information. An applicant must check a box indicating whether he is a United States citizen. *Id.* And he must check a box affirming that he is not a convicted felon. *Id.* An application that does not have the appropriate boxes marked is considered incomplete. § 97.053(5)(a)(4, 6-7), Fla. Stat.

The three checkboxes and the language accompanying them are specifically mandated by Florida law. *See* § 97.052(2)(r-t). And this Court has already dismissed the Plaintiffs’ claims that the checkboxes—and the information they elicit—are redundant and immaterial. (Order of Partial Dismissal at 12) (“The questions posed by the check-boxes on these three topics are material as a matter of law.”).⁶ Indeed, all three checkboxes are necessary for elections officials to determine an applicant’s eligibility. The only question before this Court is whether the language accompanying the mental incapacity checkbox violates the Plaintiffs’ constitutional rights. The answer is no.

Under the Florida Constitution and statutory law, individuals who have been adjudicated mentally incompetent are not permitted to vote until their disability has been removed. Art. VI, § 4, Fla. Const.; § 97.052(2)(t), Fla. Stat. The Plaintiffs do not challenge the mental incapacity disqualification. (TAC ¶ 94.) Instead, they object to the manner in which the application asks applicants whether they qualify—specifically, the application’s use of “inordinately complicated

⁵ Exhibit “B” is the 2006 Florida Voter Registration Application. The earlier version of the application, attached to the Third Amended Complaint as Exhibit “A,” contains the same language and the same checkbox.

⁶ This Court has also already rejected the Plaintiffs’ related claim that the challenged language was so confusing that it amounted to a literacy test prohibited by the Voting Rights Act. (Order of Partial Dismissal.)

language.” (TAC ¶ 149.) They claim that an applicant must be “capable of understanding and interpreting legal terminology used in the Florida Constitution (‘adjudicated mentally incapacitated.’)” (TAC ¶ 90.) Furthermore, they claim, the “language presupposes a high degree of literacy, is unnecessarily and deliberately confusing, and does not conform with plain English guidelines.” *Id.* Finally, they allege that the language is “further complicated by the addition of a double negative.” *Id.* As a matter of law, each of these allegations is insufficient to state a claim upon which relief can be granted.

A. The Challenged Language is Not Confusing.

The language on the application tracks the specific language in the Florida Constitution, *cf.* Art. VI, § 4, Fla. Const., and it does so in a manner that is neither confusing nor misleading. The Plaintiffs’ allegation that the language “does not conform with plain English guidelines” is factually incorrect and constitutionally insufficient to state a claim. The Plaintiffs’ desired “plain English” constitutional standard would subject *all* election material to line-by-line, word-by-word scrutiny. The result would be based in large part on the opinions of dueling experts and, in any event, inevitably unpredictable and subjective. Moreover, invalidating language that would be confusing or unclear to some voters would logically lead to the invalidation of *all* written material. Some registrants are completely illiterate, so even the plainest English would not be effective for them.

But more importantly, even if there were a “plain English” requirement, the challenged sentence clearly satisfies that standard. The sentence is short and simple. Indeed, it is difficult to imagine a better or clearer way to communicate the requirement that the applicant not be adjudicated mentally incompetent. Adjudications of mental incompetence may not be familiar concepts to many, but they nonetheless relate to a critical limitation on voting rights in Florida.

The Plaintiffs' objection to the "double negative" is likewise unavailing. Double negatives are objectionable only when they might be expressed more simply as a single affirmative. See *The American Heritage Dictionary of the English Language: Fourth Edition*, 2000 ("[G]rammarians since the Renaissance have objected to the double negative in English. In their eagerness to make English conform to formal logic, they conceived and promulgated the notion that two negatives destroy each other and make a positive"). The affirmative here would read: "I affirm that I have been adjudicated mentally capacitated." This is, of course, not equivalent to the challenged language, so to the extent there is a double negative, it is not grammatically exceptionable.

The State Legislature chose the clearest and simplest language available to elicit the required information.⁷ The Plaintiffs' Complaint offers no clearer alternative,⁸ and even if there were one, the state has no constitutional obligation to employ the simplest language possible. The State's actions in the election context are permissible unless they impose a *severe* burden on voters' rights. Even if the challenged language were not as clear as possible, it does rise to the level of imposing a severe burden.

B. The Challenged Language Does Not Present a Severe Burden.

Even if the challenged language were so confusing that it presented a burden on the Plaintiffs' right to vote, that burden would be minimal. When an election regulation imposes

⁷ The Florida Legislature has recognized that the challenged language is clear. In the same subsection that mandates the exact wording challenged, the Legislature required "[t]he registration application [to] be in plain language." § 97.052(2), Fla. Stat.

⁸ Earlier in this litigation, when the Plaintiffs claimed the challenged language amounted to a literacy test under the Voting Rights Act, they suggested that "[t]he phrase, 'I am legally competent to vote' would suffice." Plaintiffs' Response to Motion to Dismiss at 15 (Doc. No. 154.) It clearly would not suffice, though, to elicit specific information regarding the applicants' legal adjudication of mental capacity. And given the Plaintiffs' position that the challenged language requires applicants to be "capable of understanding and interpreting legal terminology," (TAC ¶ 90), this "alternative" hardly seems preferable.

minor burdens of First and Fourteenth Amendment rights, courts employ “less exacting review,” and “the State’s asserted regulatory interest need only be sufficiently weighty to justify the limitation imposed.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 364 (1997). In this case, there is no substantial burden. The Plaintiffs do not allege that applicants who do not understand the language are unable to obtain assistance.⁹ Nor do they allege that the challenged language limits the voting rights of any particular class of voters. *Cf. Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973) (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). Finally, applicants who are unable to understand the Florida Voter Registration Application may register to vote using the federal form, which does not include a mental incapacity checkbox. *See* Order of Partial Dismissal at 7. There is simply no burden caused by the challenged language—much less a severe burden that could support a claim for a constitutional violation. To consider the challenged language a severe burden “would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state

⁹ For standing on this cause of action, the Plaintiffs appear to rely on the Union Plaintiffs’ members who are not registered to vote. The Complaint includes no allegation that Mr. Lanman was confused or unable to check the mental incapacity box. It does allege that Ms. Diaz was “unable to understand the question,” (TAC ¶ 146), but apparently Ms. Diaz later comprehended the language; she is now registered to vote, *see* Defendant Lester Sola’s Suggestion of Mootness (Doc. No. 175.) That leaves only the Union Plaintiffs’ members. The Union Plaintiffs’ allegation that their members are unable to decipher the confusing language is ironic because the Union Plaintiffs are in a position to assist their members in voter registration. In fact, in other litigation pending in this District, the same Union Plaintiffs have alleged that they actively participated in the registration of their members. *See League of Women Voters of Fla. v. Cobb*, Case No. 06-21265 (S.D. Fla. 2006) (Compl. ¶ 18 “The AFL-CIO conducts nonpartisan voter registration drives each year intended to increase by 10% the number of its members registered to vote.”; ¶ 19 “[R]egistering its members to vote is a key part of AFSCME’s mission and organizing strategy.”).

electoral codes. The Constitution does not require that result.” *Clingman v. Beaver*, 544 U.S. 581, 593 (2005).

C. The Voter Registration Application Form’s Mental Incapacity Checkbox Serves a Legitimate Governmental Interest.

The Complaint includes several allegations that the mental incapacity checkbox, and the language accompanying it, are pointless. (TAC ¶¶ 84, 91-93, 95-98.) To the contrary, the mental incapacity checkbox serves the legitimate governmental purposes of reducing fraud and ensuring that only those eligible to vote are permitted to do so. The Plaintiffs recognize that the “State of Florida does, of course, have a legitimate interest in determining whether applicants meet the state’s eligibility requirements, including mental [capacity].” (TAC ¶ 94.) And this Court has already concluded that “the questions posed by the check-boxes . . . are material as a matter of law.” Order of Partial Dismissal at 12.

Florida’s interest in determining voter eligibility is obvious. “It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal.” *Rosario*, 410 U.S. at 761. And the Plaintiffs’ allegations that the checkbox does not actually prevent fraud or provide any practical benefit are immaterial for purposes of the constitutional sufficiency of the Plaintiffs’ claim. The Supreme Court has rejected the idea that a court should “require elaborate, empirical verification of the weightiness of the State’s asserted justifications.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997); accord *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (“Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.”); *Barilla v. Ervin*, 886 F.2d 1514, 1524 (9th Cir. 1989) (states are “not required to wait until fraud becomes rampant before taking remedial action; the state has a sufficient interest in preventing

future fraud”) (upholding Oregon’s 20-day registration deadline), *overruled on other grounds by Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).

Florida has an undeniable interest in limiting voting to those who are legally entitled to do so. The Voter Registration Application and its mental incapacity checkbox further that important interest. The Florida Legislature required the use of the checkbox to protect the integrity of Florida elections. In doing so, the Florida Legislature did not burden the right to vote.

CONCLUSION

Like nearly all states, Florida has imposed a voter registration deadline to allow sufficient time for elections officials to adequately prepare for the election. The Supreme Court has repeatedly upheld registration deadlines substantially longer than Florida’s, and there is no reason any court should treat Florida’s deadline any differently. The Plaintiffs’ desire for a “grace period” is little more than a desire for a later registration deadline. But the Florida Legislature—not the Plaintiffs—is responsible for making the legislative judgment on the timing of the registration deadline. The Legislature set the deadline at twenty-nine days before an election, and that legislative decision does not violate the Constitution.

Nor does the application language regarding mental incapacity violate the Constitution. The Legislature’s decision requiring applicants to specifically affirm their eligibility was justified by its interest in preventing fraud and protecting the electoral process. The challenged language is not confusing, and it imposes no burden on the Plaintiffs—much less a severe burden. For these reasons, this Court should dismiss the Plaintiffs’ Third Amended Complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted, this 14th day of August, 2006.

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I HEREBY CERTIFY that the foregoing has been served by Email and United States mail this 14th day of August, 2006, to the following:

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