FILED by CW D.C.
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Sep 8 2006

CLARENCE MADDOX
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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.

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DEFENDANT SUE M. COBB'S REPLY IN SUPPORT OF HER MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

Defendant Sue M. Cobb, Secretary of State of the State of Florida, submits this reply in support of her Motion to Dismiss the Third Amended Complaint.

I. INTRODUCTION.

The Plaintiffs' Third Amended Complaint alleges in separate counts that Florida has no sufficient justification for two of its election regulations: the 29-day voter registration cutoff, and the voter registration application's inquiry of an applicant's mental capacity.[1] The Plaintiffs

[1] The Third Amended Complaint includes a third cause of action, which is directed only

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allege that these regulations severely burden the right to vote. As a matter of law, these "burdens" are inconsequential and do not amount to constitutional offenses of any kind. Furthermore, the challenged regulations are sufficiently justified by the state's interest in fair, orderly, and efficient elections.

In response to the Defendants' Motions to Dismiss,[2] the Plaintiffs contend that dismissal would be improper because this Court must first carefully examine a detailed factual record to determine the severity of the Plaintiffs' burdens and the validity of the state's justifications. This is plainly not the proper standard. As the Secretary has demonstrated, the Plaintiffs have failed to state a cognizable constitutional violation, so their Third Amended Complaint must be dismissed.

II. DISMISSAL IS APPROPRIATE BECAUSE PLAINTIFFS HAVE FAILED TO STATE A COGNIZABLE CONSTITUTIONAL CLAIM.

The Plaintiffs suggest in their opposition memorandum that cases involving constitutional challenges to election regulations are somehow immune from dismissal at the pleadings stage. (Resp. at 10 & n.1.) This is not the case. Cases involving these types of challenges—like any other case—must be dismissed if they fail to state a cause of action upon which relief can be granted. In *Storer v. Brown*, 415 U.S. 724 (1974), the Supreme Court considered a constitutional challenge to California's law restricting ballot access. Under the challenged law, "[a] candidate in one party primary may not now run in that of another; if he loses in the primary, he may not run as an independent; and he must not have been associated with another political party for a year prior to the primary." *Id.* at 734-35. The District Court concluded that this restriction served a sufficiently important state interest, so it found the law constitutional. *Id.* at 728. It

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[2] The Defendants filed three separate motions to dismiss. The Secretary filed one,

dismissed the complaint, and the Supreme Court affirmed the dismissal. *Id.*[3]; *see also Griffin v. Roupas,* 385 F.3d 1128, 1130 (7th Cir. 2004) (Posner, J.) (affirming dismissal of election regulation challenge), *cert. denied* 544 U.S. 923 (2005).[4] The Supreme Court in *Storer* affirmed dismissal as a matter of law based on California's stated justifications: "It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system." *Storer*, 415 U.S. at 736.

Just as the *Storer* Court found it obvious that the California law furthered the state's legitimate interests, the challenged regulations in this case obviously further Florida's interest in fair and orderly elections. And as a matter of law, they are nondiscriminatory and impose no severe burdens.

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[3] The Plaintiffs characterize *Storer* as "vacating judgment upon detailed consideration of the evidentiary record." (Resp. at 11 n.1.) In fact, the Supreme Court decision addressed two separate cases that were consolidated for oral argument. 415 U.S. at 728. The district court had dismissed both cases, concluding that neither had stated a claim for relief. The Supreme Court affirmed with respect to the first case, *id.* at 728, and remanded the other for further proceedings, *id.* at 746.

[4] Despite Plaintiffs' claims to the contrary, many constitutional challenges to election regulations are dismissed at the pleadings stage. *See, e.g., McClure v. Galvin*, 386 F.3d 36 (1st Cir. 2004) (constitutional challenge of an election law which classified a candidate for office as a Democrat because he had voted in the Democratic primary and because he was registered as a Democrat within the 90 days preceding the election was dismissed under Rule 12(b)(6), and the dismissal was affirmed on appeal); *Rubin v. City of Santa Monica*, 308 F.3d 1008 (9th Cir. 2002) (constitutional challenge of election law prohibiting candidate from designating himself on the ballot as a "peace activist" was dismissed under Rule 12(b)(6), and the dismissal was affirmed on appeal); *Wit v. Berman*, 306 F.3d 1256 (2nd Cir. 2002) (constitutional challenge of election law prohibiting individuals with multiple residences from voting in local elections in each locality was dismissed under Rule 12(b)(6), and the dismissal was affirmed on appeal); *Zielasko v. Ohio*, 873 F.2d 957 (6th Cir. 1989) (constitutional challenge to state constitutional provision prohibiting the election to judicial office of candidates who have attained the age of seventy was

A. Plaintiffs Have Failed to State a Cognizable Constitutional Claim With Respect to a Grace Period.

The Plaintiffs ask this Court to invalidate Florida's 29-day book-closing deadline by mandating an unspecified grace period for voter registration applicants. As the Defendants explained in their Motions to Dismiss, the Supreme Court has repeatedly upheld registration deadlines well in excess of twenty-nine days. See *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973) (upholding Georgia's 50-day deadline); *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (upholding Arizona's 50-day deadline); *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972) (approving of Tennessee's 30-day deadline); *Rosario v. Rockefeller,* 410 U.S. 752, 762 (1973) (affirming 11-month deadline for primary voting).

The Plaintiffs try to distinguish these cases, arguing that the Supreme Court relied on detailed factual records justifying the need for these deadlines. (Resp. at 20-21.) Record or no record, the Court relied on the states' legislative judgments. In *Dunn v. Blumstein*, the Court noted that the 30-day registration period "reflects the judgment of the Tennessee Legislature that thirty days is an adequate period." 405 U.S. at 349 (quoting district court). Similarly, in *Marston v. Lewis*, the Court said that Arizona's 50-day cutoff "reflects a state legislative judgment that the period is necessary to achieve the State's legitimate goals." 410 U.S. at 680. In both cases, the Court accepted the state's legislative judgment. The Court in *Dunn* also recognized the congressional judgment that a thirty-day registration deadline was reasonable. Congress prohibited states from cutting off registration more than 30 days before an election for presidential elections. *Dunn*, 405 U.S. at 348 & n.19 (citing Voting Rights Act).

As a matter of law, Florida's 29-day registration deadline is reasonable. "[A] person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot. 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." *Marston v. Lewis*, 410 U.S. at 680. And "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the . . . rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (marks omitted).[5] Florida's deadline is reasonable and does not violate the Constitution.

Furthermore, the evolution of technology does not affect the reasonableness of Florida's legislative judgment. The Plaintiffs, arguing otherwise, allege that the "increased technology" renders the registration cutoff "unreasonable and arbitrary." (TAC ¶ 19.) In their Response, they rely on *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983), which explains that the distribution of information has changed drastically since the Constitutional Convention in 1787, and *Dunn v. Blumstein*, 405 U.S. 330, 358 (1972), which noted that "modern communications" discredited Tennessee's interest in requiring a three-month durational residence requirement to ensure an educated electorate. Neither of these cases suggests that incremental advances in technology must result in incremental reductions in registration cutoff periods. If that were the case, every time a Supervisor of Elections managed to make office administration more efficient, everyone would return to court to reevaluate the need for the current registration cutoff period. No technology can eliminate the need for some time period after registration closes to allow the human beings administering the election to properly prepare. The Supreme Court has repeatedly

[5] Although twice cited in the Plaintiffs' Response, *Ayers-Shchaffner v. DiStefano*, 37 F.3d 726 (1st Cir. 1994), has no bearing on this case. That case involved a peculiar instance in which a primary election was deemed procedurally invalid and a do-over election was required. The Board of Elections determined that the repeat election would be limited to voters who had voted

recognized the need for a cutoff period, and Florida's 29-day period is unquestionably reasonable.

Not surprisingly, the Plaintiffs cite no case holding that a 29-day registration cutoff (or any shorter cutoff) violates the Constitution. The Plaintiffs invite this Court to be the first. This Court should decline the invitation and conclude—as the Supreme Court has—that a 30-day registration cutoff is reasonable and constitutionally permissible.

B. Plaintiffs Have Failed to State a Cognizable Constitutional Claim With Respect to the Mental Capacity Checkbox.

The Plaintiffs claim that the language associated with the voter registration application's mental incapacity checkbox is confusing, and they contend that it serves no rational purpose. (Resp. at 15.) Neither is correct.

First, as the Secretary argued in her Motion to Dismiss, the disputed language—"I affirm I have not been adjudicated mentally incapacitated with respect to voting or, if I have, my competency has been restored."—is not, as a matter of law, confusing. The Plaintiffs suggest no clearer or better alternative in their response. Instead, they claim that the language discriminates against "those less literate." (Resp. at 15.) Specifically, they say, "Applicants with low levels of literacy are much more likely to make a mistake regarding the mental incapacity affirmation; applicants with high levels of literacy are unlikely to make the mistakes." *Id.* Perhaps so, but applicants with no literacy are unable to read *any* written language. And it cannot be the case that the use of written election materials *per se* violates the Constitution. Furthermore, "those less literate" has never been considered a suspect class. *Cf. Griffin v. Roupas*, 385 F.3d 1128, 1132 (7th Cir. 2004) (Posner, J.) ("'Working mother' does not define a class that the election law singles out for adverse treatment."), *cert. denied* 544 U.S. 923 (2005). The language is clear, necessary, and nondiscriminatory.

The Plaintiffs also allege that—confusing or not—the checkbox requirement serves no purpose. (Resp. at 13.) They illogically suggest that "rejecting applications on which the mental incapacity box is not checked bears no relationship to Defendants' interest of preventing mentally incapacitated persons from voting." *Id.* at 13-14. This Court has already determined that the checkbox is material as a matter of law. (Order of Partial Dismissal Requiring More Definite Statement as to Federal Claims at 12.) The checkbox is required by Florida law, § 97.052(2), Fla. Stat., as the Legislature has made the reasonable judgment that inquiring about applicants' eligibility furthers the state goal of ensuring that only eligible applicants are ultimately registered. Because the checkbox imposes no substantial burden and is unquestionably related to an important state goal, it does not violate the Constitution.

III. STRICT SCRUTINY REVIEW IS NOT WARRANTED.

The Plaintiffs argue that this Court should apply strict scrutiny in evaluating the challenged regulations. (Resp. at 13.) They claim the registration deadline and the mental capacity checkbox burden their right to vote. But "[t]o deem ordinary and widespread burdens like these severe 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 electoral codes. The Constitution does not require that result . . . ." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). Any "burden" suffered by the Plaintiffs is plainly not severe. Accordingly, strict scrutiny review is not warranted.

IV. WHETHER FLORIDA HAS A VALID STATE INTEREST IN THE CHALLENGED REGULATIONS IS NOT A FACTUAL INQUIRY.

Throughout their Response, the Plaintiffs argue that this Court cannot dismiss their case because they are entitled to prove that the State's action was arbitrary and irrational. (Resp. at 8,

15, 16, 19.) They argue that by explaining the basis for the challenged regulations, the Defendants are asking this Court to make factual findings, which this Court should not do on a motion to dismiss. (Resp. at 15, 16.) But no factfinding is necessary or appropriate. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communs.*, 508 U.S. 307, 315 (1993). The burden is on the Plaintiffs "to negative every conceivable basis which might support" the state's decision, whether or not the basis has a foundation in the record. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotation marks omitted).

This principle applies equally in election cases. As the Supreme Court stated in *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986), "We have never required a State to make a particularized showing of the existence of voter confusion, ballot over-crowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." The *Munro* opinion explained that in *Storer v. Brown*, "[t]here is no indication that we held California to the burden of demonstrating empirically the objective effects on political stability that were produced by the 1-year disaffiliation requirement." *Id.* at 195.

As a matter of law, Florida's determinations that (i) a 29-day registration cutoff is necessary and (ii) the mental incapacity checkbox is necessary, are reasonable and justified. And "[t]he State is not compelled to verify logical assumptions with statistical evidence." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976). The Plaintiffs' position, on the other hand, would have Article III courts demanding strict evidentiary support for each and every election regulation, would destroy the flexibility that is essential to allow states to properly regulate elections, and would "hamper the ability of States to run efficient and equitable elections, and

compel federal courts to rewrite state electoral codes." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). As the Supreme Court said in *Munro*:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. 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.

Munro, 479 U.S. at 195-96.

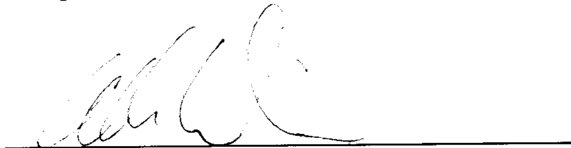
The Plaintiffs wish to question Florida's legislative judgments by insisting on proof that the judgments were the best ones possible. In support of such a radical intrusion by the courts into the legislative judgments with respect to election administration, the Plaintiffs cite cases stating only the general proposition that a complaint's allegations must be accepted as true for purposes of a motion to dismiss. But whether the challenged regulations are grounded by legitimate state interests is a legal determination—not a factual inquiry. *See Storer*, 415 U.S. at 728 (affirming dismissal of complaint after concluding state had legitimate interest in regulation).

V. CONCLUSION

The Plaintiffs have failed to state a claim upon which relief can be granted. The legislative choices the Plaintiffs challenge are unquestionably reasonable and related to valuable state objectives. They impose no severe or substantial burden on anyone. The registration deadline is consistent with those upheld by the Supreme Court and not unlike deadlines in many other states. The mental capacity checkbox is directly related to the state's eligibility requirements, and its accompanying language is neither confusing nor unclear.

Only severe restrictions on the right to vote violate the United States Constitution. "Election laws will invariably impose some burden upon individual voters. Each provision of a code, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (citations and marks omitted). If the "burdens" imposed in this case were considered severe, it is difficult to imagine what election regulations would not be. The challenged regulations do not violate the United States Constitution, and the Plaintiffs' claims must be dismissed.

Respectfully submitted, this 8th day of September, 2006.



Peter Antonacci
Florida Bar No.: 280690
Allen Winsor
Florida Bar No.: 016295
George N. Meros, Jr.
Florida Bar No.: 263321
GRAYROBINSON, P.A.
Post Office Box 11189
Tallahassee, Florida 32302-3189
Phone: 850-577-9090
Fax: 850-577-3311
Email: pva@gray-robinson.com
awinsor@gray-robinson.com
Attorneys for the Secretary of State

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been served by Email and United States mail this 8th day of September, 2006, to the following:

Mary Jill Hanson
Hanson, Perry & Jensen, P.A.
400 Executive Center Drive, Suite 207
West Palm Beach, Florida 33401
Phone: 561-686-6550
Fax: 561-686-2802
email: mjhanson@hpjlaw.com

Judith A. Browne
Sheila Y. Thomas & Elizabeth Westfall
Advancement Project
1730 M. Street, NW, Suite 910
Washington, DC 20036
Phone: 202-728-9557
Fax: 202-728-9558
email: ewestfall@advancementproject.org

Judith A. Scott
John J. Sullivan
SEIU, 1313 L. Street, NW
Washington, DC 20005
Phone: 202-898-3453
Fax: 202-898-3323
email: sullivaj@seiu.org

Michael Halberstam, Esq.
Paul, Weiss, Rifkind, Wharton, Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Phone: 212-373-3000
Fax: 202-492-0111
e-mail: mhalberstam@paulweiss.com

Elliot Mincberg
People for the American Way Foundation
2000 M. Street, Suite 400
Washington, FC 20036
Phone: 202-467-2392
Fax: 202-293-2672
email: emincberg@pfaw.org

Jonathan P. Hiatt
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006
Phone: 202-637-5053
Fax: 202-637-5323
email: jhiatt@aflcio.org

Manny Anon, Jr.
Florida Public Employees Council 79
3064 Highland Oaks Terrance
Tallahassee, Florida 32301
Phone: 222-0842
Fax: 224-6926
email: m_anon@afscmefl.org

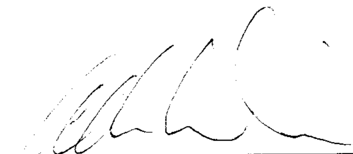
Jeffrey P. Ehrlich
Oren Rosenthal
Miami-Dade County Attorney's Office
111 N.W. First Street, Suite 2810
Miami, Florida 33128
Phone: 305-375-5151
Fax: 305-375-5634
email: ehrlich@miamidade.gov

Burnadette Norris-Weeks
100 S.E. 6th Street
Ft. Lauderdale, Florida 33301-3422
Phone: 954-768-9770
Fax: 954-768-9790
e-mail: bnorris199@aol.com

Tracey I. Arpen, Jr.
Cindy A. Laquidara
Office of General Counsel
City of Jacksonville
117 West Duval Street, Suite 480
Jacksonville, Florida 32202
Phone: 904-630-1700
Fax: 904-630-2388
email: tarpen@coj.net

Ronald A. Labasky
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
email: rlabasky@yvlaw.net

Mike Cirullo
Goren, Cherof, Doody & Ezrol
3099 East Commercial Boulevard, Suite 200
Fort Lauderdale, Florida 33308
Phone: 954-771-4500
Fax: 954-771-4923
email: mcirullo@cityatty.com



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