UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-21243-CIV-ALTONAGA/Brown

League of Women Voters of Florida, *et al.*,	:
Plaintiffs,	:
vs.	:
Kurt S. Browning, in his official capacity, and Donald L. Palmer, in his official capacity,	:
Defendants.	:

PLAINTIFFS' RESPONSE TO AND MOTION TO STRIKE DEFENDANTS' NOTICE OF FILING NEWLY AVAILABLE EVIDENCE

Plaintiffs respond to Defendants' Notice of Filing Newly Available Evidence in Opposition to Plaintiffs' Motion for Preliminary Injunction, dated July 15, 2008 [D.E. 77][1], and move to strike the newly available evidence therein as untimely, unreliable, and prejudicial to Plaintiffs.

The Evidence Proffered Is Untimely, Unreliable, and Prejudicial to Plaintiffs

Courts disfavor new evidence after the factual record has closed and evidence may be admitted only if the opposing party is given the opportunity to rebut the evidence and it is "relevant, material, and probative." *See Pimintel & Sons Guitar Makers, Inc. v. Pimentel*, 229 F.R.D. 208, 210 (D.N.M. 2005). At some time, a preliminary injunction proceeding must come to an end, and "to admit 'new' evidence . . . would further extend resolution of the preliminary

[1] This motion was docketed as a "Notice of Supplemental Authority," but the document itself accurately describes the material proffered as factual evidence—not authority at all.

injunction motion" since the other party would request additional time to review the new evidence and "conduct further investigation on the new issues raised." *Grace Christian Fellowship v. KJG Investments, Inc.*, No. 07-C-0348, 2008 WL 2412981, at *6 (E.D. Wis. Jun. 12, 2008) ("A preliminary injunction is designed to address some imminent harm. To extend this process further would not serve that purpose.").

Here, Plaintiffs seek a preliminary injunction preventing enforcement of Florida's third-party voter registration law, Fla. Stat. §§ 97.021(36) and 97.0575 (the "Amended Law"). The preliminary injunction hearing was held on June 18 and June 19, 2008, after both parties had over seven weeks to collect evidence, interview and depose witnesses, and otherwise provide the foundation for a sufficient (even ample) factual record. While this Court was generous in admitting Defendants' evidence submitted the day prior to the hearing (*see* Declaration of Mari-Jo Lewis-Wilkinson, dated June 17, 2008 [D.E. 65]) and in permitting the parties to submit supplemental materials pertaining to the relevance of such evidence, it noted that it was not "a re[v]olving door to have the parties keep giving [it] additional factual submissions." Prelim. Inj. Hrg. Tr., 6/18/08, at 22:22-23. Even if Defendants' "newly available" evidence were relevant, material, and probative, this Court should exercise caution in admitting the evidence so late in the proceeding and risk extending the process beyond the adoption and effective date of an administrative rule implementing the Amended Law.

In fact, the "newly available" evidence, because of its unreliability, would be highly prejudicial to Plaintiffs if it were admitted. Defendants argue that these documents offer further evidence of "hoarding" of applications by third party groups. (Defs.' Notice at 1.) To the contrary, these documents do not demonstrate hoarding and raise more questions than they answer.

The "newly available" evidence consists of an email dated January 28, 2008 between Judy Himber at Family Central[2] and Jennifer Nemecek, a representative of a third-party voter registration organization, ACORN, concerning voter registration forms that were "left" at Family Central. The email reveals that "a few people completed" the registration forms, and these forms had not been picked up by ACORN or submitted to an appropriate governmental agency. The evidence also consists of twenty-six applications submitted by ACORN to the Broward County Supervisor of Elections' Office on June 30, 2008. Of those twenty-six, only nine applications were completed before the book closing deadline (December 31, 2007) for the 2008 Presidential Preference Primary election held on January 29, 2008. Of those nine applications, only three (Christina Dudash, Charlene Subarsingh, and Ruby Sanders) designated a party affiliation. The evidence further shows that the Broward County Supervisor of Elections, Dr. Brenda Snipes, sent a letter to ACORN chastising them for failing to submit these applications earlier, which purportedly resulted in these voters missing the opportunity to vote in the Presidential Preference Primary election. The letter does not acknowledge the fact that, of the twenty-six applications, only, at most, three voters had missed the opportunity to vote in that primary election because only those three had designated a party affiliation and signed their applications prior to the book closing deadline.

The documents raise many factual issues that cannot be answered without deposing ACORN, Family Central, Dr. Snipes, and the applicants themselves, all of whom are not parties to this action. For example, these documents do not indicate when ACORN met with Family

[2] The documents do not disclose the nature of Family Central, but its internet site reveals that it manages child care facilities and offers family support services with its headquarters in North Lauderdale, Florida. *See* http://www.familycentral.org/History (last visited July 21, 2008).

Central and dropped off the applications.[3] The email exchange between ACORN and Family Central sheds no light as to their agreement regarding who would be responsible for submitting the voter registration applications—ACORN, Family Central, or the applicants themselves. While the email indicates that Ms. Himber believed that someone from ACORN would pick up the applications, there is no evident basis for that belief. Nor is there any explanation why, if the Family Central personnel were concerned about the submission of applications, it did not simply put the applications in an envelope and mail them to the Broward County Supervisor of Elections Office.

Moreover, in spite of the rebuke in Dr. Snipes' letter, there is no evidence that any of the three individuals who might have had the opportunity to vote in the primary election actually intended or attempted to do so. The documents fail to present any evidence that any of the three applicants complained to Dr. Snipes or her office, the Division of Elections, ACORN, or Family Central that they were not registered for the primary. Furthermore, there is no evidence that any of these three individuals cast any provisional ballots in the primary election.

If anything, the "newly available" evidence only shows that, if the State were to enforce the Amended Law, the law would allow the State to employ such evidence, flimsy as it is, to arbitrarily target politically unpopular groups such as ACORN and impose fines on ACORN, Ms. Nemecek, and perhaps others. As enacted, the Amended Law would permit Ms. Nemecek, as an individual, to be fined under the law and, given the vagueness with which the term "affiliates" is used in the Amended Law, such a fine may not necessarily contribute towards the

[3] While two of the applications are dated January and March 2007, these dates appear to be in error and the year 2008 is intended. Dr. Snipes' letter indicates her belief that the applications were signed in November 2007 and after.

$1000 cap for ACORN as an organization because the Secretary of State's office could determine that Ms. Nemecek is not an affiliate of ACORN.

While the Defendants proffer these documents to show that the State has a sufficient interest in the Amended Law to burden Plaintiffs' First Amendment rights, Defendants have not addressed the other means to impose accountability on third-party voter registration organizations without proof of willful misconduct and without the Amended Law. As Plaintiffs have maintained in their briefs and oral argument, in addition to the criminal penalties under Fla. Stat. §104.0615(4) that require proof of willfulness in the submission of applications after the book closing deadline, there is now potential liability under Fla. Stat. 97.0575(3), unchallenged in this litigation, which makes third party registration organizations fiduciaries of the individuals from whom they collect applications and imposes accountability by making the organizations liable for actions for breach of fiduciary duty without proof of intent. *See, e.g.*, Pls. Mot. for Prelim. Inj., [D.E. 24], at 19; Prelim. Inj. Hrg. Tr., 6/19/08, at 54:6-55:1. Defendants have yet to establish why the Amended Law is necessary when these other alternatives are available.

As it is, however, if this "newly available" evidence were admitted, Plaintiffs would be required either to conduct time-consuming discovery, including deposing numerous non-party witnesses, or to waive their rights to conduct an investigation to address the issues raised by this evidence. Both of these alternatives are highly prejudicial to Plaintiffs. If Plaintiffs conduct discovery, they run the risk that such discovery would prolong this proceeding past the adoption and effective date of a rule enforcing the Amended Law. Such a course of action would result in the very consequence that Plaintiffs filed a preliminary injunction motion to avoid. Alternatively, if Plaintiffs waive their rights to investigate and contest this evidence so as not to

prolong this proceeding, such a waiver would result in evidence introduced by Defendants not being tested for the truth or reliability and skewing the factual record.

The only alternative that is not prejudicial to Plaintiffs is to strike Defendants' proffered evidence. Such an alternative is prejudicial to neither party because both parties are then bound to the factual record submitted when the preliminary injunction hearing terminated and this Court's concern that it might become a "revolving door" for the admission of new evidence is assuaged.

Conclusion

For the foregoing reasons, Plaintiffs request that this Court strike Defendants' Notice of Filing Newly Available Evidence and exclude it from consideration in deciding Plaintiffs' Motion for Preliminary Injunction.

Certificate Of Pre-Filing Conference

Counsel for Plaintiffs certify that they conferred with Defendants' counsel in an effort to have them withdraw their Notice of Filing Newly Available Evidence because of the highly prejudicial effect the admission of their proffered evidence would have on the Plaintiffs. Defendants have not consented to the withdrawal of the Notice of Filing requested.

Date: July 21, 2008

s/Robert Harris
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 21, 2008, I caused to be electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below by transmission of Notices of Electronic Filing generated by CM/ECF.

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