

UNITED STATES DISTRICT COURT  
NORTH DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

FLORIDA DEMOCRATIC PARTY,

*Plaintiff,*

Case No. 4:16-cv-626-MW-CAS

v.

RICHARD SCOTT, in his official capacity as  
Governor of the State of Florida, and KEN DETZNER,  
in his official capacity as Secretary of State of Florida,

*Defendants.*

---

**THE FLORIDA SENATE’S MEMORANDUM OF LAW  
IN OPPOSITION TO PLAINTIFF’S EMERGENCY MOTION  
TO ENFORCE PRELIMINARY INJUNCTION**

Plaintiff’s motion must be denied because it improperly seeks a new injunction under the guise of a motion to “enforce” the existing injunction. The relief plaintiff seeks goes well beyond enforcing the existing injunction, which only requires the Secretary of State “to direct the supervisors of elections to extend the deadline for counties to submit or amend their early voting plans to Monday, October 17, 2016 at 5:00 p.m., and to extend the new voter registration deadline to Tuesday, October 18, 2016, at 5:00 p.m., accepting registrations up to that date and time.” Doc. 29 at 3. The Secretary of State has advised that he “has completed these tasks.” Doc. 44 at 10. The existing injunction is therefore moot; nothing re-

mains to be “enforced.” And even if not moot, the original injunction—which does not mention provisional voting rules—would be rewritten rather than “enforced” by the relief plaintiff seeks.

Because the existing injunction does not encompass the relief it seeks through its improper motion to “enforce,” plaintiff must satisfy the requirements for obtaining a new injunction. *See N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1217 (11th Cir. 2008) (“a district court may grant a preliminary injunction only if the movant establishes the following: “(1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest.”). But plaintiff has not even attempted to show that it meets these requirements, because it cannot. Accordingly, its motion should be denied.

*First*, plaintiff has not shown that any voter will suffer irreparable harm absent an injunction. The Secretary of State has confirmed that he expects that “the verification process for eligible voters with completed and verified applications will be completed before October 29, 2016, prior to when mandatory early voting begins.” Doc. 44 at 3. Plaintiff has not produced any evidence to the contrary. Moreover, even if plaintiff had produced evidence that some voters will need to

cast provisional ballots, it has produced no evidence that these votes will not be counted. Plaintiff speculates that some voters may face “obstacles” verifying their personal identification numbers in time for their provisional ballots to be counted. Doc. 33 at 6. But such speculation cannot establish irreparable harm. Indeed, absent any concrete evidence that any of plaintiff’s members face a “realistic danger” of needing to cast a provisional ballot and being unable to have their ballots counted, plaintiff lacks Article III standing to seek the relief it requests. *See Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1163 (11th Cir. 2008).

*Second*, plaintiff has not even attempted to show that it has a likelihood of success on the merits. It has not articulated any theory of illegality that would support this Court setting aside this State’s election laws, which have been in place for years. Nor could it: the relief plaintiff seeks would require this Court to invalidate the provisional ballot law the Legislature crafted to *expand* voter access while protecting the integrity of the electoral process. Plaintiff offers no legal or factual basis on which to reject the Legislature’s careful balancing of these interests.

Florida’s provisional ballot process is set forth in Section 101.048, Florida Statutes, which expressly provides a path for voting for applicants—like those plaintiff purports to represent—“whose eligibility cannot be determined.” *Id.* Such applicants are not disenfranchised: they “shall be entitled to vote a provisional ballot” and “present written evidence supporting [their] eligibility” within the next

two days. The provisional ballot “shall be counted” unless the preponderance of the evidence shows the person was not entitled to vote. *Id.* The clear implication of Section 101.048 is that a voter whose eligibility has not been determined cannot cast a regular ballot under Florida law.

Federal law also undermines plaintiff’s challenge. The provisional ballot process was expressly authorized by Congress as a means of “fail-safe voting.” In the wake of the 2000 election, Congress enacted the Help America Vote Act, 42 U.S.C. § 21083(b)(2)(B), which provides that a voter who does not otherwise meet the voting requirements “may cast a provisional ballot” upon affirming that the voter is registered and is eligible to vote. The provisional ballot counts if the official determines thereafter that the individual voter is eligible under state law to vote. *Browning*, 522 F.3d at 1170 (11th Cir. 2008).

This Court and the Eleventh Circuit have both rejected attacks on the lawfulness of Florida’s provisional-ballot process. In *Browning*, the Eleventh Circuit held that the provisional voting requirement was consistent with and not preempted by the Help America Vote Act. *Id.* at 1170–71. On remand, this Court held that Florida’s provisional-ballot process *alleviated* any burden the registration requirements imposed on the right to vote. *Fla. State Conf. of NAACP v. Browning*, 569 F. Supp. 2d 1237, 1256 (N.D. Fla. 2008). Plaintiffs do not acknowledge this prece-

dent or articulate any legal theory that might distinguish or overcome it. They thus have shown no likelihood of success on the merits.

*Third*, the relief plaintiff seeks is contrary to the public interest. The Legislature enacted the state's election laws to protect the rights of all eligible Floridians to vote, and to ensure the integrity and regularity of the electoral process. The Supreme Court and the Eleventh Circuit have emphatically affirmed a State's sovereign interest in combating voter fraud. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191, 195–96 (2008); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009). “A State indisputably has a compelling interest in preserving the integrity of its election process.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

The injunction, however, would allow any unverified applicant to cast a regular ballot on election day without any verification of their eligibility or identity by the appropriate State election officials. Merely requiring on-site identification, without any verification, would pose a great risk of voter fraud, which in turn would dilute the legitimate votes of Florida citizens and distort the electoral process. The public interest in “detering and detecting voter fraud,” correcting “maladministration” of the voter rolls, and “safeguarding voter confidence” would be irreparably harmed by plaintiff's proposed rewriting of the election laws. *Billups*, 554 F.3d at 1352.

For these reasons, in addition to those given by the defendants, intervenor Republican Party of Florida, and *amicus curiae* Florida State Association of Supervisors of Elections, the Court should deny plaintiff's motion to "enforce" the injunction.

Respectfully submitted,

/s/ Andy Bardos

George N. Meros, Jr. (FBN 263321)  
Andy Bardos (FBN 822671)  
George T. Levesque (FBN 555541)  
GrayRobinson, P.A.  
Post Office Box 11189  
Tallahassee, Florida 32302-3189  
Telephone: 850-577-9090  
Facsimile: 850-577-3311  
george.meros@gray-robinson.com  
andy.bardos@gray-robinson.com  
george.levesque@gray-robinson.com

*Attorneys for the Florida Senate*

/s/ Jonathan F. Cohn

Jonathan F. Cohn (*pro hac vice* pending)  
Eric D. McArthur (*pro hac vice* pending)  
Benjamin Beaton (*pro hac vice* pending)  
Sidley Austin LLP  
1501 K Street, NW  
Washington, DC 20005  
Telephone: 202-736-8000  
Facsimile: 202-736-8711  
jfcohn@sidley.com  
emcarthur@sidley.com  
bbeaton@sidley.com

*Attorneys for the Florida Senate*

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)**

Undersigned counsel for the Florida Senate certifies that, according to the word-processing system used to prepare this memorandum, this memorandum and the motion that it supports together contain 2,018 words, excluding the case style, signature blocks, and certificates of service.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing memorandum was filed through the Court's CM/ECF System this nineteenth day of October, 2016, and thus served on all counsel of record.

Respectfully submitted,

*/s/ Andy Bardos* \_\_\_\_\_  
Andy Bardos (FBN 822671)  
GrayRobinson, P.A.