UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:08-21243-CIV-ALTONAGA

LEAGUE OF WOMEN VOTERS OF FLORIDA, FLORIDA AFL-CIO, and MARILYNN WILLS,

Plaintiffs,

vs.

KURT S. BROWNING, in his official capacity as Secretary of State of the State of Florida, and DONALD L. PALMER in his official capacity as Director of the Division of Elections within the Department of State for the State of Florida,

Defendants.
_____/

DEFENDANTS' MOTION FOR AN ORDER ESTABLISHING PARAMETERS FOR THE HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, AND INCORPORATED MEMORANDUM OF LAW

Defendants Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida, and Donald L. Palmer, in his official capacity as Director of the Division of Elections, respectfully submit this Motion for an Order Establishing Parameters for the Hearing on Plaintiffs' Motion for Preliminary Injunction, scheduled for June 19.

Introduction

At the Plaintiffs' request, this Court scheduled an expedited hearing on their motion for preliminary injunction. Under the current scheduling order, briefing of the Plaintiffs' motion will be complete on June 6, and the Court will hold a hearing on June 19, 2008. (Doc. 15.) The parties have been unable to reach agreement on the evidentiary scope of the hearing, and Defendants respectfully seek an order establishing appropriate

parameters for the hearing to ensure the parties have notice and an opportunity to prepare their presentation to the Court. Specifically, Defendants seek entry of an order (i) establishing a deadline for each party to submit written evidence in support of their papers and (ii) limiting the presentation of live testimony.

I. Plaintiffs' Facial Challenge Will Require Minimal Factual Development.

This case is a facial challenge to a provision of the Florida Election Code, which regulates groups that collect voter registration applications of others. The challenged law requires those collecting voter registration applications to timely submit them to election officials. Plaintiffs allege that the statute is unconstitutionally vague (Count I), that it burdens Plaintiffs' speech and association rights (Count II), and that it burdens the right to vote of certain unnamed members (Count III). All three counts allege that the statute is facially unconstitutional based on the First and Fourteenth Amendments. There are no statutory claims.

As a facial challenge, little resolution of factual issues—if any—is necessary. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1274 (11th Cir. Fla. 2005) ("The First Amendment questions—which are the only issues before us—are purely legal; indeed, [Plaintiff's] constitutional challenge to the sign code is facial rather than as applied, so that our resolution of the legal questions is only minimally intertwined with the facts."). And the facts currently in evidence are not particularly relevant to the determination of the legal issues. Through declaration evidence, for example, Plaintiffs state that they conducted voter registration drives, that they believe registration drives are critical to their success, that they decided to stop collecting registration drives in light of the challenged law, and that they do not wish to engage in voter registration activities if

the physical collection of applications is regulated. (*See generally* Decs. of Wills, Gilotti, and Hall (docs. 24-2, 24-3, 24-4.)) They have submitted an expert declaration suggesting that voter registration drives could be less effective if groups do not physically take control of the applications. (*See generally* Dec. of D. Green (doc. 24-5.)) For purposes of the preliminary injunction hearing, these underlying facts provide little assistance to the Court, and their live presentation would be equally unhelpful. The issue, instead, is whether the United States Constitution invalidates the statute at issue. This is a purely legal question.

II. The Hearing Should Be Limited to Presentation of Legal Argument and Should Not Include Live Testimony.

Because factual issues involved in this case are at most minimal, the hearing should be limited to the presentation of legal argument and, to the extent relevant, its relationship with the evidence filed by the parties. If the Court will require in-person testimony, time will be required to prepare witnesses. In addition, to the extent live testimony of Defendants' employees is necessary, it will require travel to Miami. As discussed below, this Court may consider affidavit evidence and legislative facts at this hearing, and Defendants respectfully submit that live testimony will not benefit the Court.

At a recently concluded trial involving some of the same parties and counsel involved in this case—and involving a related claim—another Judge in this District heard five days of testimony following nearly ten months of discovery. *Diaz v. Browning*, __ F. Supp. 2d __, 2008 U.S. Dist. LEXIS 27361 (S.D. Fla., Mar. 25, 2008) (King, J.). And at the hearing before Judge Seitz in the earlier iteration of this challenge, the Court heard three days of testimony following no discovery. But as another District Court recently noted, "a preliminary injunction hearing is not a trial on the merits." *Free Mkt. Found. v.*

Reisman, 2008 U.S. Dist. LEXIS 23047, 10-11 (W.D. Tex. Feb. 26, 2008). Instead, the purpose of a preliminary injunction is to preserve the status quo until the court can conduct a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved," preliminary injunction determinations are generally made "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.*

Therefore, it is not surprising that, "[a]t the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." *Levi Strauss & Co. v. Sunrise Int'l Trading*, 51 F.3d 982, 985 (11th Cir. 1995) (marks omitted). This is a recognized procedure. In fact, in another challenge to a separate provision of the Florida Election Code, different plaintiffs (represented by Plaintiffs' counsel in this action)[1] conducted a preliminary injunction hearing solely with evidence filed with the parties' papers. *NAACP v. Browning*, No. 07-402 (N.D. Fla., filed Sept. 21, 2007). For efficient judicial administration of the relevant issues, the hearing in this case should follow the same course. Nonetheless, Plaintiffs have suggested that they may present objections to hearsay evidence. Judicial resolution of this issue in advance of the hearing is essential to allow for the Defendants' diligent preparation of its case for the Court.

[1] The Advancement Project and the Brennan Center, both counsel in this action, represent the Plaintiffs in that challenge. Debevoise & Plimpton, which is of counsel to Plaintiff League of Women Voters of Florida in this case, were not counsel of record in the *NAACP* litigation.

III. Defendants Should Have an Opportunity to Respond to Plaintiffs' Evidence.

Plaintiffs filed their Motion for Preliminary Injunction on May 14, and Defendants' response is due on May 28. Plaintiffs filed four declarations in support of their Motion. But since then, they have indicated their intent to expand the evidentiary support for their Motion. In their opposition to Defendants' motion to change venue, Plaintiffs' stated that they would (if permitted by the Court) call Carol Smith to testify at the hearing. (Doc. 31-2 ¶ 3.) Ms. Smith has not submitted a declaration in this case. Plaintiffs also indicated that they designated an additional potential witness (previously unknown to Defendants) who may testify at the hearing. (Doc. 31 at 8.) Still further, Plaintiffs indicated that they seek depositions from other third-party witnesses, some of whom they may call to testify at the hearing. (Doc. 31 at 8.) And Plaintiffs have requested extensive other discovery, including a deposition of the Secretary of State. They have requested ten depositions to date—all on an expedited basis in advance of the hearing. Defendants respectfully suggest that Plaintiffs should not be permitted to turn this preliminary hearing into a trial on the merits, for which there is insufficient time to adequately prepare.[2] Instead, each side should submit declarations or other documentary evidence, and counsel should present legal argument at the scheduled hearing. To the extent Plaintiffs wish to supplement the evidentiary record they have already provided to the Court (and to Defendants), the Court should require that they do so sufficiently in advance of the hearing so that Defendants have a fair opportunity to prepare.

[2] If this were a trial, for example, each side would be required to timely exchange witness lists, investigate and depose each others' witnesses, exchange exhibits, and plan accordingly. The expedited procedure Plaintiffs requested does not allow for such orderly pre-hearing procedures.

IV. Plaintiffs Should Not Be Permitted at the Preliminary Injunction Hearing to Re-Litigate Issues Resolved in Related Litigation.

One of Plaintiffs' primary arguments in this case is that Defendants bear the burden of proving a particular need for the challenged statute. (Doc. 24 at 18-20.) This is not the case, as will be explained in Defendants' forthcoming response in opposition to the Motion. But even if it were, a determination of the state's interests will not require extensive factual evidence at the preliminary injunction hearing. The factual record developed by Plaintiffs in the *Diaz* case is more than sufficient to allow this Court to assess Plaintiffs' likelihood of success on the merits.

In his final order, Judge King outlined the state's interest justifying another provision of the Florida Election Code challenged by Plaintiffs and their counsel. In *Diaz*, the Florida AFL-CIO and AFSCME (a plaintiff and former plaintiff in this litigation, respectively), challenged the constitutionality of Florida's book-closing statute, which prohibits certain changes to voter registration applications less than twenty-nine days before an election. *Id.* at *5-6. Judge King determined that discovery and a trial were necessary to evaluate the state's particular needs for an administrative filing deadline. *Id.* at *14. After nearly ten months of discovery, with extensive written discovery and no fewer than twenty-five depositions, and after a five-day trial featuring testimony from nineteen live witnesses plus deposition testimony, the Court entered judgment in favor of the Secretary. The preliminary injunction hearing—just weeks away—should not be a forum to re-litigate the issues decided in *Diaz,* which Plaintiffs elected not to appeal.

Judge King already found the administrative needs of election officials sufficient to justify the registration restriction at issue in *Diaz*. *Id.* And he made extensive factual

findings, which Plaintiffs now seek to collaterally attack through their new litigation. For example, Plaintiffs allege in this case that "[t]here is no significant problem in Florida of voter registration groups submitting voter registration forms in an untimely fashion. Nor is there a problem of voter registration drives hoarding voter registration applications." (Compl. ¶ 115.) On the contrary, Judge King specifically concluded that "many voter registration applications are collected by third-party groups, which frequently hoard applications, delivering them at the last moment." *Diaz*, at *21. As another example, Plaintiffs also allege that certain unnamed members of their organizations will be unable to register to vote without the involvement of third-party groups, such as Plaintiffs. (Compl. ¶ 129.) But Judge King concluded—after examining in great detail the voter registration process in Florida—that "voter registration in Florida is simpler, more convenient and efficient than it was in the past. It can be accomplished in a number of different ways by anyone desiring to vote." *Id.* at *20. Notably, Judge King also found "no substantial conflict or anything that would impeach the general credibility of any of the witnesses." *Id.* at *17.

At least for purposes of the preliminary injunction hearing, this Court should take judicial notice of these legislative facts. "Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally . . . ." *United States v. Bowers*, 660 F.2d 527, 531 (5th Cir. Unit B 1981). The facts determined in *Diaz* certainly will not change from case to case, and Defendants should not be forced to

present extensive testimony at the preliminary injunction hearing to re-prove its interest (to the extent such proof is even legally necessary).[3]

The purpose of the preliminary injunction hearing is to determine likelihood of success on the merits—not to adjudicate ultimate success. To the extent the Court determines that detailed factual development is required, that development can take place later in this litigation. But before it takes place, this Court should have an opportunity to consider the parties' legal argument to determine if any of these facts will ultimately matter. To be clear, Plaintiffs should be entitled to present their case at the forthcoming hearing. Their desired manner of doing so, however, "bring[s] into sharp focus the procedural differences between preliminary and permanent injunctions, and the scope of judicial consideration of the evidence necessary to meet the requirements for issuance of a preliminary injunction versus the magnitude of evidence to be considered at a trial on the question of issuance of a permanent injunction." *Tefel v. Reno*, 972 F. Supp. 623, 633 (S.D. Fla. 1997), *rev'd on other grounds*, 180 F.3d 1286 (11th Cir. 1999).

V. This Court Should Grant Specific Relief to Establish Parameters for the Preliminary Injunction Hearing.

Defendants seek an order establishing appropriate parameters for the forthcoming hearing. The parameters should be consistent with the Court's preferences and procedures. Defendants respectfully offer the following proposed parameters:

- No party should be permitted to call witnesses to testify at the hearing, except as stipulated by the parties or as ordered by the Court.[4]

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[3] Because the statute at issue in *Diaz* directly affected individuals' ability to vote, the standard employed by the Court was different, and the State had a higher burden than it does in this case. Here, the statute only regulates third-party groups—not voters. Defendants will develop this distinction in their forthcoming memorandum of law. Even if Plaintiffs' analysis of the burden were correct, though, Defendants will satisfy it, as they did in *Diaz*.

- Any motion to allow live testimony at the hearing should be filed no later than ten days before the hearing. Any such motion should include a declaration outlining the testimony to be offered. The opposing party should have five calendar days to file a response.

- All evidence (including experts) offered by Plaintiffs to be considered by the Court should be filed and served no later that the fourteenth day before the hearing.

- All evidence (including experts) offered by Defendants to be considered by the Court should be filed and served no later that the seventh day before the hearing.

- All rebuttal evidence (including experts) offered by Plaintiffs to be considered by the Court should be filed and served no later than the fourth day before the hearing.

- Argument of counsel should be limited in duration as the court best determines.[5]

Conclusion

For the reasons explained above, and to ensure efficient preparation of the parties' legal and factual presentation to the Court, Defendants respectfully seek entry of an order establishing appropriate parameters for the preliminary injunction hearing.

CERTIFICATE OF PRE-FILING CONFERENCE

Counsel for Defendants certify that they conferred with Plaintiffs' counsel in an effort to stipulate to the parameters requested in this Motion. Plaintiffs do not consent to the parameters presented above. Plaintiffs have not objected, however, to reasonable pre-hearing deadlines for the disclosure of witnesses to be presented. The parties have not agreed on particular deadlines.

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[4] If the Court is inclined to permit live testimony without prior leave, Defendants respectfully request entry of an order establishing a reasonable deadline for disclosure of such witnesses.

[5] Defendants offer these proposals by way of suggestion in these circumstances only. These proposals are not meant to conflict with the Court's preferred procedures, and Defendants will proceed at the hearing as this Court directs.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's CM/ECF system on all counsel or parties of record on the attached service list this twentieth day of May, 2008.

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