

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA**

FLORIDA DEMOCRATIC PARTY,

Plaintiff,

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 the State of Florida,

Defendants.

CASE NO. 4:16-cv-626-MW-
CAS

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
EMERGENCY MOTION TO ENFORCE PRELIMINARY INJUNCTION**

Plaintiff Florida Democratic Party respectfully submits the following memorandum of law in support of its emergency motion to enforce the preliminary injunction issued by this Court on October 12, 2016 (the “Preliminary Injunction Order”).

Despite the Court’s Preliminary Injunction Order compelling the State of Florida to extend the voter registration deadline until October 18, 2016, Plaintiff has learned that election officials have indicated that they are unlikely to actually *process* voter registration applications before early voting begins on October 24, 2016. As a result, affected voters—many of whom have already suffered through

the effects of the worst hurricane in a decade—will be forced through unnecessary *additional steps* imposed on them as a result of the state’s dilatory tactics and administrative delay. Indeed, in many cases the likely result will be complete disenfranchisement, all in the face of this Court’s emphatic injunctive relief. With all due respect, the State—not innocent voters—should bear the burden of ensuring compliance with the Court’s Preliminary Injunction Order.

Accordingly, Plaintiff seeks an emergency order compelling Defendant Detzner, his officers, employees, and agents, all persons acting in active concert or participation with Defendant Detzner, or under Defendant Detzner’s supervision, direction, or control to take immediate steps, described more specifically below, to come into compliance with this Court’s Preliminary Injunction Order.

I. STATEMENT OF FACTS

A. The Court Orders the State of Florida to Extend the Voter Registration Deadline Until October 18, 2016

On October 9, 2016, Plaintiff filed its Complaint for Emergency Injunctive and Declaratory Relief, alleging that Plaintiff is entitled to relief from this Court for violations of its rights as well as the rights of its members and constituents—thousands of eligible Florida voters—under Section 2 of the Voting Rights Act and the First and Fourteenth Amendments to the U.S. Constitution, pursuant to 42 U.S.C. §§ 1983 and 1988. *See* Dkt. 3.

On October 10, 2016, the Court entered a temporary restraining order extending the voter registration deadline to October 11, 2016, and setting a hearing for October 12, 2016, to hear argument on Plaintiff's request for a preliminary injunction extending the deadline to close of business October 18, 2016. *See* Dkt. 15. On October 12, 2016, the Court entered the Preliminary Injunction Order. *See* Dkt. 29.

As the Court will no doubt recall, the Court specifically asked counsel for the Governor and counsel for the Secretary to speak up if “at any point someone makes a technical statement that from your perspective as the Secretary of State is incorrect, or you want to be heard, please, just let me know; okay?” Transcript of October 12 Hearing, at 21-22. Counsel remained silent for the balance of the hearing and—to this date—have raised no objections, concerns, or issues with the relief ordered by the Court, choosing instead to take “no position.” *Id.* at 8.

As the Court noted in its order granting the preliminary injunction:

[N]o right [is] more precious than having a voice in our democracy. Hopefully it is not lost on anyone that the right to have a voice is why this great country exists in the first place.

Id. at 32. That simple truth, unfortunately, *was* apparently lost on Defendant Detzner.¹

¹ This appears to be consistent with the Court's (and Plaintiff's) recent experience with “[t]he mischief associated with the Florida Secretary of State's shenanigans.”

B. The State Requires Voters to Cast Provisional Ballots if Their Registration Applications Are Not Verified Before Appearing At the Polls

Once a new voter registration application is received, the State must enter the application data into the Florida Voter Registration System (“FVRS”) within a specified period of time. Fla. Stat. Ann. § 97.053(7); Fla. Admin. Code Ann. r. 1S-2.039(4). The State then processes such applications to verify that the voter is eligible. Fla. Stat. Ann. § 97.053(6). This is done by verifying the voter’s personal identification number (“PIN”)—which must be either a Florida driver’s license number, another Florida state-issued identification card number, or the last four digits of a social security number—against one of several specified government databases. Fla. Stat. Ann. § 97.053(5)(a); Fla. Admin. Code Ann. r. 1S-2.039(5).

If the PIN is verified, the State then lists the voter as an “active voter” in the FVRS, thus conferring status as a verified, registered voter. Fla. Admin. Code Ann. r. 1S-2.041(2)(a); 1S-2.039(5)(a)(1).

If the PIN cannot be verified against the government database, and the State determines that no data entry error occurred, then the voter’s application record is transferred to the election supervisor of the voter’s county of residence, who must send the voter a notice that his or her PIN could not be verified. Fla. Admin. Code

See Dkt. 30 (Notice of Cancellation of Hearing), Case No. 4:16cv607-MW/CAS, *Florida Democratic Party v. Detzner*.

Ann. r. 1S-2.039(5)(a)(3). In relevant part, county election supervisors must notify such voters that they may mail, fax, email or bring in person a copy of their applicable PIN to the supervisor's office for confirmation, and that failure to do so "prior to going to vote" will mean that they can only cast a provisional ballot. *Id.* (citing template notice and requiring that county supervisors deliver notices "in, or substantially in," the form of such template notice);² *see also* Fla. Stat. Ann. § 97.053(6).

Regardless of whether the State has simply not attempted to match a voter's PIN against applicable databases by the time a voter heads to the polls, or if there was an unsuccessful database match and a county elections supervisor has not confirmed the voter's identity by that time, the State appears not to have implemented any procedure to actually verify such voters' identity at the polls for purposes of completing voter registration. Florida's polling place manual provides that if a voter's name does not appear on a precinct register, the election inspector shall contact the supervisor of elections or consult the master list of registered voters in the county to determine if the voter is eligible to vote. *See* Florida

² The "Template Notice to Applicant re Personal Identification Number," as cited and hyperlinked in Fla. Admin. Code Ann. r. 1S-2.039(5)(a)(3), is available here: <https://www.flrules.org/Gateway/reference.asp?No=Ref-00792> (last accessed Oct. 16, 2016).

Division of Elections Polling Place Procedures Manual (June 2014), at p. 10.³ If, based on those sources, the election inspector learns that a voter is “unverified,” which is described in the manual as any voter whose PIN “could not be verified by the State,” the voter “shall be allowed to vote a provisional ballot.” *Id.*

Thus, if election officials have *not* completed the verification process before a voter appears at a voting site to cast a ballot, it appears to be the State’s position that the voter will not be permitted to cast a regular ballot—even if the voter brings the required identification to the polling place. Rather, the voter’s only option is to cast a provisional ballot.

In that circumstance, the voter will face substantially greater obstacles. For those voters casting a provisional ballot, that ballot will not be counted unless the voter’s PIN is verified either by the end of the canvassing period or no later than 5:00 PM of the second day following the election. Fla. Stat. Ann. § 97.053(6). This would be difficult for some voters to manage in light of competing personal and work demands, and may well be impossible for those still suffering from the lingering effects of the hurricane—the very population which sought this Court’s protection in this lawsuit.

³ Florida’s current polling place manual is available at: <https://www.flrules.org/Gateway/reference.asp?No=Ref-04186> (last accessed Oct. 16, 2016).

C. Early Voting Begins in Many Florida Counties on October 24

This issue has some considerable urgency. The unavailability of same-day verification matters because early voting starts in many counties on October 24th, including in each of Florida's ten most populous counties, and begins in all counties on October 29.⁴ Fla. Stat. Ann. § 101.657(d). If the State does not process all voter registration applications before early voting begins, then some new voters will show up during early voting and find themselves listed as “unverified” voters as described above—through no fault of their own. And thus such voters will be forced to cast provisional ballots, and will have little comfort those ballots will be counted. Florida's strikingly high rate of provisional ballot

⁴ For early voting dates in Florida's ten most populous counties, *see* Miami Dade County Elections, “Early Voting,” <http://www.miamidade.gov/elections/vote-early.asp>; Broward County Supervisor of Elections, “Early Voting Schedule,” <http://www.browardsoe.org/Portals/Broward/Documents/110816EVGEN/EVList-2016-GEN-ELE-V2.pdf>; Palm Beach County Supervisor of Elections, “Early Voting,” <http://www.pbcelections.org/content.aspx?id=270>; Hillsborough County Supervisor of Elections, “Early Voting,” <http://www.votehillsborough.org/About-Voting/Three-Ways-to-Vote/Early-Voting>; Supervisor of Elections for Orange County, “Early Voting Center Locations,” <http://www.ocfelections.com/earlyvoting.aspx>; Supervisor of Elections for Pinellas County, “Early Voting,” <http://www.votepinellas.com/Election-Information/Elections/Early-Voting>; Duval County Supervisor of Elections, “Early Voting Times and Locations,” <http://www.duval elections.com/Election-Information/2016-General-Early-Voting>; Lee County Elections, “Early Voting Schedule and Locations,” <http://www.lee.vote/elections/current-elections/early-voting-schedule-and-locations/>; Polk County Supervisor of Elections, “2016 Election Information,” <http://www.polkelections.com/Voter-Services/Early-Voting>; Brevard County Supervisor of Elections, “Early Voting Locations and Status,” <http://www.votebrevard.com/Election-Information/Early-Voting> (each county website as accessed October 16, 2016).

rejection (more than 40% in 2012) is just one of many reasons why Florida has the highest rate of disenfranchisement of any state in the country.⁵

D. Plaintiff Has Received Reports that the State May Not Process All Voter Registration Applications Before Early Voting Begins on October 24

It is thus of keen concern to Plaintiff that in the days since the Court entered its Preliminary Injunction Order on October 12, it has received reports that Florida state and local election officials have indicated that they are unlikely to have completed the verification process for all voter registration applications before early voting begins on October 24. Declaration of Leslie Goller (Oct. 17, 2016), at ¶¶ 3-4.

II. ARGUMENT

The Court has “broad authority to enforce the injunction” it issued on October 12. *See, e.g., In re Managed Care Litig.*, No. 00-1334-MD, 2009 WL 413510, at *7 (S.D. Fla. Feb. 19, 2009). And, for that matter, it has “inherent power under Article III of the United States Constitution to hold litigants in civil contempt for violating court orders.” *Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 967 n.18 (11th Cir. 2012).

⁵ *See* Center for American Progress, *Preventing Problems at the Polls: Florida* (Oct. 6, 2016), <https://www.americanprogress.org/issues/democracy/report/2016/10/05/145435/preventing-problems-at-the-polls-florida/>.

The Court ordered the October 11 voter registration deadline extended by a week to ensure that innocent Floridians were not disenfranchised because a hurricane struck the State shortly before the existing deadline. It is simply unacceptable for the State to risk disenfranchising those same voters through the backdoor by slow walking its processing of registration applications in an apparent effort to evade this Court's remedial injunctive relief. If the State needs to devote additional resources to process timely all applications, so be it. As between voters and the State, it is the State that should bear the burden.

Moreover, if the State fails to effectively comply with this Court's Preliminary Injunction Order by the time early voting begins—and especially if its failure to comply continues through the early voting period—Plaintiffs may well be left without an effective remedy for the consequential disenfranchisement of voters. Plaintiffs may also not learn of such continuing failures to comply until substantially after the fact. Accordingly, the State should also be compelled to provide periodic and appropriately tailored updates to Plaintiff as to the status of the State's voter registration verification efforts. These periodic updates should help ensure prompt compliance by the State and enable Plaintiff to seek additional remedies from this Court, as may be necessary, at a point in time when such remedies could still be effective.

III. CONCLUSION

For the foregoing reasons, Plaintiff seeks an emergency order compelling Defendant Detzner, his officers, employees, and agents, all persons acting in active concert or participation with Defendant Detzner, or under Defendant Detzner's supervision, direction, or control: (1) to transmit to Plaintiff a complete and fully updated list of registered voters in Florida as soon as possible but no later than 5:00 PM Eastern time on October 21, 2016; (2) to complete the process of verifying new voter registration applications as set forth in Fla. Stat. Ann. § 97.053 and Fla. Admin. Code Ann. r. 1S-2.039 no later than 5:00 PM Eastern time on October 23, 2016; (3) to the extent any new voter registration applications remain outstanding as of 5:00 PM Eastern time on October 23, 2016, to transmit to Plaintiff no later than 5:00 PM Eastern time on October 24, 2016 and weekly thereafter (a) a complete and fully updated list of registered voters in Florida, (b) a complete and fully updated list of new voter registration applications which the State has received and attempted to verify against specified government databases, but could not successfully verify, and has thus referred to applicable county election supervisors for further verification steps under Fla. Admin. Code Ann. r. 1S-2.039, and (c) a complete and fully updated list of new voter registration applications which the State has received but not yet attempted to verify against specified government databases under Fla. Admin. Code Ann. r. 1S-2.039; and (4) to clarify

that voters who remain “unverified” after early voting begins be allowed to present appropriate identification at the polling place and vote a regular ballot.

Dated: October 17, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(F), I HEREBY CERTIFY that the enclosed Memorandum of Law of Plaintiff Florida Democratic Party contains approximately 6,000 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this memorandum.

Dated: October 17, 2016

/s/ Mark Herron _____
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished through the CM/ECF system, which will send notice of electronic filing to all counsel of record.

/s/

Mark Herron