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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

RICK SCOTT FOR SENATE,

Plaintiff,

CASE NO. CACE-18-026470 Division 14

v.

BRENDA C. SNIPES, solely in her capacity as Supervisor of Elections of Broward County, Florida, and the BROWARD COUNTY CANVASSING BOARD,

Defendants.
_______________________________________/

MOVANT INTERVENORS' PROPOSED MEMORANDUM OF LAW
IN OPPOSITION TO TEMPORARY INJUNCTION

The Movant intervenor-defendants League of Women Voters of Florida and Joanne Lynch Aye (collectively, "the League") respectfully submits this proposed memorandum in opposition to Plaintiff Rick Scott For Senate's ("Plaintiff's") Emergency Motion For Injunctive Relief dated November 11, 2018.

INTRODUCTION

Plaintiff has failed to meet the high standard for a temporary injunction. Most fundamentally, Plaintiff fails to demonstrate that it is entitled to the relief that it seeks: that ballots that have been validly and timely cast should not be counted and ignored. Florida Stat. § 102.141(5) contains a deadline by which a canvassing board is to submit unofficial returns to the Department of State. Plaintiff alleges that the defendants—the Broward County Canvassing Board and Brenda Snipes as Supervisor of Elections of Broward County ("Defendants")—did not complete their ballot count by the § 102.141(5) deadline and are continuing to count ballots. Plaintiffs request that, as a result of this alleged failure by Defendants, all votes not counted by Defendants by the deadline in § 102.141(5) be ignored and not counted. The relief requested by Plaintiff would disenfranchise voters of Broward County who—through no fault of their own—cast ballots that Defendants allegedly failed to timely count.

Plaintiff has not established any of the elements necessary to succeed on its motion for injunctive relief: a substantial likelihood of success on the merits, that irreparable harm will result if the injunction is not entered, that an adequate remedy at law is unavailable, or that entry of the injunction will serve the public interest.

First, even if Plaintiff can establish a violation by Defendants of the statutory deadline, Plaintiff does not and cannot show that the appropriate remedy for such a violation should be ceasing to count votes. The votes were cast lawfully and the voters are entitled to have them

counted. Under Florida Supreme Court precedent, disenfranchisement of voters is not an appropriate remedy for officials' failure to meet procedural requirements. Plaintiff therefore cannot show the likelihood of success on the merits that is necessary for the injunctive relief that it seeks.

Second, Plaintiff has shown no harm—let alone irreparable harm—that will result from votes being counted.

Third, to the extent Plaintiff has any injury (it does not), it can be remedied by means other than disenfranchisement.

Fourth, it is the voters who will suffer permanent and irreparable harm if their votes are ignored as Plaintiff requests. The public interest lies in ensuring that every valid vote is counted, not in disenfranchising voters as a remedy for any purported failures of Defendants. Granting Plaintiff's motion here would disenfranchise those Florida voters who through no fault of their own have submitted votes that were not timely counted by Defendants. Such a ruling would subvert, not serve, the public interest. Plaintiff's motion should be denied.

LEGAL STANDARD

A party seeking a temporary injunction "must establish that (1) there is a substantial likelihood of success on the merits; (2) irreparable harm will result if the temporary injunction is not entered; (3) an adequate remedy at law is unavailable; and (4) entry of the temporary injunction will serve the public interest. *Donoho v. Allen-Rosner*, No. 4D18-1814, 2018 WL 4050738 (Fla. 4th DCA Aug. 24, 2018) (citing *Univ. Med. Clinics, Inc. v. Quality Health Plans, Inc.*, 51 So. 3d 1191, at *1, 1195 (Fla. 4th DCA 2011)).

ARGUMENT

I. Plaintiff Has Not Established A Strong Likelihood Of Success On The Merits; The Law Is Clear That All Votes Are To Be Counted And That The Remedy For Any Alleged Lack Of Compliance By Defendants With Section 102.141(5) Is Not To Ignore Timely Cast Votes

Plaintiff fails to show a strong likelihood of success on the merits. To succeed on its motion, Plaintiff must show not only that Defendants have violated the statute, but also that Plaintiff is likely to prevail in its request for the relief that it seeks. Plaintiff asks for extraordinary relief: that timely and validly cast ballots be ignored because—through no fault of the voters—Defendants allegedly failed to meet an interim deadline of Fla. Stat § 102.141(5). Section § 102.141(5) says:

> The canvassing board shall submit on forms or in formats provided by the division unofficial returns to the Department of State for each federal, statewide, state, or multicounty office or ballot measure no later than noon on the third day after any primary election and no later than noon on the fourth day after any general or other election. Such returns shall include the canvass of all ballots as required by subsection (2).

Plaintiff does not, and cannot, show that disenfranchisement of voters who complied with Florida law in all respects is an appropriate remedy for Defendants' alleged failure to meet the § 102.141(5) deadline for submitting the first unofficial count.

First, Florida law is clear that disenfranchisement is not an acceptable remedy for lack of procedural compliance by officials with election law. The Supreme Court of Florida has held that "[w]hen the voters have done all that the statute has required them to do, they will not be disfranchised solely on the basis of the failure of the election officials to observe direct statutory instructions." *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1975). "[T]he electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election." *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007, 1008 (Fla. 1988). As a result, Florida courts will *not* ignore ballots simply because of a failure by officials to strictly

adhere to statutory requirements where the intent of the voter may still be ascertained. *See Taylor v. Martin County Canvassing Bd.*, 773 So. 2d 517, 518–19 (Fla. 2000) (rejecting effort to discard absentee ballots where, "despite . . . irregularities . . . , the sanctity of the ballot and the integrity of the election were not affected" and the election "was a full and fair expression of the will of the people") (citation omitted); *State ex rel. Carpenter v. Barber*, 144 Fla. 159, 163–64 (Fla. 1940) ("Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots . . . ."); *State ex rel. Titus v. Peacock*, 125 Fla. 810, 811–12 (Fla. 1936) ("[A]n erroneous or even unlawful handing of the ballots by the election officers charged with such responsibility will not be held to have disfranchised such voters by throwing out their votes on account of erroneous procedure had solely by the election officers . . . ."); *see also Taylor v. Martin Cty. Canvassing Bd.*, No. CV 00-2850, 2000 WL 1793409, at *3 (Fla. Cir. Ct. Dec. 8, 2000), *aff'd*, 773 So. 2d 517 (Fla. 2000) ("[I]t is for the Legislature . . . to determine what sanctions should apply to election officials who do no[t] follow the law, and that the sanction should not be one that would frustrate the will of the voters . . . .").

Here, Plaintiff does not even allege that the intent of the voters cannot be ascertained from the ballots at issue, that the voters who cast the ballots were ineligible, or that the voters failed to submit their ballots on time. Instead, Plaintiff improperly calls these ballots "illegal" merely because the county failed to include them in the first of three county-level canvasses of votes. Defendants' alleged lack of compliance with § 102.141(5) is not a sufficient basis to throw out legitimate votes.

Second, Plaintiff's argument that votes be ignored finds no support in the text of § 102. Nowhere does the statute say that valid ballots which the county failed to canvass by the first unofficial deadline shall not be counted. Notably, where Florida statutes prohibit ballots from being counted, they do so expressly: For example, if a county fails to provide certified returns following a manual recount, those returned "shall be ignored." Fla. Stat. § 102.112(3). Section 102.141(5) contains no comparable language. The Court should not grant Plaintiff's request to read into the statute a procedure not found in its text, particularly such an extreme remedy as ignoring ballots that eligible voters submitted on time. *See See Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1290 (Fla. 2000) (construing Florida election statute to permit validly cast votes be counted).

Third, it would be an arbitrary and absurd result—and potentially violate the Florida and United States Constitutions—to not count valid ballots timely submitted by voters, simply because the county did not meet its statutory deadline for the first unofficial count. *See Gore v. Harris*, 773 So. 2d 524, 533 n.22 (Fla. 2000) (Pariente, J., concurring) (explaining that the arbitrary failure to count a citizen's vote due to county of residence "could raise implications of disparate treatment based solely on the voter's county of residence"). Under Plaintiff's reading, some voters would have their ballots counted (because county election officials included those ballots in the first unofficial count), while others who submitted ballots at the same time and in the same manner would be disenfranchised. Some voters whose ballots were not in the possession of the county by Saturday (overseas voters) would have their ballots counted, while other absentee voters would not. Voters whose ballots were accidentally overlooked because of a voting machine error would ultimately have their ballots counted, but voters whose ballots were not counted because of human error would have no voice in that election.

In sum, Plaintiff cannot show a strong likelihood of success on the merits. The extreme disenfranchisement remedy Plaintiff seeks is not available under the governing statutes and is inconsistent with both Florida and federal law. Plaintiff's motion must therefore be denied.

II. Plaintiff Will Not Suffer Irreparable Harm; It Is Voters Who Have Been And Will Be Harmed If Votes Are Not Counted

Plaintiff also fails to show irreparable harm. Plaintiff claims that its "interest in ensuring a fair and orderly election will be unduly burdened" absent the disenfranchisement remedy it seeks, but this conclusory assertion wholly fails to carry Plaintiff's burden. Pl.'s Mem. of Law in Support of Emergency Mot. for a Temporary Inj. ("Pl.'s Mem.") at 7. This is nothing more than an abstract interest in technical compliance with the law, an interest that is shared by every potential litigant. If an abstract interest in a "fair and orderly election" sufficed to show irreparable harm and thus demonstrate entitlement to preliminary injunctive relief, this element of the standard would be meaningless and would be met in every case. Here, Plaintiff articulates no actual harm—let alone irreparable harm—that it will suffer if properly cast votes are counted. As such, Plaintiff's motion cannot stand. *See Donoho v. Allen-Rosner*, No. 4D18-1814, 2018 WL 4050738 (Fla. 4th DCA Aug. 24, 2018) ("Irreparable injury will never be found where the injury complained of is 'doubtful, eventual or contingent.").[1]

If anyone has been harmed by Defendants' failure to include valid and timely-cast ballots in the initial canvass, it is the voters of Broward County, to whom election officials owe a responsibility to process their votes. That harm to voters from Defendants' failure to include the

[1] The cases Plaintiff cites do not support Plaintiff's assertion of irreparable injury. In *Town of Lantana v. Pelczynski*, 303 So. 2d 326, 327 (Fla. 1974), the Florida Supreme Court's holding that a statute was unconstitutional made no reference whatsoever to a finding of irreparable injury. The Eleventh Circuit case Plaintiff cites, *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000), holds that there was *no* irreparable injury. At most, Plaintiffs' cases reflect that there is a general interest in fair elections. The cases in no way indicate that such a general interest suffices for purposes of irreparable injury.

ballots in the initial canvass should ultimately be minimal so long as Defendants include all votes in subsequent counts, as Florida law requires. However, Broward County voters will suffer substantial, irreparable harm if Plaintiff is granted the relief it seeks and voters are thereby disenfranchised. "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable." *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 227 (4th Cir. 2014). This Court should not countenance Plaintiff's brazen attempt to silence the voices of eligible Floridians in electing their officials.

III. To The Extent Plaintiff Has Any Injury, The Remedy Is Not To Ignore Votes

In stating that it lacks an adequate remedy at law, Plaintiff asserts only that "Defendants' violation of 102.141(5) will increase the risk of improper counting of voters' ballots, which the courts cannot correct in the future." Pl's Mem. at 7. Plaintiff lacks a legal remedy only insofar as this case does not seek money damages. That fact, however, does not make Plaintiff any more entitled to the disenfranchisement remedy it seeks: disenfranchisement is a remedy that Florida law does not countenance either at law or in equity for election officials' purported lack of compliance with procedural requirements such as those at issue here.

Moreover, Plaintiff's assertion that "the courts cannot correct" any purported improper vote counting "in the future" is entirely conclusory, unsupported by precedent, and plainly incorrect. *Id.* Plaintiff has not shown that it will suffer any legally-cognizable harm if the votes are counted, but even if it had, Plaintiff cannot show that the requested relief of an immediate injunction requiring Defendants to cease counting ballots is necessary to avoid such purported harm. To the extent the Court finds that Plaintiff is entitled to any form of injunctive relief (and for the reasons set forth herein, it should not), the Court should require Defendants to preserve a record of which ballots were canvassed after the first unofficial count in § 102.141(5), rather than enjoining Defendants from canvassing such ballots altogether. Maintaining such records would

ensure that future rulings by this Court on the merits of Plaintiff's claim could be applied to the ballots at issue while avoiding the unnecessary prejudice and disruption of the status quo that Plaintiff's requested immediate relief would entail.

IV. The Public Interest Will Not Be Served By Ignoring Legitimate Votes; It Will Be Served By Counting Them

The public interest in "protecting the fundamental right to vote" strongly counsels against granting the requested injunction. Significantly, in cases such as this one which challenge officials' compliance with election laws, "the real parties in interest . . . not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom [the Court] must give primary consideration." *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975). Further, the Florida Supreme Court has "identified the right of Florida's citizens to vote and to have elections determined by the will of Florida's voters as important policy concerns of the Florida Legislature in enacting Florida's election code." *Palm Beach Cty. Canvassing Bd.*, 772 So. 2d at 1290. The Plaintiff's position would result in the legitimate votes of Florida voters being forever lost. The public interest unequivocally favors counting votes in order to effectuate the will of the voters, not disenfranchising voters based on technical violations by election officials. *Beckstrom v. Volusia Cty. Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998) ("[E]ven in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing . . . the court is to void the election *only* if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.") (emphasis added); *State ex rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940) ("It is the intention of the law to obtain an honest expression of the will or desire of the voter."); *Flack v. Carter*, 392 So. 2d 37, 40 (1st Dist. Court of Appeals 1980) ("In assessing the substantiality of [an] election contest, the

judge should bear in mind that the primary consideration in such a contest is whether the will of the people has been effected.”).[2]

A vote that is not counted in an election is forever lost and the voter is disenfranchised. The public interest weighs strongly in favor of requiring Defendants to count every validly cast vote in a fair and transparent manner, not in disenfranchising Florida voters.

CONCLUSION

For the foregoing reasons, the League respectfully requests that Plaintiff’s motion for a temporary injunction be denied in its entirety.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Mail Service or via an automatic email generated by the Florida Courts E-Filing Portal to all parties on the attached Service List on this 13TH day of November, 2018.

Respectfully submitted,

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[2] None of the cases cited by Plaintiff would support a finding of a public interest in votes that are validly and timely cast not being counted. *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1376 (S.D. Fla. 2004), unlike the present case, concerned a voter request to extend a deadline because the *voters* themselves had failed to comply with the deadline. *Kennedy v. Riley*, No. 2:05CV1100-MHT, 2007 WL 1461746 (M.D. Ala. May 17, 2007), and *Stoner v. Brown*, 415 U.S. 724 (1974), have nothing to do with whether votes that have been cast are counted. Notably, however, the statement that Plaintiff excerpts from *Kennedy*—that the right to vote is a “fundamental political right”—contradicts Plaintiff position in this case that voters be effectively deprived of their right to have their validly and timely cast vote counted.

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