UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 12-22432-Civ-Zloch

ARMANDO LACASA and
VINCENT J. MAZZILLI,

Plaintiffs,
vs.

PENELOPE TOWNSLEY,
as the Miami-Dade County Supervisor
of Elections,

Defendant.
_____/

DEFENDANT PENELOPE TOWNSLEY'S OPPOSITION TO MOTION FOR PRELIMINARY INJUCTION

In demanding to participate in a primary election for a party they concede they do not belong to, and therefore have no right to associate with, Plaintiffs Armando Lacasa and Vincent J. Mazzilli ("Plaintiffs") fundamentally misconstrue the United States and Florida Constitutions. While asserting claims based on the "fundamental right to vote," Plaintiffs ignore the Supreme Court's repeated decisions holding that "the associational 'interest' in selecting the candidate of a group to which one does not belong … falls far short of a constitutional right, if indeed it can even be characterized as an interest … [i]t has been described in our cases as a 'desire' and rejected as a basis for disregarding the First Amendment right to exclude." *California Democratic Party v. Jones*, 530 U.S. 567, 573-74, n. 5, 120 S.Ct. 2420 (2000); *see also Clingman v. Beaver*, 544 U.S. 581, 588, 125 S.Ct. 2029 (2005). Plaintiffs similarly ignore that a State Court has already reviewed Florida's Constitution and laws concerning a write-in candidate closing a primary election and has found that "[a]ny opposing candidate – including a write-in candidate – is 'opposition,'" and "[a] primary election will remain closed if the winner of the

primary election will have opposition at the general election." *Marvin Jacobson v. Hubert Dale Martin, et. al.*, Case No. 2006 CA 1160, at 6 (Fla. 5th Cir. Ct. Oct. 29, 2007) (a copy of this Order is attached hereto as "Exhibit A"). To the extent Plaintiffs disagree with the manner in which the State of Florida conducts its primaries and wish to re-write state law, their remedy is with the legislature and not the Federal Courts. *See Clingman*, 544 U.S. at 598 (holding that the Constitution leaves the choice of who votes in primaries "to the democratic process, not to the courts").

As such, Plaintiffs' "Emergency" Motion for Preliminary Injunction ("Motion") is both too little and too late. The request is too little because the clear and unambiguous terms of the Florida Constitution and the Florida Statutes mandate that the Democratic Primary for Miami-Dade County State Attorney be closed to all but members of the Democratic Party. Moreover, the United States Supreme Court has not only made clear that such a "closed" primary is consistent with the Constitution even when members of another party will have no meaningful vote in an election, but it is also required to protect the parties and their members from being compelled to accept the selection of a party's preferred nominee by non-party members. *Jones*, 530 U.S. at 584. Plaintiffs' Motion is similarly too little because they have not joined all parties necessary for their request to have any meaning.

The Motion is too late because the Plaintiffs have sat on their rights and waited to bring this suit until two months after qualifications ended and the Democratic primary election for the Miami-Dade County State Attorney was closed to only Democrats. During the two months that Plaintiffs sat on their rights, the election has been programmed, ballots have been printed, overseas ballots have been mailed, and absentee voters have voted. The illusory harms alleged by the Plaintiffs and the purported "emergency" that they contend justifies this Court taking

extreme action have in fact been caused by Plaintiffs' simple lack of diligence in pursuing this action. Their claims should be rejected.

Finally, even if the Plaintiffs are correct, and both Florida law and the decisions of the United States Supreme Court should be ignored, the extraordinary relief sought will have such a profound and disruptive effect on the conduct of the August 14, 2012 primary election that the "accuracy and reliability" of "not just the State Attorney race but every federal, state and county race" will be adversely affected. *See* Affidavit of Penelope Townsley, Miami-Dade County Supervisor of Elections ("Towsley Aff.") (attached hereto as "Exhibit B").

Accordingly, Defendant Penelope Townsley, Miami-Dade County Supervisor of Elections ("Supervisor Townsley"), respectfully requests that this Court deny the Motion.

BACKGROUND

A. Florida's Primary Election System

Florida law generally provides for a "closed" primary, in which only the members of a political party may nominate the party's candidate in the primary election. Fla. Stat. § 101.021. This is because the basic and fundamental purpose of a primary election is *not* to elect a candidate to office but to provide a vehicle for a particular political party to express its preference for a candidate to represent that party in the general election. *Wagner v. Gray*, 74 So. 2d 89, 91 (Fla. 1954) (primary elections "are not in reality elections, but are simply nominating devices"); *see also* Fla. Stat. § 100.061 ("In each year in which a general election is held, a primary election for nomination of candidates of political parties shall be held….").

In *Wagner*, the Florida Supreme Court held that a primary election "is merely the selective mechanism by which members of a political party express their preference in the selection of the party's candidate." *Wagner*, 74 So. 2d at 91. As such, "the main object to be

accomplished by a primary election is the selection or nomination of candidates for the various political parties … whose names should go on the official ballot to be voted for in the general election." *Id.* In keeping with this understanding, Florida law provides:

> In a primary election a qualified elector is entitled to vote the official primary election ballot of the political party designated in the elector's registration, and no other. **It is unlawful for any elector to vote in a primary for any candidate running for nomination from a party other than that in which such elector is registered.**

Fla. Stat. § 101.021 (emphasis added). By making the act of voting for another party's candidate in a primary election an "unlawful" act, this provision protects political parties and their members from having non-members select the party's representative for the general election.

The one and only exception to this rule is when there will be no general election. In 1998, the electors of Florida passed a universal primary amendment to the Florida Constitution, which opened the otherwise "closed" primary when no general election will be held. As a result of this amendment, Article VI, Section 5(b) of the Florida Constitution now provides:

> If all candidates for an office have the same party affiliation and the winner will have no opposition in the general election, all qualified electors, regardless of party affiliation, may vote in the primary election for that office.

Thus, if, and only if, all candidates are members of the same party and there will be no opposition at the general election will a primary be open to all electors.

On May 11, 2000, then-Secretary of State Katherine Harris issued DE 00-06, advising Supervisors of Elections that Article VI, Section 5(b) of the Florida Constitution does not apply when a write-in candidate qualifies to appear on the general election ballot. *See* Motion [DE 6] at Ex. C.

Since that time, every Secretary of State has directed Supervisors of Election around the state to conduct "closed" primaries when write-in candidates have qualified for election and

major political parties, like the Democratic Party, do not have any rule which would permit a non-member to vote in their primary. *See id.* at Ex. G, Affidavit of Rod Smith; Affidavit of Dorothy Jackson ("Jackson Aff.") ¶ 7 (Attached hereto as "Exhibit C")("The Democrat party has no rule or by-law which would open the Primary Election for Miami-Dade County State Attorney and the Democrat Party's policy and practice is to follow state law and keep this primary closed").

B. The 2012 Miami-Dade County State Attorney Election

Qualification for the Miami-Dade County State Attorney closed on April 20, 2012. Four candidates qualified within the time and manner prescribed by law: Democratic candidates Katherine Fernandez Rundle and Rod Vereen; and write-in candidates Democrat Michele Samaroo and Republican Omar Malone. The qualifications of all candidates were widely reported in Miami-Dade County on that day. *See,* David Ovalle, *Miami-Dade State Attorney Race Draws Two More Candidates*, The Miami-Herald, April 20, 2012, (a copy is attached hereto as "Exhibit D"). That report also noted that the presence of write-in candidates "ensure(s) the [Democratic] primary remains closed, and only Democrats can vote in the battle between Vereen and Fernandez Rundle." *Id.*

On June 14, 2012, the Secretary of State directed Supervisor Townsley to conduct a closed Democratic primary for the race between candidates Vereen and Fernandez Rundle. *See* Townsley Aff. ¶ 6, Attachment A at 5. In accordance with her responsibilities under state law, Supervisor Townsley began preparing, programming, and printing "three hundred and seventy-one (371) ballot styles for electors depending on where they live and their party affiliation." *Id.* ¶ 10. It was not until June 29, 2012, seventy days after the close of qualifications and the closing of the Democratic primary—and after the election has begun and ballots to overseas absentee

voters have been sent and voted upon—that Plaintiffs filed this action. The instant "Emergency" Motion for Preliminary Injunction followed four days after that.

ARGUMENT

I. Plaintiffs Have Failed to Clearly Demonstrate the Need for the Extraordinary and Drastic Relief of a Preliminary Injunction

A preliminary injunction can only be granted where a plaintiff establishes that (1) it has a substantial likelihood of success on the merits; (2) it will suffer irreparable injury unless the injunction issues; (3) its threatened injury outweighs whatever damage the proposed injunction may cause the other party; and (4) if issued, the injunction would not be adverse to the public interest. *See K H Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006); *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003). The Eleventh Circuit has emphasized, a "preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishe[s] the burden of persuasion as to each of the four prerequisites." *Four Seasons*, 320 F.3d at 1210 (internal quotations and citations omitted). If the movant is unable to carry its burden as to any one prong, the movant is "not entitled to a preliminary injunction," and "it is unnecessary to address the other prerequisites to such relief." *U.S. v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983).

Here, as demonstrated below, Plaintiffs have failed to carry their burden on each and every element. The issuance of the requested relief will not only be contrary to Federal and State law, but will also overwhelmingly cause more harm to the election than keeping the primary closed.

A. Plaintiffs Have No Likelihood of Success On the Merits

1. State Law Requires the State Attorney Democratic Primary to be Closed

Unable to avoid the clear and express language of Article VI, Section 5(b) of the Florida Constitution, Plaintiffs attempt to look beyond the text and re-write the Florida Constitution to fit their needs. Not only is this improper, but it abrogates the deference that the Florida Supreme Court accords to the Secretary of State, Florida's chief elections official, in interpreting the constitutional and statutory requirements concerning elections. *See, e.g., Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 250 (Fla. 1987) ("deference usually will be accorded an administrative agency's interpretation of matters entrusted by statute to its discretion or expertise"). Moreover, the interpretation pushed by Plaintiffs would place the Secretary of State and each County's Supervisor of Elections in the untenable position of deciding when any candidate—write-in or otherwise—would constitute "meaningful" opposition before a decision to open or close a primary election can be made. Such an interpretation is nonsensical and can only lead to chaos.

Initially, Article VI, Section 5(b) requires an open primary only when "all candidates for an office have the same party affiliation" and "the winner will have no opposition in the general election." This language is clear and unambiguous, and it is not necessary to look beyond the text of the provision. *See In re Advisory Op. of Governor Request of November 19, 1976 (Const. Revision Comm'n)*, 343 So. 2d 17, 26 (Fla. 1977) ("If the language used in the Constitution is plain and unambiguous, it is not subject to interpretations or construction by the courts.") As the Florida Supreme Court has explained, "the law is settled that when constitutional language is precise, its exact letter must be enforced and extrinsic guides to construction are not allowed to defeat the plain language. **Ambiguity is an absolute prerequisite to judicial construction** ...." *Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992) (emphasis added); *accord Avante*

Villa of Jacksonville Beach, Inc. v. Breidert, 958 So. 2d 1031, 1033 (Fla. Dist. Ct. App. 2007) ("Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language. If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written.").

Had the drafters intended qualified write-in candidates to not be considered "opposition," they could have made that clear by requiring open primaries if "the winner will have no opposition in the general election other than one or more write-in candidates." Similarly, had they intended opponents with no realistic chance of victory to not be considered "opposition," they could have made that clear by requiring open primaries if "the winner will have no opposition in the general election with a realistic chance of victory." Instead, Section 5(b), as voted on by the Florida electorate and as adopted, includes no qualification for the type or strength of opposition in a general election required to open a party primary. Yet Plaintiffs now urge this Court to insert such a qualification into otherwise unambiguous constitutional text.

Even if there were any ambiguity in this constitutional provision, this Court should give deference to the Opinion from the Secretary of State, wherein Florida's chief elections officer[1] directs Supervisors to treat write-in candidates as opposition in the general election under Section 5(b). *See* Motion at Ex. C. The Florida Supreme Court has made clear that elections officials' interpretation of election laws is entitled to deference by the courts:

> The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties…. [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than

[1] "The Secretary of State is the chief election officer of the state, and it is his or her responsibility to … [o]btain and maintain uniformity in the interpretation and implementation of the election laws." Fla. Stat. § 97.021.

> substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 845 (Fla. 1993) (quoting *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975)); *accord Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 557 n.3 (Fla. Dist. Ct. App. 2006) ("[E]lection officials are accorded deference in interpreting election laws and performing their duties."); *Thurman v. Cobb*, 957 So. 2d 638, 642 (Fla. Dist. Ct. App. 2006) ("Recognizing the unique nature of the election process, Florida courts have traditionally shown deference to the judgment of election officials.'').

Moreover, Plaintiffs' proposed interpretation of Section 5(b) is inconsistent with the statutory structure of Florida's elections laws. Under Florida law, if a candidate in a general election is unopposed, "the candidate [is deemed] to have voted for himself or herself" and, as a result, "the names of unopposed candidates shall not appear on the general election ballot." Fla. Stat. § 101.151(7). Thus, an unopposed candidate does not appear at all on the general election ballot. By contrast, when a party candidate is opposed by one or more write-in candidates, an election remains necessary. In that case, the general election ballot will have the party's nominee, along with a blank space for voters to vote for the write-in candidate. Plaintiffs' proposed interpretation upends this statutory scheme by essentially holding two general elections at which all voters will vote twice in the same election.

Florida law is only fulfilled by enforcing Section 5(b) according to its plain and unambiguous terms. Where the winner of a primary election "will have no opposition in the general election," an open primary is necessary to ensure the participation of all eligible voters,

regardless of party, in the election process. Where, however, the winner of a primary election will have opposition—including the opposition of a write-in or independent candidate—in the general election, a closed primary will not defeat the purpose of Section 5(b) because all eligible voters, regardless of party affiliation, will vote in the *legally* determinative election: the general election.

This straightforward interpretation is also consistent with the first clause of Section 5(b), which specifically requires that all candidates "have the same party affiliation" before that provision can be invoked to open an otherwise closed primary. In the instant case, Omar Malone, a write-in candidate, is a member of the Republican Party. Townsley Aff. at ¶ 8. Thus, the instant primary will be closed no matter how "opposition" is interpreted.

To accept Plaintiffs' reading would open a Pandora's Box and create purely subjective and unmanageable criteria to determine whether the winner of a primary will have "opposition" in the general election. Presumably, state and local election officials would have to make this determination in each and every race across the state, and any elector disagreeing with the determination would then challenge such determination in court. It is simply impossible for state and local election officials – or the courts – to satisfactorily determine whether a candidate is "realistic" or "significant," or whether a candidate has an "intention of being elected." Not only write-in candidates, but also candidates nominated by a party (whether one of the two major parties or a minor party), will fail to meet these tests in some cases. Such a reading would violate the basic tenet that "Constitutional provisions are designed to effectuate practical government regulated by law; and they should be so interpreted as to accomplish, and not to defeat, their purposes or to lessen their efficiency." *Neisel v. Moran*, 80 Fla. 98, 114 (1919).

Lastly, the very argument at issue in this matter has already been addressed and resolved in State Court. In *Marvin Jacobson v. Hubert Dale Martin, et. al.*, Case No. 2006 CA 1160 (Fla. 5th Cir. Ct. Oct. 29, 2007), electors challenged the closing of the Republican primary for Lake County Commission because a write in candidate qualified to run. *See* Ex. A at 1-3. The court found:

> Any opposing candidate – including a write-in candidate – is "opposition" … Nothing in the Constitution authorizes this Court or any other Court to predict the degree of opposition a candidate will present or to determine whether a candidate's opposition is significant or even realistic. Because the terms of the constitution are plain and unambiguous, the Court must enforce.

Id. at 6. Prior to reaching this conclusion on summary judgment, the Court denied the injunctive relief request on a similar basis. *See Marvin Jacobson v. Hubert Dale Martin, et. al.*, Case No. 2006 CA 1160 (Fla. 5th Cir. Ct. Sept. 1, 2006) (a copy of this Order is attached hereto as "Exhibit E").

Ultimately, this Court should not interpret state law in a manner inconsistent with the plain language, State court precedent, the interpretation of the State's chief elections official, or common sense. If Florida's elections laws need to be re-written to better meet the needs of the political parties, that is a matter for the legislature and the voters, not for a federal court.

2. Florida's Closed Primary is Consistent with the United States Constitution

Plaintiffs' federal claims are grounded on two assertions: (1) that members of the Republican and Independent Party have a constitutionally protected right to vote in the Democratic Primary; and (2) that non-party members have a right to vote in a party primary when it is the "de facto" election. Motion at 15-17.[2] The Supreme Court, however, has

[2] In making these assertions, Plaintiffs argue that this Court should apply a "strict scrutiny" standard of review because they erroneously view their inability to vote in another party's

addressed and rejected both of these arguments, and Plaintiffs have no likelihood of success on this issue. *See, e.g., Jones*, 530 U.S. at 573-74, n. 5; *Clingman*, 544 U.S. at 581.

The Supreme Court has held that, "[i]n facilitating the effective operation of [a] democratic government, a state might reasonably classify voters or candidates according to political affiliations … but for that classification to mean much, [the state] must be allowed to limit voters' ability to roam among political parties." *Clingman*, 544 U.S. at 594-95. As such, voters must demonstrate a least "some commitment to the party in whose primary he wishes to participate… [and] that commitment is lessened if party members may retain their registration in one party while voting in another party's primary." *Id.* at 595. Simply put, Plaintiffs have no more constitutional right to vote in the Democratic Primary for Miami-Dade County State Attorney than they do to vote in the general election for Broward County State Attorney.

Ignoring these clear pronouncements, Plaintiffs cite to general voter participation cases like *United States v. Classic*, 313 U.S. 299 (1941), *Terry v. Adams*, 345 U.S. 461 (1953), and *Gray v. Sanders*, 372 U.S. 368 (1963), to assert some inchoate right to participate in any primary. Motion at 15-16. These cases, which deal with disregarding votes, racial exclusion, and improper weighting of votes, are simply inapposite to the ability of the state to exclude non-members from party primaries. The issue of a non-member voting in a party primary is far from a constitution right and "has been described in our cases as a 'desire' and rejected as a basis for

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primary as a "severe" burden on their constitutional rights. Motion at 16. But there is no inherent right to vote in another political party's primary. *See infra* pp._13-16. In cases where "a state electoral provision places no heavy burden on associational rights, 'a states' important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions.'" *Clingman*, 544 U.S. at 593; *see also Washington State Grange v. Washington State Republican Party, et al.*, 552 U.S. 442, 458 (2008) (holding strict scrutiny standard inapplicable to state laws regulating primary elections). Accordingly, this case raises no issues requiring heightened scrutiny.

disregarding the First Amendment right to exclude." *Jones*, 530 U.S. at 573-74, n. 5; *Clingman*, 544 U.S. at 581.[3]

Moreover, Plaintiffs' allegation that the Democratic Primary is the "*de facto*" election for Miami-Dade County State Attorney and that, without participation, Plaintiffs will have no opportunity to cast a meaningful vote (Motion at 16) has been similarly rejected by the Supreme Court. *See Jones*, 530 U.S. at 583. In *Jones*, the Court struck down a California law converting the California Primary Election from a "closed primary" to a "blanket primary" where voters could vote for any candidate regardless of party affiliation. *Id*. at 570. The Court found that such a structure violated the associational rights of the political parties. In doing so, the Court explicitly rejected the voter disenfranchisement argument presented by Plaintiffs. *Id.* The Court held:

> Respondents' third asserted compelling interest is that the blanket primary is the only way to ensure that disenfranchised persons enjoy the right to an effective vote. By "disenfranchised," respondents do not mean those who cannot vote; they mean simply independents and members of the minority party in "safe" districts. These persons are disenfranchised, according to respondents, because under a closed primary they are unable to participate in what amounts to the determinative election, the majority party's primary; the only way to ensure they have an "effective" vote is to force the party to open its primary to them. This also appears to be nothing more than reformulation of an asserted state interest we have already rejected—recharacterizing nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. We have said, however, that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." The voter's desire to participate

[3] Plaintiffs' attempt to characterize this argument as an issue of "associational rights" under the First Amendment is equally misguided. The associational right to vote in a primary is one shared by a political party and its members and not one shared by a member of another political party. *Jones*, 530 U.S. at 583-584. The only First Amendment right implicated here is the right Plaintiffs are attempting to abridge: the right of the state to exclude members of other political parties from disturbing another party's selection of a preferred candidate. *Id.*

> does not become more weighty simply because the State supports it. Moreover, even if it were accurate to describe the plight of the non-party-member in a safe district as "disenfranchisement," Proposition 198 is not needed to solve the problem. **The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon his freedom of association, whereas compelling party members to accept his selection of their nominee is a state-imposed restriction upon theirs**.

Id. at 583-584 (emphasis added; internal citations omitted).[4]

Plaintiffs attempt to avoid the lack of any constitutionally protected right to vote in another party's primary by presenting an Affidavit from Rod Smith for the proposition that the Florida Democratic Party asserts no First Amendment interest in this closed primary. *See* Motion at Ex. G. This statement, however, has no bearing on the Constitutional issue before the Court. Initially, the Affidavit is not an assertion that the Democratic Party desires or wants to open the closed primary. In fact, the Affidavit is clear that "the Florida Democratic Party has no official rule or position regarding whether the 2012 Democratic Primary for the Miami-Dade County State Attorney should be open to all voters or closed only to registered Democrats" and that "[t]he party seeks to comply with all applicable provisions of federal and state law." *Id.*

Additionally, the state has an independent interest in the orderly operation of elections, and that interest predominates over the interest of one of the many parties in an election. *See Timmons v. Twins City Area New Party*, 520 U.S. 351, 358 (1997) ("it is also clear that States may, and inevitably must, enact reasonable regulations of parties and elections, and ballots to reduce election – and campaign – related disorder"). The instant primary is one of nine other

[4] It is of some note that write-in candidates, while rare, still can and do win in general elections against a party-preferred candidate. For example, Lisa Murkowski, a write-in candidate, won the 2010 United States Senate race in Alaska and now serves the residents of Alaska in the U.S. Senate. *See* Excerpt from Official Election Results of Alaska (attached hereto as Exhibit F).

races statewide where write-in candidates have closed a particular party's primary. Townsley Aff. at ¶ 28. The Constitution does not require a patchwork of open and closed primaries that depend on whether a particular party in a particular election decides to assert a recognized right. *See Clingman*, 544 U.S. at 581.

Finally, the First Amendment associational rights recognized by the Court accrue to not only the party, but also its members, some of whom have clearly asserted its protections. *See* Jackson Aff. at ¶ 5 (Plaintiffs' requested relief "is contrary to the interests of the Ron Brown South Dade Democratic Caucus and its members, and would violated [sic] our right to associate under the First Amendment.")

Ultimately, Plaintiffs have no likelihood of success on the merits, and this matter should be left to "the democratic process, not the Courts." *Clingman*, 544 U.S. at 598.

B. Plaintiffs Have No Irreparable Injury

Plaintiffs allege that absent an injunction by the Court they will have no opportunity to vote for the Miami-Dade County State Attorney. As explained above, this argument is untrue on its face, as the Miami-Dade County State Attorney will not be elected until November 6, 2012, when all electors will be able to cast a vote between the Democratic nominee and the two write-in candidates. That simple fact aside, should the Plaintiffs wish to vote in the August 14, 2012 Democratic Primary election for the Miami-Dade County State Attorney, they need only switch their party affiliation by July 16, 2012 (twenty-nine days before the election) and they will be eligible to vote in the primary election without invoking extraordinary remedies of the Federal Courts and intruding upon the entire election process. *See* Fla. Stat. § 97.055. As the Supreme Court noted in *Jones*, "[t]he voter who feels himself disenfranchised [by not being permitted to vote in a party primary] should simply join the party." *Jones*, 530 U.S. at 584.

C. The Damage Caused by the Injunction Will Outweigh Any Injury to Plaintiffs and Will Disserve the Public Interest

Plaintiffs' requested injunctive relief will "significantly harm the accuracy and reliability of the entire election," Townsley Aff. ¶ 27, and should therefore be rejected. Printing provisional ballots for this election would require coding and conducting an entirely separate election to add an additional page to the remaining two hundred and forty three (243) ballot styles comprising approximately 701,000 voters. *Id.* ¶ 11. As of July 9, 2012, the master ballots for all of the races for the August 14, 2012 Primary Election have been fully prepared, the races have been programmed for use in the optical scan ballot readers, and equipment testing is underway. *Id.* ¶ 13. Conducting a parallel election would require that all of these procedural activities be conducted again, and there is insufficient time for this to be completed with the required level of accuracy and integrity. *Id.* Additionally, the Elections Department does not own a sufficient number of Early Voting or Election Day voting equipment to administer two concurrent elections with significantly different operational and procedural requirements. *Id.* ¶ 15.

Moreover, distributing an additional ballot page containing only the State Attorney's race to only some voters would cause extreme hardship in conducting this election and would cause mass voter confusion and frustration. *Id.* ¶ 12. On Election Day and at Early Voting sites, poll workers would have to identify Republican and Non-Partisan voters, and give only them the additional ballot page – a process prone to error. *Id.* ¶ 17. The Elections Department has insufficient time to retrain the vast majority of poll workers on this new process. *Id.* ¶ 18. Critically, distributing "provisional" ballots en masse will cause longer lines and voter confusion, may discourage voting in either election, and would create suspicion and erode voter confidence in the electoral process. *Id.* ¶ 19, 20.

As such, even if Plaintiffs were entitled to some relief, the requested injunction is simply much worse than the purported harms.

II. Plaintiffs Have Failed to Join Indispensable Parties

Plaintiffs have not brought this suit against the necessary parties to effectuate relief. The State of Florida, through the Secretary of State and State Elections Canvassing Commission, has conducted all of the discretionary acts in this election. The Secretary of State and the State Elections Canvassing Commission have qualified the candidates in this race, directed the format of the ballot, declared the race a "closed" primary, and are the only entities who can certify the winner of the election. Rather than bring suit against those parties, Plaintiffs have erroneously elected to bring suit only against the Miami-Dade County Supervisor of Elections, whose role is purely ministerial and who cannot declare a winner.

For Plaintiffs to have any meaningful relief in this matter, to the extent it is warranted, they must not only be able to cast votes in the Democratic Primary, they must also have those votes counted in the ultimate certification of the election results, the act which determines a winner in the race. Supervisor Townsley's role in the election of the Miami-Dade County State Attorney falls far short of being capable of providing this relief. State law requires that the Department of State "shall certify to the supervisors of elections … the names of all duly qualified candidates for nomination or election who have qualified with the Department of State." Fla. Stat. § 99.061(6); Townsley Aff. ¶ 6. Moreover, the Department of State, Division of Elections, along with the Florida Elections Canvassing Commission, are responsible for certifying the winner of the election. Fla. Stat. § 102.111(2); Townsley Aff. ¶ 7. As such, any relief will be incomplete without the Secretary of State being present, and the Court should refrain from issuing any injunctive relief or proceeding with this matter until the Secretary of

State has been properly made a party pursuant to Rule 19 of the Federal Rules of Civil Procedure.[5]

III. Plaintiffs May Not Wait Until the Eleventh Hour to Seek Relief.

In election cases, "there is no constitutional right to procrastinate." *Dobson v. Dunlap*, 576 F. Supp. 2d 183 (D. Ma 2008); *see also Fulani v. Hogsett*, 917 F. 2d 1028, 1031 (7th Cir. 1991) (Laches, "in the context of elections…means that any claim against a state electoral procedure must be expressed expeditiously"). Rather than pursuing this matter after the close of qualifications on April 20, 2012, Plaintiffs sat on their rights for seventy days while elections officials programmed, printed, and distributed ballots; candidates campaigned and expended funds; voters began making decisions about candidates; and overseas military personnel received and voted ballots. In such situations, courts will not intervene into elections unless Plaintiffs have acted diligently to protect their rights in a timely fashion. *See Fishman v. Schaffer*, 429 U.S. 1325, 1330, 97 S. Ct. 14, 50 L.Ed.2d 56 (1976) (denying ballot access injunction in part on the ground that "applicants delayed unnecessarily in commencing [the] suit" until "[t]he Presidential and overseas ballots have already been printed; some have been distributed[, and t]he general absentee ballots are currently being printed.")[6] As such, the equitable doctrine of

[5] While not required by Rule 19, this Court should similarly abstain from issuing any injunctive relief until proper notice and opportunity to be heard has been given to all of the candidates in the Democratic Primary for the Miami-Dade County State Attorney. Were the Supervisor of Elections to violate Florida law and disobey the directives of the Secretary of State, any candidate in the election, or even the Secretary of State, would have standing to bring a meritorious suit against the Supervisor to enjoin such action. *See, e.g.,* Fla. Stat. § 97.012(14) . It is patently unfair that Plaintiffs seek to litigate this matter and change the very nature of an election in which candidates are competing and the Secretary of State is overseeing, without their presence.

[6] *See also, Westermann v. Nelson*, 409 U.S. 1236, 1236–37, 93 S.Ct. 252, 34 L.Ed.2d 207 (1972) (denying injunction "not because the cause lacks merit but because orderly election processes

laches bars relief and instead preserves the rights of the public in an orderly and cost-effective election.

The doctrine of laches is a complete bar against an injunction if there is: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Perry v. Judd*, 2012 WL 120076, *4 (4th Cir. Jan. 17, 2012) (*citing Costello v. United States*, 365 U.S. 265, 282 (1961)). This case easily meets both prongs.

Plaintiffs waited for seventy days after the closing of the Democratic Primary became common knowledge and was widely reported before initiating this cause of action – only forty-five days before the election. Such delay is *per se* a lack of diligence. *See Fulani*, 917 F.2d at 1031 (finding lack of diligence where plaintiffs filed suit three weeks before a general election trying to challenge decisions made by the Illinois Secretary of State eleven weeks before); *see also Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (applying laches where candidate waited to file suit until two weeks after he knew he would not be listed on ballot); *Liddy v. Lamone*, 919 A.2d 1276 (2007) (concluding that trial court erred in failing to apply laches to bar plaintiff's challenge to candidate's qualifications, filed too close to election).

Moreover, by virtue of this delay, as shown above, any injunctive relief now granted will seriously disrupt the electoral process. Courts have consistently held that the law does not require the public to bear the burden of the costs and chaos caused by untimely election litigation. *See Perry*, 2012 WL 120076 at *5 ("Challenges that came immediately before or

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would likely be disrupted by so late an action."); *Williams v. Rhodes*, 393 U.S. 23, 34–35, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (denying a political party's ballot access request, despite the unconstitutionality of the relevant statute, because "relief cannot be granted without serious disruption of election process"); *cf. Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999) (laches barred action challenge electoral district apportionment where action was untimely and would result in undue burden to state).

immediately after the preparation and printing of ballots would be particularly disruptive and costly for state governments….we are loath to reach a result that would only precipitate a more disorderly presidential nominating process.") (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) ("[T]here must be a substantial regulation of elections if ... some sort of order, rather than chaos, is to accompany the democratic processes.")). Indeed, "as time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made," and objector's claims of serious injury from proceeding "becomes less credible by his having slept on his rights." *Kay*, 621 F.2d at 813.

In short, Plaintiffs were on notice of the closed primary over seventy days ago. Had they filed this action on April 30th, 2012, this action could have been heard and resolved in such a way as to avoid impacting the general election, avoid the County spending additional taxpayer money, and avoid negatively impacting the rights of the voters. But Plaintiffs did not; they waited until June 29th, 2012. As a result of that delay, any injunctive relief now must of necessity impact the orderliness of the general election, negatively impact the candidates and the electorate, and force the County to spend additional time and resources. Laches bars this action.

CONCLUSION

For the foregoing reasons, Defendant Penelope Townsley, Miami-Dade County Supervisor of Elections, respectfully requests that the Motion be denied. In the event the Court grants the requested relief, Supervisor Townsley requests that Plaintiffs be ordered to post security in the amount of one million dollars as required by Rule 65(c) of the Federal Rules of Civil Procedure payable to Supervisor Townsley in the event that she is later found "to have been wrongfully enjoined or restrained." *See* Townsley Aff. at ¶ 28.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Oren Rosenthal
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