IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY FLORIDA

CASE NO.: CACE 14-012324

IN RE:THE MATTER OF

JENNIFER BRINKMAN, an individual, and
RICO PETROCELLI, an individual,
Plaintiffs,

v.

TYRON FRANCOIS, as candidate for Broward County Commission District 2, DR. BRENDA C. SNIPES, in her official capacity as Supervisor of Elections for Broward County, Florida, KEN DETZNER, as the Florida Secretary of State, and the ELECTIONS CANVASSING COMMISSION,
Defendants.
_____/

DEFENDANT SNIPES' RESPONSE IN OPPOSITION TO PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF

Defendant, Dr. Brenda C. Snipes ("Snipes") hereby responds in opposition to Plaintiff's Complaint for Declaratory and Injunctive Relief.

BACKGROUND

The Florida Election Code generally provides for "closed" primary elections—that is, elections in which only registered members of a political party may participate in the nomination of that party's candidate for the general election ballot. The actual election of candidates to office occurs at the general election, in which all duly-registered electors may vote.

In 1998, the Florida Constitution was amended to require "open" primary elections to be held under narrow and carefully limited circumstances. In any contest in which: (1) "all candidates for an office have the same party affiliation"; and (2) "the winner will have no

opposition in the general election," the Florida Constitution provides that the primary election for that office is open to "all qualified electors, regardless of party affiliation." Fla. Const. Art. VI, § 5(b). For more than a dozen years, in primary elections at the state, district, county, and municipal level, the plain language of this provision of the Florida Constitution has been applied consistently by the Secretary of State and county Supervisors of Elections. A closed primary is the rule rather than the exception.

Between June 16 and June 20, 2014, certain candidates qualified to seek election to the office of Broward County Commissioner for District 2 (the "Broward County Commissioner") by filing legally-sufficient qualifying papers with the Broward County Supervisor of Elections, Dr. Brenda Snipes (the "Supervisor"). Specifically, five candidates filed qualifying papers to seek the primary nomination of the Democratic Party and one candidate, TYRON FRANCOIS, filed qualifying papers as write-in candidate.

The Florida Constitution does not call for the primary election to be "open" to "all qualified electors" when there is opposition. On the face of the filings, Defendant FRANCOIS, presented opposition sufficient to close the primary for registered members of the Democratic Party. 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.*

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. 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.

Plaintiff filed suit seeking to "open" the Democratic Party's primary election for Broward County Commissioner. Specifically, Plaintiff asserted that the Florida Constitution provides that "Plaintiff, and all registered voters residing in Broward County District 2, have the right to vote in the 2014 Democratic Primary for the office of Broward County Commissioner. Notwithstanding any contrary provision of Florida law. (Compl. ¶ 36).

ARGUMENT

Plaintiff 's request for declaratory and injunctive relief is patently unjustified and should be denied. As explained below, the injunctive relief requested by Plaintiff would impose a tremendous burden on elections officials and would harm the public interest by disrupting the orderly conduct of a primary election that has already begun.

A. Mandatory Injunctions are Disfavored and Should Only be Reluctantly Granted.

A party seeking a permanent injunction must "establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief." *Liberty Counsel v. Florida Bar Bd. of Governors*, 12 So. 2d 183, n.7 (Fla. 2009); *K.W. Brown & Co. v. McCutchen*, 819 So.2d 977, 979 (Fla. 4th DCA 2002); *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So. 3d 784, 786 (Fla. 4th DCA 2010). Additionally, the balance of the harms between the parties must tip in the movant's favor. *See Davis v. Joyner*, 409 So. 2d 1193, 1195 (Fla. 4th DCA 1982).

When a party is seeking to have the opposing party perform an affirmative act, as Plaintiff is here, the burden is higher. "[I]njunctions should be issued cautiously; and mandatory injunctions [in particular] are looked upon with disfavor…" *Dudley v. Orange County*, 137 So. 2d 859, 863 (Fla. 1962); *Goldberger v. Regency Highland Condo. Ass'n, Inc.*, 383 So. 2d 1173, 1174 (Fla. 4th DCA 1980) ("The writ of injunction is an extraordinary remedy, harsh and drastic, particularly in its mandatory form, where equity goes beyond mere restraint and commands that acts be done or undone"). The courts "are reluctant to issue them." *Dudley*, 137 So. 2d at 863; *Goldberger*, 383 So. 2d at 1174 ("Such injunctions are looked upon with disfavor by the courts and are granted but sparingly and cautiously").

B. The Balance of Harms and Public Interest Weigh Heavily in Favor of Defendants; Plaintiff Has Not Established Any Irreparable Injury.

A "court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws," to "avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Florida has a general and compelling interest in maintaining the integrity of the electoral process and preventing voter confusion. *See e.g., Storer*

v. Brown, 415 U.S. 724, 732-33 (1974), 736; *Libertarian Party of Florida v. Smith*, 710 F. 2d 790, 792 (11th Cir. 1983) [*Libertarian I*]. The election machinery in Broward County has been in motion since long before Plaintiff filed his Complaint regarding the August 14 primary. After the close of qualifying on June 20th, Florida law required absentee ballots including the Broward County Commissioner race to be mailed to absent uniformed services and overseas voters ("UOCAVA") and their families before July 12. Fla. Stat. § 101.62(4)(a) (setting the deadline for mailing these voters' absentee ballots to at no later than 45 days before each primary election).

The Supervisor of Elections Office is about three weeks into preparation for the August 26, 2014 Primary Election. Due to the large number of voters in Broward County, preparation must began well in advance of Election Day. At the time of the July 10, 2014 hearing on *Plaintiff's Motion to Set Date and Time to Hear Plaintiffs' Complaint for Declaratory and Injunctive Relief* (hereinafter, "Scheduling Conference") preparations for the primary election was well underway. A summary of the present status of preparation is as follows: a) ballot coding and testing is complete; b) the County Commission Seat 2 race is coded as a closed primaries; b) the Pitney Bowes Absentee Ballot distribution and tracking system is being programmed for the primary election using the current ballot configuration; c) preparation of the Election Media is in production, using the current ballot configuration (includes Personal Electronic Ballot) and ADA voting machines; d) the recording and processing of the audio ballot for ADA compliance and preparing the USB Flash drives for the Precinct and Early voting optical scanners has been completed; e) logic and accuracy test has been created and tested using the ballot in its present configuration; f) the voter registration system has been updated with each voters ballot information; g) the tabulation system has been updated and configured with the

current ballot configuration; h) Election Night Reporting, following the Division of Elections protocol, has been setup; i) more than 40,000 absentee ballots have been printed for the Election Day ballot printing process. *See Affidavit of Edward Solomon.*

As the undersigned explained to the court during the Scheduling Conference on July 10, 2014, ballot coding is a comprehensive process. It is impossible to isolate individual races. The only way to change the ballot at this time is to start from the beginning, which is not possible or practicable. Overseas military/civilian absentee ballots must be mailed no later than July 12, 2014. Domestic absentee ballots must be mailed by July 22, 2014. Equipment distribution begins the first week of August. Early Voting begins August 11, 2014 and Election Day is August 26, 2014. Attorneys for the Secretary of State stated during the time of the Scheduling Conference on July 10, 2014 that the failure of Defendant Snipes to timely send out military ballots by July 12, 2014 would be in violation of relevant federal laws.

At this late stage in the elections process, the relief requested by Plaintiff has the potential to significantly harm the accuracy and reliability of the entire election, cause severe voter confusion and erode voter confidence in the electoral process. The potential for disruption extends beyond Broward County. A mandatory injunction granted in this action could trigger follow-on lawsuits across the state, creating chaos and uncertainty for elections officials in the lead-up to a statewide primary and disrupting the settled expectations of other candidates and the general public.

Here, the public interest in the smooth and orderly administration of the primary election and the balance of harms that would result from the Plaintiff's requested relief each weighs heavily in favor of Defendants. Any minimal inconvenience or harm to Plaintiff as a result of his

inability to participate in the primary election can be remedied later if decided by a judicial ruling.

C. Defendant Snipes Fulfilled A Ministerial Task Pursuant to Florida Statutes; There are Other Adequate Remedies

Section 99.061, Florida Statutes, governs the method of qualifying for nomination or election to county office. "The filing officer may not determine whether the contents of the qualifying papers are accurate" but must determine only whether "all items required by paragraph (a) have been properly filed and whether each item is complete on its face."§ 99.061(7)(c), Fla. Stat.; *see e.g.*, *State ex rel. Shevin v. Stone*, 279 So. 2d 17, 22 (Fla. 1973). In his candidate oath, Mr. Francois swore or affirmed that he is "a qualified elector of Broward County, Florida" and that he is "qualified under the Constitution and Laws of Florida to hold the office". See Plaintiff's Notice of Filing Dates July 8, 2014. Mr. Francois submitted all of the required qualifying items prior to the end of the qualifying period. Upon review, all required items had been properly filed and each item was complete on its face. The Supervisor of Elections certified Mr. Francois as duly-qualified for placement on the ballot. *See* § 99.061

Assuming Plaintiff has standing to pursue this action, the voting of which Plaintiff seeks to participate in will merely result in the "nomination" of the Democratic Party's candidate for election to that office in November. Indeed, "[t]he candidate receiving the highest number of votes cast in each contest in the primary election shall be declared **nominated** for such office." Fla. Stat. § 100.061.

D. The Balance of Harms and Public Interest Weigh Heavily in Favor of Defendants; Plaintiff Has Not Established Any Irreparable Injury.

A "court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws," to "avoid a disruption of the election process" already in full swing, "which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Florida has a general and compelling interest in maintaining the integrity of the electoral process and preventing voter confusion. *See e.g., Storer v. Brown*, 415 U.S. 724, 732-33 (1974); *Libertarian Party of Florida v. Smith*, 710 F. 2d 790, 792 (11th Cir. 1983) ("[T]he state has an interest in regulating the election process and avoiding voter confusion. That these, and the other interests asserted, are compelling has been well established under decided cases.").

Significant confusion and disruption to the election process would result if the relief that Plaintiff seeks is granted. Statutory deadlines would be missed. There are impending election deadlines looming. The election machinery for the August 26 primary election is in motion. Florida law requires absentee ballots including the County Commission District 2 race to be mailed to absent uniformed services and overseas ("UOCAVA") voters and their families no later than July 12, 2014. § 101.62(4)(a), Fla. Stat. (setting the deadline for mailing these voters' absentee ballots to at no later than 45 days before each primary election). This Florida law implements the federal Uniformed and Overseas Citizens Absentee Voting Act[1] ("UOCAVA"), as amended in 2009 by the Military and Overseas Voter Empowerment Act[2] ("MOVE Act"). Absentee ballots for non-UOCAVA voters must be mailed between July 22 and July 29. § 101.62(4)(b), Fla. Stat. (between the 35th and 28th day before each election). Of course, the ballots have already been designed for this race which is proceeding as a closed primary.

[1] Pub.L. 99-410
[2] Pub.L. 111-84

Voted and returned absentee ballots may be canvassed beginning on August 11. *See* § 101.68(2)(a), Fla. Stat. (permitting canvassing boards to canvass absentee ballots on the 15th day before the election). In-person early voting may also begin on August 11, and continue through August 24. § 101.657(1)(d), Fla. Stat. ("Early voting shall begin on the 10th day before an election that contains state or federal races and end on the 3rd day before the election").

At this stage in the elections process, the relief requested by Plaintiff has the potential to jeopardize the accuracy and reliability of the election. Plaintiff's proposal is to reverse the Supervisor's current course with a mailing deadline of tomorrow, Saturday, July 12. There is no time to restyle and mail the ballots (§ 101.151, Fla. Stat.; Rule 1S-2.032(12), Fla. Admin. Code) and reset the mailing to *all* registered electors.

Excusing the impossibility of this, there is a far simpler remedy. The Court should allow the August 26 primary election for District 2 to go forward as a closed, Democratic primary. Should the Court later determine (before logic and accuracy testing of the voting machines for the general election, or other time as identified by the Supervisor) that Mr. Francois is not a resident, an open primary can be held at the November 4 General Election. For this reason, Plaintiff will not be irreparably harmed if a preliminary injunction is not granted.

C. Plaintiff is Not Likely to Succeed on the Merits

The Supervisor lacked the authority to determine the truth or accuracy of Mr. Francois sworn compliance with the residency requirement, and his certification of Mr. Francois as duly-qualified did not – and could not – depend upon correct residency.[3] § 99.061(7)(c), Fla. Stat. The Supervisor's duty under the qualifying statute is "ministerial" and limited to only whether all required items have been properly filed and whether each item is "complete on its face." § 99.061(7)(c), Fla. Stat. The Secretary cannot "determine whether the contents of the qualifying

papers are accurate." *Id*. Indeed, his "charge under the constitution and statute does not extend to the substance or correctness or enforcement of a sworn compliance with the law –with 'matters in pais,' as it were." *State ex rel. Shevin v. Stone*, 279 So. 2d 17, 22 (Fla. 1973). The Supervisor's certification of Mr. Francois as duly-qualified was therefore *not* "in error" as Plaintiff alleges. Even if the Supervisor could determine residency, her certification is "presumptively correct." *Siegendorf*, 266 So. 2d at 346; *see also Krivanek v. The Take Back Tampa Political Comm.*, 625 So. 2d 840, 844-45 (Fla. 1993) (the "judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law").

CONCLUSION

The public interest in the smooth and orderly administration of the primary election and the balance of harms that would result from Plaintiff's requested relief each weighs heavily in favor of Defendants. But Plaintiff has not even met his ordinary burden of persuasion on these requisites, much less the elevated showing that the "right is clear and free from reasonable doubt," *Kline*, 77 So. 2d at 874, that is required to justify the mandatory preliminary injunction he has requested. Plaintiff's Motion for Preliminary Injunction should be denied.

WHEREFORE, the Dr. Brenda C. Snipes, Broward County Supervisor of Elections respectfully requests that the Court deny Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted,

__/s/Burnadette Norris-Weeks
Burnadette Norris-Weeks, Esq.
Florida Bar No. 949930
Email: bnorris@bnwlegal.com
Burnadette Norris-Weeks, P.A.
401 North Avenue of the Arts
Fort Lauderdale, FL 33311

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic mail on this 11th day of July, to: