

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO: 04-22787-CIV-GOLD/BROWN

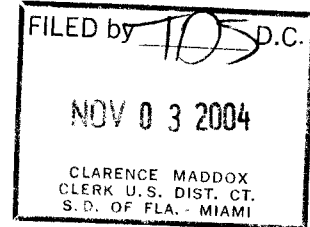
FAY FRIEDMAN, ADAM J. MEYER  
and DANIEL BENHAIM,

Plaintiff(s),

vs.

**BRENDA SNIPES, in her official capacity  
as Broward County Supervisor or Elections  
and member of the Broward County  
canvassing board; CONSTANCE KAPLAN,  
in her official capacity as Miami-Dade County  
Supervisor of elections and member of the  
Miami-Dade canvassing board; and  
GLENDA HOOD, in her official capacity  
as Florida Secretary of State,**

Defendant(s).



**ORDER GRANTING TEMPORARY RESTRAINING ORDER**

THIS CAUSE is before the Court upon Plaintiffs' Emergency Motion for a Temporary Restraining Order and/or Preliminary Injunction and Request for an Emergency Hearing [DE # 2, filed November 2, 2004] and their Corrected Memorandum in support thereof [DE # 9, filed November 2, 2004]. I held a hearing on the Emergency Motion on November 3, 2004. Counsel for Plaintiffs, counsel for Defendants, Brenda Snipes, Constance Kaplan and Glenda Hood appeared at the hearing.

**I. The Parties**

Plaintiffs, Fay Friedman, Adam J. Meyer and Daniel Benhaim (collectively "Plaintiffs") are three voters registered in the State of Florida. (Complaint at 1). On November 2, 2004, Plaintiffs filed a Complaint [DE # 1] in the United States District Court

for the Southern District of Florida under 42 U.S.C. § 1983 for Defendants' alleged violations of Plaintiffs' rights under the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B), and the First and Fourteenth Amendments to the United States Constitution. (Complaint at 5-6). Plaintiffs allege that they each timely requested an absentee ballot but they (1) never received the requested absentee ballot or they (2) received the absentee ballot on the date of the election, thereby making it impossible from them to submit the absentee ballot to the Supervisor of Elections before 7 pm on the date of the election. (*Id.*)

Defendants are Brenda Snipes, the Supervisor of Elections of Broward County, Florida, Constance Kaplan, the Supervisor of Elections of Miami-Dade County, Florida, and Glenda Hood, Secretary of State for the State of Florida (collectively "Defendants"). This action does not name, as a defendant, the Supervisor of Elections of any other county in the State of Florida. During the hearing, Plaintiffs' counsel acknowledged that this action was brought only on behalf of the three named Plaintiffs and that it is not a class action against Defendants.

## **II. Relief Requested**

Plaintiffs make three requests of the Court. First, Plaintiffs ask the Court to issue a declaratory judgment that Defendants may not reject any of Plaintiffs' absentee ballots and/or the ballots of any other qualified voters which are postmarked by November 2, 2004 but received by Defendants between 7 pm on November 2, 2004 and midnight on November 12, 2004. (Motion at 1). Second, Plaintiffs seek a temporary restraining order and/or preliminary injunction which requires Defendants Brenda Snipes and Constance Kaplan to segregate and preserve any absentee ballot postmarked by November 2, 2004 but received by them after 7 pm on November 2, 2004 and before November 12, 2004 at

midnight (hereinafter referred to as the "Absentee Ballots"). (Motion at 2). Third, Plaintiffs request that I conduct an evidentiary hearing to determine whether preliminary and/or permanent injunctive relief is appropriate. (*Id.*) This Order only relates to the request for a temporary restraining order. I do not presently have before me the issue of whether or not the Defendants should be required to count the Absentee Ballots, therefore, I make no determination on that issue.

As Plaintiffs' Emergency Motion was not entirely clear regarding the scope of injunctive relief requested from the Court, I asked Plaintiffs' counsel during the hearing on the Emergency Motion whether he was seeking injunctive relief from only Defendants Brenda Snipes and Constance Kaplan. Plaintiffs' counsel confirmed that Plaintiffs only sought a temporary restraining order requiring Defendants Brenda Snipes and Constance Kaplan, and no other Florida Supervisor of Elections, to segregate and preserve the Absentee Ballots. I issued an Order Following Emergency Hearing, wherein I asked the parties to submit supplemental briefs on the issue of whether a temporary restraining order is appropriate to preserve and segregate the Absentee Ballots.<sup>1</sup> I have received and

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As I mentioned above, Plaintiffs only asked for a temporary restraining order requiring Defendants Brenda Snipes and Constance Kaplan to segregate and preserve the Absentee Ballots at the hearing on the Emergency Motion for a Temporary Restraining Order and/or Preliminary Injunction. After the hearing, I gave the parties the opportunity to provide supplemental briefs on the issue of preservation and segregation of the Absentee Ballots. In Plaintiffs' Supplemental Memorandum they ask me, for the first time, to issue a temporary restraining order which also prevents Defendants Brenda Snipes and Constance Kaplan from submitting "such ballots to their respective canvassing boards or to take any other action with respect to such ballots pending further ruling of this Court." (Plaintiffs' Supplemental Memorandum at p. 3-4). As Plaintiffs failed to raise this issue in their Emergency Motion, their Corrected Memorandum in support thereof or at the hearing, I will reserve ruling on this issue until I conduct a full evidentiary hearing on the merits of Plaintiffs' Complaint.

reviewed briefs from Plaintiffs and all Defendants on this issue.

After reviewing the Emergency Motion, the Memorandum in Support, the supplemental briefs, the applicable case law and having heard argument from the parties, I conclude that Plaintiffs have met the burden for establishing that they are entitled to a temporary restraining order requiring Defendants Brenda Snipes and Constance Kaplan to preserve and segregate the Absentee Ballots.

### **III. Standard for Temporary Restraining Order**

The Eleventh Circuit has stated that the “grant or denial of a preliminary injunction is a decision within the sound discretion of the district court.” *Sierra Club v. Georgia Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999). There are two types of temporary restraining orders: those issued with notice to the opposing party and those issued without notice to the opposing party. The underlying purpose of an ex parte temporary restraining order (“TRO”) is for “preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 439 (1974). Applicants for temporary restraining orders without oral or written notice to the opposing party, must comply with the requirements of Federal Rule of Civil Procedure 65(b).<sup>2</sup>

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<sup>2</sup> Federal Rule of Civil Procedure 65(b) provides:

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that

Where a party seeks a temporary restraining order with notice to the opposing party, the requirements of Rule 65 do not apply. Instead, the court considering the application for a temporary restraining order applies the same procedure as it does when it considers a request for preliminary injunction. See *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965) (“where the opposing party has notice of the application for a temporary restraining order, . . . such order does not differ functionally from a preliminary injunction.”). The Eleventh Circuit requires the party moving for a temporary restraining order, with notice, to establish four factors: (1) the moving party demonstrates a substantial likelihood on the merits; (2) the temporary restraining order is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm that the temporary restraining order would cause to

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notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Federal Rules of Civil Procedure Rule 65.

the non-moving party, and (4) the temporary restraining order would not be adverse to the public interest. See *Parker v. State Bd. of Pardons and Paroles*, 275 F.3d 1032, 1034 - 1035 (11th Cir. 2001) (citing *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985); see also *Warren Pub., Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1516 (11th Cir. 1997); *Teper v. Miller*, 82 F.3d 989, 992 n.3 (11th Cir. 1996); *Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995) (citing *Gresham Park Cmty. Org. v. Howell*, 652 F.2d 1227, 1232 n. 7 (5th Cir.1981)); *Northeastern Fl. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fl.*, 896 F.2d 1283, 1284 (11th Cir.1990)(citations omitted); *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989) (citing *United States v. Alabama*, 791 F.2d 1450, 1459 n. 10 (11th Cir.1986)); *Canal Auth of State of Florida. v. Calloway*, 489 F.2d 567, 572 (5th Cir. 1974) (citations omitted). Accordingly, I will consider whether Plaintiffs have met each of these four factors in deciding whether to grant

#### **IV. Analysis**

Applying these well established principles to the facts of this case, I conclude that Plaintiffs have established that they are entitled to a temporary restraining order requiring Defendants Brenda Snipes and Constance Kaplan to segregate and preserve the Absentee Ballots, pending a preliminary injunction order.

##### *A. Substantial Likelihood of Success on the Merits*

In determining whether Plaintiffs have shown that they have a substantial likelihood of success on the merits, I must focus on whether Plaintiffs have established a likelihood of success on their claim that they are entitled to preservation and segregation of the Absentee Ballots and not whether they have demonstrated a substantial likelihood of success on all of the claims asserted in their Complaint.

Florida Statute § 101.67 (2004) governs the safekeeping of completed absentee ballots returned to the state Supervisors of Elections. Fla. Stat. § 101.67(1) requires that the “supervisor of elections shall safely keep in his or her office any envelopes received containing marked ballots of absent electors, and he or she shall, before the canvassing of election returns, deliver the envelopes to the county canvassing board along with his or her file or list kept regarding said ballots.” Further, Fla. Stat. § 101.67(2) requires that for each ballot received after 7 pm on November 2, 2004, the Supervisors of Elections must mark each ballot received with the time and date of receipt and file the ballots in the supervisor’s office.

Plaintiffs seek a temporary restraining order requiring (1) the preservation and (2) the segregation of the Absentee Ballots. Because the Supervisors of Elections are required to label and keep the Absentee Ballots under Fla. Stat. § 101.67, Plaintiffs have a substantial likelihood of prevailing on the merits of this aspect of their claims. The only relief which Plaintiffs seek in addition to what is provided under Fla. Stat. § 101.67 is for Defendants Brenda Snipes and Constance Kaplan to segregate the Absentee Ballots from other Absentee Ballots. I conclude that based on the express language of Fla. Stat. § 101.67 and the duties this statute already imposes upon the Supervisor of Elections to keep and safeguard Absentee Ballots, Plaintiffs will likely prevail on the merits of their claim for Defendants Brenda Snipes and Constance Kaplan to preserve and segregate the Absentee Ballots, pending any further order of the Court as to whether they must be counted.<sup>3</sup>

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Although I am only considering whether Plaintiffs have established a substantial likelihood of success on the limited issue of whether Defendants Brenda Snipes and

*B. A Restraining Order is Necessary to Prevent Irreparable Injury*

The second prong of the test to establish entitlement to a temporary restraining order requires Plaintiffs to show that they face an irreparable injury which is neither remote nor speculative, but actual and imminent.” *Siegel v. Lepore*, 234 F.3d 1163, 1177 (11th Cir. 2000). I conclude from the facts presented by Plaintiffs in the record that Plaintiffs do face an irreparable injury which is both actual and imminent.

In *Siegel*, the plaintiffs were four registered Florida voters and the Republican candidates for President and Vice President, who sought a preliminary injunction to prevent four Florida counties from conducting manual recounts of ballots cast in the November 2000 election. 234 F. 3d at 1168. The trial court denied the request for preliminary injunction and the plaintiffs appealed. *See id.* The Eleventh Circuit affirmed the trial court’s denial of the request for preliminary injunction on two few grounds, including that the plaintiffs had failed to establish that the anticipated injury was imminent and irreparable. *See id.* at 1177.

The Court concluded that the voter plaintiffs in *Siegel* did not face any continuing harm for several reasons. *See id.* The Eleventh Circuit noted that the voter plaintiffs were not claiming that they were “prevented from registering to vote, prevented from voting or prevented from voting for the candidate of his choice. Nor does any voter claim that his

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Constance Kaplan are required to preserve and segregate the Absentee Ballots, I note that some courts have held that a party may obtain a temporary restraining order where it has not demonstrated a likelihood of success where the feared injury to the party would be severe and the issue is properly raised in the litigation. *See James Wm. Moore e t al., Moore’s Federal Practice* § 65.36[2] (3d ed. 1999) (citing *Towers Fin. Corp. V. Dunn & Bradstreet, Inc.*, 803 F. Supp. 820, 823 (S.D. N.Y. 1992).

vote was rejected or not counted. The cases called to our attention by the parties that have warranted immediate injunctive relief have involved these kind of circumstances. Even assuming Plaintiffs can assert some kind of injury, they have not shown the kind of serious and immediate injury that demands the extraordinary relief of a preliminary injunction.” *Id.*

On the contrary, in the instant case, Plaintiffs have alleged that they were either prevented from voting or their ballots will not be counted. (Motion at 1). Plaintiffs claim that their votes will be rejected and will not be counted. (Motion at 1). This is exactly the type of harm which the Eleventh Circuit found warranted injunctive relief in *Siegel*. Accordingly, I find that Plaintiffs have established the second prong of the temporary injunction standard.

*C. & D. Threatened Injury to Plaintiffs Outweighs Harm to Defendants & Temporary Restraining Order is not Adverse to the Public Interest*

The Civil Rights Act of 1964, 42 U.S.C. § 1971(1) confers upon an individual the right to vote: “All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude.” 42 U.S.C.A. § 1971. The Supreme Court has stated that “[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). While this right and dignity is one enjoyed by the individual as an individual, this right also confers benefits on the public as a whole. The

Supreme Court has stated: “The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). See also *Smith v. Meese*, 821 F.2d 1484, 1489-90 (11th Cir. 1987). It thus follows that when an individual's right to vote is encumbered, the essence of democratic society is undermined. I therefore agree with Plaintiffs that the public interest weighs strongly in favor of ensuring that all eligible voters are allowed to register to vote and cast a ballot.

In oral argument before me and in their briefs to this court, Defendants argued that the requirement to separate the absentee ballots postmarked on or before November 2, 2004 but received between 7 p.m. on November 2 and 12 a.m. on November 12 would do great harm to the Defendants because it would entail reassigning overworked staff members who are frantically attempting to process “lawfully cast absentee and provisional ballots” within the allotted time. It goes without being said that as members of the public, Defendants share some of the same benefits that Plaintiffs do in ensuring that Plaintiffs are capable of participating in the process of representative government. Furthermore, and as mentioned above, Fla. Stat. § 101.67(2) requires that for each ballot received after 7 pm on November 2, 2004, the Supervisors of Elections must mark each ballot received with the time and date of receipt and file the ballots in the supervisor's office. Because such as procedure is already in place, I find that ordering Defendants to segregate the aforementioned absentee ballots would not cause great harm to the defendants.

At the hearing, Defendants argued that my granting of a temporary restraining order

would cause irreparable harm and injury to Defendants. Defendants argued that all Supervisors of Elections are consumed with preparations of unofficial certifications of each county's votes to the Secretary of State and to allow a temporary restraining order which would require the Defendants to devote time to the identify and segregation of the Absentee Ballots would interfere with their abilities to complete the unofficial certification process. Defendant Constance Kaplan's counsel informed me that the deadline for the unofficial certification results is due to November 4, 2004 at twelve noon. Accordingly, this temporary restraining order will not take effect until *after* one pm on November 4, 2004 to allow Defendants to complete the unofficial certification process.


**V. Conclusion**

For the reasons set forth above, it is hereby **ORDERED AND ADJUDGED**:

1. Plaintiffs' request for a temporary restraining order against Defendants Brenda Snipes, Broward County Supervisor of Elections and Constance Kaplan, Miami-Dade County Supervisor of Elections is GRANTED.

2. Commencing **at one p.m. on Thursday, November 4, 2004**, Defendants Brenda Snipes and Constance Kaplan shall segregate and preserve any and all absentee ballots which were postmarked by November 2, 2004 and which were received by their respective offices between 7 pm on November 2, 2004 and midnight on November 12, 2004.

**DONE AND ORDERED** in Chambers at Miami, Florida, this 3 day of November, 2004.

  
ALAN S. GOLD  
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Magistrate Judge Brown  
All counsel on the attached service list

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