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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

FLORIDA DEMOCRATIC PARTY,
Plaintiff,

v.

PALM BEACH COUNTY SUPERVISOR OF
ELECTIONS; SUSAN BUCHER, in her official
capacity as Palm Beach County Supervisor of
Elections,

Defendant.

Case No.

Judge:

EMERGENCY COMPLAINT AND
PETITION FOR WRIT OF
MANDAMUS

1. Plaintiff, the Florida Democratic Party, brings this emergency action to enforce its fundamental constitutional right in Florida “to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state,” Article I, section 24(a) of the Florida Constitution, and to ensure that its members and constituents—who are eligible Florida voters who support Democratic candidates—are able to fully effectuate their fundamental right to vote by curing the provisional ballots they cast in the November 6, 2018 midterm election before the November 8, 2018, 5:00 p.m. provisional ballot cure deadline. Fla. Stat. § 101.048(1).

2. On November 6, 2018, thousands of Floridians voted in the midterm election, including voters who supported Democratic Senate candidate Bill Nelson, one of the highest profile races in the nation. Indeed, the competition in this race was fierce and the margin for victory in each is small. Today, approximately 21,000 votes separate Senate candidates Nelson and Scott.

In all elections—and especially in contests as close as this one—every vote counts, and every Florida voter deserves to have the opportunity to have their vote counted and their voice heard.

3. In an effort to ensure just that, on November 7, 2018, as soon as possible, Plaintiff made a written open records request to Supervisor Susan Bucher, the Supervisor of Elections for Palm Beach County, seeking a full list of names of persons who submitted provisional ballots, including any provisional ballots rejected by the election authority in the 2018 midterm election.¹ *See* Exhibit A (incorporated fully herein). The production of the provisional ballot list is time sensitive, as it was requested largely to assist voters in curing provisional ballots prior to the provisional ballot cut-off at 5:00 p.m. on November 8, 2018. Fla. Stat. § 101.048(1). Providing the information after this deadline would constitute a constructive denial.

4. Nevertheless, Supervisor Bucher—in contrast to many supervisors across Florida—refused to produce the requested provisional ballot lists prior to the provisional ballot cut-off date, informing Plaintiff that none of the requested information would be made available until at least Friday, November 9, 2018, two days after the cure period ends, and just one day prior to the deadline for county canvassing boards to file unofficial returns. Fla. Stat. Ann. § 102.141(5). Given the limited period of time for voters to cure provisional ballots and for the canvass board to determine the unofficial results, Supervisor Bucher's refusal to quickly produce the requested documents violates Plaintiff's fundamental right to promptly inspect and copy public records. It also directly infringes upon thousands of voter's rights to have their vote counted, as failure to produce the provisional ballot list prior to the November 8, 2018 deadline will prevent Plaintiff

¹ The open records request was sent by Lisa Dowling from team@nelsonforsenate.com. The Nelson for Senate campaign and the Florida Democratic Party work in conjunction on voter outreach and voter protection as part of the democratic coordinated campaign, which is run by the Florida Democratic Party. This includes the sending of open records requests. Thus, the attached open records request was made by the Florida Democratic Party as part of the coordinated campaign.

from assisting its voters in curing their ballots, thereby placing these voters at risk of irreparable harm if their provisional ballots are not counted.

5. Accordingly, Plaintiff brings this emergency action to enjoin Defendants from withholding the requested responsive records in violation of Fla. Stat. § 119 and Article I, section 24(a) of the Florida Constitution as well as the general principles of equity, and to issue a writ of mandamus requiring Defendants to promptly produce the requested records. Plaintiff also seeks the equitable tolling of the deadline to cure the provisional ballots until 48 hours after such records are received to prevent the irreparable harm of numerous Florida voters who are at risk of disenfranchisement. In support, Plaintiff alleges as follows:

JURISDICTION AND VENUE

6. This Court has jurisdiction under Article V, Section 5(b), Florida Constitution, Florida Rules of Appellate Procedure 9.030(c)(3), Florida Rules of Civil Procedure 1.630, Fla. Stat. § 86.011, and Fla. Stat. § 119.11(1), (3). *See A.J. v. Times Pub. Co.*, 605 So. 2d 160, 162–63 (Fla. 2d DCA 1992), *approved and remanded*, 626 So. 2d 1314 (Fla. 1993).

7. Venue is proper because the Defendants reside in Palm Beach County, the cause of action accrued here, and the records requested are located here. Fla. Stat. § 47.011.

PARTIES

8. Plaintiff, the Florida Democratic Party (“FDP”), is a political party recognized by Florida law, *see* Fla. Stat. § 103.091. FDP is the statewide organization representing Democratic candidates and voters throughout the State of Florida within the meaning of Fla. Stat. Ann. § 103.121 and all other applicable provisions of the election laws. FDP’s purpose is to elect Democratic Party candidates to public office throughout Florida. To accomplish its purpose, FDP, engages in vitally important activities, including, among other things, contacting voters to remind

them to cure their provisional ballots, monitoring election returns, canvasses, and the counting of ballots. FDP is authorized to and did request public records on November 7, 2018, pursuant to Fla. Stat. § 119. Defendants' failure to swiftly provide FDP with the requested records directly violates its right to such documents. Moreover, it prevents FDP from contacting Democratic voters to assist them in curing their provisional ballots, directly harming FDP's ability to accomplish its mission by placing those voters at risk of disenfranchisement.

9. Palm Beach County Supervisors of Elections is the county agency that maintains custody and control of the public records requested by Plaintiff. Fla. Stat. § 119.011(2). It is located at 240 South Military Trail, West Palm Beach, Florida 33415.

10. Susan Bucher is the Supervisor of Elections of Palm Beach County, and is the elected official charged with administering the Palm Beach County Supervisors of Elections Office. She is therefore the custodian of the public records sought. Fla. Stat. § 119.011(5).

FACTS

11. On November 7, 2018, as soon as possible, Plaintiff made a written request to Supervisor Bucher, to inspect and copy certain public records, namely, a full list of names of persons who submitted provisional ballots, including any provisional ballots rejected by the election authority in the November 7, 2018 election pursuant to Article I, section 24(a) of the Florida Constitution, and Fla. Stat. § 119. *See* Exhibit A (incorporated fully herein).

12. The requested provisional ballot list documents the individuals who have cast provisional ballots in the 2018 midterm election in Palm Beach County. As such, it is a "document[] made or received pursuant to law or ordinance or in connection with the transaction of official business by" the Palm Beach County Supervisor of Elections, Fla. Stat. § 119.011

(defining public record), and it “perpetuate[s], communicate[s] or formalize[s] knowledge of some type.” *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So.2d 633, 640 (Fla.1980).

13. Indeed, courts have specifically found that used ballots constitute public records. *Rogers v. Hood*, 906 So. 2d 1220, 1223 (Fla. 1st DCA 2005) (“Nothing could be more obvious than that a ballot becomes a public record once it is voted.”). And the Florida Attorney General has found that lists of names and addresses of all persons requesting absentee ballots, similar to the provisional list requested by Plaintiff, are public records available for inspection. Florida Op. Atty. Gen., 1975-17 (Jan. 29, 1975). *See also* Fla. Stat. § 98.0981 (providing that voting history information, including information on a voter’s method of voting, timeline of voting, and whether such vote was counted shall be compiled in a report made publicly available).

14. Supervisor Bucher is required to produce the requested documents to Plaintiff. Nevertheless, she refused to produce them on November 7, 2018, when the request was made, stating that they would not be produced until at least Friday, November 9, 2018. Given the 5:00 p.m. November 8, 2018, deadline for curing provisional ballots, as well as the November 10, 2018, deadline for the unofficial count, her offer to produce them by November 9, 2018 is inadequate and unreasonable, and it constitutes a constructive denial. *See Promenade D'Iberville, LLC v. Sundy*, 145 So. 3d 980, 984 (Fla. Dist. Ct. App. 2014) (delays in responding to requests may constitute refusals).

15. Indeed, Supervisor Bucher’s delay will cause Plaintiff as well as the Florida voters they seek to assist in curing their provisional ballots irreparable harm. *See also League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1223 (N.D. Fla. 2018) (“irreparable injury is presumed when ‘[a] restriction on the fundamental right to vote’ is at issue” (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012))); *League of Women Voters of N.C. v. North*

Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (“And once the election occurs, there can be no do-over and no redress.”).

16. There is no adequate remedy at law, and Plaintiff has no other legal method for obtaining relief.

CAUSE OF ACTION

COUNT I

Mandamus, Violation of Florida Public Records Act, Fla. Stat. § 119, et seq., Violation of Article I, section 24(a) of the Florida Constitution

17. Plaintiff realleges and incorporates herein paragraphs 1-16, above.

18. The Plaintiff has a clear legal right to the requested relief. Article I, section 24(a) of the Florida Constitution creates a fundamental right for Plaintiff to receive the requested public records. Defendants have refused to produce those records in a reasonable time. Plaintiff has made an adequate request and has demonstrated a clear, certain, and established legal right to the performance of the aforementioned duties of Defendants and to the relief sought herein, pursuant to Article I, Section 24(a), of the Florida Constitution.

19. Defendants have a clear and indisputable legal duty to the public under Florida law to produce the documents at issue. Fla. Stat. § 119 provides that “all state, county, and municipal records are open for personal inspection and copying by any person.” Fla. Stat. § 119.01. “Providing access to public records is a duty of each agency.” *Id.* It is “not a discretionary act; it is a mandatory act.” *Mills v. Doyle*, 407 So.2d 348, 350 (Fla. 4th DCA 1981) (interpreting § 119.01, Fla. Stat.). “Those with custody of public records must permit records to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions.” *Promenade D'Iberville, LLC*, 145 So. 3d at 983. Only items specifically delineated by statute may be withheld

from disclosure. *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, 304–05 (Fla. Dist. Ct. App. 2001). “The Act is to be construed liberally in favor of openness. When there is any doubt, the court should find in favor of disclosure.” *Id.* (citations and quotation marks omitted). For these reasons, the Defendants’ performance of this duty is ministerial, not discretionary. Defendants are thereby in violation of Fla. Stat. § 119, et seq.

20. There is no adequate remedy at law because under the circumstances of this case—the imminent risk of disenfranchisement faced by Florida voters—Defendants’ refusal to produce the requested public records until at least November 9, 2018, is unreasonable and operates as a constructive denial. As such, the withholding of these documents constitutes a denial of Plaintiff’s right to access the records sought. The immediate production of the requested records, as well as the requested relief, is necessary to avoid irreparable harm.

WHEREFORE, Plaintiff prays that this Court:

- (A) Immediately set a hearing to address the issues set out herein, *see* Fla. Stat. § 119.11 (requiring prioritization of actions regarding open records requests);
- (B) Declare unlawful Defendants’ refusal to disclose the records requested by Plaintiff;
- (C) Issue a Writ of Mandamus finding that the records sought are public records, that Supervisor Bucher is a custodian of said public records, and that Plaintiff is entitled to inspect and copy said records, and requiring that Defendants allow Plaintiff to do so immediately, but no later than 48 hours from the issuance of this Court’s writ, *see* Fla. Stat. § 119.11 (requiring compliance within 48 hours unless otherwise provided);
- (D) Toll the statutory deadline under section 101.048(1), Fla. Stat., for curing provisional ballots until at least 48 hours after a list of every individual who cast a provisional ballot is produced to Plaintiff;

- (E) Grant attorneys' fees and costs pursuant to Fla. Stat. § 119.12; and
- (F) Grant such other relief as this Court may deem just and proper.

COUNT II

Equitable and Injunctive Relief

21. Plaintiff realleges and incorporates herein paragraphs 1-16, above.

22. Florida law incorporates the substantive principles of equity into its common law. *Soud v. Hike*, 56 So. 2d 462, 466 (Fla. 1952); Fla. Stat. § 2.01. “[E]quity not only has the power to but should afford relief to prevent a manifest injustice.” *Spear v. MacDonald*, 67 So. 2d 630, 635 (Fla. 1953). Without intervention from this Court, the provisional ballot cure deadline will pass before Plaintiff receives the requested records. There is no other adequate remedy at law.

23. As a result of this failure to promptly release the requested records, numerous Florida voters will be denied their fundamental right to vote—a right that is “of the highest order and is guaranteed by both the state and federal constitutions.” *City of Miami Beach v. Bd. of Trustees of City Pension Fund for Firefighters & Police Officers in City of Miami Beach*, 91 So. 3d 237, 241 (Fla. 3d DCA 2012). For this reason, injunctive relief would serve the public interest.

24. The harm caused by such a result is irreparable. This is precisely the type of manifest injustice that equity contemplates remedying.

26. Plaintiff has a substantial likelihood of success on the merits because providing access to the requested records is a mandatory act, and not discretionary. *Mills*, 407 So.2d at 350.

26. Thus, equity demands that Defendants be enjoined from enforcing the statutory provisional cure deadline in this case prior to the release of the requested records. Indeed, few things could be more fundamentally in the interests of justice than tolling a limitations period until

48 hours after Plaintiff has received the requested records, thereby ensuring that as many Florida citizens as possible have an opportunity to have their votes counted.

WHEREFORE, Plaintiff prays that this Court:

- (A) Immediately set a hearing to address the issues set out herein, *see* Fla. Stat. § 119.11 (requiring prioritization of actions regarding open records requests);
- (B) Declare unlawful Defendants' refusal to disclose the records requested by Plaintiff;
- (C) Issue a Writ of Mandamus finding that the records sought are public records, that Supervisor Bucher is a custodian of said public records, and that Plaintiff is entitled to inspect and copy said records, and requiring that Defendants allow Plaintiff to do so immediately, but no later than 48 hours from the issuance of this Court's writ, *see* Fla. Stat. § 119.11 (requiring compliance within 48 hours unless otherwise provided);
- (D) Toll the statutory deadline under section 101.048(1), Fla. Stat., for curing provisional ballots until at least 48 hours after a list of every individual who cast a provisional ballot is produced to Plaintiff;
- (E) Grant attorneys' fees and costs pursuant to Fla. Stat. § 119.12; and
- (F) Grant such other relief as this Court may deem just and proper.

Dated: November 8, 2018

Respectfully submitted,

By: /s/ Sarah Lahlou-Amine
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EXHIBIT A

NOT A CERTIFIED COPY

From: **Team Nelson** <team@nelsonforsenate.com>
Date: Wed, Nov 7, 2018 at 10:32 AM
Subject: Fwd: IMMEDIATE ATTENTION NEEDED: Florida Provisional Ballot Request Letter
To: <susanbucher@pbcelections.org>

November 7, 2018

Palm Beach County Supervisors of Elections

Re: Florida Public Records Request

Dear Sir or Madam:

Pursuant to Section 24(a) of Article I of the Florida Constitution and Chapter 119 of the Florida Statutes, I request the following information and data in connection with the November 6, 2018, including all early voting related with the election:

1. The total number of provisional ballots cast in your county.
2. The names of all individuals (and all data associated with each individual including any voter identification reference number) who cast a provisional ballot, including the reason why the voter was not allowed to cast a regular ballot.

If a record containing the names of all individuals who cast a provisional ballot is not available, we request the opportunity to inspect the provisional ballot envelopes in your office. Let me know the earliest time that I can send a representative to your office to inspect these records.

I request that you produce all of the above records immediately, or no later than close of business today, Wednesday, November 7. Please produce these records in electronic formats (*e.g.*, .txt, .xls, .xlsx, .csv, .dbf). If documents, information, or data can be emailed, please email them to team@nelsonforsenate.com. If the requested records are too voluminous to transmit by email but can be copied onto an electronic storage medium, please tell me immediately and I will provide you with blank storage media suitable for copying. If documents, information, or data cannot be emailed, please let me know either via email or phone and I will send someone to your office to pick them up. Please provide me with documents in response to each request as soon as they are ready without waiting to complete your response to other requests.

If you cannot comply with either producing these records or making them available for inspection immediately, please let me know. If you intend to deny this request in whole or part, please advise us in writing of the particular statutory exemption upon which you are relying or other basis for your denial, as required by Fla. Stat. § 119.07(1)(e)-(f). Please produce all

records you can provide, even if you conclude that you are unable to comply with certain parts of the request, as required by Fla. Stat. § 119.07(1)(d).

I request that you begin producing these records or making them available for inspection before receipt of payment.

If you have any questions or concerns, please do not hesitate to email me at team@nelsonforsenate.com or call at 813-728-4293.

Sincerely,

Lisa Dowling

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