IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NANCY CAROLA JACOBSON, et al.,

***Plaintiffs*,**

v. **CASE NO.: 4:18cv262-MW/CAS**

LAUREL M. LEE, et al.,

***Defendant/Intervenors*.**
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ORDER DENYING MOTION FOR STAY

On November 15, 2019, this Court issued a memorandum order holding the ballot order scheme described in section 101.151(3)(a), Florida Statutes, unconstitutional and enjoining its enforcement, and entered a declaratory judgment to that effect in Plaintiffs' favor. ECF Nos. 202 & 203. Defendant has appealed, *see* ECF No. 204, and has moved for a stay pending disposition of that appeal, or in the alternative for a modification of the injunction tolling its effectiveness until fourteen days after any ruling by the United States Court of Appeals for the Eleventh Circuit on whether to stay the injunction. ECF No. 207. On November 25, 2019, this Court held a hearing on Defendant's motion.[1] Having considered Defendant's

[1] This Court specifically instructed the parties to be prepared to discuss Defendant's rulemaking and emergency rulemaking powers. ECF No. 209.

motion and Plaintiffs' and Intervenors' responses, ECF Nos. 215 & 216, and with the benefit of oral argument by the parties, this Court now concludes Defendant's motion is due to be **DENIED**.

Motion for Stay

When considering whether to issue a stay, courts consider

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Defendant has not shown she is substantially likely to succeed on the merits. In her motion, Defendant acknowledges that this Court has already considered and rejected her arguments. *See* ECF No. 207 at 2. Defendant further directs this Court's attention to *New Alliance Party v. New York State Board of Elections*, 861 F. Supp. 282 (S.D.N.Y. 1994), which Defendant argues supports her arguments and which was not mentioned in the final order. This does not move the needle, for three reasons. First, as Defendant notes, *New Alliance* featured prominently in Defendant's papers and arguments, and—although this Court's memorandum order did not explicitly discuss *New Alliance*—this Court considered and rejected that case in its broader consideration of the arguments presented by the parties. This Court

need not explicitly consider and reject each and every contrary authority cited by the parties. Second, *New Alliance*—a nonbinding decision by a district court located in another circuit—was decided before the United States Supreme Court issued its decision in *Cook v. Gralike*, 531 U.S. 510 (2001), which is binding on this Court and which clearly establishes that questions of what appears on the ballot and how it appears there are issues of constitutional concern. Third, even absent binding authority, this Court does not find *New Alliance* persuasive. As the evidentiary record in this case demonstrates, candidate name order effects do indeed significantly burden voters' rights, and therefore rise to the level of being a constitutional concern. Importantly, the plaintiff in *New Alliance* "offer[ed] no empirical evidence in support of its claims, but assert[ed] that ballot placement advantage is a self-evident fact." *Id.* at 286. For these reasons, and for the reasons stated in its memorandum order which are here incorporated by reference, ECF No. 202, this Court finds Defendant has not shown a substantial likelihood of success on the merits.

This Court also finds Defendant will not suffer irreparable harm if a stay does not issue. Defendant provides no convincing authority that a *per se* rule of irreparable injury applies in favor of a state whenever a court invalidates a state statute. And contrary to Defendant's claims, this Court's memorandum order does not "effectively direct the Florida Legislature to adopt a replacement ballot order

scheme during its next session or the Secretary to adopt some temporary scheme with notice to this Court." ECF No. 207 at 4–5. This Court's order merely bows to the practical reality that one or the other (or both) of those outcomes could come to pass, and takes steps to ensure this Court can effectuate its authority should either occur or fail to occur. The Florida Legislature certainly *could* adopt a new ballot order statute, but neither this Court nor practical necessity require it to, nor to adopt any particular one of those alternatives. The State of Florida—and Defendant—have a variety of alternatives.

Defendant Lee casts doubt on whether she possesses the legal authority to adopt an interim or replacement ballot order scheme by rule or emergency rule. But Defendant has a statutory duty to "adopt rules prescribing a uniform primary and general election ballot for each certified voting system" which "incorporate[s] the requirements set forth in" Florida's statutory ballot order scheme as well as "additional matters . . . that include, without limitation" matters such as "[i]ndividual race layout" and "[o]verall ballot layout," § 101.151(9)(a), Fla. Stat. (2019). If Defendant adopts an interim or permanent measure by rule or emergency rule, section 101.151(9)(a) takes that measure out of the realm of mere quasi-legislative gap-filling and roots it in clear statutory authority, unless and until the Florida Legislature enacts a statute superseding it. Furthermore, the speculative possibility of an administrative challenge to any measure Defendant may or may not adopt is

hardly an "irreparable harm." This Court concludes Defendant has not shown she will suffer irreparable harm absent a stay.

Next, this Court finds other parties in the proceeding will be substantially injured if a stay is issued. As this Court explained at length in its memorandum order, Plaintiffs would suffer substantial harm if Florida conducted further elections employing the ballot order scheme at issue in this case. This Court finds this factor strongly militates in favor of denying a stay.

Finally, this Court concludes the public interest weighs against granting a stay. As this Court explained in its memorandum order, the public's interest is clearly served by holding elections which conform with the Constitution and is just as clearly disserved by holding elections which do not conform with the Constitution. Having concluded Florida's ballot order scheme as described in section 101.151(3)(a) is unconstitutional, this Court likewise concludes the public has no interest in holding elections organized pursuant to that provision. This factor weighs heavily against Defendant.

The motion for stay is therefore **DENIED**.

Alternative Motion to Modify Injunction

In the alternative, Defendant asks this Court to toll the deadlines laid out in this Court's memorandum order such that they will begin to run only once Defendant has exhausted her right to seek a stay from the Eleventh Circuit. For the sake of

procedural neatness, this Court interprets this request as a motion to modify this Court's injunction pursuant to Federal Rule of Civil Procedure 62(d). In effect, what Defendant seeks is a stay pending a stay; and if there is no good cause to grant a stay in the first place, this Court sees no rationale for granting one under the guise of open-ended "tolling" of deadlines. Had any party articulated a concrete need for a specific period of tolling, this Court would have been inclined to consider it, but Defendant presented no such specific cause to this Court in her motion.

This Court will not take precipitous action based on speculation about what parties not before this Court will or will not do. Nevertheless, the parties do raise a valid concern that some later necessity may arise for this Court to modify its injunction to meet the evolving circumstances of this case. The Florida Legislature may choose not to act, and the interwoven issues of Defendant's options and this Court's powers may become more acute depending on what steps the Florida Legislature does or does not take.

The 2020 Session of the Florida Legislature is scheduled to end on March 13, 2020, and—absent a special session being called later in the year—it will be clear at that point how the Florida Legislature has chosen to proceed. The element of forecasting what third parties may do will at that time be, if not eliminated, then at least much reduced, and it will be clearer whether any modification of the injunction in this case is necessary. In the event the Florida Legislature does not act, Defendant

requested seven days after the end of Session to evaluate her options. This Court finds that request eminently reasonable. This Court will therefore require Defendant to file an appropriate notice in this Court not later than seven days after the end of the 2020 Session of the Florida Legislature detailing whether the Florida Legislature has adopted a new ballot order scheme; or, if it has not, how Defendant intends to proceed. Defendant should also file at that time any related motion for this Court to modify its injunction.[2] This Court will conduct any subsequent proceedings on an expedited schedule to allow Defendant as much time as possible to take any necessary action following this Court's resolution of these issues, assuming there is ultimately anything for this Court to resolve.

To be clear, this Court has not prejudged whether a modification of its injunction is either necessary or appropriate; but, to the extent it is possible to anticipate a schedule on which to litigate those issues in an orderly fashion if they should arise, it seems prudent to allow the parties (and this Court) to plan for that eventuality. This Court appreciates the continuing diligence and professionalism of the parties as they work toward the common goal of facilitating the orderly administration of justice. Accordingly,

[2] By establishing an expedited briefing schedule for the foreseeable potential need to modify the injunction concerning these matters, this Court in no way forecloses the right of any party to move for a modification of the injunction on this or any other basis at any appropriate time.

IT IS ORDERED:

1. Defendant's motion for stay pending appeal and alternative motion to modify the injunction, ECF No. 207, are **DENIED**.
2. **On or before March 20, 2020**, Defendant shall file a notice in this matter informing this Court how she intends to proceed. Defendant shall also file any related motion to modify the injunction in this case at that time. Plaintiffs and Intervenors shall file any response **on or before March 27, 2020**.

SO ORDERED on November 26, 2019.

s/Mark E. Walker
Chief United States District Judge