

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA**

DEMOCRATIC SENATORIAL
CAMPAIGN COMMITTEE, and
BILL NELSON FOR U.S. SENATE,

Plaintiffs,

v.

KENNETH W. DETZNER, in his
official capacity as Florida Secretary
of State, the FLORIDA
ELECTIONS CANVASSING
COMMISSION, and RICK SCOTT,
PAM BONDI, and JIMMY
PETRONIS, in their official capacity
as members of the Florida Elections
Canvassing Commission

Defendants.

Case No. 4:18-cv-00528-MW-MJF

**[PROPOSED] ORDER GRANTING PLAINTIFF'S EMERGENCY
MOTION FOR TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE**

This matter having come before the Court on Plaintiffs Democratic Senatorial Campaign Committee and Bill Nelson for U.S. Senate (collectively, "Plaintiffs") Emergency Motion for Temporary Restraining Order and Preliminary Injunction against Kenneth W. Detzner, in his official capacity as Florida Secretary of State, the Florida Elections Canvassing Commission, and Rick Scott, Pam Bondi, and Jimmy Petronis, in their official capacity as members of the Florida Elections Canvassing Commission.

The Court having considered the Complaint, the Motion, and supporting Memorandum of Law, and upon notice to Defendants,

IT IS ORDERED that the Motion is GRANTED as follows:

I. FINDINGS OF FACT

1. On November 6, 2018, Florida held a general election. Among other races on the ballot was the office of U.S. Senator. The Democratic candidate is Senator Bill Nelson; the Republican candidate is Governor Rick Scott.

2. Under Florida law, local canvassing officials must report election results “no later than noon on the fourth day after any general or other election.” Fla. Stat. § 102.147(5). Florida law provides for a recount process to address and correct voting machine errors when the results of a close election hang in the balance.

3. If the unofficial returns filed by the county canvassing boards by the fourth day after the election (here, Saturday, November 10, 2018) reflect that a candidate lost by one-half percent or less of the votes cast for the office, “a recount shall be ordered of the votes cast with respect to such office.” Fla. Stat. § 102.141(7).

4. If the second set of unofficial returns—those following a machine recount—indicate that a candidate lost by one-quarter of a percent or less of the votes cast for the office, “a manual recount of the overvotes and undervotes cast in

the entire geographic jurisdiction of such office” must be ordered by the Secretary of State—but only if certain conditions are met. Fla. Stat. § 102.166(1).

Specifically, a manual recount is not ordered unless “[t]he number of overvotes and undervotes is fewer than the number of votes needed to change the outcome of the election.” *Id.* § 102.166(1).

5. The Secretary of State has declared a machine recount for three statewide elections (U.S. Senator, Governor, and Agriculture Commissioner). In addition, some local races have gone to a machine recount, such as State House District 89 in Palm Beach County.

6. At least one Florida county will be unable to complete a machine and manual recount by the statutory deadlines.

II. CONCLUSIONS OF LAW

1. A party seeking preliminary injunctive relief or a temporary restraining order bears the burden of establishing its entitlement to relief. *Scott v. Roberts*, 612 F.3d 1279, 1289-90 (11th Cir. 2010). “To obtain such relief, the moving party must show (1) a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury outweighs possible harm that the injunction may cause the opposing party; and (4) that the injunction would not disserve the public interest.”

GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1322 (11th Cir. 2015).

2. Plaintiffs are likely to succeed on the merits. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992) (outlining “flexible standard” to resolve constitutional challenges to state election laws that burden voting rights). The denial of the right to vote amounts to a severe burden on the franchise. *See, e.g., Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016). Because denial of the right to vote imposes a severe burden on the franchise, administrative election deadlines must yield to voters’ “constitutionally protected right to vote and to have their votes counted.” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *see also Fla. Democratic Party*, 215 F. Supp. 3d at 1257. The magnitude of the burden is amplified because those votes subject to recount are likely to be outcome determinative. *See Fla. Stat. § 102.166(1)(b)* (requiring manual count of the overvotes and undervotes if the “number of overvotes and undervotes is fewer than the number of votes needed to change the outcome of the election”). And the State has proffered no sufficient reason to justify enforcing the recount deadlines.

3. Further, the recount deadlines will treat similarly situated voters differently because those voters fortunate enough to live in counties in which the canvassing boards are able to complete the recount on time will have their votes

counted, while voters in other counties will have their votes “ignored,” Fla. Stat. § 102.112(3); *see also Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (“A citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972))).

4. Accordingly, Defendants’ enforcement of the statutory recount deadlines to cut short the recount process for U.S. Senate in any county is likely unlawful as an undue burden on the right to vote, in violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, and/or disparate treatment in violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

5. Plaintiffs will suffer irreparable harm if the temporary restraining order is not issued. Absent injunctive relief, some eligible Florida voters, including Plaintiffs’ supporters and members, will be disenfranchised unless the recount process is completed in each and every county. *See Touchston v. McDermott*, 234 F.3d 1133, 1158-59 (11th Cir. 2000).

6. The balance of hardships in this case weighs in favor of granting the emergency and temporary injunctive relief. Some of Plaintiffs’ supporters and members, as well as other eligible Florida voters, will be irreparably harmed in the absence of such relief by being disenfranchised, and the impact to the State will be

de minimis. Local canvassing boards are already required to recount every ballot by machine or manually upon order of the Secretary of State, and the U.S. Senate does not seat new senators for the next term until on or about January 3, 2019.

7. The relief that Plaintiffs seek is in the public interest because it will allow eligible Florida voters to exercise their fundamental right to vote. The public has a paramount interest in elections in which every eligible resident can cast an effective vote. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005).

III. TEMPORARY RESTRAINING ORDER

Now, therefore, it is ORDERED as follows:

1. Pursuant to Civil Rule 65, Defendants and persons acting in concert with Defendants, are hereby RESTRAINED and ENJOINED, until such date upon which Plaintiffs' application for a preliminary injunction may be heard, from any of the following acts:

a. Enforcing Fla. Stat. §§ 102.111, 102.112(2), 102.112(3), 102.141(7)(c), and any other source of state law that requires Defendants, their officers, employees, and agents, and all persons acting in active concert or participation with Defendants, or under Defendants' supervision, direction, or control, including all supervisors of elections and canvassing boards, to halt any machine or manual recount before it is completed and/or refuse to count votes

validly cast in an election that is subject to a recount because of a county's failure to complete a machine or manual recount by a state statutory deadline.

b. Preventing all counties in Florida an opportunity to complete the machine and manual recount processes set out in Florida Revised Statute Section 102 and its implementing regulations and certify official returns under Fla. Stat. § 102.112(1) including the results of such recount(s), notwithstanding any deadlines imposed by Florida law, including Fla. Stat. §§ 102.141(7)(c) and 102.112(2).

c. Taking any action to certify the results for the office of U.S. Senate until all counties in Florida complete the machine and manual recount processes set out above and certify official returns under Fla. Stat. § 102.112(1).

2. Pursuant to Civil Rule 65(c), the Court finds that a bond is unnecessary and would not be in the public interest to require under the circumstances of this litigation.

3. Defendants shall appear before this Court on November __, 2018, at _____ a.m./p.m., before the Honorable Judge _____, and at such time show cause why a preliminary injunction should not issue as requested by Plaintiffs.

Entered this _____ day of November, 2018

UNITED STATES DISTRICT JUDGE

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