IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

GABRIEL HILLEL KAIMOWITZ,

Plaintiff,

v. CASE NO. 1:16-cv-257-MW-GRJ

SUPERVISOR OF ELECTIONS, et al.,

Defendants.

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REPORT AND RECOMMENDATION

This cause is before the Court on Plaintiff's Motion for Temporary, Preliminary and Permanent Injunctive Relief. ECF 26.[1] In support of the motion, Plaintiff has filed his own affidavit, ECF No. 26-1, and memorandum of law in support. ECF No. 27. As directed by the Court the Supervisor of Elections in and for Alachua County has filed a response in opposition, ECF No. 51, with an Affidavit of Pam Carpenter, Alachua County Supervisor of Elections. ECF No. 51-1.[2] For the following reasons,

[1] The Court previously found that Plaintiff was not entitled to a temporary restraining order because Plaintiff had not demonstrated why notice should not be given before a temporary restraining order is entered. ECF No. 29.

[2] Plaintiff also has filed a document entitled "Plaintiff's Reply To 1) Defendant Supervisor of Elections' Answer And Affirmative Defense to Verified First Amended Complaint, And 2) Defendant, Supervisor of Elections' Response In Opposition To Plaintiff's Motion for Temporary, Preliminary, And Permanent Injunctive Relief. ECF No.

Plaintiff's Motion for Preliminary Injunctive Relief is due to be denied.

I. Background

Plaintiff, Gabriel Hillel Kaimowitz ("Kaimowitz"), proceeding *pro se,* sues the Supervisor of Elections in and for Alachua County, Florida ("Supervisor of Elections") challenging the Florida law that provides the names of unopposed candidates for county and circuit court judgeships should not be included on the ballot.[3] In his motion for preliminary injunction Plaintiff contends that this provision of Florida law violates the Fifteenth Amendment to the U.S. Constitution by denying African Americans the right to participate on equal footing with whites in the election of judges. Plaintiff says that not listing the names of unopposed candidates on the ballot prevents African American voters from writing in the name of a candidate thus presumably depriving them of an opportunity

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55. Plaintiff's filing is due to be stricken for two reasons. First, the Federal Rules of Civil Procedure do not permit the filing of a reply to an answer. A reply to an answer is permitted only "if the Court orders one." Rule 7(a)(7) of the Federal Rules of Civil Procedure. There is no need for a reply here and the Court has not ordered Plaintiff to file a reply. Plaintiff's reply to the Supervisor of Elections' response in opposition also is not permitted. Under N.D. Fla. Loc. Rule 7.1(I) "A party ordinarily may not file a reply memorandum in support of a motion." The Rule further mandates that "When leave to file a reply memorandum is required, a party must obtain leave before tendering the reply memorandum." Plaintiff has not obtained leave to file the reply memorandum and therefore the filing is unauthorized and due to be stricken.

[3] FLA. STAT. § 105.051(1)(a) (2016)

to vote for a black candidate. Secondly, because at least two of the unopposed candidates for judgeships are African American, Plaintiff says that "these candidates will avoid all public scrutiny, and so there is no reason for anyone to be informed 'of this milestone for people of color in Alachua County.'" ECF No. 26, p. 4¶16. Kaimowitz requests the Court to enjoin the Supervisor of Elections from issuing the 2016 Alachua County election ballots unless those ballots include the list of six unopposed circuit judges and three unopposed county judges.

As discussed below, Plaintiff has failed to offer any factual or meritorious legal basis for the granting of such an extraordinary remedy that surely would result in disruption of the general election and the election process.

II. Discussion

Granting or denying a preliminary injunction is a decision within the discretion of the district court.[4] Guiding this discretion is the required finding that a plaintiff establish each of the following four factors: (1) a substantial likelihood of success on the merits; (2) a substantial threat of

[4] *Carillon Imps., Ltd. v. Frank Pesce Intern. Group Ltd.,* 112 F.3d 1125, 1126 (11th Cir. 1997) (*citing United States v. Lambert,* 695 F.2d 536, 539 (11th Cir. 1983)).

irreparable injury if the injunction were not granted; (3) that the threatened injury to the plaintiffs outweighs the harm an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest.[5] A preliminary injunction is an extraordinary and drastic remedy and should not be granted unless the movant "clearly carries the burden of persuasion" of all four factors.[6] Because Kaimowitz has failed to establish all four factors, his motion for injunctive relief is due to be denied.

A. Kaimowitz has not shown a substantial likelihood of success on the merits.

The critical flaw with the motion for preliminary injunction is that Kaimowitz cannot show that he has a substantial likelihood of success on the merits. Kaimowitz fails to offer any facts suggesting that the right of African Americans (or any other voter for that matter) to vote is impaired because voters cannot cast a vote for an unopposed judicial candidate. And Plaintiff fails to cite one case or any legal authority remotely suggesting that Florida law requiring the Supervisor of Election not to list

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[5] *Siegel v. LePore,* 234 F.3d 1163, 1176 (11th Cir. 2000); *Carillon Imps.,* 112 F.3d at 1126*; United States v. Jefferson Cnty.,* 720 F.2d 1511, 1519 (11th Cir. 1983).

[6] *Jefferson Cnty.,* 720 F.2d at 1519 (citation omitted).

unopposed judicial candidates on the ballot, is unconstitutional.

Under Florida law, the names of unopposed judicial candidates do not appear on ballots.[7] Furthermore, judicial candidates must qualify during a specified time period prior to the election, among other requirements.[8] Kaimowitz contends that these provisions are unconstitutional under the Fifteenth Amendment, which provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[9] In support of this argument the sole authority Kaimowitz cites is *Nipper v Smith,* 39 F. 3d 1494 (11th Cir. 1994)(*en banc*). *Nipper* provides no assistance to Kaimowitz and has nothing to do with a case like this which— unlike *Nipper*— does not involve a claim of vote dilution.[10]

Nipper was a typical voter dilution claim under the Voting Rights Act.

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[7] FLA. STAT. § 105.051(1)(a) (2016).

[8] *Id*. § 105.031.

[9] U.S. CONST. amend. XV.

[10] Voting dilution refers to a situation where voting is racially polarized and the state dilutes the voting strength of politically cohesive minority group members either "by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door." *Johnson v. DeGrandy,* 512 U.S. 997, 1007 (1994).

In *Nipper* black registered voters brought a claim against Florida officials under the Voting Rights Act, asserting a claim of voter dilution in connection with election of judges in judicial circuit and county in Florida's Fourth Judicial Circuit. The plaintiffs, there, alleged that the use of at-large elections dilutes the voting strength of the black minority in violation of section 2(a) of the Voting Rights Act, 42 U.S.C. § 1973 (1988). The plaintiffs sought the creation of subdistricts that would ensure the ability to elect black judges of their choice. The *en banc* court in *Nipper* rejected the plan to replace some of Florida's at-large judicial election districts with single-member subdistricts. *Nipper* at 1531.

Florida law requiring that ballots not include the names of unopposed judicial candidates has nothing to do with voter dilution nor is there any claim by Kaimowitz in this case that the Florida law violates the Voting Rights Act. Rather, Kaimowitz simply claims—without any elaboration or explanation—that voters are deprived of writing in the name of a candidate. The problem with this argument is that every voter—not just African American voters—cannot write in names where there is an unopposed judicial candidate. Moreover, to the extent that Kaimowitz says allowing write-in candidates would result in more African American judges,

Kaimowitz offers no evidence (or even a plausible theory) to support this claim. Indeed, Kaimowitz acknowledges that at least two of the unopposed judicial candidates whose names will not appear on the ballot in the November 2016 election are African American.[11]

Kaimowitz bases his claim in this case exclusively upon the Fifteenth Amendment and not the Voting Rights Act. The Fifteenth Amendment, however, has nothing to do with the current system of not listing unopposed judicial candidates on the ballot. Rather, the Fifteenth Amendment applies to cases involving voter discrimination based on race where there are challenges to voter identification laws, election methods, and voting district systems.[12] Notably, as opposed to claims under section 2 of the Voting Rights Act, claims under the Fifteenth Amendment require a

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[11] Plaintiff says that one of the African American judges is a county judge, who was elected in 2004 and since then has not been opposed. The other African American judge is a county judge who was elected in 2014 and whose name will not appear on the ballot because the judge is unopposed.

[12] See, *e.g.*, *Escambia County, Fla. v. McMillan*, 466 U.S. 48 (1984) (applying the Fifteenth Amendment to the at-large method for electing county commissioners and members of the county school board); *Wright v. Rockefeller*, 376 U.S. 52 (1964) (applying the Fifteenth Amendment to a New York statute dictating congressional districts); *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959) (applying the Fifteenth Amendment to voter registration requirements); *Johnson v. DeSoto Cty. Bd. of Com'rs*, 204 F.3d 1335 (11th Cir. 2000) (applying the Fifteenth Amendment to the at-large method for electing county commissioners and members of the county school board).

finding of intent to discriminate in or order to establish a violation. *City of Mobile v. Bolden,* 446 U.S. 55, 61-68 (1980); *Al-Hakim v. State of Florida*, 892 F. Supp. 1464, 1476 (M.D. Fla. 1995) Thus, to show a violation of the Fifteenth Amendment, a plaintiff "must show that the . . . decision or act had a discriminatory purpose and effect."[13] A court will "evaluate all available direct and circumstantial evidence of intent in determining whether a discriminatory purpose was a motivating factor in a particular decision."[14] A court also looks at any evidence to determine whether there is a "significant impact on . . . persons today."[15]

For example, in *Al-Hakim v. State of Florida,* the election of judges was challenged under, *inter alia*, the Fifteenth Amendment.[16] Al-Hakim was a black resident of Hillsborough County,[17] and he noted the number of black judges in the county, along with other statistics regarding race.[18] He

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[13] *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 (11th Cir. 1999); *Askew v. City of Rome*, 127 F.3d 1355, 1373 (11th Cir. 1997).

[14] *Id.* at 1189.

[15] *Dillard v. Baldwin Cty. Bd. Of Educ.*, 686 F. Supp. 1459, 1467-68 (M.D. Ala. 1988)

[16] 892 F. Supp. 1464 (M.D. Fla. 1995).

[17] *Id.* at 1470.

[18] *Id.* at 1471.

used these statistics and other facts to allege that the system of electing judges is unconstitutional.[19] The Court there concluded that there was no evidence of record that the system for electing judges "was contrived for a discriminatory purpose or that its operation . . . denied plaintiff his rights guaranteed under the Constitution."[20] The Court also found there was no evidence of an existing racial impact due to Florida's electoral system.[21]

While Kaimowitz points to the racial composition of judges in the county, this is not enough to show a violation of the Fifteenth Amendment. Like the plaintiff in *Al-Hakim*, Kaimowitz has failed to show any discriminatory purpose or evidence of intent on the part of the Florida legislature in enacting its statutes regarding the election of judges. Merely alleging that there are only a few African American judges on the bench is not sufficient and has nothing to do with whether unopposed judicial candidates are or are not listed on the ballot. Beyond that, Kaimowitz has failed to show any discriminatory effect on the right to vote that is caused by the method for electing judges. African-Americans are free to run for

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[19] *Id.* at 1472.

[20] *Id.* at 1477.

[21] *Id.*

judicial elections and the requirement that unopposed judicial candidates are not included on the ballot, does nothing to prevent African-Americans from voting in an election and does nothing to prevent the electorate from electing African American candidates for judgeships.

Lastly, Kaimowitz's argument— that not listing on the ballot the two unopposed African American judges will cause these candidates to "avoid all public scrutiny" and will prevent anyone from being informed of this "milestone for people of color in Alachua County"—defies common sense. While having African Americans serving in two of the five county judgeships in Alachua County may be considered a "milestone," listing their names on the ballot, even though they are unopposed, has nothing to do with informing the public of this fact. The names of candidates on a ballot, including those running for judgeships, do not list the race or ethnicity of any candidate. Unless a voter knew one of the two African American judges a voter would have no way of knowing the race of the unopposed candidate. Common sense dictates that this reason for listing unopposed judicial candidates is not very compelling.

In short, Kaimowitz has failed to advance any legal theory that demonstrates he has a substantial likelihood of success on the merits. He

has failed to present any compelling reason for listing unopposed judicial candidates on the ballot and has failed to offer any legal authority supporting his claim. Because Kaimowitz has failed to establish a substantial likelihood of success on the merits, he is not entitled to injunctive relief.

B. Kaimowitz has not shown a substantial threat of irreparable harm.

A movant for a preliminary injunction must also show a substantial threat of irreparable injury that is "neither remote nor speculative, but actual and imminent."[22] Kaimowitz claims that there will be "irreparable injury to the constitutionally guaranteed right to vote" if he and others cannot express an opinion or position about the judicial candidates for the 2016 election.[23]

Although the November 2006 election is imminent, the fact that unopposed judicial candidates are not listed on the ballot, does not prevent or impact the ability of voters from expressing an opinion or position about the judicial candidates. Kaimowitz provides no explanation nor does he

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[22] *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (quotation omitted).

[23] ECF No. 6 ¶ 25A.

offer any plausible facts demonstrating that either he (or any other voter) has been (or will be) prevented from voting in any election as a result of the ballots not containing the names of unopposed judicial candidates.

Moreover, if Kaimowitz wants a change in the law so that the names of all Alachua County judges, whether opposed or unopposed, appear on the general election ballot, the Florida Constitution provides a method for doing so. Under Article V, Section 10(b)(1) and 10(b)(2), electors may approve a local option to select circuit and county court judges by merit selection and retention rather than by election. A petition for initiating one of these local options would be the appropriate avenue to pursue if Plaintiff wants a change on the ballot. Filing a legally unsupported and baseless motion for a preliminary injunction is not the appropriate path to secure the change Plaintiff seeks.

Accordingly, for these reasons, Kaimowitz has not and cannot show a substantial threat to any actual harm.

C. Kaimowitz has not shown that the threatened injury to the plaintiff outweighs the harm an injunction may cause the defendant.

On a motion for an injunction, the movant has the burden of showing that his perceived injuries outweigh the harm that the injunction might

cause to the defendant.[24] Kaimowitz asserts that there is no harm in placing the names of unopposed judicial candidates on the ballot. This argument misses the point.

The problem is that Kaimowitz has failed to show he would suffer any threatened injury if the unopposed judicial candidates are not listed on the ballot. Apparently, in an effort to show an injury to himself (which he is required to do to have standing) Kaimowitz says that if Judge Jaworski, an unopposed white county judge, was listed on the ballot Kaimowitz "would have offered himself as a write-in candidate." ECF No. 26, p. 4 ¶17. This argument losses the day because Kaimowitz is not qualified to serve as a state judge. He says that he is retired from the Florida Bar, while the Florida Bar apparently takes the position that he is suspended from the Florida Bar. In either case Kaimowitz is not an active member of the Florida Bar and therefore is not qualified to serve as a judge. Thus, the fact that Kaimowitz will be deprived of the opportunity of writing-in his own name makes no difference and does not result in any injury.

On the other hand, the Supervisor of Elections has filed an affidavit

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[24] *Cate v. Oldham*, 707 F.2d 1176, 1185 (11th Cir. 1983).

detailing the substantial and costly burden the Supervisor of Elections would incur if the requested injunction was entered. The Supervisor of Elections avers that the cost incurred to print and ship the official ballots for the 2016 general election was $90,842.00.[25] In addition, there is not just one but 67 separate general election ballot styles in use in Alachua County because the county is divided among several congressional and legislative districts.[26] The Supervisor of Elections already has mailed the official ballots to more than 23,000 registered absentee voters, including U.S. military serving abroad, and to an additional 6,000 individuals, who have requested a vote by mail ballot.[27] Further, as of October 14, 2016, more than 4,000 voted and signed absentee ballots have been returned to the office of the Supervisor of Elections.[28] Consequently, if the Supervisor of Elections was enjoined from issuing and using the official ballots for the 2016 general election, the Supervisor of Elections would incur substantial cost including the cost of increased personnel time and the substantial

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[25] ECF No. 51-1 ("Carpenter Affd.") ¶8.

[26] Carpenter Affd. ¶9.

[27] Carpenter Affd. ¶11.

[28] Carpenter Affd. ¶12.

increased cost for emergency reprinting of the paper ballots.[29]

In addition to the substantial cost that would be incurred, the Supervisor of Elections would not be able to comply with federal and state requirements for the completion of absentee ballots and early voting.[30] The Supervisor of Elections avers that 30 to 35 days would be required to recreate the ballot, obtain sufficient printed ballots and re-program and test the voting machines.[31] And because there is no equipment certified in the State of Florida capable of accepting two different sets of ballots for the same election, the voting system could not tabulate any of the 29,000 vote by mail ballots in circulation, thus nullifying all of these votes.[32]

The bottom line is that an injunction requiring the Supervisor of Elections to list unopposed judicial candidates on the official ballots would severely disrupt the local electorate, create possible confusion among registered voters and surely would prevent timely completion of statewide and Presidential vote tallies, all of which would negatively impact the

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[29] Carpenter Affd. ¶13.

[30] Carpenter Affd. ¶14.

[31] *Id.*

[32] *Id.*

sanctity of the voting process.

Accordingly, the entry of the injunction Kaimowitz requests not only would serve no purpose it would result in disrupting the entire 2016 general election in Alachua County for no good reason.

D. Kaimowitz has failed to show that the injunction will not disserve the public interest.

A premanent injunction requires the movant to show that granting the injunction will not disserve the public interest.[33] Kaimowitz says that "[v]oting and elections are in the public interest. Depriving Plaintiff and other eligible voters of the opportunity to consider people seeking to be judges is NOT."[34]

As explained in detail above, entry of the requested injunction would be adverse to the public's interest in having fair, timely and accurate elections. And requiring the Supervisor of Elections at this late stage to restart or substantially modify the process of preparing, issuing, verifying and counting ballots would surely result in confusion by the electorate and could result in nullifying votes already cast thus having an impact on the

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[33] *See Siegel,* 234 F.3d at 1176.

[34] ECF. No. 6 ¶ 25E.

results of contested elections for county, state and national office.

The Court, therefore, concludes that Kaimowitz cannot carry the burden on this element.

III. Recommendation

In light of the foregoing, it is respectfully **RECOMMENDED** that:

1. Plaintiff's Motion for Temporary, Preliminary and Permenant Injunctive Relief, ECF No. 26, should be **DENIED**.[35]

2. Plaintiff's Reply to 1)Defendant Supervisor of Elections' Answer And Affirmative Defense to Verified First Amended Complaint, And 2) Defendant, Supervisor of Elections' Response In Opposition to Plaintiff's Motion for Temorary, Preliminary, And Permanent Injunctive Relief, ECF No. 55, should be **STRICKEN.**

IN CHAMBERS this 25th day of October, 2016.

s/Gary R. Jones
GARY R. JONES
United States Magistrate Judge

[35] Also, for the same reasons explained in this report and recommendation, Plaintiff's Motion for Injunctive Relief, ECF No. 6, and Plaintiff's Motion for Declaratory Relief, ECF No. 8, should be **DENIED**.

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A copy of objections shall be served upon all other parties. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a report and recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions.[36]

[36] *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.