

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

RICK SCOTT FOR SENATE,

Plaintiff,

v.

**SUSAN BUCHER, solely in her capacity as
Supervisor of Elections of Palm Beach
County, Florida,**

Defendant.

CASE NO.

JUDGE

Verified Complaint

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Rick Scott for Senate (“Plaintiff”), through undersigned counsel, sues Susan Bucher, solely in her capacity as the Supervisor of Elections of Palm Beach County, Florida (“Defendant”), and alleges:

JURISDICTION AND VENUE

1. This is a lawsuit for declaratory and injunctive relief under § 86.011, Fla. Stat.
2. Venue is proper in Palm Beach County, Florida because Defendant maintains her principal places of business in Palm Beach County and because all or part of the claim for relief at issue in this litigation arose in Palm Beach County.

PARTIES

3. Plaintiff is a federal campaign committee authorized to conduct political activity throughout the state of Florida.

4. Defendant is responsible for overseeing the conduct of elections in Palm Beach

County, including but not limited to the conduct of election personnel throughout the county in the post-election process.

5. Plaintiff is supporting candidates to be voted upon in the election in Palm Beach County and throughout Florida. Plaintiff's interests in enforcement of the election laws and ensuring a fair election are adversely affected by the conduct complained of below.

6. All conditions precedent to the filing of this lawsuit have been performed, have been waived, or are otherwise excused.

**COUNT I – REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST
DEFENDANT’S VIOLATION OF § 101.5614(4)(a), FLA. STAT. REGARDING THE
PROCESSING OF PHYSICALLY DAMAGED, “OVERVOTED,” AND
“UNDERVOTED” ABSENTEE BALLOTS**

7. Plaintiff adopts and realleges the allegations of paragraphs 1–6 above.

8. Section 101.5614(4)(a), Fla. Stat., the provision of the Florida Election Code at issue in this lawsuit, governs the processing of physically damaged, “overvoted,” and “undervoted” absentee ballots. That provision states, in relevant part (emphasis added):

If any vote-by-mail ballot is physically damaged so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot **in the presence of witnesses** and substituted for the damaged ballot. Likewise, a duplicate ballot shall be made of a vote-by-mail ballot containing an overvoted race or a marked vote-by-mail ballot in which every race is undervoted **which shall include all valid votes as determined by the canvassing board based on rules adopted by the division pursuant to s. 102.166(4).**

9. The language of § 101.5614(4)(a) is uncomplicated and unambiguous.

10. Regarding the processing of physically damaged absentee ballots, § 101.5614(4)(a) requires the Supervisor of Elections to make true duplicate copies of all such damaged ballots “in the presence of witnesses.”

11. Regarding the processing of “overvoted” and “undervoted” absentee ballots,

§ 101.5614(4)(a) provides that only the Canvassing Board—not the Supervisor of Elections, or any other entity—is authorized to determine “all valid votes . . . based upon rules adopted by the division . . .” No provision of the Florida Election Code (or any other legal authority) confers upon the Supervisor of Elections (or any other entity) the power to determine which “overvoted” or “undervoted” absentee ballots contain “valid votes,” within the meaning of § 101.5614(4)(a). That power belongs exclusively to the Canvassing Board.

12. Defendant is presently violating the mandates of § 101.5614(4)(a) in two respects.

13. First, on November 8, 2018, Defendant refused to allow Plaintiff’s representatives (or the representatives of any other political party) to properly witness Defendant’s processing and duplication of physically damaged absentee ballots.

14. In fact, Plaintiff’s representatives have only been allowed outside of the proximity required to properly witness Defendant’s staff’s review and processing of the ballots. Defendant has effectively precluded Plaintiff’s representatives from making any substantive observation of the activities of Defendant’s staff, in direct violation of § 101.5614(4)(a).

15. The statute requires Defendant to make true duplicate copies of all physically damaged absentee ballots “in the presence of witnesses.” § 101.5614(4)(a). As of the filing of this lawsuit, Plaintiff’s representatives have been prohibited from witnessing and/or actually overseeing the duplication of physically damaged absentee ballots. Plaintiff’s representatives have not even been allowed to confirm Defendant’s compliance with the statute’s procedure for processing physically damaged absentee ballots.

16. Despite having thousands of ballots to review, Defendant provided Plaintiff’s representatives with a very quick partial walk-through of the area and then did not allow any further access in reasonable proximity to Defendant’s staff. Moreover, as of mid-afternoon,

upon information and belief Plaintiff learned that there were roughly 1500 faxed-in military ballots and to the extent that these need to be converted to a ballot, the same issues noted above took place.

17. Second, and even more alarmingly, Defendant has failed to allow the Palm Beach County Canvassing Board to execute its statutory duty to determine “all valid votes” from “overvoted” and “undervoted” absentee ballots. Instead, Defendant—in violation of the express language of § 101.5614(4)(a)—has made determinations regarding voter intent herself (through her staff), and has withheld a portion of “overvoted” and “undervoted” absentee ballots from the Palm Beach County Canvassing Board, which the Board will not be provided for review tomorrow. As prescribed in § 101.5614(4)(a), only the Palm Beach County Canvassing Board—not Defendant, or any other entity—is empowered by law to determine “all valid votes” from “overvoted” and “undervoted” absentee ballots.

18. Plaintiff notified Defendant about the violations of § 101.5614(4)(a), but as of the filing of this lawsuit, Defendant has failed to cure such violations.

19. There is a present, *bona fide* controversy over whether Defendant is presently violating the mandates of § 101.5614(4)(a).

20. Plaintiff’s, its candidates’, and its voters’ rights will be violated if the Election Code is not followed, as Defendant’s ongoing violations of § 101.5614(4)(a) jeopardizes the integrity of, and may alter the outcome of, the 2018 general election.

21. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

a. A declaratory judgment that Defendant’s refusal to allow Plaintiff’s representatives to witness Defendant’s processing and duplication of physically damaged

absentee ballots violates § 101.5614(4)(a), Fla. Stat.

b. A declaratory judgment that Defendant's, rather than the Palm Beach County Canvassing Board's, determination of "all valid votes" from "overvoted" and "undervoted" absentee ballots violates § 101.5614(4)(a), Fla. Stat.

c. A temporary and permanent injunction ordering Defendant to cease violating § 101.5614(4)(a), Fla. Stat., and ordering Defendant (i) to have the Supervisor's staff review the duplicate ballots together with the original damaged ballots in the presence of the Plaintiff and any other witnesses, and if there is an objection by the witnesses, require the objected to duplicate ballots in question to be set aside for immediate review by the Canvassing Board once the review process is complete of all physically damaged absentee ballots and duplicate ballots, consistent with the procedure codified in § 101.5614(4)(a); and (ii) to allow the Palm Beach County Canvassing Board (and *only* that entity) to determine valid votes from "overvoted" and "undervoted" absentee ballots, consistent with the procedure codified in § 101.5614(4)(a).

d. The costs of this lawsuit, together with reasonable attorney's fees to the extent provided by law; and

e. Such further relief as the Court deems proper.

VERIFICATION

I hereby swear or affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Aliette D. Rodz
Counsel for the Plaintiff

Dated: November 8, 2018

Respectfully submitted,

/s/ Aliette D. Rodz

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**SUSAN BUCHER, solely in her capacity as
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**PLAINTIFF'S VERIFIED EMERGENCY MOTION FOR A TEMPORARY
INJUNCTION AND SUPPORTING MEMORANDUM OF LAW**

Plaintiff, Rick Scott for Senate (“Plaintiff”), through undersigned counsel, respectfully moves this Court pursuant to Fla. R. Civ. P. 1.610(a) for a Temporary Injunction, ordering Defendant Susan Bucher, solely in her capacity as Supervisor of Elections of Palm Beach County, Florida (“Defendant”), to cease violating § 101.5614(4)(a), Fla. Stat., and ordering Defendant: (i) to have the Supervisor’s staff review the duplicate ballot together with the original damaged ballot in the presence of the Plaintiff and any other witnesses, and if there is an objection by the witnesses, require the objected to duplicate ballots in question to be set aside for immediate review by the Canvassing Board once the review process is complete of all physically damaged absentee ballots and duplicate ballots, consistent with the procedure codified in § 101.5614(4)(a); and (ii) to allow the Palm Beach County Canvassing Board (and only that entity) to determine valid votes from “overvoted” and “undervoted” absentee ballots, consistent with the procedure codified in § 101.5614(4)(a).

Defendant's failure to follow the procedures codified in § 101.5614(4)(a) has inflicted, and continues to inflict, irreparable injury upon Plaintiff. Respectfully, this Court should issue immediate relief to protect both the Plaintiff and the integrity of the 2018 general election.

As attested in the attached Certificate of Service, Plaintiff concurrently is serving Defendant with the Verified Complaint and this Motion by facsimile and e-mail.

Dated: November 8, 2018

Respectfully submitted,

/s/ Alette D. Rodz

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Attorneys for Plaintiff

**MEMORANDUM OF LAW IN SUPPORT OF
EMERGENCY MOTION FOR A TEMPORARY INJUNCTION**

Plaintiff respectfully requests that this Court immediately issue a Temporary Injunction, ordering Defendant to cease violating § 101.5614(4)(a), Fla. Stat., and ordering Defendant (i) to make true duplicate copies, in the presence of witnesses, of all physically damaged absentee ballots, consistent with the procedure codified in § 101.5614(4)(a); and (ii) to allow the Palm Beach County Canvassing Board (and only that entity) to determine valid votes from “overvoted” and “undervoted” absentee ballots, consistent with the procedure codified in § 101.5614(4)(a). In support of this Motion, Plaintiff states:

I. FLORIDA LAW GOVERNING THE PROCESSING OF PHYSICALLY DAMAGED, “OVERVOTED,” AND “UNDERVOTED” ABSENTEE BALLOTS

Section 101.5614(4)(a), Fla. Stat., the provision of the Florida Election Code at issue here, governs the processing of physically damaged, “overvoted,” and “undervoted” absentee ballots. That provision states, in relevant part (emphasis added):

If any vote-by-mail ballot is physically damaged so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot **in the presence of witnesses** and substituted for the damaged ballot. Likewise, a duplicate ballot shall be made of a vote-by-mail ballot containing an overvoted race or a marked vote-by-mail ballot in which every race is undervoted **which shall include all valid votes as determined by the canvassing board based on rules adopted by the division pursuant to s. 102.166(4).**

The language of § 101.5614(4)(a) is uncomplicated and unambiguous. First, regarding the processing of physically damaged absentee ballots, § 101.5614(4)(a) requires the Supervisor of Elections to make true duplicate copies of all such damaged ballots **in the presence of witnesses**. Second, regarding the processing of “overvoted” and “undervoted” ballots, § 101.5614(4)(a) is clear that only the Canvassing Board—**not the Supervisor of Elections**—is

authorized to determine “all valid votes . . . based upon rules adopted by the division” No provision of Florida’s Election Code (or any other authority) confers upon the Supervisor of Elections the power to determine which “overvoted” and “undervoted” absentee ballots contain “valid votes,” within the meaning of § 101.5614(4)(a). That power, as prescribed in § 101.5614(4)(a), belongs exclusively to the Canvassing Board.

II. OVERVIEW OF DEFENDANT’S UNLAWFUL CONDUCT

As explained in the *Verified Complaint* at ¶¶ 12–18, Defendant is presently violating the mandates of § 101.5614(4)(a) by failing to follow the procedures for processing physically damaged, “overvoted,” and “undervoted” absentee ballots.

Specifically, Defendant has refused to allow Plaintiff’s representatives (or the representatives of any political party) to witness Defendant’s processing and duplication of physically damaged absentee ballots. *Verified Complaint* at ¶¶ 13–16. In fact, the Plaintiff has only been allowed outside of the proximity required to properly witness the staff’s review and processing of the ballots. *Id.* at ¶ 14. Instead, Defendant has essentially precluded the Plaintiff from making any substantive observation of the activities of the staff in direct violation of § 101.5614(4)(a). *Id.* The statute requires Defendant to make true duplicate copies of all physically damaged ballots “**in the presence of witnesses**” and, as of the filing of this Motion, Plaintiff’s representatives have been prohibited from witnessing and/or actually overseeing the duplication of ballots. *Id.* at ¶ 15. Plaintiff has not even been allowed to confirm Defendant’s compliance with the statute’s procedure for processing such damaged ballots. *Id.* Despite having thousands of ballots to review, the Supervisor provided the Plaintiff with a very quick partial walk-through of the area and then did not allow any further access in reasonable proximity to the staff. *Id.* at ¶ 16. Moreover, as of mid-afternoon, upon information and belief Plaintiff learned

that there were roughly 1500 faxed in military ballots and to the extent that these need to be converted to a duplicate ballot, the same issues noted above took place. *Id.*

Even more alarmingly, regarding the processing of “overvoted” and “undervoted” absentee ballots, Defendant has failed to allow the Palm Beach County Canvassing Board to execute its statutory duty to determine “all valid votes” from such irregular ballots. *Id.* at ¶ 17. Instead, Defendant--in violation of the express language of § 101.5614(4)(a)--has made determinations regarding voter intent herself, and has withheld a portion of “overvoted” and “undervoted” absentee ballots from the Palm Beach County Canvassing Board—to which they will not review tomorrow. *Id.* As explained above, the Palm Beach County Canvassing Board--not Defendant--is the only entity empowered by law to determine “all valid votes” from “overvoted” and “undervoted” absentee ballots. *See* § 101.5614(4)(a).

III. MEMORANDUM OF LAW: PLAINTIFF SATISFIES THE REQUIREMENTS FOR OBTAINING A TEMPORARY INJUNCTION

A. The Standard for Obtaining Injunctive Relief

This Court should issue an emergency temporary injunction where necessary to avoid immediate and irreparable injury to Plaintiff. A temporary injunction may be granted without notice upon a showing, by affidavit or verified pleading, that “immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition[.]” Fla. R. Civ. P. 1.610(a)(1)(A).¹ An applicant for a temporary injunction also must certify to the

¹ Rule 1.610(a)(1)(A)–(B) provides: “A temporary injunction may be granted without written or oral notice to the adverse party or his attorney only if: (A) it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant’s attorney certifies in writing any efforts that have been made to give notice and the reasons why notice should not be required.”

Court the efforts, if any, “that have been made to give notice and the reasons why notice should not be required.” Rule 1.610(a)(1)(B).

The standard for granting a temporary injunction under Rule 1.610 is well established. The Court should examine four factors, including whether: (1) there is a substantial likelihood that the movant will succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is not granted; (3) there is no adequate remedy at law; and (4) the public interest will be served by the temporary injunction. *See U.S. 1 Office Corp. v. Falls Home Furnishings, Inc.*, 655 So. 2d 209, 210 (Fla. 3d DCA 1995) (affirming application for a temporary injunction where plaintiff made showing of all four factors); *see also Zuckerman v. Professional Writers of Florida, Inc.*, 398 So. 2d 870, 871 (Fla. 4th DCA 1981) (affirming temporary restraining order and requiring bond).

In the context of requests for injunctive relief in the election setting, the Supreme Court of the United States has stated that “[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of election laws, and should act and rely upon general equitable principles.” *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). *See also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (denying injunction to suspend voter identification rules “[g]iven the imminence of the election” and the State’s “compelling interest in preserving the integrity of its election process” and “preventing voter fraud” (internal quotation marks omitted)).

B. Plaintiff Satisfies the Four Requirements for Obtaining Injunctive Relief

Plaintiff satisfies the four requirements under Florida law for obtaining injunctive relief.

First, Plaintiff has established a strong likelihood of success on the merits. Section 101.5614 clearly and unambiguously instructs election officials to create a true duplicate copy of

any damaged ballots **in the presence of witnesses** and substitute the damaged ballot. Likewise, a duplicate ballot shall be made of a vote-by-mail ballot containing an overvoted race or a marked vote-by-mail ballot in which every race is undervoted which shall include all valid votes as determined by the canvassing board based on the rules adopted by the division pursuant to s. 102.166(4). All duplicate ballots shall be clearly labeled “duplicate,” bear a serial number which shall be recorded on the defective ballot, and be counted in lieu of the defective ballot. See Florida Statute Section 101.5614 (4)(a). This has not been done. That provision contains no exceptions and, indeed, the Division of Elections has already determined which ballots it will show to the Canvassing Board and which it deems that it can correct itself without any witnesses as required under Florida law.

Second, the Verified Complaint clearly shows that Plaintiff will suffer immediate and irreparable injury absent the Court’s issuance of a temporary injunction. *See* Verified Complaint at ¶¶ 12-18, and 20. The general election has taken place and these post-election matters are to conclude by 5PM Eastern time today. Unless this Court grants immediate relief, Plaintiff’s interest in ensuring a fair and orderly election, and Plaintiff’s members’ right to the same, will be unduly burdened by the potentially unauthorized, duplicative votes or inaccurate votes cast by electors at the affected precincts, where Defendant failed to comply with the requirement of § 101.5614. *See Lantana v. Pelczynski*, 303 So. 2d 326, 327 (Fla. 1974) (“There is no question that the State has the power and the duty to insure free and fair elections.”); *see also Siegel v. LePore*, 234 F.3d 1163, 1180 (11th Cir. 2000) (acknowledging that regulations governing the electoral process may be necessary to protect a State’s “interest in conducting an orderly and fair election”); *Hunter v. Hamilton Cnty. Bd. of Elections*, 2010 WL 4878957, at *4-*5 (S.D. Ohio Nov. 22, 2010) (recognizing that a candidate may suffer irreparable harm if provisional ballots

that should be counted are not counted); *Fla. State Conference of N.A.A.C.P. v. Browning*, 569 F. Supp. 2d 1237, 1251 (denying plaintiffs’ request to enjoin Florida voter identification statute in light of the State’s compelling interest “in fair and honest elections”). Moreover, as discussed above, notice of the Verified Complaint and the instant Motion is being served contemporaneously on Defendant. Due to the limited time remaining, however, respectfully this Court should adjudicate this issue immediately. *See United States v. Metro. Dade Cnty.*, 815 F. Supp. 1475, 1478–79 (S.D. Fla. 1993) (“Where an impending election is imminent and the election machinery is already in progress, a Court may take into account equitable considerations when prescribing immediate relief.”) (citing *Reynolds*, 377 U.S. at 585); *cf. Siegel*, 234 F.3d at 1177 (suggesting that harm from an election that is “underway or imminent” is sufficient to satisfy the “immediate and irreparable” standard).

Third, Plaintiff does not have an adequate remedy at law. As noted above, the election took place and these post-election matters are presently underway, subjecting Plaintiff to immediate and irreparable injury as a result of Defendant’s conduct. Defendant’s violation of the § 101.5614 will increase the risk of improper and/or likely “double-counting” of voters’ ballots, which the courts cannot correct in the future, after the conclusion of the election. Plaintiff’s only pathway to achieving relief is through this Court’s issuance of a temporary injunction, which would at least help ameliorate Defendant’s election law violations.

Fourth and finally, there is a strong public interest in enforcing state election laws and protecting the fundamental right to vote. *See, e.g., Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1376 (acknowledging the State’s interest in regulating elections in order to avoid chaos, provide order, and ensure a “fair and honest election”); *Kennedy v. Riley*, No. 2:05cv1100-MHT, 2007 WL 1461746, at *2 (finding that the public interest is served by protecting the “fundamental

political right” to vote) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) (recognizing that “as a practical matter, there must be a substantial regulation of elections if they are going to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.”). The public interest factor thus weighs in favor of requiring election officials to strictly comply with the requirements of § 101.5614.

CONCLUSION

For these reasons, Plaintiff respectfully requests that this Court immediately issue a Temporary Injunction ordering Defendant: (i) to have the Supervisor’s staff review the duplicate ballots together with the original damaged ballots in the presence of the Plaintiff and any other witnesses, and if there is an objection by the witnesses, require the objected to duplicate ballots in question to be set aside for immediate review by the Canvassing Board once the review process is complete of all physically damaged absentee ballots and duplicate ballots, consistent with the procedure codified in § 101.5614(4)(a); and (ii) to allow the Palm Beach County Canvassing Board (and only that entity) to determine valid votes from “overvoted” and “undervoted” absentee ballots, consistent with the procedure codified in § 101.5614(4)(a).

Dated: November 8, 2018

VERIFICATION

Under penalty of perjury, I declare that I have read the foregoing Emergency Motion, and the facts alleged therein are true and correct to the best of my knowledge and belief.

Aliette D. Rodz
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2018, I did cause a true and correct copy of the Verified Complaint, and the foregoing Plaintiff's Emergency Motion for Temporary Injunction and Supporting Memorandum of Law, to be served via facsimile and email upon:

Palm Beach County Supervisor of Elections

Susan Bucher, Supervisor
240 South Military Trail
West Palm Beach, FL 33415

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