IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2016-CA-003471-XXXX

DIVISION: CV-E

CAROL ELIZABETH SCOTT; PAUL BREMER; JENNIE BENNETT; and ELIZABETH W. WILLIAMS,
Plaintiffs,

v.

MIKE HOGAN, as Supervisor of Elections for Duval County, Florida; CHRIS H. CHAMBLESS, as Supervisor of Elections for Clay County, Florida; VICKI P. CANNON, as Supervisor of Elections for Nassau County, Florida; ALEXANDER PANTINAKIS, Individually; and DANIEL KENNETH LEIGH, Individually;
Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND DISMISSING COMPLAINT

This cause came on to be heard on the motions of the Defendant Kenneth Leigh[1] and the Defendant Alexander Pantinakis[2] to dismiss Counts I and II of the Plaintiffs' Complaint filed on May 20, 2016.[3] In their instant Motions, the Defendants argue that this Court should dismiss the Plaintiffs' Complaint on grounds that it fails to state a cause of action and is legally insufficient to support the relief requested in each Count. On May 31, 2016, the former trial judge conducted

[1] On May 24, 2016, Mr. Leigh filed "Motion to Dismiss for Failure to State a Cause of Action Upon Which Relief Can Be Granted, Motion to Strike Attorney's Fees and Costs, and Motion for Sanctions." On May 30, 2016, Mr. Leigh filed a "Memorandum in Support of Defendant Daniel Kenneth Leigh's Motion to Dismiss."

[2] On May 26, 2016, Mr. Pantinakis filed "Defendant, Alexander Pantinakis', Motion to Dismiss & to Strike." On May 30, 2016, Mr. Pantinakis filed a "Memorandum of Law in Support of His Motion to Dismiss & to Strike."

[3] On May 30, 2016, the Plaintiffs filed a "Response to Motions to Dismiss For Failure to State a Cause of Action."

a hearing addressing the Plaintiffs' Complaint and the Defendants' Motions to Dismiss.[4] On June 13, 2016, this Court conducted a status conference to address the pending motions in the instant case and discussed setting a time frame, if necessary, to hear the instant cause of action.

This Court, after having considered the pleadings, stipulations of uncontested facts, facts alleged by the Plaintiffs in their Complaint (which for the purpose of the instant Motions this Court accepts as true and in a light most favorable to the Plaintiffs), the case law, and argument of counsel, finds the Complaint fails to state a cause of action upon which relief can be granted.

I. Factual Allegations

The four Plaintiffs are registered voters in the Fourth Judicial Circuit, and each is registered as a Democrat, an Independent, or No Party Affiliation. None of the four is a registered Republican. Defendant Mr. Kenneth Leigh is a registered Republican and has lawfully qualified for the general election in November as a write-in candidate for the office of State Attorney of the Fourth Judicial Circuit. Mr. Leigh qualified with the Secretary of State without paying a qualifying fee.

Mr. Leigh's name will not appear on the ballot in the November general election, but a line will be placed on the ballot to enable a voter to write in his name if the elector chooses to vote for Mr. Leigh. As a write-in candidate, Mr. Leigh's name will not appear on the primary ballot in the Republican Party primary, currently scheduled for August 30, 2016.

Ms. Angela Corey, Mr. Wes White, and Ms. Melissa Nelson are all Republicans seeking the office of State Attorney, and all have qualified to be placed on the ballot in the Republican Party primary. Each of these three candidates qualified with the Secretary of State either by

[4] On June 5, 2016, Mr. Leigh filed "Defendant's, Daniel Kenneth Leigh, Verified Motion to Disqualify Trial Judge" based on statements the former trial judge made during a status conference held on June 3, 2016. On June 6, 2016, the former trial judge entered an Order Granting Motion to Recuse. On June 7, 2016, the Chief Judge of the Fourth Judicial Circuit entered an Order reassigning this matter to the undersigned.

paying a qualifying fee or by petition. The winner of the Republican Party primary will be placed on the November ballot and all electors, regardless of party affiliation, will be entitled to vote for the winner of the Republican Party primary, write in the name of Mr. Leigh on the blank line for write-ins, or not vote at all in that race. Defendant Mr. Alexander Pantinakis, at all times material to the issues in this case, was the campaign manager for Ms. Angela Corey and served as a committeeman of the Republican Party of Florida.

II. Standard of Review

With respect to reviewing a motion to dismiss, the First District Court of Appeal of Florida has held "a court may consider only the factual allegations set forth in the complaint, must accept those allegations as true, and must resolve in the plaintiff's favor all inferences that might be drawn from those allegations." Mosby v. Harrell, 909 So. 2d 323, 326 (Fla. 1st DCA 2005) (citing Gowan v. Bay County, 744 So. 2d 1136 (Fla. 1st DCA 1999); W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc., 28 So. 2d 297 (Fla. 1st DCA 1999)).

III. Applicable Law, Analysis, and Findings

With respect to the case at bar, this Court notes in 1998, the voters of the State of Florida amended Article VI, Section 5, of the Florida Constitution, to state:

> If all candidates for an office have the same party affiliation and the winner will have no opposition in the general election, all qualified electors, regardless of party affiliation, may vote in the primary elections for that office.

Art. VI, § 5(b), Fla. Const. (2016). This amendment is known as the Universal Primary Amendment ("UPA"). In 2000, the Florida Secretary of State issued an advisory opinion stating a write-in candidate constitutes opposition in the general election and, therefore, if there is a write-in candidate a general election primary will remain closed. Lacasa v. Townsley, 883 F. Supp. 2d 1231, 1233 (S.D. Fla. 2012); Op. Fla. Div. Elec. DE 00-6 (May 11, 2000). Florida

courts have interpreted the UPA as follows: "a primary election for public office will not be opened to all registered voters unless two conditions are met: '(1) all candidates for the office must have the same party affiliation; and (2) the winner of the primary will have no opposition in the general election.'" Brinkmann v. Francois, 184 So. 3d 504, 514 (Fla. 2016). See Telli v. Snipes, 98 So. 3d 1284, 1286 (Fla. 4th DCA 2012).

Pursuant to this authority, and pursuant to subsequent case law, the supervisors of election in the counties of the Fourth Judicial Circuit will close the primary election unless a court of competent jurisdiction orders otherwise. Here, the Plaintiffs agree that if the write-in candidacy of Mr. Leigh was "real" and not illusory, his candidacy would constitute "opposition" and the primary would be closed pursuant to the UPA even if Mr. Leigh had no chance of winning. However, the Plaintiffs have alleged facts which they believe this Court should rely upon in concluding that the write-in candidacy of Mr. Leigh is a sham and does not constitute "opposition" within the meaning of the UPA.

The facts as alleged by the Plaintiffs are as follows: (1) the candidacy of Mr. Leigh is a sham and a political ploy solely to assist Ms. Angela Corey in her bid for re-election; (2) Mr. Leigh is of the same political party as Ms. Corey, supports her candidacy, and has donated to her re-election campaign; (3) Mr. Leigh's qualifying documents as a write-in candidate were hand-delivered to the Secretary of State in Tallahassee, Florida by Mr. Pantinakis, Ms. Corey's campaign manager; (4) Mr. Leigh's purpose in qualifying as a write-in candidate was not to be elected State Attorney, but was solely for the purpose of closing the Republican Party primary to assist Ms. Corey; and (5) there are 319,004 registered Republican voters in the Fourth Judicial Circuit and 438,894 registered voters who are not Republican. It is alleged that Mr. Leigh is seeking to disenfranchise the 438,894 non-Republicans who will not be able to have a voice in

the selection of State Attorney.

The attorneys, the parties, and the general public are reminded that the foregoing allegations of the Plaintiffs have not been established as fact through an evidentiary hearing, but are accepted as true solely for the purpose of determining the legal sufficiency of the Complaint.

Count I – Closing the Republican Primary Election

In February of this year, the Florida Supreme Court issued an opinion arising out of the Fourth District Court of Appeal of Florida involving very similar issues to those raised by the Plaintiffs. Brinkmann, 184 So. 3d 504. The Court's opinion in Brinkmann mirrored the rationale of another Fourth District case, decided in 2012, also involving similar issues. Telli, 98 So. 3d 1284.

In Brinkmann, five candidates qualified as Democrats for a seat on the County Commission of Broward County. No other candidates qualified. Mr. Francois, also a Democrat, qualified to run as a write-in candidate, which would result in a blank space being placed on the November general election ballot and allow voters to write in Mr. Francois' name. In Telli, three candidates for the County Commission, all Democrats, properly qualified for the office. Two candidates, a Democrat and a Republican, qualified as write-in candidates.

In Brinkmann, as in Telli, the plaintiffs alleged that the write-in candidates were not viable opposition and, therefore, should not be included within the intended meaning of "opposition" as used in the UPA. The plaintiffs further argued it was the intent of the framers and voters in the adoption of the UPA that all voters be permitted to cast a meaningful vote only for viable candidates, and the write-in candidates were not viable. The Florida Supreme Court and the Fourth District Court of Appeal of Florida both rejected the plaintiffs' arguments. Brinkmann, 184 So. 3d at 514; Telli, 98 So. 3d at 1287.

The Florida Supreme Court and the Fourth District held the language of the UPA was clear and unambiguous. Brinkmann, 184 So. 3d at 511-15; Telli, 98 So. 3d at 1286-87. These courts held that since write-in candidates are considered candidates under the Florida Statutes and they met all qualifying requirements to be write-in candidates, the candidates are, therefore, opposition as that term is utilized in the UPA.

The Florida Supreme Court in Brinkmann discussed the viability issue, and adopted as part of its holding language from a similar case in the Southern District of Florida:

> The Court will not consult a crystal ball to determine when and whether a given write-in candidate constitutes "real" or mere illusory opposition. The question is not whether [the write-in candidates] *will likely* prevail in the general election over the winner of the Democratic primary (or even garner a significant percentage of the vote), but whether, under the current framework set forth by the Florida Constitution, they *could*.

Brinkmann, 184 So. 3d at 511 (quoting Lacasa, 888 F. Supp. 2d at 1243). In its conclusion holding that write-in candidates are "opposition" as the term is used in the UPA, the Fourth District in Telli also discussed the issue of viability and how that issue should be resolved:

> The viability of the candidates for the office of Broward County Commissioner will be decided by the voters, not by this court. The UPA's clear and unambiguous language, as well as the comments thereto, dictate that it is not the role of this court to declare the futility of these (or any) candidacies for elected office. That role is reserved by the voters who will cast ballots in the coming general election. This court is also not prepared to proclaim that any duly-qualified candidate, write-in or otherwise, constitutes "no opposition" for the purposes of the Florida Constitution. For this court to hold that it has the authority to decide which duly-qualified candidacies do (or do not) constitute "opposition in the general election" would be contrary to the electoral process.

Telli, 98 So. 3d at 1287. See also § 97.021(5)(b), Fla. Stat. (2016) (defining "candidate" as "[a]ny person who seeks to qualify for election as a write-in candidate").

The Florida Supreme Court in Brinkmann found a determination of whether or not a write-in candidate is "opposition" under the UPA presents a question of constitutional

interpretation and sets forth the rules it applied for their interpretation of the UPA. Brinkmann, 184 So. 3d at 509. The Court began by examining the explicit language utilized in the UPA and found that since the language was clear, unambiguous, and addressed the matter in issue, it must be enforced as written.

The Court further found the usual and ordinary meaning of "opposition" was intended by the framers of the amendment, and could be found in the dictionary. Finally, through the following language, the Court strongly suggested that trial courts should avoid judicial interference in elections: "Finally, it should be noted that this Court champions a strong public policy against judicial interference in the democratic process of elections." Brinkmann, 184 So. 3d at 510. In the instant case, this Court holds that to permit a party to inquire into the subjective motives of an otherwise qualified write-in candidate for public office would amount to judicial interference in the democratic process of elections, and would create a slippery slope leading to a proliferation of lawsuits resulting in unnecessary and unwarranted judicial interference in similar cases.

If this case were a case of first impression, this Court may have arrived at a different conclusion than those rendered by the Fourth District Court of Appeal of Florida and the Florida Supreme Court. Here, the Plaintiffs have a very compelling argument that a write-in candidate who has no intention of winning the office of State Attorney, and whose name will not appear on the ballot, is not "opposition" within the meaning of the UPA. Furthermore, it is inconceivable that the framers of the UPA intended to exclude a substantial majority of the registered voters from the process of the selection of a State Attorney, if it can be proven that an otherwise qualified write-in candidate was a sham and a political ploy to enhance the candidacy of another. However, even if the Plaintiffs' assertions are taken as true and Mr. Leigh filed as a write-in

candidate to close the primary election for State Attorney to only Republicans, Florida law as it currently exists does not offer the Plaintiffs the relief they seek. The opinions of the Supreme Court and the Fourth District Court of Appeal are binding authority on this Court, and this Court is compelled to apply the rationale and holdings of these courts.

For the foregoing reasons, it is inappropriate for this Court to order the Republican Party primary election for State Attorney be opened to all electors, since the winner of the Republican primary will face opposition in the general election, through write-in candidate Mr. Leigh.

Count Two - 42 U.S.C. § 1983

The Plaintiffs seek the same relief in Count II as in Count I, that is, to order the August 30, 2016, primary to be an open primary in which all registered voters can vote. The Plaintiffs have attempted to allege a cause of action pursuant to 42 U.S.C. § 1983 and suggest Defendant Kenneth Leigh and Defendant Alexander Pantinakis have denied them substantive due process by denying them the right to vote.

This Court has concurrent jurisdiction with the federal courts to consider the Plaintiffs' allegations that the Defendants' actions have violated their civil rights. See Redevelopment Agency of City of San Bernardino v. Alvarez, 288 F. Supp. 2d 1112, 1115 (C.D. Cal. 2003) (citing Felder v. Casey, 487 U.S. 131, 139 (1988) (stating, "[a]lthough a § 1983 claim is a federal claim, state courts have concurrent jurisdiction with the federal court to adjudicate claims arising under that statute")); see also Lloyd v. Page, 474 So. 2d 865, 867-68 (Fla. 1st DCA 1985) (citing Dowd Box v. Courtney, 368 U.S. 502, 508 (1962)).

As such, section 1983 of chapter 42 of the United States Code reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2016).

Here, the Plaintiffs, in order to plead a legally sufficient cause of action, must establish they have a fundamental right to vote in the Republican primary. The Plaintiffs are not Republicans. Therefore, this Court finds the Plaintiffs have not established a fundamental right to vote in an *opposing party's* primary election, that is, the Republican primary. Likewise, the registered Republicans in Duval County have no right to vote in the Democratic primary scheduled for August 30, 2016, in which several races are contested among the Democrats.

The only argument presented by the Plaintiffs alleging they have a right to vote in the Republican primary is that the Republican primary should be open to all voters pursuant to the UPA. The Plaintiffs have failed to submit any case law or authority that a closed primary, as established by state law, is a denial of a due process right to vote. For the reasons expressed in the discussion of Count I, the Republican Party primary is limited to Republican voters because of the opposition provided by the write-in candidate.

Furthermore, this Court finds that the Plaintiffs have not alleged sufficient facts which could establish that Mr. Leigh and Mr. Pantinakis were acting under color of state law, or that State action occurred in this matter that violated a fundamental right of the Plaintiffs.

Finally, the allegations as presented are insufficient to establish that the Supervisor of Elections in each county has improperly denied the Plaintiffs the right to vote under color of state law. To the contrary, the Supervisors are merely applying the terms of the Florida Constitution

which have been upheld by a federal district judge in South Florida, the Florida Supreme Court, and the Fourth District Court of Appeal. See §§ 97.012, 99.061, 99.121, Fla. Stat. (2016); Lacasa, 883 F. Supp.2d at 1243-44; Brinkmann, 184 So. 3d at 514-15; Telli, 98 So. 3d at 1286.

IV. Attorneys' Fees

The Plaintiffs have abandoned their claim for attorneys' fees as to Count I, acknowledging there is no statutory or contractual basis for such fees. However, the Defendants, Mr. Leigh and Mr. Pantinakis, have alleged in their respective Motions to Dismiss that the instant lawsuit is frivolous in light of Brinkmann and that attorneys' fees are appropriate pursuant to section 57.105, Florida Statutes.

Although this Court is dismissing the Complaint as a result of the holdings and rationale of Brinkmann and Telli, this Court does not find that the Complaint was frivolous. To the contrary, this Court finds that the Plaintiffs filed the Complaint in good faith for the following reasons:

1. Although the Brinkmann decision was unanimous, two of the Justices concurred in the result only and did not necessarily agree with the rationale.
2. The Plaintiffs' alleged facts which were not present in the Brinkmann and Telli cases, to wit: the "opposition" of the write-in candidate was a sham and a political ploy.
3. The Plaintiffs, in good faith, made an argument that Mr. Leigh was not opposition if he had no hope of prevailing in the election. The Plaintiffs apparently relied upon the following language of the Brinkmann opinion: " . . . it appears that the usual and ordinary meaning of 'opposition' as intended by the people who adopted the UPA contemplated an individual qualified to compete against a political party's winner *in hopes of prevailing in a contest for public office.*" Brinkmann, 184 So. 3d at 511 (emphasis added).

4. The Plaintiffs in good faith sought to distinguish the Brinkmann and Telli cases, and sought to modify or expand the appellate courts' holdings to exclude an alleged "sham" candidate from the definition of "opposition."

Upon due consideration, it is

ORDERED:

1. The Motion to Dismiss filed by Defendant Leigh on May 24, 2016, is **GRANTED.**
2. The Motion to Dismiss filed by Defendant Pantinakis on May 26, 2016, is **GRANTED**.
3. The Plaintiffs' Complaint, filed on May 20, 2016, is **DISMISSED WITH PREJUDICE.**
4. The respective requests for attorneys' fees are denied, and each party shall be responsible for fees incurred by that party.
5. Issues regarding failure to join the Secretary of State as an indispensable party, the Plaintiffs' request for injunctive relief, discovery issues, and the parties' request for an accelerated calendar are rendered **MOOT** by the foregoing dismissal.
6. The style of this case is amended to reflect the correct spelling of the surname of Alexander Pantinakis.

DONE AND ORDERED in Jacksonville, Duval County, Florida this 17 day of June, 2016.

/S/ RICHARD R. TOWNSEND
RICHARD TOWNSEND
Senior Circuit Court Judge

Copies to:

Samuel S. Jacobson, Esq.
Stephanie A. Sussman, Esq.
Attorneys for Plaintiffs

Lindsey Brock, Esq.
Attorney for Alexander Pantinakis

Jon. R. Phillips, Esq.
Attorney for Mike Hogan

Ronald A. Labasky, Esq.
Attorney for Vicki P. Cannon
and Chris H. Chambliss

William J. Sheppard, Esq.
Attorney for Plaintiffs

Daniel Kenneth Leigh, Esq.
Stefani K. Nolan, Esq.
Attorneys for Daniel Kenneth Leigh

Case No.: 16-2016-CA-003471-XXXX