

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

SOUTH CAROLINA PROGRESSIVE
NETWORK EDUCATION FUND,

Plaintiff,

v.

MARCI ANDINO, in her official capacity as
Executive Director of the South Carolina
State Election Commission; JOHN WELLS,
in his official capacity as Chair of the South
Carolina State Election Commission; and
JOANNE DAY, CLIFFORD J. EDLER,
LINDA MCCALL and SCOTT MOSLEY, in
their official capacities as members of the
South Carolina State Election Commission,

Defendants.

Case No.

DECLARATION OF JACK E. COHOON

JACK E. COHOON, under penalty of perjury, pursuant to 28 U.S.C. § 1746, declares that the following is true and correct:

1. I am an attorney in good standing, admitted to practice before this Court, and am Special Counsel in the firm of Burnette Shutt McDaniel in Columbia, South Carolina. I represent Plaintiff in this matter and submit this Declaration in support of Plaintiff's motion for a temporary restraining order and preliminary injunction.

2. On October 1, 2020, counsel for Plaintiff contacted by email the following counsel who have been retained by Defendants in prior actions before this Court to give notice that Plaintiff intended to file this lawsuit: Jane W. Trinkley, Mary Elizabeth Crump, and William Grayson Lambert, of the law firm of Burr and Forman LLP; Harrison David Brant of

the Office of the State Treasurer; J. Robert Bolchoz; and Karl S. Bowers, Jr., of the Bowers Law Office.

3. On October 2, Harrison Brant, the General Counsel for the SC State Election Commission, responded to Plaintiff's counsel's October 1 email and asked us to direct any further correspondence to him directly.

4. Attached as Exhibit A to this Declaration is a true and correct copy of the a consent order dated October 2, 2018, entered into between the State of South Carolina through its Attorney General and Marci Andino, in her official capacity as Executive Director of the South Carolina State Election Commission, before the South Carolina Court of Common Pleas, in Civil Action No. 2018-CP-40-05088.

Dated this 2nd day of October 2020.

By: s/Jack E. Cohoon
Jack E. Cohoon (Fed. ID No. 9995)

BURNETTE SHUTT MCDANIEL
912 Lady Street, 2nd Floor
P.O. Box 1929
Columbia, South Carolina 29202
P: (803) 850-0912
F: (803) 904-7910
jcohoon@burnetteshutt.law

Exhibit A

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	
)	
State of South Carolina, ex rel Alan Wilson,)	
Attorney General,)	
)	C/A No. 2018-CP-40-05088
Plaintiff,)	
)	
v.)	CONSENT ORDER
)	
Marci Andino, in her official capacity as)	
Executive Director of the South Carolina)	
State Election Commission,)	
)	
Defendant.)	
_____)	

This matter has come before this Court pursuant to Rule 65, SCRPC, by the State ex rel Alan Wilson, Attorney General for a Motion for Temporary Injunction directing the Defendant Executive Director to set a voter registration deadline of October 17, 2018 (inclusive of that date), for all forms of registration¹ and to take all such measures are needed to ensure that the deadline is properly implemented. The Executive Director has consented to that Motion. According to the Attorney General’s Motion for the State, the new deadline is essential to protect the right to vote because of the disaster that Hurricane Florence has caused in this state with continuing harm. After careful review of the Motion and the Complaint herein, with attached supporting documents, the Court has determined that a Temporary Injunction must be issued.

BACKGROUND

For the 2018 General Election, the in-person registration cut-off date is October 6,

¹ The Complaint specifically mentioned the examples of in-person and registration by mail, but the intent is to seek extend the deadline of October 17 for all forms of registration including, but not limited to electronic (S.C. Code Ann. § 7-5-185).

and the by mail and on-line cut-off date is October 7, 2018 but mail and in person deadlines may be affected by the fact that those days fall on a weekend *See eg*, S.C. Code Ann. § 7-5-150 (“The registration books shall be closed thirty days before each election . . .”).

Hurricane Florence has had a profound impact on this state that has continuing effects today. As a result of this natural disaster, lives have been lost, families displaced and massive amounts of property destroyed. In addition to State and local authorities working tirelessly, the National Guard has been activated in various parts of the State. Anticipating the storm and addressing its aftermath, the following State Executive, Judicial and County Orders and Presidential Declarations (copies attached to Complaint) demonstrate this impact:

A. Executive Order 2018-30 temporarily closed State Schools and Offices in 26 Counties beginning September 11, 2018, due to shelter and evacuation efforts. Executive Order 2018-35 rescinding that closure order effective September 15 except for Horry and Georgetown counties. Executive Order 2018-36 lifted Horry and Georgetown restrictions and “allow[ed] county authorities to make decisions about access and applicable school districts to make decisions about school openings.” Georgetown County Offices were closed September 25 until further notice. Georgetown County News Release, September 24, 2018, <http://www.georgetowncountysc.org/>.

B. Executive Order 2018-42 declared that a State of Emergency exists in South Carolina effective September 24, 2018. The Order notes that river levels are already at flood state and expected to exceed flood state by 3.49 to 16.6 feet,

with flood states continuing through October 1, 2018; [that] residents have evacuated from these areas, and evacuations are still occurring, for some residents and healthcare facilities; and [that] the State continues to support counties or local governments in response and recovery operations, fulfilling more than 1238 requests for additional resources or assistance to address infrastructure, public safety, and public health concerns.”

The Order notes that “the President of the United States of America issued a Major Disaster Declaration for the State of South Carolina, amending it on September 21, 2018, to include Individual Assistance and Public Assistance for various counties, with additional counties to be added.” The Order also suspends licensing and registration requirements regarding private security personnel or companies who are contracted with South Carolina security companies in protecting property and restoring essential services in South Carolina and directed that SLED initiation an emergency registration process.

C. More than 250 roads in Horry County were closed as of September 26, 2018, due to flooding including popular highways. Alex Lang, “Here are the roads closed in Horry County nearly two weeks after Hurricane Florence,” Myrtle Beach Sun News, (excerpt attached to Complaint), <https://www.myrtlebeachonline.com/news/local/article219044315.html>.

D. The Supreme Court’s Order of September 17, 2018, declares September 11-21 to be statewide holidays for purposes of computing time under Court rules. The Memorandum of Supreme Court Chief Justice Beatty of September 16 directs that “Judges should be flexible in granting continuances to attorneys and parties

who have experienced personal issues, including evacuation, caused by the weather conditions that prevent their appearance in court.”

The State Election Commission has received correspondence from several groups and a county board on behalf of voters expressing concern about the impact of Hurricane Florence and ongoing flooding problems on the abilities of many eligible South Carolina residents to register to vote by these deadlines.

**THE MOTION SATISFIES THE GROUNDS FOR GRANTING
A TEMPORARY INJUNCTION**

“For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.” *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). The State’s Complaint, with attached supporting documents, satisfies these standards and is incorporated in this Motion by reference. As noted, the Defendant consents to the Motion.

Likelihood of Success

The State will likely succeed because extending the registration time is necessary to preserve the right to vote. The Complaint asserts two causes of action: one to extend registration to protect the right to vote and the other for equitable tolling to protect that right.

As stated in the Complaint: The right to vote is fundamental. To protect this right to the extent possible in the wake of a major hurricane causing unparalleled flooding, the Executive Director must be directed to set a voter registration of October 17, 2018 (inclusive of that date), for all forms of registration, consistent with her general

authority to ensure that voter registration complies with “applicable state or federal law.” §7-3-20. *See Ops. Atty. Gen.*, March 8, 2016 - 2016 WL 963705, at *3 (right to vote is a fundamental right and interpretation by a court of the Voter ID Act will certainly be well cognizant of the fundamental nature of the right to vote); *South Carolina v. United States*, 898 F. Supp. 2d 30, 35–36 (D.D.C. 2012) (“The Attorney General of South Carolina and Ms. Andino have emphasized that a driving principle both at the polling place and in South Carolina state law more generally is erring in favor of the voter.”); *see also, Ops. Atty. Gen.* (October 3, 1989 -1989 WL 406196)(interpreting §41–35–110 of the Code and the authority of the Employment Security Commission to make a certain finding to the limited and exigent circumstances occasioned by the devastation of Hurricane Hugo).

As to the second cause of action, to preserve the constitutionally protected right to vote in light of the natural catastrophe caused by Hurricane Florence, the Court may suspend by equitable tolling the running of the current registration deadline to allow voter registration to proceed up to and including October 17, 2018, for all forms of registration. A Court such as this Court possesses the inherent powers to do justice in the wake of an act of God. *See Carlisle v. U.S.*, 517 U.S. 416, 436 (1996). The Legislature did not intend voters to be barred from exercising their constitutional right to vote because a natural disaster has struck the State.

As stated in *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009):

Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. *Rodriguez v. Superior Court*, 176 Cal.App.4th 1461, 98 Cal.Rptr.3d 728 (2009). “Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period ‘to ensure fundamental practicality and fairness.’” *Id.* at 736 (citation omitted).

See also, Carlisle v. United States, supra(In the rare situations Justice STEVENS envisions—delay of a meritorious motion due to an Act of God, *see post*, at 1480, or cases comparable to those in which we would read and grant an out-of-time rehearing petition, *see post*, at 1478—these modes of relief should provide an adequate corrective.”); *Windland v. Dretke*, No. 3-05-CV-2438-K, 2006 WL 1391435, at *2 (N.D. Tex. May 18, 2006), *rev'd sub nom. Windland v. Quarterman*, 578 F.3d 314 (5th Cir. 2009)² .

In addition to the above authority, decisions under similar circumstances from courts in Florida and Georgia show that the State is likely to succeed on the merits. *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. October 10, 2016) granted a temporary restraining order extending the voter registration deadline for one day due to the effects of Hurricane Matthew followed by another order granting a preliminary injunction extending the deadline by a total of seven days. (*Fla. Democratic Party v. Scott*, No. 4:16CV626-MW/CAS, 2016 WL 6080225, at *1 (N.D. Fla. Oct. 12, 2016)). As stated in the October 10 Order: “Of course, the State of Florida has the ability to set its own deadlines and has an interest in maintaining those deadlines. But it would be nonsensical to prioritize those deadlines over the right to vote, especially given the circumstances here. Other states ravished by Hurricane Matthew extended their

² As stated in *Windland*:

Petitioner further argues that the AEDPA statute of limitations should be tolled from September 22, 2005 to October 3, 2005 due to a power outage at the prison caused by Hurricane Rita. The court agrees that equitable tolling may be warranted where a hurricane or other natural disaster prevents the timely filing of a federal habeas petition. *See Carlisle v. United States*, 517 U.S. 416, 436, 116 S.Ct. 1460, 1471, 134 L.Ed.2d 613 (1996) (suggesting that equitable tolling doctrine may apply to excuse untimely filing of meritorious motion due to an “Act of God”)

registration deadline to protect voters.” *See also, Georgia Coal. for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1344–46 (S.D. Ga. 2016)(granting preliminary injunction extending registration deadline for seven days for Chatham County where registration offices had been closed).

As set forth above, this Court’s directing an extension is consistent with the general authority of the Executive Director to ensure that voter registration complies with “applicable state or federal law” (§7-3-20) and with the authority of this Court to suspend by equitable tolling the running of the current registration deadline. The deadline must be extended statewide to preserve uniformity of voting requirements and because all parts of the State have been affected to some degree by Hurricane Florence. The Constitution recognizes that standards for voting must be uniform statewide. *Ops. Atty. Gen.* (March 12, 2014 – 2014 WL 1398593). Therefore, the State is likely to succeed on the merits.

Irreparable Harm

The irreparable harm would come if the registration is not extended and citizens are unable to vote because their lives are still disrupted by the effects of the Hurricane. Those effects are profound, catastrophic in some parts of the State and well documented in the Executive and Judicial Orders and other documents referenced above.

No Adequate Remedy

No adequate remedy exists. The registration deadlines are about to expire. No express mechanism exists for extension of the deadlines.

CONCLUSION

The granting of a temporary injunction is consistent with the preservation of the right to vote, the Executive Director’s general authority to ensure that voter registration

complies with “applicable state or federal law” (§7-3-20) and the authority of this Court to suspend by equitable tolling the running of the current registration deadline.

For the foregoing reasons, IT IS ORDERED THAT the Director set a registration deadline of October 17, 2018, inclusive of that date, for all forms of registration and to undertake all measures within her authority to ensure that the new deadline is implemented.

AND IT IS SO ORDERED.

[electronic signature page to follow]

I CONSENT:

s/ J. Emory Smith, Jr.

S.C. Bar No. 5262
Deputy Solicitor General

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680
(803)734-3677 (Fax)
esmith@scag.gov

October 1, 2018

Attorneys for the State ex rel Wilson

I CONSENT:

s/ Harrison David Brant

S.C. Bar No. 80131
General Counsel
S.C. State Election Commission
P.O. Box 5987
Columbia, SC 29250-5987

October 1, 2018

Counsel for Marci Andino, etc



Richland Common Pleas

Case Caption: State Of South Carolina , plaintiff, et al vs Marci Andino , defendant,
et al
Case Number: 2018CP4005088
Type: Order/Temporary Injunction

So Ordered

s/ R.E. Hood #2164