

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. ----- 2020 CA 000908

**REVEREND CYNTHIA COTTO GRIMES, ART YOUNG,**  
and **DENNIS McFATTEN,**

Plaintiffs,

vs.

**FLORIDA DEPARTMENT OF STATE,**  
**FLORIDA DIVISION OF ELECTIONS,**  
**LAUREL M. LEE**, Secretary of State  
of Florida, and **MARK EARLY, SUPERVISOR OF**  
**ELECTIONS**, Leon County, Florida,

Defendants.

**VERIFIED SECOND AMENDED COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

Plaintiffs Reverend Cynthia Cotto Grimes, Art Young, and Captain Dennis McFatten sue Defendants Florida Department of State, Florida Division of Elections, Laurel M. Lee in her capacity as Secretary of State of Florida, and Mark Early in his capacity as Leon County Supervisor of Elections and state:

**Preliminary Statement**

1. The right to vote is the cornerstone of our democracy and the government's obligation to ensure its exercise is of fundamental importance. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

The right to vote is a “precious” and “fundamental” right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). Voting is, indisputably, a right “ ‘of the most fundamental significance under our constitutional structure.’ ” *Burdick v. Takushi*, 504 U.S. 426, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)). State and local laws that unconstitutionally burden that right are impermissible. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008).

*Fla. Democratic Party v. Scott*, 215 F.Supp.3d 1250, 1256 (N.D. Fla. 2016).

2. Indeed, the right to vote is not only expressly provided by the federal and state constitutions, it is implicit within the penumbra of liberties protected by these constitutions. Without the right to vote, there would be no assurance of, and mechanism for, self-governance. Moreover, when the government undertakes to administer how the right to vote is exercised, it must do so in a manner that is consistent with other individual constitutional rights.<sup>1</sup>

3. This case asks whether the State of Florida, in response to the on-going coronavirus pandemic, has done everything it could do to ensure that electors who do not wish to vote in person have a more accessible way to cast their ballots.

### **PARTIES, JURISDICTION AND VENUE**

4. Plaintiff Art Young is a 68-year old resident living in Miami-Dade County, Florida.

5. Plaintiff Reverend Cynthia Cotto Grimes is a 56-year old resident in Marion County, Florida.

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<sup>1</sup> For example, the government cannot design or administer a program for exercising one’s right to vote that effectively violates the individual’s right to equal protection under the law. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1988) (conditioning

6. Plaintiff Captain Dennis McFatten is a 52-year old retired officer with the Marion County Sheriff's Office.

7. Defendant Florida Department of State is charged with the oversight of elections throughout the state.

8. Defendant Division of Elections is an agency of the State of Florida that is located in Leon County, Florida. The Division is responsible for ensuring that Florida has fair and accurate elections. In addition to working directly with county Supervisors of Elections, the Division "ensures compliance with election laws, provides statewide coordination of election administration and promotes public participation in the electoral process."

9. Defendant Laurel M. Lee is the Secretary of State of Florida and does business in Leon County, Florida. In her official capacity, Secretary Lee is Florida's Chief of Elections, Chief Cultural Officer and head of the Department of State.

10. Defendant Mark Early serves in his official capacity as Supervisor of Elections, Leon County, Florida.

11. Venue is proper in this Court based on the sword and shield doctrine. *See Dept. of Highway Safety v. Sarnoff*, 734 So. 2d 1054 (Fla. 1<sup>st</sup> DCA 1998), *approved*, 825 So. 2d 351 (Fla. 2002).

### **GENERAL ALLEGATIONS**

12. Florida state election law provides electors with the option to vote by mail, rather

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access to voting on wealth violates voters' Equal Protection rights and heightened scrutiny appropriate when reviewing such state laws); *Jones v. Governor of Florida*, 950 F.3d 795 (11<sup>th</sup> Cir. 2020) (conditioning the right to vote on the payment of fees and restitution violates the indigent's rights to Equal Protection); Amend. XIV, U.S. Const.; Art. I, § 2, Fla. Const.

than in person. The process is as follows:

- a. an elector may request a mail-by-vote ballot, as long as the request is made in person or in writing, Fla. Stat. 101.62 (1)(a);
- b. such a request must be received no later than 5 p.m. on the 10<sup>th</sup> day before the election, Fla. Stat. 101.62 (2)
- c. the county supervisor of elections shall mail the vote-by-mail ballots to voters between the 33<sup>rd</sup> and 40<sup>th</sup> days before the election,-- but in no event shall this be later than 8 days before the election, Fla. Stat. 101.62 (2), (4)(b).
- d. the county canvassing board may begin canvassing vote-by-mail ballots on 22<sup>nd</sup> day before the election (not later than 3 days after the election); Fla. Stat. §101.68 (2)(a).

13. Plaintiffs are Florida registered electors and wish to vote in the November 3, 2020 General Election. One plaintiff is a senior citizen in Miami whose compromised immune system due to psoriatic arthritis prevents him from leaving his home. Another plaintiff is a religious leader in Ocala who works with elderly parishioners. And a third plaintiff is a retired Captain in the Marion County Sheriff's Office who regularly works with the elderly but now, because the elderly cannot leave their homes and cannot see visitors, he is unable to help them with their desired voting by mail.

14. Statistics show that cases of COVID-19 have increased in Florida at an alarming rate. Cases affecting black Florida residents have increased by nearly 20% and deaths rose over 30%. Cases for white residents rose 15% and deaths rose over 20%. Hispanics of all races saw a 17% increase in cases and more than a 7% rise in deaths. The highest rate of COVID-19 deaths is among the elderly, especially those who have pre-existing chronic health conditions. The degree to which each of these groups' ability to exercise their right to vote may depend on the

availability of alternative voting methods.

15. There is no question that Florida law allows electors to request mail-in-ballots and then, by separate mailing, submit them for canvassing. The issue in this action is whether the statutes authorize county supervisors of elections to automatically send mail-in-ballots to electors even without a request and, if so, whether -- as a matter of constitutional law -- they should be required to do so.

16. The spread of the novel coronavirus (COVID-19) throughout Florida has placed electors wishing to exercise their constitutional right to vote in a precarious position. Experience within this state and around the country has shown that failing to honor the Governor's stay-at-home order can have potentially disastrous consequences. Electors can either go to the polls and vote in person (thereby potentially exposing themselves to the virus) or go through the process of requesting mail-in ballots and then, by separate e-mail, submit the ballots to be canvassed (which may require them to go to the post office for stamps and to mail the requests and the ballots).

17. States around the country have begun to modify their vote-by-mail procedures to make them more voter-friendly.

### **What Other States Are Doing**

18. In California, for example, Governor Gavin Newsom signed Executive Order N-64-20 into law. That order directed each county elections officer to transmit vote-by-mail ballots for the November 3, 2020 General Election to all voters registered in the State of California whether or not the electors had first requested the ballot be sent to them.

19. In Oregon, mail-in ballots are sent to every voter in the state three weeks before each election, along with a pamphlet of information about the candidates and the issues. Voters mark

and sign their ballots and drop them in a mailbox. Election officials (who are trained in forensics) contact voters if their signatures don't match voter identification rolls and tally and report ballot results. To alleviate the need for voters to have to go out to buy stamps in order to mail their ballots, the state pays for return postage.

20. Similar procedures are used in Colorado, Hawaii, Utah, and Washington. South Dakota and Nebraska are considering re-vamping their vote-by-mail procedures. More than a dozen states have either postponed their primaries or moved to a vote-by-mail system in direct response to the coronavirus pandemic. The trend is quickly spreading as states look for ways to make the voting process safer.

21. Here, in Florida, voters must still complete a two-step process to cast their vote-by-mail ballots and while counties look for ways to make it easier (by, for instance, allowing voters to click on computer links to register for mail-in voting), those without computers or postage stamps to mail their ballots are still disadvantaged.

22. Of late, media around the country has shown a great interest in re-vamping statewide vote-by-mail procedures.<sup>2</sup> Just this past Sunday (May 10, 2020), the *New York Times Magazine*

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<sup>2</sup> See, e.g., <https://www.cnbc.com/amp/2020/04/06/coronavirus-election-lawmakers-push-for-vote-by-mail.html> (last visited May 12, 2020); <https://www.nytimes.com/2020/04/15/learning/should-we-all-be-able-to-vote-by-mail.html> (last visited May 12, 2020); <https://www.nytimes.com/2020/05/05/magazine/voting-by-mail-2020-covid.html> (last visited May 12, 2020); <https://thehill.com/homenews/campaign/496657-gop-group-releases-ad-advocating-for-vote-by-mail-amid-coronavirus-pandemic?amp> (last visited May 12, 2020); <https://www.cnn.com/2020/04/26/opinions/vote-rights-pandemic-covid-19-austin-hillery/index.html> (last visited May 12, 2020).

cover story was devoted to the impact of the virus on, among other things, mail-in voting. In Florida, interest in automatic vote-by-mail is growing.<sup>3</sup>

### **Duty to Ensure The Integrity of the Voting Process**

23. The right to vote is constitutional and the government must ensure that all electors have a meaningful opportunity to participate in the voting process. This includes easy and safe access to the voting process. It is especially important in these days of coronavirus and social distancing. And it is especially important because the high incidence of sickness and death in, for example, racial and age communities implicitly disenfranchises many voters' ability to participate in the election process. This applies equally to those people not especially susceptible to the virus but who choose not to be exposed to it.

24. Indeed, the recent experience in Wisconsin highlights the significance of taking added steps to ensure that every voter can submit his or her ballot in a safe and secure manner. There, voters who could not get their mail-in ballots submitted in time were forced to stand in lines at polling places to cast their in-person ballots. Reports state that 52 people who worked at polling stations in Wisconsin have now tested positive for COVID-19.

25. Florida is one of the most affected states in the country. The incidence of those contracting the coronavirus in this state has now reached close to 42,000 confirmed cases, resulting in more than 1,800 deaths. (This number rises daily and does not take into consideration how a second wave of the virus will affect the state). Many electors in Florida are

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<sup>3</sup> See <https://www.baynews9.com/fl/tampa/politics/2020/05/06/another-lawsuit-challenges-florida-s-vote-by-mail-laws> (last visited May 12, 2020); <https://www.jacksonville.com/news/20200409/coronavirus-florida-is-uptick-in-deaths-of-black-people-start-of-trend> (last visited May 12, 2020).

elderly and whether they have underlying illnesses or not, their ability to participate in a two-step vote-by-mail process is questionable. The same is true for non-elderly electors. This is the time for the State of Florida to simplify the vote-by-mail process to make it easier and safer.

### **A Simple and Safe Solution**

26. This may be accomplished in several ways. Two suggestions are: 1) county Supervisors of Elections should mail to all electors in that county a vote-by-mail ballot, whether requested or not, in sufficient time before each election, along with a postage-paid return envelope so that voters can simply place their ballots in the mailbox early enough to be counted; and 2) county Supervisors of Elections should be authorized to begin tabulating mail-in votes earlier than the now allotted 22-days-before election time period to ensure adequate time for processing the expected increase in the number of such votes.<sup>4</sup> These are exceptional circumstances and to ensure that the state's voting process proceeds in a fair, efficient, and safe way, modifications to the vote-by-mail process are necessary.

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<sup>4</sup> There is every reason to expect that the spread of COVID-19 in Florida could reduce the number of in-person polling sites available which would then place a strain on the staff assigned to the open sites. See <https://fox6now.com/2020/04/07/pitch-in-where-we-can-reduced-number-of-polling-sites-1st-time-workers-keep-elections-moving-despite-covid-19/> (last visited May 12, 2020); <https://www.nytimes.com/2020/04/02/us/politics/wisconsin-election-coronavirus.html> (last visited May 12, 2020); [https://journalstar.com/news/local/govt-and-politics/elections/coronavirus-will-force-changes-at-polling-places-this-year/article\\_a1c168c2-6b1f-5aba-87bf-cb018062a73d.amp.html](https://journalstar.com/news/local/govt-and-politics/elections/coronavirus-will-force-changes-at-polling-places-this-year/article_a1c168c2-6b1f-5aba-87bf-cb018062a73d.amp.html) (last visited May 12, 2020).



**CLAIMS FOR RELIEF**

**COUNT 1  
DECLARATORY RELIEF  
(Against All Defendants)**

27. Plaintiffs incorporate all allegations in paragraphs 1-17 as if fully set forth herein.

28. Section 101.62 (1)(a), Florida Statutes, provides that an elector may request a vote-by-mail ballot, as long as the request is made in person or in writing.<sup>5</sup>

29. Section 101.62 (1)(a), Florida Statutes, has been read to provide that mail-in ballots will only be sent out upon the request of an elector. This is contrary to accepted principles of statutory interpretation.

30. Based on the foregoing, an actual, justiciable controversy exists between the parties.

31. Accordingly, Plaintiffs request a judicial determination that Section 101.62 (1)(a), Florida Statutes, allows the Defendants to automatically send mail-in ballots to all electors in Florida, whether requested to do so or not.

WHEREFORE, Plaintiffs Reverend Cynthia Grimes, Art Young, and Captain Dennis McFatten demand judgment against Defendants herein declaring that Section 101.62 (1)(a), Florida Statutes, does not limit the provision of mail-in ballots to only those electors who request such ballots.

**COUNT II  
INJUNCTIVE RELIEF  
(Against All Defendants)**

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<sup>5</sup> Florida Statute 101.64 (1) provides “The supervisor shall accept a request for a vote-by-mail ballot from an elector in person or in writing.” Applying the principle of *expressio unius est exclusio alterius*, this language does not preclude the supervisor from automatically mailing out ballots.

32. Plaintiffs incorporate the allegations in paragraphs 1 through 17 as if fully set forth herein.

33. In view of the growing recognition around the country that vote-by-mail processes must be streamlined and made more accessible to the public -- and especially the number of individual states that have changed their voting laws to send mail-in ballots to electors even without a request -- there is a substantial likelihood of success on the merits.

34. There is currently no other remedy at law available to ensure the relief sought herein. Given the allocation of resources necessary if the requested relief is granted and the time necessary to comply with it, this is a matter that must be resolved quickly. No other avenue can afford the expeditious review that courts can give.

35. By ensuring the reliability of Florida's vote-by-mail procedures, and ultimately the election, injunctive relief unquestionably serves the public interest.

To the extent that candidates can be voted into office without mail-in ballots being considered, there is a strong likelihood of irreparable harm. Injunction is the proper remedy to provide immediate review and, if ultimately granted, to avoid a skewed election. Finally, the injunction is undoubtedly in the public interest. The Constitution guarantees the right of voters "to cast their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031, 85 L.Ed.2d 1368 (1941). Cementing unconstitutional obstacles to "that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

*Fla. Democratic Party v. Scott*, 215 F.Supp. 3d 1250, 1258 (N.D. Fla. 2016).

WHEREFORE, the Plaintiffs request that this Court order the State of Florida and the Leon County Supervisor of Elections to automatically send mail-in ballot to all electors in the county, whether requested or not, to include with the ballot a stamped self-addressed return envelope for

the submission of mail-in ballots, and to roll back the time for processing the mail-in-ballots to a date that would enable the county to tabulate the ballots for the reporting of election results.

Respectfully submitted,

/s/ *Harvey J. Sepler*

Harvey J. Sepler

Rimon, P.C.

3389 Sheridan Street #450

Hollywood, Florida 33021

T/F: (305) 501-2898

Fla. Bar No. 473431

[harvey.sepler@rimonlaw.com](mailto:harvey.sepler@rimonlaw.com)

**CERTIFICATE OF SERVICE**

I CERTIFY that a true and correct copy of the foregoing has been filed on this 28th day of May, 2020 with the Clerk of Court, and sent via U.S. mail to The Florida Department of State and the Florida Division of Elections, c/o Office of the General Counsel, 400 S. Monroe Street, Suite 209, Tallahassee, Florida 32399, Laurel M. Lee, in her capacity as the Secretary of State, R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32301, and Mark Early, Supervisor of Elections of Leon County, Florida, 2990-1 Apalachee Parkway, Tallahassee, Florida 32301.

/s/ *Harvey J. Sepler*

Harvey J. Sepler

Fla. Bar No. 473431