

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

Reverend Cynthia Cotto GRIMES,
Art YOUNG, and Dennis MCFATTEN,
Plaintiffs,

v.

CASE NO.: 2020-CA-000908

FLORIDA DEPARTMENT OF STATE,
FLORIDA DIVISION OF ELECTIONS,
and Laurel M. LEE, Secretary of State of Florida,
Defendants.

DEPARTMENT DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE
PLAINTIFFS' VERIFIED SECOND AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW, Defendants, Florida Department of State, Florida Division of Elections, and Laurel M. Lee, Secretary of State of Florida (hereinafter "Department Defendants") and move to dismiss with prejudice Plaintiffs' Verified Second Amended complaint for Declaratory and Injunctive Relief ("Second Amended Complaint") deemed filed July 2, 2020. As discussed below, the Second Amended Complaint should be dismissed for failure to state a cause of action, failure to properly invoke the jurisdiction of the Court, and failure to join indispensable parties. While the failure to join indispensable parties may be curable, the failure to state a cause of action and jurisdictional issue, for various reasons, are not. Because amendment would be futile, dismissal with prejudice is proper.

Overview of Second Amended Complaint and Foundational Defects Therein

Plaintiffs' Second Amended Complaint defines the issue in this action as "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." *See* Second Amended Complaint at p. 5, ¶ 15.

In Count I, Plaintiffs seek a declaratory judgment 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.” *See id.* at p. 9 (Wherefore clause). Plaintiffs in Count II, entitled “Injunctive Relief”, seek to require the “State of Florida and the Leon County Supervisor of Elections” to “automatically send mail-in ballot [sic] 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.” *See* Second Amended Complaint at pp. 10-11. Although there are references to constitutional rights sprinkled throughout the Second Amended Complaint, Plaintiffs do not tether the requested injunctive relief in Count II to any specific cause of action – constitutional or otherwise.

As discussed in more detail as to each below, Plaintiffs’ Second Amended Complaint suffers from a number of foundational cause of action defects as well as a jurisdictional defect. First, Plaintiffs have no standing where they have not alleged any personal harm from the existing vote-by-mail statutory framework. As individual plaintiffs, they have no standing to assert the rights of others. Second, there is no current controversy between the parties, and as such, the request for a Declaratory Judgment in Count I amounts to nothing more than the request for an advisory opinion, an improper use of a declaratory judgment action that fails to properly invoke the jurisdiction of the court. Third, Plaintiffs have not stated what, if any, constitutional cause of action to which they purport to tether a temporary or permanent injunction. An injunction is merely a remedy and must accompany an underlying cause of action. Fourth, Plaintiffs have not alleged any relief that is proper against the Department Defendants

where such Defendants do not mail ballots to voters nor determine the statutory timeframes for canvassing of vote-by-mail ballots.

Additionally, to the extent Plaintiffs seek the mailing of postage-paid vote-by-mail ballots to all electors as well as the earlier canvassing of vote-by-mail ballots by county Supervisors of Elections and canvassing boards, this relief seeks to bind the county Supervisors of Elections, not the Department Defendants. The county Supervisors of Elections mail the ballots and initiate canvassing pursuant to their statutory duties. The Department Defendants do not. Plaintiffs have named only one county Supervisor of Elections but have failed to name the other 66 Supervisors of Elections who are indispensable parties to any relief granted in the lawsuit.

In any event, and as also explained in more detail below, as to Plaintiffs' request for earlier canvassing of vote-by-mail ballots, such request is moot as Governor Ron DeSantis's Executive Order Number 20-149, in conjunction with the modification to section 101.5612(2), Florida Statutes, in Chapter 2020-109, Laws of Florida, allows Supervisors of Elections to begin canvassing vote-by-mail ballots up to 40 days prior to an election, as opposed to the 22 days that existed previously. *See* Department Defendants' Request for Judicial Notice filed July 7, 2020.

Multiple Failures to State a Cause of Action and to Invoke the Jurisdiction of the Court

I. No Standing

Plaintiffs have not alleged standing because they not alleged any personal harm from the existing vote-by-mail statutory framework, and, as individual as opposed to associational plaintiffs, have no standing to assert the rights of others. *See McCarty v. Myers*, 125 So. 3d 333, 337 (Fla. 1st DCA 2013) (reversing trial court order based upon lack of standing and reciting general rule that a litigant must assert his or her own legal rights and cannot rest claims upon legal rights and interests of third parties). The sum total of Plaintiffs' personal factual allegations

are set forth in paragraphs 4, 5, 6, and 13 of the Second Amended Complaint. *See* Second Amended Complaint at pp. 2 through 4. More specifically, paragraphs 4, 5, and 6, set forth Plaintiffs' names, ages, and counties of residence. Paragraph 13 alleges that all Plaintiffs wish to vote in the November 3, 2020 General Election and further alleges a few additional factual details as follows:

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 see visitors, he is unable to help them with their desired voting by mail.

See Second Amended Complaint at p. 4, ¶ 13.

Plaintiffs proceed to summarize what some other states are doing during this unique time, the interest of news media in such electoral happenings of various states, and then offer "suggestions" for ways they believe Florida could simplify and make safer the vote-by-mail process. *See* Second Amended Complaint at page 8. However, Plaintiffs never allege that their personal right to vote, and especially their right to vote by mail, is burdened in any way. Plaintiffs fail to allege that any of them will be unable to successfully vote. They do not allege any problems requesting, voting, or timely returning a vote-by-mail ballot.

Although a determination of standing is often a factual question not proper at a motion to dismiss stage, standing may properly be assessed where the lack thereof is apparent from the face of the complaint. *See e.g., National Collegiate Student Loan Trust 2006-4 v. Meyer*, 265 So. 3d 715, 718 (Fla. 2d DCA 2019). Here, that is exactly the case. Taking all factual allegations as true for purposes of the instant Motion to Dismiss, no plaintiff alleges any personal harm or violation of rights from the existing statutory framework, nor an inability to vote safely within such framework for the upcoming elections.

Further, Plaintiffs are not organizational defendants who could potentially establish associational standing. Accordingly, Plaintiffs have no standing to assert the rights of others, as appears to be an intent of the Second Amended Complaint where it is asserted that one plaintiff works with elderly parishioners and another plaintiff is unable to help elderly individuals with their desired voting by mail. *See McCarty v. Myers*, 125 So. 3d at 337; *Florida Home Builders Ass'n v. Department of Labor and Employment Sec.*, 412 So. 2d 351, 353 (Fla. 1982) (discussing requisites for associational standing on behalf of members).

Because Plaintiffs have not asserted any personal harm from the existing statutory vote-by-mail framework, they have failed to state a cause of action by failing to allege standing.

II. Because Count I for Declaratory Judgment Seeks Only an Advisory Opinion, it fails to state a cause of action and invoke the jurisdiction of the Court

To invoke the jurisdiction of the Court, a declaratory judgment action must contain, at its core, an actual or justiciable controversy between the parties based on articulated facts which demonstrate a real threat of immediate injury. *See Aphorp v. Detzner*, 162 So. 3d 236, 240 (Fla. 1st DCA 2015).

Plaintiffs allege in Count I that:

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.

See Second Amended Complaint at p. 9, ¶'s 29 through 31.

Contrary to Plaintiffs’ assertion, there is in fact no actual, justiciable controversy between the parties. Plaintiffs have not alleged any violation of section 101.62(1)(a) by Defendants¹ nor of Plaintiffs’ rights under the statute, and only ask that the statute be interpreted in a particular way for the electors of Florida as a whole. *See El Faison Dorado, Inc. v. Hillsborough County*, 483 So. 2d 518, 519 (Fla. 2d DCA 1986) (citing with approval language from *Anderson on Declaratory Judgments*, Vo. 1, 2d Ed., page 77: “[I]f the construction or validity of a statute or an ordinance is drawn in question, the courts will not entertain an action based thereon, seeking a determination as to either the construction or the validity thereof, where there is no controversy as to the violation of such statute or ordinance. In these circumstances there is no justiciable controversy.”)

Here, without any allegation of a violation of the statute by the Department Defendants or of Plaintiffs’ individual rights thereunder, Plaintiffs’ request for a Declaratory Judgment in Count I amounts to nothing more than the request for an advisory opinion as to the interpretation of a statute – an invalid use of the declaratory judgment action. Where no justiciable controversy exists between the parties, a court errs in exercising its jurisdiction to render a declaratory judgment. *See Apthorp*, 162 So. 3d at 237.

III. Count II for Injunctive Relief is a Remedy Untethered to a Cause of Action

Plaintiffs have not articulated what, if any, constitutional cause of action to which they purport to tether a temporary or permanent injunction. An injunction is merely a remedy and must accompany an underlying cause of action. The 11th Circuit Court of Appeals in *Alabama v. Army Corps of Engineers* articulated this concept well:

There is no such thing as a suit for a traditional injunction in the abstract...An injunction is a remedy potentially available only after a plaintiff can make a

¹ Although not amounting to an allegation of violation in any event, it is unclear to whom Plaintiffs refer in alleging that the “statute *has been read* to provide...”. *See* Second Amended Complaint at p. 9, ¶ 29 (emphasis added).

showing that some independent legal right is being infringed—if the plaintiff’s rights have not been violated, he is not entitled to any relief, injunctive or otherwise.

Alabama v. U.S. Army Corps of Engineers, 424 F.3d 1117, 1127 (11th Cir. 2005) (internal citations omitted).

Here, the Second Amended Complaint references generally “a matter of constitutional law”, “the right to vote” and “equal protection of the law.” *See* Second Amended Complaint at p. 5, ¶ 15; p. 2, ¶ 2, fn. 1. Plaintiffs allege that “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*.” *See id.* at p. 2, ¶ 2. (emphasis added).

Thus, it is ultimately unclear what the underlying claim purports to be as Plaintiffs never articulate what, if any, specific constitutional right is believed to be burdened and under what specific legal theory. As such, Plaintiffs have failed to tether Count II seeking injunctive relief to the violation of definitive legal right in a specific cause of action.

IV. No Cause of Action Against Department Defendants

Plaintiffs have not asserted any fairly traceable injury nor sought any relief that is proper nor subject to redress against the Department Defendants because the Department Defendants do not mail ballots to voters nor determine the statutory timeframes for canvassing of vote-by-mail ballots. Plaintiffs phrase their identified issue and requested relief differently at different points:

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.

See Second Amended Complaint at p. 5, ¶ 15 (emphasis added).

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 [sic] 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.

See id. at p. 10.

Notwithstanding the “Wherefore” clause as to Count II that seeks for *the State of Florida* and *the Leon County Supervisor of Elections* to send mail-in ballots to *all electors in the county*, based upon Plaintiffs’ central issue statement cited above, Plaintiffs overall seem to recognize that it is in fact county Supervisors of Elections – all 67 of them – that mail vote-by-mail ballots to electors in their respective counties and who initiate the canvassing of ballots by the canvassing board upon their return. The Department Defendants do not mail nor canvass ballots, nor establish the dates for same. *See* §§ 101.62 (describing procedures for requesting a vote-by-mail ballot from a Supervisor of Elections); 101.64 and 101.65 (detailing requirements for Supervisors of Elections in mailing a vote-by-mail ballot to an elector); and 101.68 (canvassing of vote-by-mail ballot and Supervisors of Elections actions to be taken related thereto).

Thus, even assuming Plaintiffs were to be successful in their case, there is no injury fairly traceable to the Department Defendants and there is no relief that the Department Defendants could afford them. *See Jacobson v. Florida Secretary of State*, 957 F.3d 1193, 1207-08, 1212 (11th Cir. 2020). *Jacobson* held that any injury from Florida’s ballot order statute was not fairly traceable to the Florida Secretary of State where the nonparty county Supervisors of Elections, as opposed to the Secretary, had the responsibility for ballot placement in the manner prescribed by statute, and further, that the Supervisors were independent constitutional officers not subject to the Secretary’s control. *Id.* The same is true here where any actions complained of are independent duties of the Supervisors of Elections pursuant to Florida law. As such, amendment to attempt to state a claim against the Department Defendants would be futile.

As an aside, as briefly discussed in the claims and defects overview section, the relief sought as to extended canvassing times, still not proper against the Department Defendants in any event, has become moot because Governor Ron DeSantis's Executive Order Number 20-149, in conjunction with the modification to section 101.5612(2), Florida Statutes, in Chapter 2020-109, Laws of Florida, allows Supervisors of Elections to begin canvassing vote-by-mail ballots up to 40 days prior to an election, as opposed to the 22 days that existed previously. *See* Department Defendants' Request for Judicial Notice filed July 7, 2020. This is because for the upcoming Primary and General Elections, based upon the Executive Order, the start of canvassing can begin immediately upon conclusion of the logic and accuracy test under section 101.5612, Florida Statutes. Based upon the recent amendment to section 101.5612, by Chapter 2020-109, Laws of Florida, this logic and accuracy testing can now statutorily be conducted up to 25 days prior to early voting, as opposed to the 10 days previously in statute, resulting in an ability to begin canvassing vote-by-mail ballots up to 40 days prior to the elections. As such, Plaintiffs' request to roll back the time for processing vote-by-mail ballots is moot.

Failure to Join Indispensable Parties

Related to the point above that Plaintiffs have not stated a cause of action against the Department Defendants, Plaintiffs have failed to join as indispensable parties the other 66 county Supervisors of Elections who would be required to mail postage paid vote-by-mail ballots to all electors, and who would be affected by changed canvassing dates if Plaintiffs were to be successful in their claims. A court has no ability to enjoin or otherwise affect the rights of individuals not part of a lawsuit. *See Jacobson*, 957 F.3d at 1207-08, 1212. Thus, even assuming Plaintiffs could state a cause of action, which they cannot, they would need to join as parties to

the lawsuit all 66 of the remaining Supervisors of Elections in order to legally achieve the requested relief.

WHEREFORE, Defendants, Florida Department of State, Florida Division of Elections, and Laurel M. Lee, Secretary of State of Florida, respectfully request that the Court **DISMISS** with prejudice Plaintiffs' Verified Second Amended Complaint for Declaratory and Injunctive Relief.

July 7, 2020

Respectfully submitted,

/s/ Colleen E. O'Brien

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of July, 2020, a true copy of this motion was filed electronically with the Clerk of Court through the Florida Courts eFiling Portal, which shall serve a copy via e-mail to all counsel of record.

/s/ Colleen E. O'Brien

Attorney