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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 EARLEY, SUPERVISOR OF
ELECTIONS, Leon County, Florida,

Defendants.

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RESPONSE TO MOTIONS TO DISMISS

The Plaintiffs REVEREND CYNTHIA COTTO GRIMES, ART YOUNG, and DENNIS McFATTEN, through undersigned counsel, file this Response to the two pending defense Motions to Dismiss. Because the two motions share several key arguments, in addition to raising separate arguments, and in an effort to avoid repeating answers, the Plaintiffs are filing one Response but will indicate to which defense motion each argument is directed. If this Court would prefer, the Plaintiffs would be happy to respond to each dismissal motion separately.

The Motions to Dismiss raise four separate arguments. While the motions argue the issues somewhat differently, they contest the Plaintiffs' standing to challenge the named Defendants, the justiciability of their claims, and the availability of the remedy sought.

STANDING

The Verified Second Amended Complaint presents three Plaintiffs from different parts of the state and with different ages and health conditions -- all having both a direct and an indirect interest in voting by mail in Florida.

Both motions to dismiss argue that the Plaintiffs lack standing to challenge the named Defendants. The State of Florida, Division of Elections, and Secretary of State (hereinafter designated the "State") argue that the Plaintiffs fail to allege a personal injury but, instead, assert the interests of unnamed third parties, and that this deprives them of standing to bring this action. [1]

Respectfully, the Plaintiffs have asserted their own interests; they simply have couched them in a manner showing that while those interests are personal to them,[2] they are also shared by people throughout the state. The fact that the remedy they seek will benefit,

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> "Determining whether a party has standing is a pure question of law to be reviewed de novo." Sanchez v. Century Everglades, LLC, 946 So.2d 563, 564 (Fla. 3d "Determining whether a party has standing is a pure question of law to be reviewed de novo." Sanchez v. Century Everglades, LLC, 946 So.2d 563, 564 (Fla. 3d DCA 2006) (quoting Alachua Cnty v. Scharps, 855 So.2d 195, 198 (Fla. 1st DCA 2003)). Generally, standing "requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." Hayes v. Guardianship of Thompson, 952 So.2d 498, 505 (Fla.2006).

Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261, 282-83 (Fla. 2013).

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For instance, Plaintiff Young, who can't leave his house to vote, voices mail-in ballot claims that are personal to him.

in an incidental way, other voters with similar conditions does not detract from the Plaintiffs' personal stake in the outcome. *See* Padavano, Phillip J., Florida Civil Practice, Vol. 5 § 4.3 Standing, at 93 (2014 ed.) ("In every case there are some actions taken that will affect the rights of nonparties").[3]

The Defendant Earley expresses this concern but does so by arguing that the Plaintiffs fail to state a cause of action. Here, again, even though the Plaintiffs' stake in the outcome is shared by nonparties, it does not detract from their standing to challenge all defendants. Moreover, with respect to Defendant Earley, there is another consideration within the standing/cause of action issue.

Even though Supervisor Earley is separately elected by the voters in Leon County, he is in essence an agent of the state in this context. Voting policy and procedure are set by the State of Florida and county Supervisors of Election are required to comply with them. *See, e.g.,* Florida Statute 97.0115 (2019) (state pre-empts election laws throughout Florida); Florida Statute 97.012 (1) (2019) (Secretary of State "maintain[s] uniformity in the implementation of the election laws"). Defendant Earley's actions are determined by state policies and, in that regard, his mail-in voting actions are the same as the actions taken by all other Florida Supervisors of Election around the state. He is, with respect to this issue, the same as the Supervisors in Miami-Dade and Marion counties.

Finally, if the Plaintiffs had sued the Miami-Dade and Marion County Supervisors of Election, and filed the actions in those counties, in addition to suing the State in Leon

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[3] Indeed, since many congregants in her church are senior citizens (some of whom have underlying health conditions), Plaintiff Reverend Grimes enjoys associational standing. *See, e.g., Hillsborough County v. Florida Restaurant Ass'n, Inc.*, 603 So. 2d 587 (Fla. 2nd DCA 1992).

County,[4] there would be three different -- yet identical -- lawsuits pending in three different circuit courts in Florida.[5] Indeed, this Court has no jurisdiction over Miami-Dade and Marion county cases.

As a matter of judicial economy and consistency in the law, the matters were treated together, filed in Leon County, and named the Leon County Supervisor of Election as one of the defendants. As such, the Plaintiffs have standing to sue all of the named defendants in Leon County.

APPLICABILITY OF DECLARATORY JUDGMENT

Declaratory Judgment is designed to help clarify and declare an individual's rights under Florida law. "Any person claiming to be interested or who may be in doubt about his or her rights under … a statute, …. any regulation made under statutory authority [or] any question of construction or validity arising under such statute" may bring a declaratory action." Fla. Stat. 86.021 (2019). It applies to present or future acts:

> Any declaratory judgment rendered pursuant to this chapter may be rendered by way of anticipation with respect to any act not yet done or any event that has not yet happened, and in such case the judgment shall have the same binding effect with respect to that future act or event, and the rights and liability to arise therefrom, as if that act or event had already been done

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> "Absent waiver or exception, in civil actions brought against the state, its agencies or subdivisions, venue properly lies in the county of its principal headquarters."

Florida Public Serv. Comm'n v. Triple "A" Enterprises, Inc., 387 So. 2d 940, 942 (Fla. 1980); *Barr v. Florida Board of Regents*, 644 So. 2d 333, 335 (Fla. 1st DCA 1994).

[5] As explained in more detail above, the State of Florida has an independent cognizable interest in ensuring that the state's voting laws are properly followed.

> or had already happened before the judgment was rendered.

Fla. Stat. 86.051 (2019).

Its purpose is clear:

> This chapter is declared to be substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed.

Fla. Stat. 86.101 (2019).

Declaratory Judgment is the proper vehicle to bring the instant challenge. These Plaintiffs have personal interests at stake. They all want to vote and all will have difficulty registering to vote-by-mail. And they all believe that as a result of the expected flood of mail-in ballots for the General Election, elections offices will be inundated and their mailed ballots will not be counted.

The Plaintiffs are not requesting an advisory opinion. They have a genuine concern that county Supervisors of Election are improperly interpreting and implementing the statutorily approved mail-in process, and that this causes them to fear that either they won't be able to vote or their mailed-in votes may not be counted. Either way, this controversy satisfies the test for declaratory judgment.

OTHER ARGUMENTS

The Defendants raise several other arguments in favor of dismissal: injunctive relief untethered to an independent constitutional right, lack of jurisdiction under Chapter 86, Florida Statutes, lack of a cause of action against the State, failure to join indispensible parties, and mootness.

Injunctive Relief

The State argues that the Plaintiffs' request for injunctive relief is untethered to a constitutional right. To the contrary, the Plaintiffs have clearly asserted their constitutional right to vote (which includes the right to vote by mail) and that the right is chilled by misinterpretation and implementation of the state statutes. There is no question, then, that the Plaintiffs have asserted an independent constitutional interest that is jeopardized by the Defendants' actions.

Jurisdiction under Chapter 86

Defendant Earley argues that the absence of a justiciable controversy prohibits this Court from exercising jurisdiction under Chapter 86. As argued above, the Plaintiffs asserted personal as well as associational rights that are jeopardized by the Defendants' actions. There is a valid controversy presented here and for the reasons stated previously in this Response, Supervisor Earley is a proper defendant in the case.

Cause of Action against the State

The State argues that because it doesn't mail ballots out and doesn't "determine the statutory timeframes for canvassing of vote-by-mail ballots," they are not proper defendants in the case. The Plaintiffs should look instead to county Supervisors of Elections for relief.

After all, the State argues, Supervisors of Election are independent constitutional officers and anything the State (via the Secretary of State) tries to do in this regard would be "futile." State's Motion to Dismiss at 7-8.

This is a mischaracterization of Florida's election law. As provided in Fla. Stat. 97.0115, the state has pre-empted the election law and procedure. These state offices have

everything to do with the setting and implementation of state voting procedures. To assert that there "is no injury fairly traceable to the Department Defendants and there is no relief that the Department Defendants could afford them," State's Motion to Dismiss at 8, is simply inaccurate. There can be no doubt that the Defendants all have a constitutional duty to ensure the fairness of voting and that the Plaintiffs all have a cognizable interest in the matter.[6]

Failure to Join Indispensible Parties

The Defendants argue that in order for the Plaintiffs to prevail in this case, they must join other Supervisors of Election as Defendants. First, whether or not other potential defendants are brought into the action does not absolve the named defendants of responsibility in this case. The Plaintiffs can still prevail on the claims asserted.

For the reasons already stated herein, each of these Defendants bears responsibility for implementing the policies and procedures for voting in Florida.

Mootness

The State argues that Governor DeSantis' Executive Order, moving the vote-by-mail canvassing time from 22 days before the election to 40 days moots one of the Plaintiffs' prayers for relief. It doesn't. It is a step in the right direction, to be sure, but the question of how much time is necessary to count mail-in ballots depends on, among other things, the number and condition of the ballots submitted. County Supervisors are in the best position to know what their counties need; the decision of when to begin canvassing

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It is important to keep in mind that the Plaintiffs are not challenging the constitutionality of the statutes. Rather, they argue that the statutes are ambiguous viz. the amount of discretion they afford county Supervisors of Election, and that Supervisors of Election are misinterpreting and misapplying them.

should be left to their discretion. We believe the statute allows for it but is being misinterpreted.

Moreover, claims of mootness, lack of standing, and failure to join indispensible parties are affirmative defenses – they are not bases upon which to grant dismissal as a matter of law.

TEST FOR GRANTING A MOTION TO DISMISS

As this Court held in *City of Weston, Florida v. The Honorable Richard "Rick" Scott*, Case Nos. 2018 CA 000699, 2018 CA 001509, and 2018 CA 000882 (Oct. 18, 2018):

> A complaint should be dismissed only if the movant can establish beyond any doubt that the claimant could prove no set of facts whatever in support of his claim that would entitle the claimant to relief. Johnson v. Gulf County, 965 So.2d 298 (Fla. 1st DCA 2007). In ruling on a motion to dismiss the court must assume all allegations in the complaint are true. All reasonable inferences must be construed in favor of the non-moving party. Felder v. State of Florida, Department of Management Services, Division of Retirement, 993 So. 2d 1031, 1034 (Fla. 1st DCA 2008). In declaratory judgment actions, the inquiry on a motion to dismiss is limited to reviewing the sufficiency of the complaint, not the likelihood of success on the merits. Meadows Community Association, Inc. v. Russell-Tutty, 928 So. 2d 1276, 1279-80 (Fla. 2d DCA 2006).

This complaint is sufficient and the Defendants have not met this very high burden for dismissal. If for no other reason than this case implicates the integrity of our voting process, it should be decided on the merits.

WHEREFORE, the Plaintiffs urge that the motions to dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed on this 10th day of July, 2020 with the Clerk of Court through the Florida Courts eFiling Portal, which shall serve a copy via e-mail to all counsel of record.

Harvey J. Sepler
Attorney for Plaintiffs