IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

KIRK NIELSEN et al.,

Plaintiffs,

v.

CONSOLIDATED
CASE NO. 4:20cv236-RH-MJF

RON DESANTIS et al.,

Defendants.
_____/

ORDER DISMISSING THE NIELSEN AND WILLIAMS COMPLAINTS IN PART

The plaintiffs in these consolidated actions challenge Florida voting procedures. The defendants have moved to dismiss for lack of jurisdiction and failure to state a claim on which relief can be granted. This order announces the ruling on the motions and provides an abbreviated explanation. Trial is imminent. Complete findings of fact and conclusions of law will be announced after the trial.

I. The Claims

The three sets of plaintiffs have been identified by the first-named plaintiff in the set's first pleading—so the Nielsen, Grubb, and Williams plaintiffs. The current pleadings are the Nielsen plaintiffs' second amended complaint (ECF No.

292-1), the Grubb plaintiffs' intervention complaint (ECF No. 121-1 in Case No. 1:20cv67), and the Williams plaintiffs' third amended complaint. (ECF No. 341-1).

The Nielsen plaintiffs challenge three provisions: the requirement for a voter to pay postage to mail in a ballot ("the postage requirement"); the deadline of 7:00 p.m. on election day for a Supervisor of Elections to receive a mailed ballot ("the ballot-receipt deadline"); and a restriction on delivery of remote ballots cast by others ("the ballot-delivery restriction"). The Grubb plaintiffs challenge the failure to provide a method for blind individuals to prepare a remote secret ballot ("the secret-ballot limitation"). The Williams plaintiffs challenge these same provisions and a number of others primarily related to the risk posed by covid-19. The Williams plaintiffs' 34 claims are listed in a more definite statement, ECF No. 68.

The defendants include the Florida Secretary of State, the Attorney General, the members of the Florida Elections Canvassing Commission, the Supervisors of Elections of each of Florida's 67 counties, and each county's Canvassing Board. Pending are 15 motions to dismiss. The motions are not identical, but some or all assert that the case presents a nonjusticiable political question, the plaintiffs lack standing, or the complaints fail to state a claim on which relief can be granted. Some defendants assert they are not responsible for the challenged provisions and thus are improper defendants.

II. Standards Governing Motions to Dismiss

A motion to dismiss for lack of jurisdiction can properly challenge the sufficiency of a complaint's jurisdictional *allegations* or the sufficiency of the *actual facts* to establish jurisdiction. On a motion challenging jurisdictional *allegations*, a complaint's factual allegations must be accepted as true, and all reasonable inferences must be drawn in the plaintiffs' favor. *See, e.g.*, *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 855 (11th Cir. 1990). When, as here, the record includes evidentiary materials, they may be considered in determining whether jurisdiction exists based on the actual facts. *See, e.g.*, *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335-36 (11th Cir. 2013).

To survive a motion to dismiss for failure to state a claim on which relief can be granted, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For purposes of a motion to dismiss, the complaint's factual allegations, though not its legal conclusions, must be accepted as true. *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A motion to dismiss for failure to state a claim is not the vehicle by which the truth of a plaintiff's factual allegations should be judged.

III. Standing

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Supreme Court said the "irreducible constitutional minimum of standing contains three elements." First, the plaintiff "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. (internal quotation marks and citations omitted). Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id*. (internal quotation marks, ellipses, and brackets omitted). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. (internal quotation marks omitted). A statutory violation alone does not obviate the need to meet these standards. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016); *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1305–06 (11th Cir. 2020).

A. Concrete and Particularized Injury in Fact

Each individual plaintiff has standing to challenge provisions reasonably likely to affect the plaintiff. Each organizational plaintiff with members has standing to assert the claims of the members to the extent the members themselves

would have standing to assert the claims. And each organization has standing to challenge provisions that inflict an injury in fact on the organization itself.

Thus, for example, the individual plaintiffs who wish to vote by mail and reside in counties that do not provide postage have standing to challenge the postage requirement. So do organizations with such members.

The individual plaintiffs who wish to vote by mail and wish to do so closer in time to election day than would be prudent under the ballot-receipt deadline have standing to challenge that deadline. This is especially so for the three plaintiffs whose ballots were received late and thus not counted in a prior election. To be sure, an individual could vote well in advance, reducing the risk that a ballot would be received too late. But some risk would remain, and some voters legitimately wish to vote closer in time to election day. A rule that significantly restricts a voter's ability to vote when the voter wishes inflicts an injury in fact.

The individual plaintiffs who wish to have their ballots delivered by others who are prohibited from doing so by the ballot-delivery restriction have standing to challenge that restriction. The organizations who wish to deliver ballots or to arrange delivery have standing to challenge this restriction not only on behalf of members but in their own right.

Blind individuals who wish to vote by mail have standing to challenge the secret-ballot limitation. So do organizations with blind members.

Individual plaintiffs who wish to vote in a manner minimizing the risk of covid-19 have standing to challenge provisions they assert pose an unnecessary risk to them. And they have standing to challenge provisions that make voting by mail less reliable. Thus an individual who wishes to vote by mail later than would be necessary to ensure a ballot has not been excluded for a mismatched signature—or to cure any such exclusion—has standing to challenge the cure deadline.

On the other hand, there is no reason to believe an individual plaintiff will need to request an emergency ballot on election day. There is no reason to believe an individual plaintiff will change addresses or, if so, will fail to notify the proper Supervisor of Elections of the change. The emergency-ballot and change-of-address practices thus inflict no injury in fact on the individual plaintiffs. Even so, the organizations can challenge these practices on their own behalf; the provisions adversely affect the organizations' effort to register and turn out voters.

In sum, for each claim, at least one plaintiff survives the current motions to dismiss for lack of standing, with one exception. Items 3, 4, and 5 on the Williams plaintiffs' more definite statement apparently are based not only on the current covid-19 emergency declaration but on the possibility of a future emergency declaration—a declaration resulting from a hurricane, for example. The possibility of such a declaration is too speculative to constitute an injury in fact.

The organizational plaintiffs with members have standing to assert the claims of their members. With one exception, the organizational plaintiffs also have adequately alleged standing based on diversion of resources, though sometimes just barely. They will have to prove the allegations at trial. The exception is Zebra Coalition, which has not alleged it has members, has not explained the connection, if any, between its mission and voting procedures, and has not adequately alleged standing based on diversion of resources.

The bottom line: all plaintiffs except Zebra Coalition will remain in the case, and only the other-emergency claim will be dismissed for lack of standing.

B. Traceable and Redressable

An injury is traceable to a defendant if the defendant has a role in implementing or enforcing the provision that causes the injury. For most of the provisions at issue, this includes both the Secretary of State and the Supervisors of Elections.

The Secretary is the official directly responsible for carrying out some of the challenged provisions. She is a proper defendant, both in terms of standing and under *Ex parte Young*, 209 U.S. 123 (1908). The Eleventh Circuit's decision in *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (11th Cir. 2020), is not to the contrary. There the court held any injury resulting from a ballot-order statute was not traceable to or redressable by an injunction against the Secretary, because

the statute explicitly required the Supervisors, not the Secretary, to comply with the statute. The same is not true for the provisions at issue here; the Secretary has a role with respect to all of them. Moreover, the Secretary would almost surely be unwilling to delegate to the Supervisors the sole responsibility for implementing and enforcing the challenged provisions and defending this litigation. *Cf. People First of Ala. v. Sec'y of State for Ala.*, No. 20-12184, 2020 WL 3478093 (11th Cir. June 25, 2020) (Grant, J., concurring in the denial of a stay) (noting uncertainty about whether the Alabama Secretary of State, having successfully argued for dismissal of claims against him based on *Jacobson*, could appeal an injunction requiring changes in Alabama voting procedures).

In light of the Secretary's apparent insistence in *Jacobson* that the Supervisors need not comply with her directives or even heed a federal injunction against the Secretary, it cannot be said, at least at this stage of the litigation, that the Supervisors and Canvassing Boards are not also defendants against whom any proper relief could be entered. *See Jacobson*, 957 F.3d at 1210-12.

Thus, for example, the Supervisors enforce the ballot-receipt deadline in the first instance, and a Supervisor's decision carries forward. The County Canvassing Board submits returns, the Florida Elections Canvassing Commission certifies the results, and the Secretary oversees the deadlines for all of this. *See, e.g.*, Fla. Stat. §§ 101.67(2), 102.141, 102.112. If the plaintiffs prevail on this claim on the

merits—if, that is, it is held that the receipt deadline is unconstitutional—then *Jacobson* suggests that, to ensure its effectiveness, an injunction will properly be entered against all the affected parties.

The claims against the Florida Elections Canvassing Commission are barred by the Eleventh Amendment. But the Commission now has been replaced as a defendant by its individual members in their official capacities. They are the proper defendants for claims within the Commission's purview.

Only the Nielsen plaintiffs have named the Attorney General as a defendant. They have named the Attorney General for all three of the provisions they challenge—for the postage requirement, the ballot-receipt deadline, and the ballot-delivery restriction. The Attorney General says she is not responsible for enforcing any of the challenged provisions.

The Attorney General is not a proper defendant based only on her role as the state's chief legal officer. *See, e.g.*, *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1300-01 (11th Cir. 2019). But her domain includes the Office of Statewide Prosecution. That office has authority to prosecute any crime that occurs in two or more judicial circuits and involves voter registration or voting. *See* Fla. Stat. § 16.56(1)(a)12. This includes the challenged ballot-delivery provision. If the challenge succeeds, an injunction against prosecution could properly run against the Attorney General.

The Attorney General has no responsibility for implementing or enforcing the other challenged provisions, so this order grants the Attorney General's motion to dismiss to that extent.

The bottom line for the defendants: the Florida Elections Canvassing Commission will be dismissed, and the claims against the Attorney General will be narrowed. One or more of the plaintiffs' purported injuries are fairly traceable to and would be redressable by a judgment against each of the remaining defendants.

IV. Political Question

The Secretary's blanket assertion that voting procedures present political questions outside the jurisdiction of the federal courts—that the states can do as they please and federal courts must stay out of it—is unfounded. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 398-99 (5th Cir. 2020). This case does not present issues of the kind involved in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), or even *Jacobson*.

To be sure, if construed broadly, some of the Williams plaintiffs' more extreme contentions could perhaps be deemed political questions. But the contentions will not be construed so broadly, and if so construed, would not succeed anyway. There is too much to do in properly resolving this litigation to get sidetracked into a largely academic analysis of issues that will not arise. The goal is to focus on the wheat, not the chaff.

V. Merits

Requiring a voter to pay for postage to mail a registration form or ballot to a Supervisor of Elections is not unconstitutional or otherwise unlawful. Nor is it unconstitutional or otherwise unlawful for some counties to pay for postage while others do not. This order thus dismisses on the merits the Nielsen plaintiffs' postage claim and these items from the Williams plaintiffs' more definite statement: 7, 18, and 33.

In addition, it is not unconstitutional or otherwise unlawful for different counties to have different practices on prepaid postage or on the location of ballot drop boxes. These represent two of the three separate assertions included in the Williams plaintiffs' item 17.

The other claims are sufficient to withstand the motions to dismiss, though sometimes just barely. This ruling has not been based on the value of compiling a more complete record on the various issues—but that will be an added benefit of the ruling.

VI. Conclusion

For these reasons, the motions to dismiss the Nielsen and Williams complaints must be granted in part and denied in part. The motions to dismiss the Grubb complaint must be denied; the Grubb complaint suffers none of the deficiencies requiring dismissal of the other complaints in part. The Florida

Elections Commission's motion to dismiss is moot because the Commission has been dropped as a defendant through amendment. Accordingly,

IT IS ORDERED:

1. These motions to dismiss are granted in part and denied in part: ECF Nos. 80, 82, 84, 95 (as amended by 97), 105, 114, 140, 157, 208, 237, 256, and 322.

2. These motions to dismiss are denied: ECF Nos. 234 and 277.

3. This motion to dismiss is denied as moot: ECF No. 79.

SO ORDERED on June 30, 2020.

s/Robert L. Hinkle
United States District Judge