UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., *et al.*,

Plaintiffs,

v.

Case No.: 4:21-cv-00186-MW/MAF

LAUREL M. LEE, in her official capacity as Florida Secretary of State, *et al.*,

Defendants,

and

NATIONAL REPUBLICAN SENATORIAL COMMITTEE and REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendants.

RESPONSE IN OPPOSITION TO LEAGUE PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT, AND INCORPORATED MEMORANDUM OF LAW

Defendant Laurel M. Lee, in her capacity as the Florida Secretary of State, submits this response in opposition to *League* Plaintiffs' October 22, 2021 motion for leave to file a Second Amended Complaint, ECF No. 292, and Defendant Ashley Moody, Florida Attorney General, joins in this response. Filed at the literal eve of

the close of discovery, Plaintiffs do not seek to narrow the issues before the Court but to expand them. Specifically, Plaintiffs request leave of this Court to name an additional plaintiff, Miriam Hanan, and an additional defendant, 15th Judicial Circuit State Attorney Dave Aronberg, to revive their claim challenging Florida Statute 104.0616(2) (the "Ballot Collection Restriction"), which this Court dismissed on October 8, 2021. ECF No. 274.

The cut-off date adopted by this Court for adding parties or amending the pleadings in this case was July 6, 2021, nearly *four months* ago. *See* ECF No. 161 at 15; ECF No. 162 at 2. Moreover, Plaintiffs have been on notice that their earlier pleadings regarding the Ballot Collection Restriction were deficient for lack of standing since, at the very least, this Court sua sponte raised the issue of Plaintiffs' standing to sue the Secretary of State and Defendant Attorney General filed her motions to dismiss. *See* ECF No. 115 at 3; ECF No. 120 at 11; ECF No. 176 at 10–11. Once those motions to dismiss were filed, Plaintiffs had a very simple choice regarding their complaint: amend it or defend it. Plaintiffs chose the latter, and therefore cannot establish good cause for waiting until after this Court dismissed Plaintiffs' challenge to that provision before filing this motion to amend on the very last day of discovery.[1] In short, the undue delay exhibited here by Plaintiffs is

[1] Notably, this Court had already extended the close of discovery from September 15 to October 22. *See* ECF No. 22.

exactly the type that frequently leads Courts to exercise their discretion under Rule 15 to deny amendments. *See Brivik v. Law*, 545 F. App'x 804, 807 (11th Cir. 2013) (finding that district court properly denied leave to amend "because [plaintiff] did not move for leave to amend until *after* the district court granted [defendant's] motion to dismiss and *after* the deadline to do so in the district court's scheduling order" (emphasis added)).

Furthermore, granting Plaintiffs' motion would prejudice the Defendants. Defendants will not have sufficient time to conduct the necessary discovery to effectively respond to the Plaintiffs' new witness testimony before the dispositive motions deadline, re-depose witnesses and experts testifying after the Court's dismissal of these claims, and will most likely require pushing back the both the dispositive motion deadline and the date currently set for trial.

Plaintiffs' eleventh-hour request to amend their pleading is particularly prejudicial in this context where it implicates statewide election administration; it threatens Defendants' interest in finality prior to the 2022 primary election to help protect against voter confusion that is likely to result from having election rules in flux. It is also contrary to this Court's interests in judicial economy. In short, allowing such amendments and new parties at this late stage of the litigation would have a cascading effect that would harm Defendants and all Floridians. This Court should thus deny the *League* Plaintiffs' motion.

I. Plaintiffs' lack of diligence precludes adding new parties and claims at this late stage of the litigation.

Rule 15 provides that leave to amend a complaint prior to trial should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). Even though courts enjoy considerable discretion to allow plaintiffs to amend their pleadings, that discretion militates denial based "on 'numerous grounds' such as 'undue delay, undue prejudice to the defendants, and futility of the amendment.'" *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1284 (11th Cir. 2000) (quoting *Abramson v. Gonzalez*, 949 F.2d 1567, 1581 (11th Cir. 1992)). Although the "mere passage of time, without more, is an insufficient reason to deny leave to amend a complaint, undue delay may clearly support such a denial." *In re Engle Cases*, 767 F.3d 1082, 1108-09 (11th Cir. 2014).

Thus, while "Rule 15(a)'s liberal amendment policy seeks to serve justice, [it] does not excuse a lack of diligence that imposes additional and unwarranted burdens on an opponent and the courts." *Acosta-Mestre v. Hilton Int'l*, 156 F.3d 49, 53 (1st Cir. 1998). When a plaintiff's delay causes the motion to amend to be "filed at a late stage of the litigation, *such as near the close of discovery*, an increased burden is on the movant to show justification for the failure to move earlier." *Glomski v. Oakland*, No. 05-CV-70503-DT, 2006 U.S. Dist. LEXIS 115010, at *3-4 (E.D. Mich. Nov. 8, 2006) (citing *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999)); *see also Stepanischen v. Merchs. Despatch Transp. Corp.*, 722 F.2d

922, 933 (1st Cir. 1983) (stating that when "considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has the burden of showing some valid reason for his neglect and delay" (internal quotation marks omitted)). The greater the delay in moving for leave to amend the complaint, "the greater the presumption against granting leave to amend." *Tamari v. Bache & Co.*, 838 F.2d 904, 909 (7th Cir. 1988). As this Court explained:

> the Eleventh Circuit has held that it is not an abuse of discretion to deny a motion for leave to amend filed *near the close of discovery* because granting the motion "would have produced more attempts at discovery, delayed disposition of the case, . . . likely prejudiced [the adverse party], [and] . . . there seems to be no good reason why [the movant] could not have made the motion earlier."

Blaxton v. Laidacker, No. 3:08cv440/WS/EMT, 2011 U.S. Dist. LEXIS 88505, at *3 (N.D. Fla. Aug. 10, 2011) (emphasis added) (quoting *Maynard v. Bd. of Regents of Div. of Univs.*, 342 F.3d 1281, 1287 (11th Cir. 2003)).

Furthermore, scheduling orders "limit[ing] the time to join other parties [and to] amend the pleadings," Fed. R. Civ. P. 16(b)(3)(A), may be modified "only for good cause . . . ." *Id.* 16(b)(4). The good cause standard "precludes modification unless the schedule cannot be met despite the diligence of the party seeking the extension." *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998) (quotation marks omitted); *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) ("If [a] party was not diligent, the [good cause] inquiry should end.").

In this case, several facts demonstrate both undue delay and lack of diligence in Plaintiffs' filing of their motion to amend.

First, the controlling deadline for adding parties or filing amended complaints in this matter was July 6, 2021. ECF No. 161 at 15; ECF No. 162 at 2. Plaintiffs did not provide a proposed deadline of their own in the parties' Rule 26 report for amending the pleadings, *see* ECF No. 161 at 15, or otherwise seek to change that deadline until now.

Notably, the Eleventh Circuit has determined that even a two-month delay after the deadline for amending pleadings can be sufficient delay to deny leave to amend. *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1309 (11th Cir. 1999) (finding no abuse of discretion in denying amendment when the plaintiff "did not seek leave to amend until 2 months after the deadline for amending pleadings had passed, [and] the dispositive motion deadline was one month away"). Here almost four months have elapsed since July 6, and Plaintiffs have made no argument for why they have good cause to modify the scheduling order here— "good faith" is not the same as good cause. *See* ECF No. 292 at 3. Plaintiffs have waived their opportunity to argue that they have good cause to amend. *See Queen's Harbour Yacht & Country Club Ass'n v. Lee*, No. 3:09-cv-1256-J-34MCR, 2010 U.S. Dist. LEXIS 153978, at *12 n.8 (M.D. Fla. Aug. 25, 2010) (observing that a plaintiff "should not expect the Court to make Plaintiff's arguments for it" and that "if Plaintiff fails to raise an argument,

the Court will consider it waived."). And Plaintiffs have certainly failed to show "compelling good cause" for an extension of time as this Court is requiring for extending deadlines in this case "given the upcoming election year," ECF No. 162, at 1 n.1.

Second, Plaintiffs were on notice at least by July 12, 2021, that Plaintiffs lacked standing to sue the Attorney General or any other named defendant regarding the Ballot Collection Restriction when Defendant Moody plainly argued that very point in her Motion to Dismiss Plaintiffs' initial complaint. *See* ECF No. 120 at 11 ("Because enforcement of the challenged provision, at least as pled in the Complaint, is left entirely to local prosecutors, not the Attorney General, . . . the Attorney General is an improper defendant." (internal citation and quotation marks omitted)).[2] This argument was again presented on July 30, 2021, in Defendant Moody's Motion to Dismiss Plaintiffs' Corrected First Amended Complaint. *See* ECF No. 274 at 22 ("*As Defendant Moody points out*, in most cases, Florida's State Attorneys are responsible for enforcing criminal statutes like section 104.0616(2)." (citing ECF

[2] In fact, the distinction between the enforcement authority of the Florida State Attorneys and that of the Attorney General was publicly available at the time Plaintiffs' filed their first complaint, and was thus "available [to Plaintiffs] at the time the complaints were filed," *cf. Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999); accordingly, the date Plaintiffs were technically "on notice" of those facts for purposes of Rule 15 was even earlier than July 12.

No. 176 at 10–11) (emphasis added)).[3] Yet Plaintiffs failed to move to amend their complaint at that time, opting instead to wait for more than three months after July 12, delaying until after this Court issued its Order dismissing that claim for lack of standing. Courts frequently deny leave to amend because of undue delay under such circumstances. *See, e.g.*, *Krantz v. Prudential Inv. Fund Mgmt. LLC*, 305 F.3d 140, 144 (3d Cir. 2002) (affirming denial of a plaintiff's leave to amend where the defendant's motion to dismiss put the plaintiff on notice regarding the deficiencies in his complaint, but the plaintiff "chose not to resolve them"); *Guzman v. Bank of N.Y. Mellon*, No. 5:16-CV-1210-DAE, 2018 U.S. Dist. LEXIS 228929, at *7-8 (W.D. Tex. Feb. 23, 2018) (denying motion for leave to amend FAC where the plaintiffs "were on notice that their FAC may have been deficient as soon as [the defendant] filed its motion to dismiss," and yet "delayed another two months to file the . . . motion for leave"); *Wevodau v. Pennsylvania*, No. 1:16-CV-0743, 2017 U.S.

[3] Additionally, on July 7, 2021, this Court sua sponte raised the issue of standing with respect to the Secretary in its Order to Show Cause, stating that "in these cases, Plaintiffs challenge amendments to section 104.0616, Florida Statutes. As amended, that section governs, among other things, the delivery or collection of vote-by-mail ballots and imposes criminal liability—a first-degree misdemeanor—for any designated violation. § 104.0616(2), Fla. Stat. (2021). This Court is loath to understand how any injury flowing from this statute is traceable to Secretary Lee such that she is a proper defendant as to that claim." ECF No. 115 at 3. Thus, Plaintiffs were on notice of a standing issue as to the Secretary by at least July 7. Moreover, the Secretary's July 23, 2021 Response to the Court's Order to Show Cause emphasized that the Secretary "has no role in enforcing" this provision. *See* ECF No. 163 at 13.

Dist. LEXIS 150777, at *6-7 (M.D. Pa. Sep. 18, 2017) (finding undue delay where a plaintiff was "put on notice in the form of Defendants' motion to dismiss that his amended complaint" was deficient, and the plaintiff had "no entitlement to belatedly amend [the] complaint after the court decided that the factual allegations in [the] amended complaint were indeed insufficient").[4]

Plaintiffs' argument that their motion should be granted because it was "prompted by" this Court's Order on Defendants' Motion to Dismiss, and filed "shortly after" the Order was issued, ECF No. 292 at 3–5, thus rings hollow. While Plaintiffs could have perhaps argued for extension of the July 6 deadline by the end of July or early August in response to arguments made in Defendant Moody's July 12 Motion to Dismiss, and that they had been reasonably diligent doing so at that point, the same cannot be said of a motion filed near the end of October at the close of discovery. Plaintiffs had the opportunity to resolve deficiencies in standing, but instead chose to wait and see what this Court would do about it—that decision was neither necessary nor diligent. *Cf. Sosa*, 133 F.3d at 1418 (holding that the good cause standard "precludes modification unless the schedule *cannot be met despite the diligence* of the party seeking the extension." (emphasis added)); *Rodriguez v.*

[4] Plaintiffs' reliance on their previous interpretation of *Nielsen v. DeSantis*, 469 F. Supp. 3d 1261, 1267–68 (N.D. Fla. 2020) is thus unavailing. *See* ECF No. 292 at 4-5. A mistaken interpretation of the law does not change the fact that Plaintiffs were on notice at least by Defendant Moody's July 12 Motion to Dismiss that their pleadings were deficient with regard to standing, yet chose not to act.

Xie, No. 6:18-cv-1911-Orl-EJK, 2020 U.S. Dist. LEXIS 242389, at *5 (M.D. Fla. Sep. 2, 2020) (where a plaintiff moves to amend the complaint "only five days prior to the close of discovery," "[s]uch delay does not demonstrate diligence").

Third, Plaintiffs' undue delay and lack of diligence is further evidenced by the fact that it was filed just three weeks before the November 12, 2021 dispositive motion deadline. *McGregor*, 180 F.3d at 1309 (finding no abuse of discretion in denying leave to amend when "the dispositive motion deadline was one month away"). Plaintiffs knew long before filing their motion that this deadline was approaching, yet chose to not to amend their pleadings earlier.

Because Plaintiffs fail to explain their lack of diligence in moving to modify the amended pleading deadline at this late stage in the litigation, they fail to meet their burden of showing good cause as required by Rule 16(b). *See Watkins v. Farmers & Merchs. Bank*, 237 Fed. Appx. 591, 592 (11th Cir. 2007) (affirming district court's denial of leave to amend where "[plaintiff] moved for leave months after the [] deadline for amendments . . . [and where plaintiff had] not demonstrated good cause for departing from the district court's scheduling order."). Under these circumstances, this Court should deny Plaintiffs' motion.

II. Because this is a time-sensitive election case, Plaintiffs' motion would unfairly prejudice Defendants by re-opening discovery at this late stage and threatening to delay trial.

As with undue delay, courts should deny amendments that "would occasion

undue prejudice to the opposition party." *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 228 (5th Cir. 1983). Courts frequently find "undue prejudice where an amendment is made near the close of discovery on information already known or available prior to the filing of a motion to amend the pleadings." *Martco Ltd. P'ship v. Bruks-Klockner, Inc.*, No. 2:07 CV2002, 2011 U.S. Dist. LEXIS 43334, at *7-9 (W.D. La. Apr. 19, 2011); *Doe v. Columbia Univ.*, 165 F.R.D. 394, 396 (S.D.N.Y. 1996) (finding that leave to amend the complaint would cause the defendants "substantial prejudice . . . especially as they come near the close of discovery"). Even more so, "allowing amendment *after* the close of discovery creates significant prejudice, and other Circuits agree." *Duggins*, 195 F.3d at 834 (emphasis added) (citing the Eleventh Circuit's holding in *Campbell*, 166 F.3d 1157).

The Eleventh Circuit has also stated that "prejudice is especially likely to exist if the amendment . . . would require additional discovery." *Tampa Bay Water v. HDR Eng'g, Inc.*, 731 F.3d 1171, 1186 (11th Cir. 2013) (internal quotation marks omitted). In *Tampa Bay Water*, the court affirmed the district court's denial of the plaintiff's motion to amend its complaint on the grounds of prejudice and undue delay. As the court emphasized, because the "inevitable result of amendment would be that [defendant] would need to investigate the facts and prepare to defend against the new claim[s], which would require additional discovery and further delay the trial," denial of leave to amend was appropriate. *See id.*; *see also Unique Indus. v. 965207*

Alta. Ltd., 764 F. Supp. 2d 191, 208 (D.D.C. 2011) (denying the plaintiff's "last-minute" motion for leave to amend and add new parties, defenses, and claims because it would "unfairly prejudice the defendant" by necessitating "yet additional discovery and result[ing] in even more delay").

The same is true for Defendants in this case. While Plaintiffs are seeking to resurrect prior claims that have been dismissed, in contrast with the plaintiffs who sought to introduce new claims in *Tampa Bay Water*, this last-minute amendment to add Plaintiffs' proposed new plaintiff and defendant would still require Defendants to obtain additional fact discovery on these parties and take their depositions *after* the close of discovery and literally on the eve of the already tight November 12 dispositive motions deadline, causing significant prejudice to Defendants. Moreover, it would potentially require re-deposing witnesses and experts who sat for deposition after the Ballot Collection Restriction claims have been dismissed. But this is only the beginning of the harms that would result from granting Plaintiffs' motion: Defendants would be obliged to introduce new witnesses to counter the allegations that will be brought by a new plaintiff.[5]

[5] Defendants may even be obliged to introduce new witnesses to counter State Attorney Aronberg's perspective. State Attorney Aronberg has publicly referred to the legislation at issue as "undemocratic" and "voter suppression," Jay O'Brien, *Palm Beach County State Attorney Calls Florida Elections Bill "Gross"*, CBS12 News (Apr. 27, 2021), https://cbs12.com/news/local/palm-beach-state-attorney-slams-controversial-florida-elections-bill (last visited Oct. 27, 2021). In addition,

Added discovery (or new intervenors) would require additional preparation, time, and expenditure of resources on the part of all parties to this action and this Court. This is unwise with approaching dispositive motions briefing deadlines and a truncated pre-trial calendar crowded with pre-trial briefs, *Daubert* motions, and exhibits deadlines. Accordingly, the "inevitable result of amendment," *see Tampa Bay Water*, 731 F.3d at 1186, is additional labor by all concerned under truncated deadlines, with delay being a very real possibility. Such eleventh-hour additions impose exactly the kinds of "unwarranted burdens" on both opponents and courts that causes courts to deny leave to amend. *Acosta-Mestre*, 156 F.3d at 53 ("Since the addition of [an additional defendant] at the eleventh hour would have *resulted in further significant delay both in the completion of discovery and the trial of the case*, we discern no abuse of discretion in the district court's denial of leave to amend the complaint." (emphasis added)); *see also Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (noting that the district court did not abuse its discretion in denying leave to amend because the motion was filed several days before the discovery cut off, defendant would have had a limited time to respond, and granting leave to amend would have required additional discovery prejudicing the

State Attorney Aronberg directed a tweet toward the Florida legislature referencing S.B. 90 as "#VoterSuppression." *See* Dave Aronberg, *Twitter* (April 27, 2021), *available at* https://twitter.com/aronberg/status/1387215731172028417 (last visited Oct. 29, 2021).

defendant); *Muench Photography, Inc. v. Pearson Educ., Inc.*, No. 12-CV-01927-WHO, 2013 U.S. Dist. LEXIS 115834, 2013 WL 4426493, at *3 (N.D. Cal. Aug. 15, 2013) (noting that seeking leave to amend *two weeks before* the close of discovery where amendment would require additional discovery would cause prejudice and undue delay).[6]

Indeed, it took Plaintiffs two weeks after this Court's October 8, 2021 order dismissing the ballot harvesting claims, ECF No. 274, for Plaintiffs to name a new plaintiff and defendant to try and restore those claims. Principles of equity and fairness would dictate that Defendants also be given two weeks to determine who their witnesses will be to respond to the newly added plaintiff and defendant. Yet in two weeks, dispositive motions will be due, demonstrating the cascading effect this amendment would immediately have on impending deadlines in this litigation and the prejudice that would result to Defendants.

Even more problematic is the fact that corporate representative depositions

[6] Plaintiffs assert they intend to seek "only minimal discovery" from their proposed new parties. *See* ECF No. 292 at 5. But minimal discovery has proven difficult in this case. Consider, for example, the *Florida Rising* Plaintiffs' decision to send over 27,000 new documents to the Secretary's counsel, *see* Exhibit 1 ("October 22, 2021 Florida Rising Production"), in response to the Secretary's request for production that was served on the *Florida Rising* Plaintiffs on July 2, 2021. Exhibit 2 ("Secretary's First Request for Production"). The *Florida Rising* Plaintiffs sent this "rolling production," on the evening of October 22, 2021, the deadline for fact discovery in this case, after all depositions for the day had concluded. Ex. 1. Presumably, more is on the way given the production's rolling nature. *Id*.

have already been completed, and expert depositions are now finished as of today. During the course of discovery in this case, approximately twenty corporate representative depositions and a dozen expert depositions have been taken. Significant time and resources went into preparing for and taking these depositions; questioning largely did not focus on the claims Plaintiffs seek to resurrect because this Court dismissed those claims. If this Court grants leave to amend and allows Plaintiffs to bring those claims back, many of these depositions would likely need to be taken again to ask the necessary questions for addressing the newly returned ballot harvesting claims made by the new Plaintiff.

The time-sensitive context of elections cases like this also favors denial of the motion. Any delay in the disposition of this case could have ripple effects that harm the administration of forthcoming elections and the voters. Because of the inevitable delay to dispositive motions and trial that would result from granting leave to amend here, less time will be available to educate Florida voters about applicable election laws. This is particularly true in a redistricting year like this that creates an added layer of voter confusion from the newly drawn districts. Election administrators need adequate time to inform the public about changes to election rules or administration that may result from this case.

Finally, contrary to Plaintiffs' assertions, the proposed amendments would not conserve judicial resources. This Court has already permitted numerous

amendments to pleadings in this case and been forced to adjudicate numerous discovery disputes; there have been nine different complaints in the four cases before this Court. Greatly expanding discovery from both sides at this late stage, after the discovery deadline and on the eve of dispositive motions deadlines, coupled with the possible postponement of the trial date, will result in significant judicial inconvenience and expenditure of resources, thus hindering the interests of judicial economy. And again, any delay to the early trial date the Secretary suggested and this Court adopted must be avoided; finality concerning the rules that will govern the 2022 elections is paramount. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006).

Thus, this Court should deny Plaintiffs' motion for leave to amend.

Dated: October 29, 2021

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(F) of the Local Rules of the Northern District of Florida, I certify that the foregoing reply memorandum contains 3,915 words.

/s/ Mohammad O. Jazil

CERTIFICATE OF SERVICE

I certify that on October 29, 2021, I caused to be served a copy of the foregoing by CM/ECF to all counsel of record.

/s/ Mohammad O. Jazil