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

FLORIDA STATE CONFERENCE OF BRANCHES AND YOUTH UNITS OF THE NAACP, *et al.*, Plaintiffs, v. LAUREL M. LEE, *et al.*, Defendants, and NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*, Intervenor-Defendants.	Case No. 4:21-cv-187-MW-MAF

SECRETARY'S RESPONSE TO COURT'S
NOVEMBER 23, 2021, ORDER TO SHOW CAUSE

The Florida Secretary of State responds to this Court's November 23, 2021, Order to Show Cause as to "why this Court should not strike the portions of [her] motions for summary judgment defending statutes she lacks standing to defend as well as Defendants Hays, Doyle, and White's notices/motions adopting Defendant Lee's arguments." Case No. 187, ECF 295 at 3.

First, lawyers for the Secretary and for Supervisors Hays and Doyle collaborated on the motions for summary judgment and memoranda of law in

support. The lawyers jointly signed and filed the resulting papers. Case No. 187, ECF 285 at 2; 285-1 at 67. Given the joint filings, a separate joinder should be unnecessary. This is because the joint signing and filing of papers appropriately presents to this Court the issues concerning the vote-by-mail request and non-solicitation provisions. *See* Fed. R. Civ. P. 11(a)-(b); Local Rule 56.1. Thus, there was no "attempt[] to do an end-run around the [law of standing]" or this Court's prior orders, just another way to arrive at the result this Court suggested. Case No. 187, ECF 295 at 3.[1]

Second, the Secretary did inform this Court in response to an earlier order to show cause that she is not the proper defendant for the vote-by-mail request and non-solicitation provisions because county-level officials—the supervisors of elections—must implement the provisions. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253-58 (11th Cir. 2020). But the State is still injured. "[A] state"—whether directly enjoined or not—"clearly has a legitimate interest in the

[1] Striking Defendants Hays and Doyle's motions without considering the same also implicates their procedural due process right to be heard. *See, e.g.*, *Parker v. Williams*, 862 F.2d 1471, 1481–82 (11th Cir. 1989) ("[P]rocedural due process is an absolute right protected by our Constitution, and an opportunity to be heard on an issue is an essential element of procedural due process. The denial of an opportunity to litigate can never be harmless error. A party *must* have his day in court."), *overruled on other grounds by Turquitt v. Jefferson Cty., Ala.*, 137 F.3d 1285 (11th Cir. 1998). District courts must thus "balance the need to manage [their] docket with the party's right to be heard." *See Glover v. City of Pensacola*, 372 F. App'x 952, 953 (11th Cir. 2010).

continued enforceability of its own statutes." *Maine v. Taylor*, 477 U.S. 131, 137 (1986); *cf. Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (citations omitted).[2]

Thus, in her earlier filing, the Secretary informed this Court that she seeks to defend all of the provisions being challenged especially when (it seemed at the time) no State or county defendant would be left to assert the State's interests. Case No. 187, ECF 166 at 3, 14. The Secretary can do that for three reasons.

1. As an initial matter, not all Defendants are the same. *See Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). "[A] State has standing to defend the constitutionality of its statutes." *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *accord Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) ("Of course, 'a State has standing to defend the constitutionality of its statute.'"). Perhaps recognizing this absolute, the U.S. Supreme Court recently granted the Alabama Secretary of State a stay in a post-*Jacobson* election case, *Merrill v. People First of Ala.*, Case No. 19A1063, 2020 WL 3604049 (U.S. Jul. 2, 2020),

[2] *See also Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.").

where the plaintiffs had argued, among other things, that *Jacobson* precluded that State's Secretary from appealing portions of a preliminary injunction directed at local officials. *See People First of Ala. v. Sec'y of State for Ala.*, 815 Fed. Appx. 505, 510 n.7 (11th Cir. 2020). Notably, the Court granted the stay where two members of the Eleventh Circuit's panel "assume[d] without deciding" that the Secretary could appeal, *id.* (Rosenbaum, J., and Jill Pryor, J., concurring), and the third said she was "uncertain that the proper parties have appealed the order's remarkable revisions to [State law]." *Id.* at 516 (Grant, J., concurring).

2. In addition, standing to defend is not the same as standing to sue. In *Bethune-Hill*, for example, the U.S. Supreme Court stated that the Virginia House of Delegates—in a "defensive posture"—did "not need to establish standing." 139 S. Ct. at 1952. There, the Court explained that the House could defend the constitutionality of certain actions as a defendant and then an appellee "[b]ecause neither role entailed invoking a court's jurisdiction." *Id.* at 1251.

3. The standing-to-defend analysis itself becomes unnecessary where some combination of Plaintiffs and Defendants confer Article III jurisdiction on this Court. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Penn.*, 140 S. Ct. 2367, 2379 n. 6 (2020). This is so even for claims where the Secretary may not be the proper defendant under *Ex parte Young* and regardless of whether individual supervisors mount a defense. *See id.* Indeed, "it is not any the less a

case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested." *Pope v. United States*, 323 U.S. 1, 11 (1944). Conceptually then, the standing-to-defend analysis becomes ripe for adjudication only if this Court deems the vote-by-mail or non-solicitation provision unconstitutional and not a single supervisor joins the Secretary in appealing that decision. *See Little Sisters*, 140 S. Ct. at 2379 n.6.

Here, the Secretary appears as a state official in a defensive posture to assert the State's interests. Under Florida law, and for purposes of *Ex parte Young*, she is the appropriate official responsible for asserting the State's interests in the provisions at issue. *Jacobson* recognized as much. 974 F.3d at 1256 (citing *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019)).[3] And, regardless, assuming Plaintiffs have standing to sue over the vote-by-mail and non-solicitation provisions, some combination of Defendants has standing to defend. Under the circumstances, Plaintiffs should respond to the Secretary's arguments and the Secretary respectfully asks this Court to consider the arguments.

Third, at the very least, as the Secretary detailed in her earlier filing, she is like a defendant-intervenor in portions of the case (except that Plaintiffs have

[3] *Jacobson* reminds us that "[i]n *Lee*, a motions panel of this Court ruled that the Florida Secretary of State was a proper defendant under *Ex parte Young*, in an action challenging an election procedure administered by the county Supervisors of Elections." 974 F.3d at 1256. *Jacobson* never said that *Lee* was wrongly decided.

already sued her as a party). Case No. 187, ECF 166 at 13-15. An intervenor need not be the proper party to redress a plaintiff's injury in order to defend against the plaintiff's claim; she need only show that the relief would affect her interests. *Id.* (collecting Eleventh Circuit cases). True, an adverse ruling on the vote-by-mail request and non-solicitation provisions would not result in an injunction against the Secretary. But an adverse ruling would most assuredly affect the Secretary's interests—the State's interests that she asserts—because duly-enacted statutes would be rendered unenforceable. *See Taylor*, 477 U.S. at 136-37.

Thus, in her earlier filing, the Secretary asked this Court to treat, if necessary, the response as a motion to intervene to allow her to present the State's interests as to the vote-by-mail request and non-solicitation provisions. Case No. 187, ECF 166 at 14 n.17. The Secretary makes that request more explicit in her separate motion to intervene filed on the same day as this response so that she can provide the State's perspective at summary judgment and trial just as she has since the beginning of this litigation. The State's perspective remains crucial as this Court weighs, for example, the State's interests with the alleged burdens for purposes of the First and Fourteenth Amendment's *Anderson-Burdick* test.

<u>*Finally*</u>, the Secretary notes that allowing her to participate provides the surest route to a quick resolution of the four cases now before this Court. Plaintiffs have sought and the Secretary has provided the State's perspective on all four of

the provisions that remain at issue before this Court. No interlocutory appeals (from denial of intervention, for example) or mandamus proceedings should delay these proceedings. Nor should questions about who has standing to defend delay the proceedings especially when the Eleventh Circuit can address the issue if it ever becomes necessary to do so. This is not an appeal to convenience, clarity, or cost. Rather, consistent with the binding authorities discussed above, this is a recognition of the Secretary's commitment to ensuring that a final set of rules are quickly in place for the 2022 General Election.

For these reasons, the Secretary respectfully asks that this Court not strike the arguments in her papers.

Respectfully submitted by:

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Dated: November 30, 2021

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NORTHERN DISTRICT OF FLORIDA
LOCAL RULE CERTIFICATION

The foregoing complies with the size and font requirements of the local rules. It also contains 1,563 words.

/s/ Mohammad Jazil
Attorney for Defendant Secretary of State

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on the 30th of November, 2021.

/s/ Mohammad Jazil
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