UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA RISING TOGETHER., et al., Plaintiffs, v. LAUREL M. LEE, et al., Defendants,	Case No.: 4:21-cv-201-MW/MJF Consolidated for discovery purposes only with Case Nos.: 4:21-cv-186-MW/MAF 4:21-cv-187-MW/MAF 4:21-cv-242-MW/MAF

FLORIDA RISING PLAINTIFFS' OPPOSITION TO DEFENDANT LEE'S MOTION TO INTERVENE AND RESPONSE TO THE RESPONSES TO THE COURT'S ORDER TO SHOW CAUSE

On the eve of trial, the Secretary filed a Motion to Intervene, ECF No. 260 ("Motion"), seeking to defend portions of Florida election law for which she has previously argued she has no responsibility and already successfully dismissed herself as a Defendant. The Secretary's Motion comes months after this Court informed her that she would not be permitted to make arguments on provisions of law for which she is no longer a Defendant—an order she chose to ignore.

The *Florida Rising* Plaintiffs agree with the Court that, absent intervention, Defendant Lee should not be allowed to make arguments or offer evidence regarding provisions as to which she is not a defendant (namely, the Line Warming Restriction and the Vote-by-Mail Application Restriction). And under the circumstances, the

Secretary's Motion is not timely and intervention should be denied. If, however, the Court exercises its discretion and permits the Secretary to intervene, the Court should impose reasonable limitations on the Secretary's intervention and participation in the provisions that the Secretary now seeks to intervene to defend, consistent with federal law.

ARGUMENT

I. Defendant Lee's Motion should be denied because it is untimely.

"Whether leave to intervene is sought under section (a) or section (b) of Rule 24, the application must be timely." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977).[1] Timeliness is thus a prerequisite to both intervention as a right and permissive intervention, *see N.A.A.C.P. v. New York*, 413 U.S. 345, 365 (1973), and an untimely intervention motion "must be denied." *Id.* Because "[t]imeliness is to be determined from all the circumstances," it is a matter of "sound discretion" for the district court, not to be overturned absent an abuse of discretion. *Id.* at 365-66; *see also United States v. Jefferson Cnty.*, 720 F.2d 1511, 1516 (11th Cir. 1983). In exercising that discretion and determining whether the motion to intervene is timely, the Court should consider four factors, otherwise known as the *Stallworth* factors:

> (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

> petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Jefferson, 720 F.2d at 1516 (citing *Stallworth,* 558 F.2d at 264-66). Here, each of these factors cut sharply against allowing the Secretary's intervention now, at this late stage of the case.

A. The Secretary knew of her interest in these claims long before seeking intervention.

The first factor the Court should consider is how long the prospective intervenor knew, or should have known, about their interests in the case. *Id*. Where a would-be intervenor "knew at an early stage in the proceedings that their rights could be adversely affected" and failed to promptly intervene, the Court should weigh this factor against intervention. *Id.*; *see also Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1125 (5th Cir. 1970) (weighing "length of time during which the proposed intervenor has known about his interest in suit without acting").

The Secretary cannot plausibly disclaim early knowledge of her interests in the claims that she now seeks to intervene to defend against. The *Florida Rising* Plaintiffs named the Secretary as a Defendant on the very first day they filed suit, *see* ECF No. 1 (No. 4:21-cv-00201-MW), and the Secretary has been an active participant in the litigation since that day. It has been nearly five months since this

Court issued an order to show cause in the *League of Women Voters* and *NAACP* cases, asking the parties to address whether the Secretary was a proper Defendant in this case for the claims she now seeks to defend in light of the Eleventh Circuit's decision in *Jacobson v. Florida Secretary of State*, 974 F.3d 1236 (11th Cir. 2020). *See* ECF No. 115 (No. 4:21-cv-00186) ("July 7 Show Cause Order"). In *Jacobson*, the Secretary argued that she was an improper defendant in a case challenging Florida's ballot order statute. 974 F.3d at 1253. In that case, moreover, the Secretary was the *only* defendant named and the Eleventh Circuit's endorsement of the Secretary's view resulted in a reversal of a final judgment that was issued after a full trial on the merits. *Id.* at 1269. It is thus understandable that the Court would want to make sure that this issue was thoroughly addressed and settled early on in these proceedings, not least of all to conserve judicial and party resources against a redux of the experience of *Jacobson*.

And, in fact, in response to the July 7 Show Cause Order, the Secretary affirmatively argued that she was not a proper defendant for Plaintiffs' claims challenging the Line Warming Restriction and Vote-by-Mail Application Restriction because—the Secretary asserted—she had no role in enforcing or implementing them. Sec'y Lee's Resp. at 5, 6, 11, ECF No. 115 (No. 4:21-cv-00201-MW). At the same time, the Secretary asked the Court "to allow her to present the State's good faith arguments in defense of the State's legislative enactments—to

allow her to defend all five provisions of the 2021 Law from attack under the U.S. Constitution and the Voting Rights Act." *Id.* at 3. Notably, the Secretary explicitly recognized that intervention might be required for her to do so. *Id.* at 14 n.17. Still, the Secretary did not move to intervene.

The Secretary also did not move to intervene after the Court decided that it agreed with the Secretary, and issued its order dismissing her as a Defendant for Plaintiffs' claims challenging the Line Warming Restriction and Vote-by-Mail Application Restriction, *see* Order on Mots. to Dismiss, ECF No. 201, in which the Court made it abundantly clear that it would not permit the Secretary to make arguments for claims for which she was no longer a party, *see id.* at 32 ("Because … this Court dismissed Plaintiffs' claims against Defendant Lee as to the latter two restrictions, Defendant Lee only has standing to defend the former two restrictions."). At that point in the case, the Secretary was on notice, that absent a successful motion for reconsideration or some other affirmative action and order from the Court, the Secretary could *not* "defend all five provisions of the 2021 Law," as she had so requested. Sec'y Lee's Resp. at 3, ECF No. 115.

The Secretary instead ignored the Court's clear direction and filed its motion for summary judgment on all of Plaintiffs' claims anyway. *See* Mot. for Summ. J. at 2, ECF No. 242-1. The Court's response was foreseeable, issuing an order to show cause that pointed out that it had "already explained" that "Defendant Lee may only

defend" the claims that remained against her, and directing the Secretary (and the two Supervisors who joined her motion only on the claims for which she had been successfully dismissed as a Defendant) to show why those portions of the Secretary's motion should not be stricken. Order to Show Cause at 1, 3, ECF No. 257.

In arguing that this issue did not "crystallize" until last week's order to show cause, the Secretary ignores all of the relevant background, pointing—as justification for her decision to move for summary judgment on all of Plaintiffs' claims—only to the Court's Order on the Supervisors' Active Participation. *See* Mot. at 5 (citing Order on Def. Supervisors' Active Participation in Case, ECF No. 273 (No. 4:21-cv-00186)). But while that Order suggested that the Supervisors could "coordinate" their defense with the Secretary, that Order in no way suggested that the Secretary could defend the provisions for which she was no longer a party by herself. Order at 4, ECF No. 273 (No. 4:21-cv-00186). To the contrary, the Court's Motion to Dismiss Order made clear that the Secretary could not do so when the Court explicitly refused to consider the Secretary's arguments on provisions for which she was no longer a party. *See* Order at 33, ECF No. 201. The Secretary chose to ignore that Order. And despite previously recognizing that intervention was likely

necessary to allow her to defend against all provisions, the Secretary did not move to intervene until now, nearly *five months* later.[2]

This Court has previously penalized parties in this case for not acting promptly when on notice of possible issues with their litigation strategy. *See* Order at 4-6, ECF No. 312 (No. 4:21-cv-00186) (denying the *League of Women Voters* Plaintiffs leave to amend their claims where "Plaintiffs were on notice of the deficiencies in their complaint," "had multiple opportunities to reassess their position" and where the Court's prior order "should have been a cue to Plaintiffs to that they needed to allege with particularity how each claim and injury was traceable to each defendant"). The same logic should apply here: the Secretary was on clear notice that she was not permitted to defend against claims for which she was not a party, admitted herself that intervention was likely required to do so, but did not move to intervene until the eve of trial. Her motion is not timely.

[2] The Secretary's footnote in her response to the July 7 Show Cause Order asking the Court to "construe" the brief as a motion to intervene should fall flat. Sec'y Lee's Resp. at 14, n. 17, ECF 115. Motions are not made in footnotes—particularly not motions made under a Rule which requires the prospective intervenor to make an affirmative showing of their right to intervention. *See* Fed. R. Civ. P. 24. And, in any event, the Court's order dismissing the Secretary made it perfectly clear that the Court had not "construed" the Secretary's response as such a motion. Instead, it very directly advised the Secretary she would not be permitted to defend on the dismissed provisions.

B. Intervention would prejudice Plaintiffs on the eve of trial.

The second factor the Court must consider is the prejudice Plaintiffs may face if the Secretary is permitted to intervene at this stage of the litigation. *Jefferson*, 720 F.2d at 1516. Of course, the risk of prejudice to the Plaintiffs grows as the litigation passes critical stages, as this one long since has. *See* 7C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1916 (3d ed. 2007) (explaining "an application made after the trial has begun or just as it is about to begin may be denied as untimely").

All discovery is complete, the parties have nearly finished briefing on their motions for summary judgment and have only a few weeks to finalize their pre-trial preparations for trial in January. For months now, Plaintiffs have understood that the Secretary would not be permitted to defend the portions of the law for which she is not a proper Defendant, an understanding that has informed their litigation strategy as they have prepared for trial. Further, allowing the Secretary to defend these laws will increase the remaining briefing and time required for trial, necessarily inflating litigation costs to Plaintiffs. *See United States by Bell ex rel. Marshall v. Allegheny-Ludlum Indus., Inc.*, 553 F.2d 451, 453 (5th Cir. 1977) (recognizing increased "litigation expenses" as prejudice to parties in evaluating timeliness of intervention motion); *see also* Order at 3, ECF No. 257 (recognizing the prejudice to Plaintiffs where Defendant Lee has ignored the Court's prior directives and now would

"forc[e] Plaintiffs to expend resources responding to" the Secretary's arguments on claims from which she was dismissed, based on her own arguments).

And Plaintiffs anticipate that, should Plaintiffs prevail on the claims that the Secretary now belatedly attempts to intervene to defend after successfully dismissing herself as a defendant, the Secretary will turn around and claim that, under the usual rules applying to intervention, the Secretary is not liable for the attorney's fees that Plaintiffs incurred as a direct result of the Secretary's litigation tactics. *See, e.g.*, *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 763 (1989) (explaining fee awards against intervenor-defendants are usually not available because fees liability and merits liability run together). This would establish an alarming precedent to enable state actors to do a direct run-around the fee shifting provision in 42 U.S.C. § 1988 that Congress intended to ensure not only robust enforcement of civil rights laws in actions such as this one, but also voluntarily compliance by state actors with those same provisions. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31(1982).

C. The Secretary will not be substantially prejudiced if intervention is denied.

The third factor the Court must consider is the prejudice the Secretary would face if intervention was denied. The answer is none.

For this factor, "the thrust of the inquiry must be the extent to which a final judgment in the case may bind the movant even though he is not adequately

represented by an existing party." *Jefferson*, 720 F.2d at 1517. To start, existing Defendant-Intervenors in the case—the Republican National Committee (RNC) and National Republican Senatorial Republican Committee (NRSC)—have already shown a full willingness to defend the constitutionality of these laws, as have at least two Supervisors. *Cf. Meek v. Metro. Dade Cnty., Fla.*, 985 F.2d 1471, 1479 (11th Cir. 1993) (finding prejudice to would-be intervenors where "no other parties remain in the case to pursue the objective of defending the at-large system").

Most importantly, however, the Secretary faces no risk that she will be bound by or directly affected by the Court's judgment on the Line Warming Restriction and Vote-by-Mail Application Restriction claims. As the Secretary argued, *and the Court agreed*, "[n]either the Secretary nor any component of the Department of State has enforcement authority over the vote-by-mail request provisions." Sec'y Lee's Resp. at 5, ECF No. 115; *see also id.* at 11 ("The statute grants the Secretary no role in implementing [the vote-by-mail request] section."); *id.* at 6 ("The Secretary has no role in enforcing Section 29's non-solicitation provisions."). The Eleventh Circuit has explained that, where the movant "could not be bound, or where his interest is identical with a party and consequently he is adequately represented, we would find no prejudice sufficient to give weight to the third factor." *Jefferson*, 720 F.2d at 1517.

D. Additional circumstances militate against intervention.

This Court should finally consider any "unusual circumstances" which weigh for or against intervention. Here, the Secretary's predicament is one of her own making. In most states, Secretaries of State readily embrace their role to oversee their electoral system and take responsibility for litigating and defending against challenges to those systems. The Florida Secretary of State did so for decades.

Recently, however, as this Court knows, the Secretary argued that the Secretary's general duty to enforce Florida's election laws, by itself, was not sufficient to make her legally responsible for injuries Florida voters might suffer from that system—an argument with which the Eleventh Circuit agreed. *See generally Jacobson*, 974 F.3d 1236. As a result of the Secretary's success in this argument, voting rights plaintiffs that bring challenges to Florida's election laws now must spend considerable time and expense to sue all of Florida's 67 Supervisors of Elections if they seek statewide relief. Yet, now, after successfully removing herself as a defendant on these claims, the Secretary wants to continue defending Florida's election laws as an Intervenor-Defendant—and thus, theoretically, without the liability for defending those laws should Plaintiffs prevail. *See supra* at 9.

The other unusual factor here is, of course, the number of parties to this case. The Secretary aside, there are already 68 Defendants and 2 Intervenor-Defendants

to this case. This Court does not need yet another perspective to render a thoughtful judgment on these laws.

II. Absent intervention, Defendant Lee should not be allowed to assert arguments or offer evidence regarding provisions as to which she is not a defendant.

As the Court's recent Order to Show Cause explained, "Defendant Lee may only defend those provisions that she has standing to defend." Order at 1, ECF No. 257. And with respect to the Line Warming Restriction and Vote-by-Mail Application Restriction, Defendant Lee has no such standing, because she is not subject to a potential adverse judgment in this case. *Id.* at 2.

While a *State* may, as Defendant Lee argues, have "standing to defend the constitutionality of its statute," *Diamond v. Charles*, 476 U.S. 54, 62 (1986), Defendant Lee is *not* the State of Florida—indeed, the State of Florida is immune from suit. *See Hans v. Louisiana*, 134 U.S. 1 (1890). Were it otherwise, Plaintiffs could simply seek an injunction against Florida, Florida could defend itself, and the complexities of a case involving 67 Supervisors of Elections would not arise. Significantly, Defendant Lee "has not identified any legal basis for [her] claimed authority to litigate on the State's behalf." *Va. H.D. v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). The Court therefore has, at a minimum, the discretion to refuse to entertain arguments and evidence from the Secretary about provisions as to which she is not a proper defendant.

The *Florida Rising* Plaintiffs do, however, agree with Supervisors Hays and Doyle that Hays and Doyle's joinder to Defendants' Motion for Summary Judgment, including their designation as movants on the motion and their counsel's signatures on the motion and supporting memorandum, mean that all of Defendants' arguments for summary judgment have been made to the Court by parties with standing to make them. The *Florida Rising* Plaintiffs therefore respectfully suggest that the Court should not strike any of the arguments in Defendants' Motion for Summary Judgment. The Court should, however, continue to enforce its requirement that arguments in defense of the Challenged Provisions may be made only by parties with standing to make them, and should refuse to consider any future evidence or arguments offered in support of the Line-Warming Restriction and the Vote-by-Mail Application Restriction that may be made by Defendant Lee alone. This approach will also ensure that, should Plaintiffs prevail, Supervisors Hays and Doyle do not suddenly disclaim responsibility for those arguments—and the expense that Plaintiffs have had to incur in responding to them—when it comes time to address Plaintiffs' entitlement to costs and fees.

III. If intervention is permitted, the Secretary's participation should be limited.

If this Court ultimately decides to permit intervention, Plaintiffs respectfully urge the Court to impose guardrails on the Secretary's participation—limits this Court has the authority to impose. *See Stringfellow v. Concerned Neighbors in*

Action, 480 U.S. 370, 383 (1987) (Brennan, J. concurring) (explaining "restrictions on participation may. . .be placed on an intervenor of right"); *Southern v. Plumb Tools*, 696 F.2d 1321, 1322 (11th Cir. 1983) ("Discretion under Rule 24(b) to grant or deny intervention *in toto* necessarily implies the power to condition intervention upon certain particulars."); *Beauregard, Inc. v. Sword Servs., LLC*, 107 F.3d. 351, 352-53 (5th Cir. 1997) ("[I]t is now a firmly established principle that reasonable conditions may be imposed even upon one who intervenes as of right."); *see also* Fed. R. Civ. P. 24 advisory committee's note to 1966 amendment ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.").

Should this Court grant intervention to the Secretary, it should make clear that (1) the Secretary will be permitted to argue and present evidence *only* as to the constitutionality of the Line Warming Restriction or Vote-by-Mail Application Restriction (and not as to other jurisdictional arguments the Secretary might otherwise make), and (2) the Secretary should expect to share responsibility with the Supervisors who join in those arguments for the costs for the Plaintiffs' prosecution of those claims should Plaintiffs prevail. Plaintiffs do not suggest this framework out of whole cloth; rather, this suggestion is consistent with Congress's vision for how

states should participate in federal court when they wish to defend the constitutionality of a state statute. Specifically, 28 U.S.C. § 2403(b) states

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument **on the question of constitutionality**. The State shall, subject to the applicable provisions of law, **have all the rights of a party and be subject to all liabilities of a party as to court costs** to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(b) (emphases added); *see also Hutto v. Finney*, 437 U.S. 678, 694 (1978) (noting congressional intent under § 1988 for states to be liable for costs, including attorneys' fees).

Plaintiffs recognize that 28 U.S.C. § 2403(b) is not a perfect match for this case: Because the Secretary and Attorney General were parties to this case from the moment it was filed (and thus the State or its officers were on notice of the suit), this Court was not required to notify the State of the constitutional questions at issue. And, as noted, the Secretary of State is not properly characterized as the "State." But § 2403(b) does *inform* the proper role a State should play when intervening to defend the constitutionality of a state statute: it should be limited to presenting evidence *only* as to the constitutionality of the statute, and it should expect to share costs should the Plaintiffs prevail.

Respectfully submitted this 2nd day of December, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was served on all counsel of record through the Court's CM/ECF system on the 2nd of December, 2021

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