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

FLORIDA RISING TOGETHER, et al., Plaintiffs, v. LAUREL M. LEE, in her official capacity as the Secretary of State of Florida, et al., Defendants.	Case No. 4:21-cv-201-MW-MJF

FLORIDA RISING TOGETHER PLAINTIFFS' CORRECTED OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY DEFENDANT CRAIG LATIMER[1]

[1] This corrected filing updates two citations to exhibits inadvertently mis-identified in the original filing.

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INTRODUCTION

The Motion for Summary Judgment ("Mot.") filed by the Hillsborough County SOE (joined by the Miami-Dade SOE (ECF 252)) [2] ("Defendants") misconstrues the *Florida Rising* Complaint, fails to properly state the applicable standard for summary judgment, and misapprehends the fundamental holding of *Jacobson v. Florida Secretary of State,* 974 F.3d 1236 (11th Cir. 2020) with respect to the traceability and redressability prongs of a standing analysis. This court has already ruled that Plaintiffs' claims satisfy the legal test for traceability and redressability as to the Supervisors. *See* ECF 201 at 26-31. For each of the claims directed at the SOEs—related to SB90's restrictions on secure drop boxes (Section 28), requesting vote by mail ballots (Section 24), and providing assistance to voters waiting to vote (Section 29) the record shows material facts in dispute as to the impacts of these provisions in Hillsborough and Miami-Dade County. Thus, this motion should be denied.

STATEMENT OF FACTS

Florida Rising Plaintiffs provide a detailed Statement of Facts in their Memorandum of Law in Support of Motion for Partial Summary Judgment (ECF

[2] The Miami-Dade "joinder" was filed on November 15. Although styled a "joinder," the Miami-Dade filing raises issues not presented in the Hillsborough motion and is, in reality, a summary judgment motion. Because Miami-Dade filed three days after the summary judgment deadline established by the Court for motions for summary judgment (ECF 101) its motion was untimely and should be summarily denied.

No. 241-1), and in Florida Rising Plaintiffs' forthcoming Opposition to the Secretary of State's Motion for Summary Judgment. The Statement of Facts from those filings are incorporated by reference herein.

LEGAL STANDARD

For purposes of a motion for summary judgment, the Defendants must demonstrate an absence of a "genuine dispute as to any material fact" with respect to Florida Rising Plaintiffs' claims, and that Defendant are therefore "entitled to judgement as a matter of law." Fed. R. Civ. P. 56(a). At the summary judgment stage "the court must construe the evidence and all reasonable inferences arising from it in the light most favorable to the non-moving party." *Whitehead v. BBVA Compass Bank*, 979 F.3d 1327, 1328 (11th Cir. 2020). In a summary judgment motion, "The district court may not weigh the evidence or find facts." *Morrison v. Amway Corp.,* 323 F.3d 920, 924 (11th Cir. 2003). The court "may not weigh conflicting evidence or make credibility determinations of its own." *FindWhat Investor Group v. FindWhat.com,* 658 F.3d 1282, 1307 (11th Cir. 2011).

"The moving party bears the initial burden of proving the absence of a genuine issue of material fact." *Whitehead,* 979 F.3d at 1328. "The burden then shifts to the nonmoving party, who is required to go beyond the pleadings to establish that there is a genuine issue for trial." *Id.* (citation omitted) (internal quotations marks omitted).

ARGUMENT

I. DEFENDANTS ARE PROPER PARTIES TO THIS LITIGATION

The Defendants' Motion fails to satisfy the standard for summary judgment as the record evidence demonstrates both that the Challenged Provisions will harm voters in Hillsborough and Miami-Dade County, and that Plaintiffs have suffered cognizable injuries from the implementation of SB90.

The Defendants' motion attempts to reduce the summary judgment standard to the much narrower issue of whether the Hillsborough SOE has acted or is likely to act with discriminatory intent in implementing SB90, *see* Mot. 6; or whether there are other opportunities to vote in Hillsborough County despite the impacts of SB90. *Id.* at 4-6. This argument is predicated on a misreading of the *Florida Rising* Plaintiffs' claims against the SOEs in this case.

Contrary to Defendants' assertions, the Complaint alleges that the Florida legislature acted with discriminatory intent in enacting SB90; the intent of the SOEs is not at issue. *See generally* ECF 59. The Complaint asserts causes of action against the SOEs because they are responsible for implementing and enforcing the Secure Drop Box Restrictions, the Vote by Mail Application Restriction and the Polling Place Assistance Restriction (referred to herein as "Challenged Provisions"). *See id.* ¶59. Based on the Eleventh Circuit's holding in *Jacobson*, this is sufficient to render the SOEs appropriate defendants. *See* 974 F. 3d at 1253 (holding that injuries to Plaintiffs are traceable to the SOEs because the SOEs are obligated under Florida

law to implement Florida election law). Indeed, this Court has already upheld this principle in addressing Secretary Lee's Motion to Dismiss. *See* ECF 201 at 26-28 (finding injuries to Plaintiffs traceable to SOEs because they are "directly responsible for" drop box availability, VBM identification requirements and the restrictions on assistance to voters waiting on line); *id.* at 31 (holding that an injunction against the SOEs will "have the practical effect of redressing Plaintiffs' alleged injuries" with respect to the drop box restrictions, the VBM application requirements and the polling place assistance restriction). Defendants have identified nothing in the record that contradicts this conclusion.

While the availability of other opportunities to vote may be relevant to the ultimate inquiry as to whether the Challenged Provisions comport with the First, Fourteenth and Fifteenth Amendments to the Constitution and the Voting Rights Act, mere invocation of "other opportunities to vote" does not establish absence of material facts in dispute as to the impacts of the Challenged Provisions. As is documented below, there are material facts in dispute with respect to the impact of each of the Challenged Provisions in Hillsborough and Miami-Dade Counties.

Defendants also assert that the alleged injuries of SB90 in Hillsborough County are too speculative to justify a challenge, because "no voter has voted in Hillsborough County since SB90 was enacted." Mot. 12. But in the Eleventh Circuit, pre-enforcement challenges are possible where "credible threat of an injury

exists". *American Charities for Reasonable Fundraising Regulation v. Pinellas County*, 221 F.3d 1211, 1214 (11th Cir. 2000). Here, because Hillsborough and Miami-Dade Counties intend to apply and enforce the Challenged Provisions, and because the Challenged Provisions will directly impact voters in Hillsborough and Miami-Dade County, the threat of injury to voters is credible and real.

Accordingly, the motion should be denied.

II. DISPUTES OF MATERIAL FACT BAR SUMMARY JUDGMENT ON THE CHALLENGED PROVISIONS

A. Drop Box Restriction (Section 28)

The drop box restrictions in Section 28 of SB90 reduce the days and hours of drop box availability. Thus, while the Motion claims the number of drop boxes will not be impacted by SB90, Mot. 7-8, in discovery, Hillsborough County's representative stated that in response to SB90, "The SOE 24 hour drop box at the Elections Service Center will be discontinued." ECF 271-21 No. 34. Whether the curtailment of hours of a drop box that previously operated 24/7 increases burden on voters in Hillsborough County is a disputed fact that cannot be resolved on summary judgment.

The Hillsborough SOE also will discontinue drop boxes at two additional early voting sites, the Amalie Arena and Raymond Jones Stadium. Mot. 7. The Hillsborough SOE asserts these changes are unrelated to SB90 because these sites "won't be available because they are back to having fans in place now." *Id.* This

explanation is misleading. While these arenas may not be available as early voting sites due to the presence of fans, prior to SB90 these sites could have been locations for drop boxes even if they were not early voting sites. ECF 271-59 ¶15. But for SB90, these sites could have been used for drop boxes, during or outside of early voting times and days, with or without SOE staff providing security. *Id.* Indeed, in the 2020 General Election, the Duval County SOE provided a drive-through VBM drop box at Jacksonville Jaguars TIAA Bank Field, a location that was not an early voting site. *Id. See also* ECF 238-9 ¶131. The only thing preventing the Hillsborough SOE from maintaining drop boxes at the two stadiums is SB90, not the presence of fans.

In addition, Plaintiffs are directly impacted by the enforcement of Section 24 in Hillsborough County. Mi Familia Vota Education Fund conducts numerous programs to assist voters in using drop boxes in Hillsborough County. This mission will be thwarted by the restrictions on the use of drop boxes, requiring the diversion of staff, resources and funds to restructure the group's voter outreach program. *See* ECF 278-1 ¶¶4, 12-15.

There are similarly disputed issues of fact with regard to the Drop Box restrictions in Miami-Dade County. While the Miami-Dade joinder asserts that "there will be no severe restriction of the availability of drop boxes in Miami Dade County", ECF 252 ¶ 5, in interrogatory responses, the Miami-Dade SOE stated the

County will not provide drop boxes at the South Dade Government Center or the North Dade Government Center outside of the days and hours of Early Voting "because neither location meets the definition of 'permanent branch office' as described in Section 28 of Senate Bill 90 (2021)." *See* ECF 271-23 Interrog. No. 3. Whether this reduction in days and hours of availability increases the burden on Miami-Dade voters is a disputed fact that cannot be resolved on summary judgment.

B. Vote by Mail Application Restriction (Section 24)

Neither Hillsborough County nor Miami-Dade dispute that significant numbers of voters in their counties lack one or more forms of identification needed to request a VBM ballot, pursuant to Section 24 of SB90. An analysis of the Florida Voter Registration System (FVRS) has identified 47,419 Hillsborough County and 22,717 Miami-Dade County voters whose voter records lack the identification number needed to request a VBM ballot. *See* ECF 271-59 ¶¶7-8. Significantly, these figures likely represent an undercount of the number of voters in these counties who will be unable to obtain a mail ballot, since these only represent the number of voters without any form of acceptable identification for purposes of obtaining a mail ballot, and do not include voters who attempt to seek a VBM by using an identification number that does not match the number in the FVRS. *See* ECF 238-9 ¶61.

For voters registered since 2006, the VBM application restriction has a disparate racial impact. *See* ECF 238-9 ¶ 88 & tbl 10. The percent of Black

registered voters without a driver's license or Social Security Number is nearly twice the overall share of Black registered voters during this time period. By contrast, while white voters were more than 55% of voters who registered since 2006, white voters constitute only 13.65% of voters without a Social Security Number or a driver's license. *Id.* These numbers show similar results for Hillsborough and Miami-Dade County. *See* ECF 271-59 at ¶¶7-8 & tbl.1 (describing how Black voters constitute 35.2% of voters without identification in Hillsborough County registered since 2006; Black voters constitute 36.5% of voters without identification in Miami-Dade County registered since 2006). Thus, the record shows material facts in dispute as to the impacts of the VBM application restriction on voters generally in Hillsborough and Miami-Dade Counties, and as to disparate racial impacts in both counties.

The Defendants' motion does not directly address the issue of the impact on voters of the mail ballot application restriction, asserting only that the SOEs are able to meet the administrative burdens of this law. *See* ECF 237 at page 9; ECF 252 ¶ 6.[3] But Defendants do not address the impact to the tens of thousands of Hillsborough and Miami-Dade voters who will be unable to obtain VBM ballots.

[3] Both Motions also address a separate provision of SB90, the vote-by-mail repeat request restriction, F.S. § 101.62(1)(a). Florida Rising Together Plaintiffs do not challenge this provision of SB90, so it is not relevant to the motion for summary judgment.

The restrictions on VBM applications will cause clear and specific injury to Plaintiff organizations that engage in voter education efforts in Hillsborough and Miami-Dade Counties to assist voters in applying for VBM ballots. *See* ECF 278-1 ¶¶4, 7-9; *see also* ECF 271-57 ¶¶4, 6-13. Section 24 will also directly impact Plaintiff organizations with members in Miami-Dade County who lack the forms of identification required for the VBM application. *See* ECF 271-58 ¶29.

Thus, nothing in this motion provides a basis for granting summary judgment on this claim.

C. Polling Place Assistance Restriction (Section 29)

The Polling Place Assistance Restriction, Section 29 of SB90, expands the definition of "solicitation" to include "engaging in any activity with the intent of influencing or the effect of influencing a voter." F.S. § 102.031(4)(b). Plaintiffs challenge this provision as violating the First, Fourteenth and Fifteenth Amendments of the Constitution, and Sections 2 and 208 of the Voting Rights Act. *See* ECF 59 ¶¶ 165-218.

Defendants make two arguments as to this provision, neither of which merits summary judgment. First, Defendants assert that since the Hillsborough SOE staff will provide assistance to voters who need it, there is no impact to any voters in Hillsborough County. ECF 237 at 10. But the SOE's assertion that his staff will provide assistance does not mitigate the injury to voters or to Plaintiffs from Section

29. Plaintiffs have already testified that their programs to assist voters at the polls will be significantly impaired by Section 29. *See generally* ECF 241-1 (SOF ¶¶ 6-7, 21). Significantly, the Hillsborough SOE does not assert that SOE staff will be able to provide the kinds of services offered by Plaintiffs, including language assistance, assistance to voters with disabilities, food, cell phone charging, toys for children or umbrellas. *See id.* Thus, there are material facts in dispute as to whether the Polling Place Assistance Restriction will impact voters in Hillsborough County.

Additionally, the Hillsborough Motion does not dispute that Section 29 bars assistance to any voter from anyone other than SOE staff. Since VRA Section 208 specifically allows a voter to obtain assistance from an individual of "the voter's choice," *see* 52 U.S.C. § 10508, the fact that voters may receive assistance from SOE staff does not address a Section 208 claim.

Finally, Hillsborough asserts that Section 29 is of no consequence because "there are no long lines on Election Day" in Hillsborough County. ECF 237 at 10. But this assertion is belied by the Hillsborough SOE's admission in this case that "voters have waited more than 30 minutes in line to vote during early voting or on election day in a statewide election" since 2012. *See* ECF 271-60 No. 20. This assertion is also rebutted by testimony of multiple Plaintiffs that they have provided assistance to voters waiting in line in Hillsborough County. *See* ECF 241-1 at 23 n.3; *see also* ECF 238-24 at 59:13-62:8; ECF 238-25 at 23:23-24:6.

There have been numerous reports of long wait times for voting in Hillsborough County during the 2020 general election. According to news reports, the wait time at the Riverview Branch Library was about 40 minutes and "about an hour" at the Southshore Regional Library on the first day of early voting. ECF 271-59 ¶¶26-27. There is a history of long lines on election day in Hillsborough County. According to a study of the 2012 elections, voters waited for extensive amounts of time after the polls closed. The average post-closure wait time was 30 minutes, with the longest recorded wait time of more than 3 hours. *See id.* ¶¶23-24. At the very least, the impact of Section 29 on Hillsborough County voters is a disputed issue of fact.

There are similarly facts in dispute as to the impact of Section 29 in Miami-Dade County. The Miami-Dade SOE has acknowledged that she has "heard from voters" in Miami Dade that in past elections there have been wait times of "hours, many hours." ECF 271-28 at 50:18-51:8. In the 2020 general election, over 59,000 voters had to wait on line at least 30 minutes to vote in person. ECF 238-9 ¶ 240 & fig.7. In the 2020 general election, Miami-Dade County had long lines at early voting locations, where voters reported waiting in line 90 minutes. ECF 271-59 ¶28.

The Miami-Dade SOE does not dispute that Section 29 requires SOEs to enforce the restriction, or that Section 29 expands the scope of activity barred by state law. Moreover, the Miami-Dade SOE acknowledged at deposition that the

County does not allow the provision of water or other assistance to voters within 150 feet of the polling place. ECF 238-10 at 22:16.

The Miami-Dade SOE's argument appears to be that because she was already interpreting and applying the law prior to SB90 as barring polling place assistance within 150 feet, her decision to now implement this provision of SB90 cannot be challenged. ECF 252 ¶7. This is a disputed issue of fact—multiple Plaintiffs testified that they provided voter assistance in Miami-Dade County prior to the passage of SB90. *See* ECF 238-24 at 60:20-61:6; *see also* ECF 238-21 at 52:19-56:8. And the Miami-Dade SOE's argument does not follow. In future elections, the Miami-Dade SOE's actions preventing nonpartisan voter assistance will be implementing SB90. As such, her actions will impact voters in Miami-Dade County, they will be traceable to her enforcement of the restriction, and an injunction against her will provide relief to Plaintiffs. Indeed, the Miami-Dade SOE does not dispute that future enforcement of Section 29 will be pursuant to SB90. *See* ECF 238-10 at 77:9-78:5 (agreeing that policy of banning all activity within 150 feet of polling place is based "both" on law before and after SB90). She is thus an appropriate defendant for this challenge.

Miami-Dade similarly asserts that Section 29 causes no harm to Miami-Dade voters because Miami-Dade officials allow voters to keep their place in line if they need to leave the voting line. ECF 252 ¶ 3; *see* ECF 238-10 at 23:2-7. That assertion

is also inconsistent with the experience of Plaintiffs, who have provided assistance to voters in Miami-Dade. *See* ECF 241-1 at 23 n.3 And the mere fact that voters in Miami-Dade County may be able to briefly leave the line without losing their place does not substitute for the range of nonpartisan assistance offered by Plaintiffs which, as noted above, includes food, water, umbrellas, language assistance and power for charging phones. ECF 241-1 (SOF 6-7,21). Thus, there are facts in dispute as to whether the voluntary activities of the Miami-Dade SOE can replace the polling place assistance activities of Plaintiffs that will be banned under SB90.

CONCLUSION

Plaintiffs have identified impacts to voters in Hillsborough County and Miami-Dade County from the Challenged Provisions of SB90. The Defendants are responsible for implementing the provisions of SB90 that will impact voters in their respective Counties. Accordingly, they are proper Defendants for this challenge and their motion for summary judgment should be denied.

Dated: December 3, 2021

Respectfully submitted,

s/ *Kira Romero-Craft*

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LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), this memorandum contains 3,081 words, excluding the case style, table of authorities, table of contents, signature blocks, and certificate of service.

s/ *Kira Romero-Craft*
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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 3rd of December, 2021.

s/ *Kira Romero-Craft*
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