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

FLORIDA RISING TOGETHER, et al.,

***Plaintiffs*,**

v. **Case No.: 4:21cv201-MW/MJF**

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

***Defendants*,**

and

NATIONAL REPUBLICAN SENATORIAL COMMITTEE and REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendants.

_____/

ORDER ON DEFENDANT SUPERVISORS' MOTION FOR SUMMARY JUDGMENT

This is a voting case. This Court has considered, without hearing, the parties' cross-motions for summary judgment. This Order addresses the motion filed by Defendant Latimer and joined by Defendant White ("Defendant Supervisors"). ECF Nos. 237 and 252. This Court addresses the motion filed by Defendants Lee, Doyle, and Hays and Plaintiffs' motion for partial summary judgment by separate order.

Plaintiffs have challenged several new laws enacted or amended by the Florida Legislature in SB 90. Defendant Supervisors have moved for summary judgment, asserting Plaintiffs lack standing to challenge these laws, and in the alternative, that neither Defendant has done or will do anything to intentionally violate Florida voters' rights. This Order addresses Defendant Supervisors' arguments, starting with whether Plaintiffs have demonstrated standing at the summary-judgment stage.[1]

I

To establish standing, Plaintiffs must show (1) that they have suffered an injury-in-fact that is (2) traceable to Defendants and that (3) can likely be redressed by a favorable ruling. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). And they must do so for each statutory provision they challenge. *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273 (11th Cir. 2006) (emphasizing that courts have an "independent obligation . . . to ensure a case or controversy exists as to each challenged provision even in a case where the plaintiffs established harm under one provision of the statute"). Plaintiffs proceed under two theories of standing, organizational standing and associational standing. This Court discusses each in turn.

[1] The parties are well aware of this case's underlying facts and procedural history, and thus this Court will not restate them here.

An organization may have standing to assert claims based on injuries to itself if that organization is affected in a tangible way. *See Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) ("An organization has standing to challenge conduct that impedes its ability to attract members, to raise revenues, or to fulfill its purposes." (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982))). Here, Plaintiffs proceed under a diversion-of-resources theory. "Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014).

In addition to organizational standing, an organization may sue "on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1316 (11th Cir. 2021) ("*GBM*"). As discussed below, Plaintiffs' members have standing as to the challenged provisions of SB 90 with respect to the Defendant Supervisors. Additionally, this lawsuit is germane to Plaintiffs, whose core purposes involve registering voters, voter education, encouraging electoral participation, and advocating for accessibility for

Florida voters. Finally, neither the claims asserted, nor the relief requested requires the participation of the individual members in this lawsuit. *See Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1244 (11th Cir. 2003); *GBM*, 992 F.3d at 1316 n.29 ("[P]rospective relief weigh[s] in favor of finding that associational standing exists.").

"The party invoking federal jurisdiction bears the burden of proving standing." *Bischoff v. Osceola Cnty., Fla.*, 222 F.3d 874, 878 (11th Cir. 2000). Critically, "each element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.' " *Id.* (quoting *Lujan*, 504 U.S. at 561). Accordingly, "when standing is raised at the summary judgment stage, the plaintiff must 'set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken as true.' " *Id.* (quoting *Lujan*, 504 U.S. 561).

In this case, Defendant Latimer—belatedly joined by Defendant White—move for summary judgment against Plaintiffs with respect to "any *as applied* challenge which may be inferred from Plaintiffs' pleadings, to the extent such a challenge might be focused upon Hillsborough County's Supervisor of Elections and upon his conduct of future elections." ECF No. 237 at 3 (Latimer Motion); *see also* ECF No. 252 ¶ 8 ("Supervisor White joins the Motion for Summary Judgment filed

by Supervisor Latimer as to any as applied challenge that may be inferred from Plaintiffs' pleadings to the extent such a challenge might be focused upon Miami-Dade County's Supervisor of Elections.").

The Defendant Supervisors assert Plaintiffs have not demonstrated that they have standing to proceed against Defendants Latimer and White. But this Court recognized Plaintiff's cognizable injuries under a diversion-of-resources theory and associational standing theory at the pleading stage, ECF No. 201 at 14-23, and now Plaintiffs have put meat on the bones at the summary-judgment stage to show that the challenged provisions violate their First Amendment rights and their members' voting rights by limiting access to drop boxes, voting line relief activities and expression, and voting by mail.[2]

[2] Although Defendant Supervisors do not challenge Plaintiffs' diversion-of-resources injuries, the record includes evidence to support Plaintiffs' organizational theory for standing. *See, e.g.*, ECF No. 241-1 at 27-28; ECF No. 280 at 43-48. For example, Plaintiff Hispanic Federation ("HF") asserts it will have to shift "funds and staff time from other election activities to creating a strategy to maintain an effective voter assistance program despite SB90 and then implement those programmatic changes in training curriculums and additional education activities." ECF No. 240-2 ¶ 13. In addition, "HF anticipates longer lines resulting from SB90 and will make upward adjustments to its budget for refreshments to accommodate the additional voters requiring voter assistance." *Id*. HF is also assessing changes to its voter assistance program as a result of the new restrictions inside the no-solicitation zone, including increasing resources for its voter assistance hotline and additional canvassers and additional training time to educate canvassers on their new compliance strategy. *Id*. ¶ 14. Likewise, Plaintiff Florida Rising Together, which operates in Hillsborough and Miami-Dade Counties, is diverting staff time to planning how the new "line warming" restrictions will impact its volunteer program and developing new strategies and technologies to encourage voters to stay in line at their polling places. *See* ECF No. 244-19 at 22, 78-81.

Specifically, Plaintiffs respond with evidence that, by operation of the challenged law restricting drop boxes, Hillsborough County will no longer offer a 24/7 drop box that was previously available, and that Miami-Dade County will no longer make two drop box locations available to voters on Election Day and the Monday before Election Day. *See* ECF No. 271-21 at 4; ECF No. 271-23 at 5. *See also* ECF No. 278-1 ¶¶ 4, 12-15 (noting changes to Plaintiff Mi Familia's "Ride to the Polls" car service assistance program caused by drop box restrictions). In addition, Plaintiffs have come forward with evidence that voters have had to wait in lines longer—sometimes, substantially longer—than 30 minutes in Hillsborough and Miami-Dade Counties. *See, e.g.*, ECF No. 271-60 at 315; ECF No. 271-59 ¶¶ 23-24, 26-28; ECF No. 238-9 ¶ 240. Plaintiffs have also produced record evidence of the burdens the new vote-by-mail application requirements impose on voters, including Plaintiffs' members, and how these requirements impact Plaintiffs' ability to assist voters in Hillsborough and Miami-Dade Counties, among other places in Florida. *See, e.g.*, ECF No. 280 at 46-47; ECF No. 279 at 10-12; ECF No. 278-1 ¶¶ 4, 7-9; ECF No. 271-58 ¶ 29; ECF No. 271-57 at 3-5.

Defendant Supervisors also challenge Plaintiffs' showing as to traceability and redressability, noting that Defendant Supervisors have not done anything or said they might do anything that causes Plaintiffs' asserted injuries. Not so. As this Court previously noted, Defendant Supervisors are statutorily tasked with enforcing the

challenged provisions—Sections 101.69, 101.62(1)(b), and 102.031(4)(a)-(b), Florida Statutes—and that Plaintiffs' asserted injuries are traceable to the Supervisors' enforcement of these provisions and redressable by an injunction prohibiting such enforcement. *See* ECF No. 201 at 25-31. Upon review of the evidence in the record, Defendant Supervisors' argument does not change this Court's conclusion as to these standing requirements from the pleading stage. Accordingly, the facts and all reasonable inferences drawn therefrom demonstrate that Plaintiffs have standing to proceed at the summary judgment stage. [3]

II

Aside from asserting no case or controversy exists for Plaintiffs' case to proceed, Defendant Supervisors assert they are entitled to summary judgment as to Plaintiffs' claims for intentional race discrimination, undue burden on the right to vote, and violation of free speech, because they "did not enact SB 90" nor were they sponsors of the bill. ECF No. 237 at 2-3. This Court understands Defendant Supervisors' frustration, but, as a legal matter, their argument is baseless. While Defendant Supervisors admittedly are not also state legislators, they are the officials

[3] Standing jurisprudence in the Eleventh Circuit is evolving. This Court reiterates that Plaintiffs must establish standing at each stage of the case, including trial. The facts and all reasonable inferences in favor of Plaintiffs at this stage demonstrate that Plaintiffs have standing, but more granular facts may be required at trial to establish the same. *See Jacobson*, 974 F.3d at 1250. Plaintiffs' counsel should be prepared to introduce evidence with specificity as to the diversion of resources necessitated by the challenged laws and the identifiable burdens the challenged provisions impose upon their members, if any.

vested with statutory responsibility for enforcing the challenged laws. Moreover, Plaintiffs identify material facts in dispute that preclude entry of summary judgment for Defendant Supervisors. *See* ECF No. 276 at 8-16.[4] Accordingly, Plaintiffs have demonstrated standing to proceed with respect to each challenged provision.

III

This Court reiterates that Defendants Latimer and White move for summary judgment only with respect to any as-applied claims that can be inferred from the Amended Complaint, ECF No. 59. This Court also recognizes that claims may shift from facial to as-applied challenges, depending on the facts in dispute and the relief requested. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) ("[T]he distinction between facial and as-applied challenges" is fluid.); *Doe #6 v. Miami-Dade Cnty.*, 974 F.3d 1333, 1338 (11th Cir. 2020) (noting that the difference between the two turns not on what the parties have pleaded but rather on the relief the court grants). Accordingly, the Eleventh Circuit has expressed a willingness to permit parties to change their focus from a facial to an as-applied challenge "at the summary judgment

[4] With respect to Defendant White's assertion that there is no record evidence to show that any Plaintiffs have engaged in or intend to engage in any "line warming" activities in Miami-Dade County, Plaintiffs cite evidence disputing the assertion. *See, e.g.*, ECF No. 291 at 15-17; ECF No. 271-58. Upon review, a factual question remains as to whether, on an as-applied basis, Plaintiffs are entitled to relief on their challenge to the "line warming" ban in Miami-Dade County, among other Florida counties.

stage." *Id.* (citing *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013)).

Nonetheless, as this Court noted in its order on Defendant Lee's motion for summary judgment, the distinction between as-applied and facial challenges is consequential with respect to Plaintiffs' First Amendment challenge to the non-solicitation provision. Defendant Latimer's motion, ECF No. 237, is therefore **GRANTED in part** only as to Count V of the Amended Complaint to the extent Plaintiffs raise a facial challenge to the non-solicitation provision under the First Amendment, ECF No. 59 at 101.[5] The motion is otherwise **DENIED**.

It does not appear at this juncture that Plaintiffs need to amend their complaint to account for this kind of shift, but for this Court's convenience and to avoid prejudice to the Defendants, Plaintiffs need to tell this Court in advance how they intend to proceed at trial. Specifically, **Plaintiffs must file with the pretrial stipulation due December 27, 2021, a list of each claim they intend to pursue at**

[5] This Court recognizes that Plaintiffs' overbreadth challenge is, necessarily, a facial challenge under the First Amendment. But there, Plaintiffs' claim does not necessarily rise or fall depending on whether the First Amendment reaches Plaintiffs' activity. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) ("Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own."). Likewise, whether a law implicates the First Amendment or not, "[w]hen vagueness permeates the text of such a law, it is subject to facial attack." *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). Accordingly, this Court makes clear that it *does not* grant summary judgment on Plaintiffs' overbreadth or vagueness claims alleged in Count V of the Amended Complaint.

trial and whether that claim is brought as a facial challenge, an as-applied challenge, or both—or if the designation is inapplicable, they must so state.

SO ORDERED on December 17, 2021.

s/Mark E. Walker
Chief United States District Judge