

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA**

DREAM DEFENDERS, et al.,

Plaintiffs,

v.

CASE NO. 1:20-cv-67-RH-GRJ

RON DESANTIS, et al.,

Defendants.

_____ /

KIRK NIELSEN, et al.,

Plaintiffs,

v.

CASE NO. 4:20-cv-236-RH-MJF

RON DESANTIS, et al.,

Defendants.

_____ /

**DEFENDANT ELECTIONS CANVASSING COMMISSION'S
MOTION TO DISMISS AS AN IMPROPER PARTY
(Case No. 1:20-cv-67)**

Defendant, Florida Elections Canvassing Commission, through undersigned counsel and pursuant to Fed.R.Civ.P. 12(b), files this motion to dismiss the Elections Canvassing Commission as an improper party, and states:

In this matter, plaintiffs, individual voters and various non-profit groups, challenge certain aspects of Florida's vote-by-mail process as violating their

constitutional rights in light of the ongoing COVID-19 pandemic. They bring their challenge against numerous defendants, including among others, the Florida Elections Canvassing Commission (Canvassing Commission). The Canvassing Commission is a statutory entity comprised of the Governor and two members of the Florida Cabinet, selected by the Governor. § 102.111, Fla. Stat. The three members of the Canvassing Commission meet as a body after primary and general elections for the purpose of certifying the returns received from the counties for that election for each federal, state, and multicounty office. § 102.111(2), Fla. Stat.

Plaintiffs challenge numerous aspects of Florida's vote-by-mail process, but this motion will address only those claims asserted against the Canvassing Commission: 1) limiting the ability to request a vote-by-mail ballot on an emergency basis to election day and rejecting an emergency request for a vote-by-mail ballot if the request is not accompanied by an affidavit (called herein the VBM ballot request requirements); 3) rejecting vote-by-mail ballots not received by a Supervisor of Elections by 7 p.m. on election day (the election day receipt deadline); 4) rejecting vote-by-mail ballots when cure affidavits and documentation are received after 5:00 p.m. on the second day after an election (the cure rejection deadline), and 5) the failure to extend the deadline for counties to submit election returns to the department (county return deadline).

The Canvassing Commission is simply not a proper party to this litigation. The Canvassing Commission, whose limited authority is delegated by the Florida Legislature, is not responsible for the enforcement of any aspect of any of the challenged provisions. In particular, the Canvassing Commission has no authority over any requirements associated with a voter's ability to procure a vote-by-mail ballot, whether that request must be done on election day or whether the request must be accompanied by an affidavit (the VBM ballot request requirements) - all matters associated with the VBM ballot request requirements are within the authority of each county's Supervisor of Elections, and not the Canvassing Commission. *See, e.g.*, § 101.62 (including numerous provisions relating to the process by which a voter requests a vote-by-mail ballot from a supervisor of elections). Nor does the Canvassing Commission have any involvement with or authority to enforce the cure rejection deadlines, which relate to the time within which a voter must fix or cure any defects in his or her returned vote-by-mail ballot. All matters associated with overseeing voters' efforts to cure defective vote-by-mail ballots (e.g., where there is a signature mismatch between the executed vote-by-mail ballot and the signature of record for that voter) and time periods for the cure are the responsibility of and enforced by each county's supervisor of elections and that county's canvassing board. *See, e.g.*, § 101.68

(including the detailed processes by which voters can “cure” defects in their vote-by-mail ballots).

Despite plaintiffs’ contentions, the Canvassing Commission also does not have any authority to modify the election day receipt deadline. The Canvassing Commission has some limited authority under section 101.698, Florida Statutes, to promulgate emergency rules relating to the “voting methods” to be used by overseas voters (including uniformed members of the armed services) in an emergency where it is “impossible or unreasonable” to comply with the existing laws applicable to voting methods used by overseas voters, but this authority in no way extends to modifying any other aspects of the election day receipt deadline applicable to voters who are not residing overseas.¹

Similarly, plaintiffs seek relief from the Canvassing Commission for its “failure to extend the deadline for county canvassing boards to file election returns,” with the Department of State (the county return deadline). (Dream Defenders Plaintiffs’ More Definite Statement, Doc. 108 at para. 25). Although section 102.112(4), Florida Statutes, does provide the Canvassing Commission limited authority to “determine the deadline” if election returns have not been

¹ It bears noting that overseas absentee voters are subject to different timelines than absentee voters who are not overseas. This is the product of a federal consent decree, federal statutory law, separate state statutory provisions, and, of course, a unique but unchanging factual circumstance.

received from a county by the deadline, and the county's delay is due to an emergency, this authority relates only to the deadline applicable to a county, and arises only after the election has occurred and the returns have not been received. This does not provide the Canvassing Commission the authority in advance of an election to modify the election day receipt deadline applicable to *voters* using vote-by-mail ballots.

As the Canvassing Commission has no authority over any of the challenged provisions, it should be dismissed from this matter under the Eleventh Amendment and for lack of standing.

ARGUMENT

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility requires “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” *id.*, and must rise “above the speculative level.” *Twombly*, 550 U.S. at 555. “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

**11th Amendment sovereign immunity bars suit
against the Elections Canvassing Commission**

Under the Eleventh Amendment, a state may not be sued in federal court unless it waives its sovereign immunity or its immunity is abrogated by an act of Congress under section 5 of the Fourteenth Amendment. *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011). But under *Ex Parte Young*, 209 U.S. 123 (1908), a suit filed against a state official in her or his official capacity for injunctive relief on a prospective basis, alleging violations of the federal constitution, are not considered to be suits against the state that violate the Eleventh Amendment.

This exception, however, has been read narrowly. A state official is subject to suit in his official capacity only “when his office imbues him with the responsibility to enforce the law or laws at issue in the suit.” *Grizzle*, 634 F.3d at 1319; *see Wusiya v. City of Miami Beach*, 614 F. App’x 389, 393 (11th Cir. 2015). In other words, “federal courts have refused to apply *Ex [P]arte Young* where the officer who is charged has no authority to enforce the challenged statute.” *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1342 (11th Cir. 1999). That authority must be specific, as opposed to the official’s “general executive power,” which is “not a basis for jurisdiction in most circumstances.” *Women’s Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003).

Here, because the Canvassing Commission has no enforcement responsibilities with respect to the VBM ballot request requirements, the election day receipt deadline, the cure rejection deadline or the county return deadline, the Canvassing Commission is not a proper party under the 11th Amendment.

The Canvassing Commission, comprised of the Governor and two members of the Cabinet selected by the Governor, is a state-created entity, with all of its powers delegated by the Florida Legislature. Under sections 102.111(2), 102.121, and 102.131, Florida Statutes, the Canvassing Commission is responsible for meeting at very specific dates and times after primary and general elections (at 9 a.m. on the 9th day after a primary election and at 9 a.m. on the 14th day after a general election) for the purpose of certifying the returns of that election for each federal, state and multicounty office, as well as the “true vote” for constitutional amendments or any other measure presented to the voters during that election. The certificates executed by the Canvassing Commission contain the total number of votes cast for each person or measure presented to the voters, and this information is recorded by the Department of State. *Id.* This is very much a ministerial task, conferring on the Canvassing Commission no enforcement authority of any kind. As such, it does not support an argument that the Canvassing Commission is a proper defendant under *Ex Parte Young*. See *Osterback v. Scott*, 782 F. App’x 856, 859 (11th Cir. 2019)(confirming that “a state officer, in order to be an

appropriate defendant, must, at a minimum, have some connection with the enforcement of the provision at issue,” and holding that a governor’s “general executive authority, or even partial responsibility for administering a challenged statute, is insufficient to make the governor a proper party under *Ex Parte Young*.”)

The legislature delegated additional duties to the Canvassing Commission, but these statutorily-defined duties are only authorized under very specific circumstances and very limited in scope. This includes limited authority to address voting methods concerning overseas voters under section 101.698, Florida Statutes, and the authority under section 101.112(4), Florida Statutes, to “determine a deadline” for a county to submit its returns after an election if the Canvassing Commission did not timely receive the returns from that county due to a statutorily-defined emergency. Neither of these provisions grant the Canvassing Commission authority over the provisions of the elections code challenged by plaintiff.

Section 101.698 provides:

If a national or local emergency or other situation arises which makes substantial compliance with the provisions of state or federal law relating to the *methods of voting for overseas voters* impossible or unreasonable, such as an armed conflict involving United States Armed Forces or mobilization of those forces, including state National Guard and reserve components, the Elections Canvassing Commission may adopt by emergency rules such special procedures or requirements necessary to

facilitate absentee voting by those persons directly affected who are otherwise eligible to vote in the election.
(emphasis supplied)

In normal circumstances, absentee ballots of overseas voters, including uniformed service members, are timely if they are postmarked by election day and received within 10 days after the election. § 101.6952(5), Fla. Stat. Unlike U.S.-based absentee voters (such as the individual plaintiffs, here) overseas voters are simply not bound by the same deadline for receipt by the supervisor of their vote-by-mail ballots. The Canvassing Commission's rulemaking authority under this provision is thus limited to a very specific set of circumstances involving an emergency that makes it impossible or unreasonable for overseas voters to otherwise comply with the methods by which they normally vote. Under this limited set of circumstances, the Canvassing Commission can promulgate special procedures to facilitate voting by those overseas voters. Clearly, this provision does not provide the Canvassing Commission with broad authority to facilitate any other absentee voting, including absentee voting by voters living in the United States. Even more pertinent to the matters raised here, this provision does not give the Canvassing Commission any authority with respect to the election day receipt deadline challenged by plaintiffs.

Section 102.112, Florida Statutes, sets the deadlines by which county returns after an election must be submitted to the Department of State. Subsections (1)

and (2) provide that the returns must be filed with the department by 5 p.m. on the 7th day following a primary election and by noon on the 12th day following the general election. Subsection (3) provides that returns not received by those deadlines shall be ignored by the department.

Subsection (4) of section 102.112, Florida Statutes, provides:

If the returns are not received by the department due to an emergency, as defined in s. 101.732, the Elections Canvassing Commission shall determine the deadline by which the returns must be received.

Plaintiffs cite this provision in support of the proposition that the Canvassing Commission has the authority to

extend the deadline for county canvassing boards to file election returns to allow for county ballots postmarked or dated by election day and received within 10 days thereafter and, if necessary, cured within 15 days after election day. (Dream Defenders Plaintiffs' More Definite Stmt at para. 25)

Plaintiffs assert this proposition, but do not otherwise explain how section 102.112 authorizes the Canvassing Commission to in any way modify the separate election day receipt deadlines challenged by plaintiffs here. The election day receipt deadlines applicable to the plaintiffs here are set forth in sections 101.67(2), 101.6103(2), and 101.64, Florida Statutes, and they require that absentee ballots submitted by absentee voters living in the United States must be received by the supervisor by 7 p.m. on the day of the election. These deadlines are separate and

unrelated to the deadline by which a county must submit the returns of the elections to the department, as set forth above.

Thus, the Canvassing Commission simply has no statutory authority to modify the deadlines applicable to the plaintiffs on election day. The authority given the Canvassing Commission to modify the deadline for a county whose returns were not timely submitted because of an emergency clearly does not authorize the Canvassing Commission to modify (either before or after an election) the election day receipt deadline applicable to the individual voters and associations who are named plaintiffs here.

Contrary to plaintiffs' assertions, the Canvassing Commission does not exercise broad authority over enforcing provisions of the elections code. The Florida Secretary of State is the state's chief election officer, and each county has its own elected officials as well its own statutorily created canvassing boards, all of whom exercise broad responsibility for conducting Florida's elections. *See, e.g.*, § 97.012, Fla. Stat. (designating the Secretary of State the "chief election officer"); Art. VIII, § 1(d), Fla. Const. (establishing the office of county supervisor of elections); § 101.6103(1), Fla. Stat. (assigning the supervisors of elections authority to administer the state's vote-by-mail system); and § 102.141, Fla. Stat. (creating county canvassing boards and assigning duties).

As set forth above, as the Canvassing Commission does not “have any relationship to the enforcement of [the challenged] provision, . . . the *Ex Parte Young* doctrine does not apply.” *Summit Med. Assocs.*, 180 F.3d at 1342. Accordingly, the Canvassing Commission should be dismissed as an improper party.

Alternatively, plaintiffs have not demonstrated standing to sue the Canvassing Commission because the commission has not caused their alleged injuries and cannot redress them.

Plaintiffs’ lack of standing is a separate reason why the Canvassing Commission is an improper party. To have standing, a litigant must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision. *Jacobson v. Fla. Sec’y of State*, 957 F.3d 1193, *4 (11th Cir. 2020). This analysis is even more searching than the *Ex Parte Young* analysis. *See id.* at *11. Here, however, Plaintiffs cannot show that the Canvassing Commission caused their injuries or has the power to redress them.

For all the reasons discussed above, the Canvassing Commission lacks all authority to require a county to change its VBM ballot request requirements, to modify the election day receipt deadline, or the cure rejection deadline. And although the Canvassing Commission has limited authority after an election to modify a county’s return deadline when that county has failed to file election

returns due to an emergency, this does not authorize the Canvassing Commission to alter the election day receipt deadline (which is what the plaintiffs are seeking) or to modify the county return deadline in advance of the election. The Canvassing Commission is not involved in those aspects of Florida election law.

“If relief is sought against an official who cannot remedy the plaintiff’s alleged injury, there is no ‘case or controversy between himself and the defendant[s] within the meaning of Art[icle] III.’” *Gallardo by & through Vassallo v. Senior*, No. 4:16-cv-116, 2017 WL 3081816, at *6 (N.D. Fla. July 18, 2017); *see Lewis v. Governor of Alabama*, 944 F.3d 1287 (11th Cir. 2019) (en banc) (holding that plaintiffs challenging state statute lacked standing to sue Alabama’s Attorney General, who had “no enforcement role” as to challenged statute); *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998) (dismissing, for lack of standing, supervisors of elections who had “no source of power” to enforce provision at issue).

Moreover, plaintiffs have not demonstrated that the Canvassing Commission has the power to redress their alleged injuries. “Article III standing and the proper defendant under *Ex [P]arte Young* are ‘[s]eparate[]’ issues.” *Jacobson*, 957 F.3d 1193, *12. Whereas a “state official need only have ‘some connection’ with the enforcement of the challenged law” to constitute a proper party under *Ex Parte*

Young, standing requires more: “that the plaintiff’s injury be ‘fairly traceable’ to the defendant’s actions and redressable by relief against *that* defendant.” *Id.*

For the reasons set forth above, the injuries claimed by plaintiffs are not traceable to or redressable by the Canvassing Commission, and the commission should be dismissed from this matter for lack of standing, as well.

WHEREFORE, for the reasons set forth above, the Florida Elections Canvassing Commission respectfully requests that the Court dismiss the commission as an improper party.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Elizabeth Teegen

Elizabeth Teegen (FBN 833274)
Chief Assistant Attorney General
Elizabeth.Teegen@myfloridalegal.com

Timothy L. Newhall (FBN 391255)
Senior Assistant Attorney General
Timothy.Newhall@myfloridalegal.com

Complex Litigation
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
850-414-3300
ComplexLitigation.eservice@myfloridalegal.com

CERTIFICATE OF COMPLIANCE WITH N.D. FLA. LOC. R. 7.1(F)

I hereby certify that this response and memorandum contains 3050 words, inclusive of case style, signature block and certificate of service.

/s/ Elizabeth Teegen
Elizabeth Teegen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which provides notice to all parties, on this 27th day of May, 2020.

/s/ Elizabeth Teegen
Elizabeth Teegen