**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**TALLAHASSEE DIVISION**

**EQUALITY FLORIDA**, et al.,

*Plaintiffs*,

v. No. 4:22-cv-134-AW-MJF

**RON DESANTIS**, in his official capacity as Governor of Florida, et al.,

*Defendants*.
_____/

**CONSOLIDATED MOTION TO EXTEND RULE 26(F) DEADLINE AND OPPOSITION TO PLAINTIFFS' MOTION TO ESTABLISH A LITIGATION SCHEDULE AND FOR A RULE 16 CONFERENCE**

**1.** Plaintiffs served their complaint on March 31, 2022. The schedule that Plaintiffs proposed on April 19 was entirely one-sided. It would have afforded them two months to amend their complaint, four months to take comprehensive discovery, and another two months to brief up their preliminary injunction motion, with a hearing presumably around the end of the year. ECF 36-1 at 11. And resting on their view that their motion for a preliminary injunction and Defendants' motion to dismiss should be briefed simultaneously for "maximal efficiency," ECF 36 at 5, Plaintiffs' proposal would have delayed the filing of Defendants' motion to dismiss until mid-October.

Defendants of course agree that the "litigation should be conducted in a coordinated and efficient manner," ECF 36 at 1, and they promptly agreed to the time that Plaintiffs requested to amend their complaint. Defendants responded to the balance of Plaintiffs' proposal as follows:

> We believe the case is likely to be resolved on the pleadings and plan to proceed expeditiously with a motion to dismiss after your amended complaint is served. Of course, other things being equal, we'd be happy to consolidate the litigation of our motion to dismiss with deadlines governing your preliminary injunction motion, but we aren't willing to delay our motion and we oppose discovery pending its resolution.

ECF 36-1 at 2.

In other words, Defendants' position is that the complaint should be tested promptly and before the parties undertake protracted discovery, which makes it premature to set case management deadlines that presume that expedited discovery will occur, especially because the operative complaint (promising to add and subtract parties) has not yet been filed. But even if it had, Plaintiffs remain free to file their preliminary injunction motion at any time and, until they do, there is no basis whatsoever for expedited discovery. *See Mullane v. Almon*, 339 F.R.D. 659, 664 (N.D. Fla. 2021) ("The lack of a pending motion for a preliminary injunction greatly undercuts Plaintiff's assertion that he requires expedited discovery.").

Plaintiffs characterize Defendants' response as an indication that they "were not willing to confer." ECF 36 at 2. But Defendants did confer. They simply disagreed with Plaintiffs' proposal. And Defendants disagree with Plaintiffs' new

proposed schedule, revealed to Defendants for the first time in their motion, because it continues to call for protracted discovery while slow-tracking the briefing of Defendants' motion to dismiss. Even under their new proposal, briefing on the motion would not be complete until September 30, six full months after the original complaint was served.

The purpose of a preliminary injunction motion is to seek emergency relief that is needed imminently. *See Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (a delay in seeking preliminary relief is reason alone to deny it). By initially proposing a schedule that would likely delay resolution of their preliminary injunction motion until 2023 (and modifying that proposal only in response to Defendants' position that they wish to litigate their motion to dismiss expeditiously), Plaintiffs have made clear that this is not such a case. Plaintiffs thus seek what is tantamount to a summary judgment record in support of a belated preliminary injunction motion. Defendants believe that, instead, litigation on the pleadings should proceed promptly.

**2.** Defendants also believe that there are compelling reasons for the Court to stay discovery pending resolution of their motion to dismiss, so it is premature at this time to set scheduling deadlines that presume expedited discovery will occur. And although Defendants' motion to stay discovery would itself be premature until the amended complaint and motion to dismiss are filed, *see, e.g.*, *Hetherington v.*

*Lee*, No. 3:21-cv-671, 2021 WL 7084092, at *1 (N.D. Fla. June 24, 2021) (finding it necessary to take a "preliminary peek" at the motion to dismiss when considering whether to stay discovery), Defendants will promptly raise the issue when appropriate, and that is reason enough to avoid prejudging the issue by setting discovery deadlines now.

And Defendants believe the Court is likely to grant their motion to stay. Although district courts enjoy significant discretion over docket management, "[f]acial challenges to the legal sufficiency of a claim . . . should be resolved before discovery begins." *Moore v. Potter*, 141 F. App'x 803, 807 (11th Cir. 2005) (quoting *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997)) (alterations omitted) (affirming decision to stay discovery pending motion to dismiss); *Roman v. Tyco Simplex Grinnell*, 732 F. App'x 813, 815 (11th Cir. 2018) ("[A] motion to dismiss for failure to state a claim must be resolved before discovery begins."); *Stepanovich v. City of Naples*, 728 F. App'x 891, 903 (11th Cir. 2018) (same). As *Chudasama* explains, resolving dispositive motions pre-discovery avoids "unnecessary costs to the litigants and to the court system." 123 F.3d at 1368; *see Lawrence v. Governor*, 721 F. App'x 862, 864 (11th Cir. 2018) ("[W]arn[ing] of the dangers of allowing a case to proceed through the pretrial processes with a potentially invalid claim.").

And while there may in certain cases be good cause to deviate from the default rule that discovery is stayed pending resolution of a motion to dismiss, there is none here. In the ordinary case, the Rule 26(f) deadline is 39 days after a defendant appears.[1] After the Rule 26(f) conference, the parties may take discovery absent a court order to the contrary. Thus, in the ordinary case, there is plenty of time for a defendant to move to dismiss before discovery begins. Here, by contrast, Plaintiffs served their complaint and then immediately announced that they would amend it two months later, preempting any motion to dismiss the initial complaint while allowing the clock to run under Rule 26(f).

Nor is Plaintiffs' eventual preliminary injunction motion a significant consideration. Plaintiffs' original proposal called for four months of preliminary injunction discovery with briefing to be completed in mid-November and a hearing to be set later. *See* ECF 36-1 at 11. That proposal severely undercuts any assertion that preliminary injunction discovery cannot wait until after the motion to dismiss is decided. If Defendants' motion to dismiss is denied, there will be ample time to litigate Plaintiffs' motion on such a timeline, while if it is granted there will be no need to do so at all.

[1] Under Federal Rule of Civil Procedure 16(b)(2), the Court "must issue the scheduling order" no later than "60 days after any defendant has appeared." Rule 26(f)(1), in turn, requires that the parties confer "at least 21 days before a scheduling order is due under Rule 16(b)."

Plaintiffs indeed have it backwards in asserting that preliminary injunction discovery "should obviously occur before rather than after briefing on Plaintiffs' preliminary injunction motion" and that a different approach would be "exceptionally irregular." ECF 36 at 5. To the contrary, "[t]he lack of a pending motion for a preliminary injunction greatly undercuts Plaintiff's assertion that he requires expedited discovery." *Mullane*, 339 F.R.D. at 664.

Because plaintiffs seeking a preliminary injunction bear the burden of showing irreparable harm and any delay in seeking relief weighs heavily against them, it is the norm in cases of this kind for plaintiffs to file their preliminary injunction motion shortly after their initial complaint and is exceedingly common for such motions to be resolved without discovery. *See, e.g.*, *Speech First, Inc. v. Cartwright*, No. 21-12583, 2022 WL 1301853, at *6 (11th Cir. 2022) (preliminary injunction filed within a week of complaint and resolved without discovery); *Gonzalez v. Governor of Georgia*, 978 F.3d 1266, 1268 (11th Cir. 2020) (same); *Keister v. Bell*, 879 F.3d 1282, 1286–87 (11th Cir. 2018) (preliminary injunction filed within a day of complaint and resolved without discovery); *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021) (same).[2] And even when preliminary

[2] *See also Florida v. United States*, No. 8:21-cv-541 (M.D. Fla.) (seeking preliminary relief one day after filing the complaint); *Florida v. HHS*, No. 3:21-cv-2722 (N.D. Fla.) (preliminary injunction motion filed the same day as complaint); *Florida v. Nelson*, No. 8:21-cv-2524 (M.D. Fla.) (five days

injunction discovery is appropriate, it is almost necessarily ordered only *after* the plaintiffs' motion is filed, *i.e.*, after the court has an opportunity to review the preliminary injunction motion and determine whether expedited discovery is appropriate. Unsurprisingly, then, it is overwhelmingly the norm for district courts to order a conference to discuss scheduling, procedure, and discovery only after the motion for preliminary injunction is filed.[3]

To the extent Plaintiffs' concern is with "efficiency," this Court's ruling on the motion to dismiss—even if it is denied—will set the legal framework for the rest of the case. And if the motion is granted in whole or in part, that will either be the end of the case or, at minimum, narrow and focus the issues that may need to be explored for the balance of the litigation.

**3.** Regardless of the merits of Plaintiffs' proposed schedule, resolution of case management issues is premature. Plaintiffs served their complaint on March 31, 2022 and immediately sought two months to amend the complaint, including by

later); *Florida v. Becerra*, No. 8:21-cv-839 (M.D. Fla.) (fourteen days later); *see also Florida v. OSHA*, No. 21-13866 (11th Cir.) (seeking a stay three days after filing a petition for review).

[3] *See Dream Defs. v. DeSantis*, No. 4:21-cv-191-MW/MAF, ECF Nos. 64, 68 (N.D. Fla. 2021); *Aderant N. Am., Inc. v. Yezovich*, No. 4:21-cv-343-MW/MAF, ECF Nos. 3, 5 (N.D. Fla. 2021); *21st Century Oncology, Inc. v. Moody*, 4:19-cv-298-MW/CAS, ECF Nos. 3, 9 (N.D. Fla. 2019); *League of Women Voters of Fla. v. Scott*, 4:18-cv-525-MW/CAS, ECF Nos. 4, 8 (N.D. Fla. 2018); *Hoffer v. Jones*, 4:17-cv-214–MW/CAS, ECF Nos. 11, 12 (N.D. Fla. 2017).

adding and dropping parties. Per this Court's order, the amended complaint is due May 25.

In the meantime, Rule 16 requires the parties to hold their Rule 26(f) conference by tomorrow, May 10. But there is no operative complaint. Defendants do not know precisely what claims Plaintiffs are bringing or even who the Plaintiffs and Defendants will be in the amended complaint. A Rule 26(f) conference is thus premature.

Indeed, Defendants "would be prejudiced if required to confer prior to Plaintiffs' filing of their amended complaint because they cannot adequately discuss the nature and basis of [P]laintiffs' claims and [their] defenses without an operative complaint." *Henry's Bullfrog Bees v. Sunland Trading, Inc.*, No. 221CV00582TLNCKD, 2021 WL 2227811, at *3 (E.D. Cal. June 2, 2021). Plaintiffs have represented that their amended complaint will add and drop parties, and as a matter of common sense "the Rule 26(f) conference should not take place until [P]laintiffs have identified and served the additional part[ies] they have advised they intend to add . . . so that [they] can be included in the conference." *Id.* Adhering to the current schedule would further prejudice parties who are currently required to participate in any Rule 26 conference but may well be voluntarily dropped from the case mere weeks later.

Defendants therefore respectfully ask the Court to extend the deadline for the parties' Rule 26(f) conference until **June 15**. For the same reasons, Defendants ask the Court to deny Plaintiffs' motion or at least hold it in abeyance until June 15. By that date, Defendants expect to have filed their motion to dismiss and motion to stay discovery, and a case management conference will therefore be appropriate.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

Henry C. Whitaker (FBN 1031175)
SOLICITOR GENERAL

*/s/ Daniel William Bell*
Daniel William Bell (FBN 1008587)
CHIEF DEPUTY SOLICITOR GENERAL

Bilal Faruqui (FBN 15212)
ASSISTANT ATTORNEY GENERAL

Anita Patel (FBN 70214)
ASSISTANT ATTORNEY GENERAL

Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
daniel.bell@myfloridalegal.com

*Counsel for Governor Ron DeSantis, the Florida State Board of Education, Thomas R. Grady, Ben Gibson, Monesia Brown, Esther Byrd, Grazie P. Christie, Ryan Petty, Joe York, Commissioner Richard Corcoran, and the Florida Department of Education*

*/s/ Erin G. Jackson*
Erin G. Jackson, Esq. (FBN 413097)
Ashley Gallahger, Esq. (FBN 125141)
Johnson Jackson PLLC
100 N. Tampa Street, Suite 2310
Tampa, FL 33602
Telephone: (813) 580-8400
Facsimile: (813) 580-8407
ejackson@johnsonjackson.com
agallagher@johnsonjackson.com
lstillwell@johnsonjackson.com
kharris@johnsonjackson.com

*Counsel for the Manatee County School Board*

*/s/ Walter J. Harvey*
Walter J. Harvey (FBN 74144)
The School Board of Miami-Dade County, Florida
1450 NE 2nd Avenue, Suite 430
Miami, Florida 33132
305-995-1304
walter.harvey@dadeschools.net
jordanmadrigal@dadeschools.net

*Counsel for the Miami-Dade County School Board*

*/s/ J. David Marsey*
J. David Marsey (FBN 0010212)
Jeffrey J. Grosholz (FBN 1018568)
Rumberger, Kirk & Caldwell, P.A.
101 N. Monroe Street Suite 120
Tallahassee, Florida 32301
Telephone: (850) 222-6550
dmarsey@rumberger.com
jgrosholz@rumberger.com
docketingorlando@rumberger.com
dmarseysecy@rumberger.com
jgrosholzsecy@rumberger.com

*Counsel for the St. John's County School Board*

*/s/ Bob L. Harris*
Bob L. Harris, Esq. (FBN 460109)
James J. Dean, Esq. (FBN 0832121)
Cameron H. Carstens, Esq. (FBN 112864)
MESSER CAPARELLO, P.A.
Post Office Box 15579
Tallahassee, Florida 32317
Telephone: (850) 222-0720
Facsimile: (850) 558-0662
bharris@lawfla.com
ahopkins@lawfla.com
jdean@lawfla.com
ccarstens@lawfla.com

H. MATTHEW FUQUA
Florida Bar Number 451101
Fuqua & Milton, P.A.
4450 Lafayette Street (32446)
Post Office Box 1508
Marianna, FL 32447
(850) 526-2263
mfuqua@fmc.legal

*Counsel for the Jackson County School Board*

*/s/ Daniel DeLeo*
Daniel DeLeo, Esq. (FBN 14268)
Patrick Duggan, Esq. (FBN 899461)
Shumaker, Loop & Kendrick, LLP
240 S. Pineapple Ave 10th floor
Sarasota, Florida 34236
Telephone: (941) 364-2740
ddeleo@shumaker.com

*Counsel for the Sarasota County School Board*

## CERTIFICATE OF CONFERRAL

Consistent with Local Rule 7.1(B), undersigned counsel conferred in good faith with counsel for Plaintiffs, who oppose the relief requested in this motion.

## CERTIFICATE OF WORD COUNT

Consistent with Local Rule 7.1(F), this motion contains 1885 words.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of May, 2022, a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which will provide service to all parties.

*/s/ Daniel William Bell*
Chief Deputy Solicitor General