

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

EQUALITY FLORIDA, et al.,

Plaintiffs,

v.

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

**FLORIDA STATE BOARD OF
EDUCATION, et al.,**

Defendants.

**STATE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO
LIFT THE STAY OF DISCOVERY**

Two months ago, Plaintiffs told this Court that staying discovery could cause a “months-long” delay, which would “perpetuate[] the harms” that they contend flow from HB 1557. DE81 at 6–7. The Court considered and rejected those arguments, granting a short stay of discovery while Defendants’ motions to dismiss were considered. DE89. Plaintiffs now reprise the same arguments, telling the Court that it needs to lift the stay because they have suffered harm and delay. DE113 at 6–12. But those arguments are no better now than they were the first time (if anything, they are worse), and thus this Court should leave its stay undisturbed for the same reasons that it granted a stay in the first instance. DE89.

I. Plaintiffs have pointed to no changed circumstances that justify lifting the discovery stay.

Plaintiffs contend that two categories of fact have changed since July such that the Court should reconsider its prior order staying discovery: (1) they say that because the school year has started, they now have evidence that HB 1557 is causing them harm, DE113 at 6–12; and (2) they say that they have voluntarily limited the scope of discovery, DE113 at 13–16. Neither of those claims is meaningfully different from what Plaintiffs presented in opposition to the stay the first time around, and neither justifies lifting the stay now.

A. Plaintiffs’ “new” evidence about HB 1557’s enforcement does not justify lifting the discovery stay.

1. Plaintiffs’ primary basis for seeking discovery now is that, given the “start of the school year,” DE113 at 6, they claim they are suffering “ongoing injury,” DE113 at 7. That is the same argument Plaintiffs made in opposing the stay. There, they said that HB 1557 was “causing widespread injury,” which needed to be addressed promptly because, on their view, “each day that goes by with this unconstitutional law on the books is one day longer that Plaintiffs are being injured.” DE81 at 2–3. They cautioned that “[t]he school year is set to begin next month, in just a matter of weeks, at which point these injuries will only multiply.” DE81 at 5. And they added that “[i]ssuing a stay . . . would effectively derail [the trial] schedule

and prejudice Plaintiffs by putting off discovery and throwing the trial schedule into serious doubt.” DE81 at 2–3.

All of that is not only false, *see* DE68 at 24–31 (explaining that HB 1557 causes Plaintiffs no injury); DE105 at 10–13 (same); *see also* DE68 at 31–57 (explaining why HB 1557 is constitutional as a matter of law); DE105 at 15–30 (same), but it is also the same argument this Court rejected. The Court recognized then, as now, that Plaintiffs’ “principal objection” to a stay was “delay.” DE89 at 1. But it reasoned that “the stay need not lead to substantial delay” because the motions to dismiss would “soon be ripe for resolution.” DE89 at 1. Moreover, the Court explained that it was a “factor in considering the equities” that Plaintiffs “have not moved quickly.” DE89 at 2. That reasoning is even more persuasive today. The motions to dismiss are now fully briefed. And Plaintiffs’ pleas of urgency are belied by their own actions. Although Plaintiffs assert that they have discovered new harms since the start of the school year, DE113 at 6–7, they did not move to lift the stay until a full month after the school year had started. Moreover, many of the “new facts” Plaintiffs point to were available weeks, if not months ago. *E.g.*, DE113 at 8 n.4 (citing an article from June as supposedly new evidence justifying lifting the stay). For the reasons this Court gave in July, a stay of discovery pending a ruling on the motions to dismiss remains warranted.

2. Plaintiffs' complaints of delay ring especially hollow given that they have disclaimed seeking a preliminary injunction. If Plaintiffs believe they are suffering ongoing irreparable harm, then the Rules of Civil Procedure give them a remedy—they can seek a preliminary injunction. But, at every step of this case, Plaintiffs have made the strategic decision not to seek one: they immediately took two months to amend their complaint after filing; they disclaimed an injunction in their amended complaint; and even now they say they will not seek preliminary relief. Of course, at this point that delay alone would be reason enough to deny Plaintiffs any form of preliminary relief. *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). Plaintiffs' own waiver, however, is not a basis for them to seek premature discovery.

3. Regardless, Plaintiffs' "new" evidence only underscores that discovery should not proceed because it proves that the State Defendants have not caused Plaintiffs an injury redressable by this Court. That itself should foreclose lifting the stay because discovery is often stayed while adjudicating challenges to subject-matter jurisdiction—a practice that makes sense because subject-matter jurisdiction goes to a court's power to order discovery in the first place. DE72 at 3.

Consider, to start, what Plaintiffs say their "new" evidence shows. They contend the evidence proves that Defendants' interpretation of HB 1557 is not being carried out in Florida schools. DE113 at 12. But if that is true, it also tends to prove

that Plaintiffs cannot get redress from the State Defendants. If the State Defendants' interpretation is not being followed by Florida schools (because the school boards are independent actors), then how would an injunction against the State Defendants redress Plaintiffs' alleged harm? *See* DE105 at 8–10 (explaining that redressability problem).¹

In any event, much of what Plaintiffs point to is simply not regulated by HB 1557. Plaintiffs complain, for example, that schools have apparently taken down “safe space” stickers, told teachers not to wear rainbows, told a high school student not to create a website about LGBT service projects, threatened an employee with a misdemeanor violation, and declined to name October LGBT History month. DE113 at 7–9. None of that is even remotely related to the actual text of HB 1557. Recall, the one provision of that law that Plaintiffs challenge says that “[c]lassroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards,” which shall be adopted by the Department of Education by “June 30,

¹ Plaintiffs recycle their contention in their notice of supplemental authority that the State Defendants have disclaimed their own interpretation of HB 1557 in a letter to school boards about Title IX. DE113 at 12. But as the State Defendants explained in their reply supporting the motion to dismiss, the letter does not refer to HB 1557; it speaks of “Florida law,” and specifically Florida law regulating sports teams designed for women. DE105 at 8 n.4. Plaintiffs give no new reason for why the letter says anything different.

2023.” DE68 at 16. Plaintiffs make no meaningful attempt to connect their new evidence to that provision. Nor could they; no reasonable English speaker would think that, for example, wearing a rainbow shirt is “[c]lassroom instruction . . . on sexual orientation or gender identity.”

That leaves Plaintiffs’ concern that some books are being taken out of some classrooms and some school lessons are being changed. DE113 at 9. Again, however, the evidence they cite is not tied to HB 1557. Having a book in a library or classroom “that students could take home and read for fun,” *see* DE113 at 9 n.6, is not “classroom instruction.” And a mere reference to Sally Ride’s sexual orientation is not “instruction on sexual orientation or gender identity.” *See* DE113 at 9 n.7.

All that underscores that Plaintiffs have suffered no cognizable injury-in-fact flowing from HB 1557, much less one that can be redressed by any declaration or injunction against Defendants. *See* DE105 at 10–13 (explaining why Plaintiffs have suffered no injury); DE105 at 8–10 (same for redressability). Nor can Plaintiffs bridge that gap by citing some schools’ beliefs that their conduct is required by the law (or press accounts that say as much)—HB 1557 requires exactly what its text says and no more.

B. Plaintiffs' late-breaking decision to limit their overly burdensome discovery requests do not justify lifting the stay.

Plaintiffs also contend that the “balance of equities has shifted” in their favor because they “narrowed the scope of the discovery they seek.” DE113 at 13. But the requests they eliminated concern categories of documents that they were never entitled to discovery about in the first place, and so eliminating them does not substantially limit the burden of discovery. Discovery was unlikely to proceed into those topics anyway. At any rate, the remaining discovery is still sufficiently burdensome to justify a short stay.

1. Plaintiffs eliminated two categories of discovery: discovery into the Governor’s office and discovery into the legislature “to prove improper animus.” DE113 at 13–14. Neither category was proper in the first place.

Start with the Governor’s office. Plaintiffs note that they dismissed their claims against the Governor (and the discovery directed to the Governor) based on Chief Judge Walker’s opinion that the Governor was an improper party in *Falls v. DeSantis*, No. 22-cv-166, DE68 at 2–3 (N.D. Fla. July 8, 2022). *See* DE113 at 13. But *Falls* broke no new ground. On the contrary, Chief Judge Walker relied on several of his own cases decided years before Plaintiffs filed suit. *See Falls*, No. 22-cv-166, DE68 at 2 (citing *Namphy v. DeSantis*, 493 F. Supp. 3d 1130, 1137 (N.D. Fla. 2020); *Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1209 (N.D. Fla. 2020)). Plaintiffs do not get points now for the fact that they filed two

complaints naming the Governor as lead defendant without any basis for doing so either time.

The same is true for Plaintiffs' assertion they will "not further" seek discovery into legislative motive to prove animus. DE113 at 14. That is not so much a concession as it is a product of legal research that has likely revealed to Plaintiffs that, in this circuit, legislative privilege bars "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015) (emphasis omitted) (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972) (internal quotation marks omitted)). And courts in this district have repeatedly held that the legislative privilege applies, and bars discovery from legislators, even when a plaintiff seeks to prove illicit motivation in a constitutional challenge. *E.g.*, *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 455–58 (N.D. Fla. 2021) (Walker, C.J.); *Florida v. United States*, 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) (Hinkle, J.). Plaintiffs, in short, have made no meaningful concessions regarding discovery.

2. In any event, the remaining burden of discovery more than justifies a short stay. Even as amended, Plaintiffs are requesting from "all Defendants" "[a]ll documents concerning the . . . enforcement, operationalization, application, interpretation, or implementation of HB 1557." DE113 at 14. And that is just one of the many requests they have served. This Court previously found that "the discovery

sought is extensive and would impose substantial burdens that could be avoided altogether if the motions to dismiss are granted.” DE89 at 2. That is still true.

Indeed, Plaintiffs’ motion betrays an approach to discovery that portends substantial burdens. Plaintiffs demanded far-reaching discovery from the Governor and the Legislature, defended that discovery in opposing the motion to stay, DE81 at 16–17, and then turned around and disclaimed it all a couple of months later, DE 113 at 13–14. Rather than sanction Plaintiffs’ “serve first, research later” approach, the Court should keep discovery stayed for a short period, which may obviate the need for discovery entirely, and will certainly streamline it at the very least.

II. Plaintiffs’ motion fails to grapple with much of the reasoning underlying this Court’s stay order.

Even assuming that Plaintiffs were correct about the impact of their “new” evidence, they would be wrong that discovery should proceed.

Most prominently, Plaintiffs’ motion says nothing at all about their claims on merits. That alone is a reason to keep the stay in place. Only a well-pleaded complaint “unlock[s] the doors of discovery,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009), and thus, “[t]he Eleventh Circuit has recognized repeatedly . . . that discovery follows a well pleaded complaint—not the other way around,” *Gibbons v. McBride*, No. 14-cv-056, 2014 WL 5460593, at *4 (S.D. Ga. Oct. 27, 2014) (emphasis omitted). This Court recognized that legal principle when it granted the stay of discovery, reasoning that a stay was proper after “preliminarily consider[ing]

the issues raised in the motions to dismiss.” DE89 at 2. Plaintiffs offer no reason to revisit that analysis now, and it independently supports the stay.

In addition, Plaintiffs’ claims still trample “Eleventh Amendment immunity, which implicates [the] State’s dignity and integrity.” DE89 at 2. Back in July, this Court correctly recognized that it should decide the Eleventh Amendment immunity issues before permitting discovery. *Id.* Plaintiffs concede that their discovery requests still implicate immunity. DE113 at 13. As this Court noted in July, however, the presence of that potential immunity is good reason to stay discovery pending resolution of those (and other) arguments raised in the motions to dismiss. DE89 at 2.

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion to lift the discovery stay should be denied.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Consistent with Local Rule 7.1(F), this motion contains 2,284 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 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/ Henry C. Whitaker
Solicitor General