IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LUCILLE ANDERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION FILE
v.	)	
	)	NO. 1:20-CV-03263-MLB
BRAD RAFFENSPERGER, et al.,	)	
	)	
Defendants.	)	

STATE DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

The State Defendants submit this Reply Brief in Support of their Motion to Dismiss.[1]

INTRODUCTION

The Plaintiffs' Brief in Opposition to the State Defendants' Motion to Dismiss (the "Plaintiffs' Brief") [Doc. No. 112], confirms the obvious: this lawsuit is more political statement than actual legal action. Plaintiffs cannot articulate any specific relief they seek, and they rely exclusively on conclusory statements instead of factual allegations or binding authority. More substantively, Plaintiffs' entire theory comes down to the idea that the

[1] This Reply Brief adopts the same abbreviations as the Brief in Support of the Motion to Dismiss. [Doc. No. 106-1.] Additionally, pinpoint citations continue to refer to the ECF page designation.

State Defendants must ensure "uniformity" in the conduct of elections; indeed, Plaintiffs' Brief uses the word ten times. The fatal flaw in Plaintiffs' argument, however, is two-fold: (1) there is no legal basis to adopt the Plaintiffs' preferred policy of absolute uniformity to the exclusion of dozens of statutes that delegate and differentiate statutory obligations of the State and county election officials; and (2) there are no allegations that the State has administered policies differently across counties. If this Court agrees with either premise, the Complaint must be dismissed.

ARGUMENT AND CITATION TO AUTHORITY

Plaintiffs do not (and cannot) deny that the Georgia Election Code sets forth distinct responsibilities for State and county election officials. *See* [Doc. No. 106-1 at 7-10.] Nor do Plaintiffs challenge Georgia's county-administered election system as unconstitutional. Given these concessions, the Complaint fails—on the defenses and the merits—because it blurs or ignores key distinctions between state and local governments.

Specifically, Georgia law imposes the following duties squarely and exclusively on county election officials: (1) distributing polling locations; (2) training poll workers, including on the use of paper ballots; (3) providing technicians; (4) setting up polling locations; and (5) having a sufficient backup of paper pollbooks and paper ballots. *See* [Doc. No. 1 at 79; Doc. No.

106-1 at 7-10.] Plaintiffs do not attack these statutes as unconstitutional; instead, they wrongly view them as meaningless. Granting Plaintiffs' relief would be tantamount to rewriting Georgia's entire Election Code based on the legal theory that Defendants must exact "uniformity" across thousands of polling places across the State. [Doc. No. 112 at 8, 9, 10, 13, 14, 22, 23, 30.] No law supports this idea, and Plaintiffs' legal theory is entitled to no deference.

Finding no Georgia law to support their contentions, Plaintiffs rely mainly on Judge Ross's recent opinion in *New Georgia Project v. Raffensperger*, 1:20-cv-01986-ELR, 2020 WL 5200930 *8 n.16 (N.D. Ga. Aug. 31, 2020) (appeal currently pending). There, the court cited to O.C.G.A. §§ 21-2-31 and 21-2-50(b), but neither supports Plaintiffs' contention. The first addresses the State Election Board's ("SEB") duty to "*promulgate rules and regulations* so as (1) to obtain uniformity in the practices and proceedings of" local election officials; and (2) ensure consistent methods are used for determining what constitutes a vote. O.C.G.A. §§ 21-2-31(1) and (7) (emphasis added). Plaintiffs, however, have not challenged any regulation as failing to meet this standard. Moreover, the Eleventh Circuit recently reversed an order that compelled a state rulemaking body to promulgate a

particular rule. *Jacobson v. Florida Sec'y of State*, 19-14552, 2020 WL 5289377, at *14 (11th Cir. Sept. 3, 2020).

The second statute cited in *New Georgia Project* describes the Secretary as the State's "chief election official, [which precludes him from serving] in any fiduciary capacity for the campaign of any candidate whose election will be certified by the Secretary of State." O.C.G.A. § 21-2-50(b). This statute does not save the Complaint for two reasons. First, binding precedent provides that plaintiffs may not "rely on the Secretary's general election authority to establish traceability."[2] *Id.*

Second, State law runs counter to Plaintiffs' claim. The Secretary's status as "chief election official" is textually used only to limit the Secretary's political involvement in campaigns where he certifies the results. O.C.G.A. § 21-2-50(b). It imposes no other obligations, much less those covered by other statutes like training local election officials, providing resources, or deciding where polling locations should be located. O.C.G.A. §§ 21-2-70(8) (training poll workers), 21-2-90 (staffing polling locations), 21-2-91 (same), 21-2-283[3]

[2] Plaintiffs meekly argue that *Jacobson* is factually distinguishable because Florida law imposes different duties than Georgia law. [Doc. No. 112 at 10.] They cite no distinctions to support this argument.

[3] At one point, the State Defendants' Brief wrongly referred to this as Code Section 21-2-238. [Doc. No. 106-1 at 8.]

(printing ballots), 21-2-265 (deciding where to place polling locations); Ga. Comp. R. & Regs. 183-1-12-.19 (training), 183-1-12-.18(3) (supplying polling places with sufficient ballots), 183-1-12-.19 (supplying paper backup pollbooks).

A Georgia court would likely deem this dispositive. State law provides that the more specific statutes control, meaning the harms Plaintiffs cite arise out of alleged breaches of counties' specific statutory obligations and not those of the State Defendants. *Bellsouth Telecommunications, LLC v. Cobb Cty.*, 305 Ga. 144, 147 (2019). And, if the legislature wanted to completely upend the current statutory framework, it certainly could do so, but it has declined. *Deutsche Bank Nat. Tr. Co. v. JP Morgan Chase Bank, N.A.*, 307 Ga. App. 307, 311 (2010).

Next, Plaintiffs twice cite to *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011). [Doc. No. 112 at 10-11.] But, they fail to address the State Defendants' argument that *Grizzle* applied a different, proper party, analysis, and its reliance on the "Chief Election Officer" phrase cannot withstand the weight of *Jacobson*.[4]

[4] Contrary to Plaintiffs' argument, the foregoing is not a "proper party" argument or defense. [Doc. No. 112 at 2-4.] As pointed out in the State Defendants' Brief, under that framework, Plaintiffs must only show "some connection" to the challenged law. *Jacobson*, 2020 WL 5289377 at *14

Plaintiffs' remaining alleged "authority" is just generalized allegations in the Complaint about the law. [Doc. No. 1 ¶¶ 4, 17-18, 20, 25, 200, 207, 213.] Of course, the question of a duty is a legal one, *Waldon v. ACE Am. Ins. Co.*, 1:16-CV-1608-AT, 2017 WL 3000040, at *3 (N.D. Ga. Mar. 21, 2017), and interpretations of statutes are also legal questions. *United States v. Murrell*, 368 F.3d 1283, 1285 (11th Cir. 2004). This Court "is not required to accept as true [Plaintiffs'] conclusions of law when considering a Rule 12(b)(6) motion to dismiss." *Solis-Ramirez v. U.S. Dep't. of Justice*, 758 F.2d 1426, 1429 (11th Cir. 1985). Much less is the Court required to accept as true Plaintiffs' numerous legal conclusions pled as factual ones. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

I. Plaintiffs Lack Standing.

Plaintiffs theory of standing's injury-in-fact requirement is "what is past is prologue." [Doc. No. 111 at 10-18.] This falls short of the Constitution's requirements, especially when the Complaint itself acknowledged two unique facets of the June 2020 primary: COVID-19 and new technology. *See* [Doc. No. 1 ¶¶ 10, 24.] Even the articles cited by Plaintiffs' ideological supporters

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(citation omitted). As discussed throughout this Brief, Plaintiffs' errors are far more fundamental and warrant dismissing the Complaint altogether.

acknowledged this: "Georgia is just the latest state that has seen widespread problems with holding an election during a pandemic. Longer than usual lines have been reported in cities across the country." *See* [Doc. No. 111 at 11 n.1 (citing https://www.politico.com/news/2020/06/09/georgia-primary-election-voting309066).]

Under these circumstances, the Complaint does not show that any injury is concrete or imminent: Plaintiffs can continue to urge their supporters to vote by mail or do so themselves; this avoids the threat of lines completely. Moreover, the Complaint fails to allege, in a non-conclusory way, that the County Defendants have not learned from the 2020 election, in which the technology was new and so were pandemic precautions. Instead, Plaintiffs just ask this Court to make the allegations for them. Most importantly, the injury the Plaintiffs articulate is a generalized grievance and not based on the enforcement of a statute or policy. Generalized allegations ordinarily provide only a tenuous ground to establish standing; here, they fail completely.

The cases Plaintiffs attempt to rely on do not support their conclusion. *See Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984), *New Ga. Project*, 2020 WL 5200930 at *8 n.16. Unlike this case, *Lynch* involved facial and as-applied challenges to a statute. 744 F.2d at 1456. It relies heavily on *O'Shea*

v. Littleton, 414 U.S. 488, 496 (1974), where the Supreme Court rejected a constitutional challenge to bond setting practices, in part, because the allegations were made in "general terms." *Lynch* recognized this aspect of *O'Shea*, and it distinguished the complaint before it as being based on a statute and not some general condition. 744 F.2d at 1456. This case is far more like *O'Shea*, and consequently, Plaintiffs' authority *proves* the State Defendants' point.[5]

II. Plaintiffs Seek Unconstitutional Relief.

Plaintiffs seeking relief for acts or omissions of county election officials must sue the proper county officials; suing the State is not a shortcut to statewide relief. *Jacobson*, 2020 WL 5289377 at *12. *Jacobson* ensures that Plaintiffs' claims against the State Defendants fail, because as shown, the relief they seek is implemented by county election officials. "As nonparties, [150 county election officials] are not 'obliged ... in any binding sense ... to honor an incidental legal determination [this] suit produce[s].'" *Id.* (citing *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1302 (11th Cir. 2019) (en

[5] The *New Georgia Project* case is equally distinguishable, because there, the plaintiffs challenged five specific statutes and not just elections generally. 2020 WL 5200930 at *1-2.

banc)). This precludes a finding of redressability and would lead to a violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs counter *Jacobson*'s preclusive effect by claiming that an injunction "can and should be applied on a statewide level." [Doc. No. 112 at 6.] The Eleventh Circuit made clear, however, that this is not a policy choice the State is empowered to make. Nothing empowers the State Defendants to commandeer local resources and supplant non-party county election officials' decisions. And, non-party county election officials remain "lawfully entitled" to act pursuant to existing State law. *Jacobson*, 2020 WL 5289377, at *12. Further, as discussed, *Jacobson* precludes this Court from ordering the SEB to mandate relief through the promulgation of a regulation. *Id.*

Plaintiffs argue that some burdens are only felt by individuals in particular counties. [Doc. No. 112 at 6.] This reveals the logical fallacies in Plaintiffs' arguments. If statewide relief is unnecessary, then there is no statewide problem: the issue is localized in a few, mostly urban and suburban counties. If statewide relief is required, the Plaintiffs have not alleged that the State Defendants are not treating "all persons similarly situated" persons equally. [Doc. No. 112 at 6 (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).] Plaintiffs have not claimed that the State

trains or allocates resources in some counties differently than others. This too warrants dismissal.

III. Plaintiffs Seek Non-Justiciable Relief.

The clearest reason to dismiss Plaintiffs' Complaint is its absolute failure to articulate any applicable judicially manageable standards for relief. This is not just an obey-the-law injunction argument. [Doc. No. 112 at 14-15.] To make the point, the State Defendants posed no fewer than fourteen questions to Plaintiffs about how to implement the relief the Complaint seeks. [Doc. No. 106-1 at 14-16.] Plaintiffs failed to answer any of the questions; they did not even try. This speaks volumes, as Plaintiffs still cannot articulate any judicially manageable standard to determine questions about "adequate" training or "sufficient" resources. Plaintiffs' failure is particularly fatal given the Plaintiffs' Brief's failure to address any of the State Defendants' binding authority on justiciability. [*Id.* at 12-14.]

Instead, Plaintiffs focus on cases that were decided only under the Eleventh Circuit's prohibition on obey-the-law injunctions. *See Fair Fight Action v. Raffensperger*, 413 F. Supp. 3d 1251, 1280 (N.D. Ga. 2019). But, *Fair Fight Action* did not involve questions of justiciability, and it at least involved (mostly) challenges to the constitutionality of State statutes and not generalized grievances. *See generally id*. The same is true of *League of*

Women Voters of Ohio v. Brunner, 548 F.3d 463 (6th Cir. 2008), which addressed neither justiciability nor obey-the-law injunctions. Put simply, this Court could agree with Plaintiffs on the obey-the-law arguments (it should not) but still dismiss the Complaint on the uncontested grounds of no justiciability.

Plaintiffs' claim that other courts have "*granted* injunctive relief to remedy long lines based on similar, if not broader, parameters." [Doc. No. 112 at 15 (citing *Fleming v. Guiterrez*, No. 13-cv-222 WJ/RHS, 2014 12650657, at *11 (D.N.M. Sept. 12, 2014).] *Fleming*, however, is not expansive at all: its order was "simply holding [defendants] to their word … to comply with the voting machine allocations set forth in the [defendant's] 2013 Resolution" to have a certain number of machines available at polling places. 2014 12650657 at *11. Plaintiffs do not address, much less ask this Court to enforce O.C.G.A. § 21-2-367(b), which sets forth the minimum number of machines required at polling locations.[6] Plaintiffs' reliance on affidavits submitted in support of their preliminary injunction motion do not save the Complaint on a motion to dismiss. *Land v. Dollar*, 330 U.S. 731, 735 n. 4

[6] Similarly, *Jefferson County Board of Education v. Bryan M.*, 706 Fed. Appx. 510, 516 (11th Cir. 2017) involved special education and required an IEP team to consider a child's zoned school and include the parents in the process.

(1947). These failures should be addressed now, and they warrant early dismissal. *See Levy v. Miami-Dade Cty.*, 358 F.3d 1303, 1305 (11th Cir. 2004).

IV. ***Burford* Abstention.**

The State Defendants never argued that *Burford* abstention is mandatory. The discretionary abstention doctrine should be applied here because there is an ongoing State process. In addition, questions of relief in this case turn on what may be "difficult questions" of State law, *see supra* at 4, and the remedies sought can best be crafted by State officials for precedential purposes and in the light of their expertise. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989).

Plaintiffs' response to the *Burford* argument reveals other flaws with their claims. Plaintiffs do not expressly claim the State Defendants violated "the primary and election laws," nor do they argue any of those laws are unconstitutional. [Doc. No. 112 at 19.] Instead, they (1) want this Court to order State Defendants to act in excess of their authority (2) based on a *res ipsa loquitor* theory of liability. Neither is available in this context. *Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1123-24 (N.D. Ga. 2020) (addressing "exceed authority" claims); *Hernandez v. Tregea*, 207CV149FTMUASPC, 2008 WL 11430028, at *10 (M.D. Fla. Dec. 1, 2008) (rejecting constitutional *res ipsa* claims).

V. Plaintiffs' First & Fourteenth Amendment Claims (Count I).

Plaintiffs' First and Fourteenth Amendment claims fail for two key reasons. First, Plaintiffs' ability to vote through numerous means makes any burden on exercising the right to vote minimal at best. *See supra* at 12. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring) (focusing analysis on burden on right to vote, not on particular voters or methods). Put simply, only those voters (in certain counties) who ignore the option of voting by mail or by absentee mail drop boxes *may* have to wait in line. Given the various options before the Plaintiffs, this is a very slight burden, if any.

Second, the State Defendants have not caused long lines at any Georgia polling location. Plaintiffs attempt to leapfrog causation by claiming that the Complaint survives so long as they allege a constitutional injury. [Doc. No. 112 at 21.] No Eleventh Circuit authority supports this claim, particularly when injury and causation are challenged. This is for good reason: an opposite conclusion would allow suits against state officials for things like traffic patterns or weather. When Plaintiffs address causation, they impermissibly rely on conclusory statements about law from the Complaint. *See supra* at 1.

Even assuming there is a burden on Plaintiffs (there is not), the Court can certainly weigh the State's interest – the benefit of having a county-based election administration system. This allows decisions to be made closer to the electorate and overcomes the purported burden on Plaintiffs who choose to vote in person on Election Day in a few counties.

VI. Substantive Due Process (Count II).

Plaintiffs argue that the Eleventh Circuit analyzes substantive due process claims under the analytical framework established by the *Anderson-Burdick* line of cases. [Doc. No. 112 at 14-18]; *see e.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346, 1352-53 (11th Cir. 2009). Thus, for the same reasons discussed above, Count II fails. *Supra* at Section V.

In the alternative, Plaintiffs have not alleged facts nor do they otherwise claim that the State Defendants' *conduct* shocks the conscious. Instead, they claim that the potential harm caused by lines does. This turns the analysis on its head: a substantive due process claim requires a plaintiff to allege "that a *defendant's conduct* 'shocks the conscience.'" *See Nix v. Fulton Cty. Sch. Dist.*, 311 F.3d 1373, 1375 (11th Cir. 2002) (citation omitted). In fact, Defendant's conduct has been to try to mitigate any effects of long lines caused by COVID-19 by establishing an online absentee ballot request

portal, allowing secure absentee ballot drop boxes, and providing counties with information on how to prepare for and minimize lines. Plaintiffs do not seriously argue that Defendant's conduct shocks the conscience, thus Defendants cannot be liable for violations of substantive due process.

VII. Equal Protection (Count III).

The State Defendants articulated no fewer than five reasons why Plaintiffs failed to state a claim for a violation of the Equal Protection Clause. Plaintiffs address only some. They ignore, for example, that *Bush v. Gore*'s holding is an incredibly "limited one" that addressed a court order that imposed no standards on how to count ballots. 531 U.S. 98 (2000) at 109. This case involves neither lax standards nor vote counting; it involves Plaintiffs' request for amorphous concepts like "sufficient" training and "adequate" equipment.

The other cases Plaintiffs cite do not overcome this. *See, e.g.*, *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1185 (11th Cir. 2008); *Wexler v. Anderson*, 452 F.3d 1226, 1231-32 (11th Cir. 2006). *Browning* addressed county discretion to implement voter registration processes where no standards applied. *Wexler* made clear that an Equal Protection analysis focuses on whether there are uniform procedures in place across a State. *See generally Wexler*, 452 F.3d 1226. Plaintiffs have not alleged that the State

operates differently in Fulton or Forsyth County. It asks this Court to compel the State Defendants to do more in some counties. In other words, Plaintiffs have not argued that the State Defendants treat voters in some counties differently than others. Finally, as with the other causes of action, Plaintiffs have failed to allege that the State Defendants caused any purported constitutional violation. The Count should be dismissed.

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that this Court GRANT their Motion to Dismiss Plaintiffs' Complaint.

This 22nd day of September 2020.

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L.R. 7.1(D) CERTIFICATION

I certify that this **DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS** has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). Specifically, this Brief has been prepared using 13-pt Century Schoolbook font.

/s/ Josh Belinfante
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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the within and foregoing **DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system, which automatically sent counsel of record e-mail notification of such filing.

This 8th day of September 2020.

/s/ Josh Belinfante
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