

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

LUCILLE ANDERSON, SARA
ALAMI, GIANELLA CONTRERAS
CHAVEZ, DSCC, and DEMOCRATIC
PARTY OF GEORGIA, INC.,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his
official capacity as the Georgia
Secretary of State and Chair of the
Georgia State Election Board, *et al.*,

Defendants.

CIVIL ACTION

FILE NO. 1:20-CV-03263-MLB

**REPLY BRIEF IN SUPPORT OF COUNTY DEFENDANTS¹
MOTION TO DISMISS**

INTRODUCTION

Plaintiffs still cannot explain how their claims and requested relief satisfy Article III's justiciability requirements, especially when they are limited to prospective injunctive relief. Even after Plaintiffs' response, this

¹ County Defendants are the members of the Boards of Election for Chatham, Clayton, Cobb, DeKalb, Douglas, Fulton, Gwinnett, Henry, and Macon-Bibb Counties, as listed on pages 3-4 of Plaintiffs' Complaint [Doc. 1], and as further amended by the Court's Order substituting a Henry County Board of Elections and Registration Official-Capacity Defendant [Doc. 90].

Court is left guessing as to the scope of Plaintiffs' claims: What number satisfies Plaintiffs' unstated standard for "sufficient and adequately trained poll workers"? "Sufficient technicians"? "Sufficient time to set up polling locations"? "Sufficient backup paper pollbooks"? "Sufficient numbers or access to emergency paper ballots when the Voting System malfunctions"? "Clear guidance or instruction on when to use emergency paper ballots"? And what exactly are the "other election resources" referred to in Plaintiffs Prayer for Relief? [Doc. 1, p. 79]. Plaintiffs cannot explain their own requested remedy because their claims rest on conclusory, speculative, and non-justiciable claims.

Plaintiffs continue to lay all of the unique challenges presented by the ongoing pandemic on County Defendants and accuse them of various failings. Georgia's election apparatus underwent significant alteration in recent months and years. Indeed, the State now uses new equipment—equipment uniformly used in every county across Georgia. County Defendants continue to work every day to ameliorate the effect of COVID-19 on the upcoming general election. And the County Defendants learned from novel and intermittent issues that sprang up during the June Primary. Thus, Plaintiffs' asserted future injuries, which their Complaint relies on to establish standing, are in

fact “hypothetical” and not certainly impending—and not caused by County Defendants.

At this stage, Plaintiffs’ cannot identify actual *threatened* or *impending* injuries. Nor can they articulate concrete injuries ready for resolution by this Court. Plaintiffs claim the existence previous injuries can establish standing. [Doc. 111, p. 10]. But they are wrong because even a “[p]ast injury from alleged unconstitutional conduct does not in itself show a present case or controversy regarding injunctive relief, if unaccompanied by current adverse effects.” *Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984). Plaintiffs miss this point as they fail to identify past *unconstitutional* injuries. While “[p]ast wrongs do constitute evidence bearing on whether there is a real and immediate threat of repeated injury,” Plaintiffs must show the previous harms “expos[ed] them to unconstitutional conduct.” *Id.* Nothing in Plaintiffs’ Complaint satisfies this requirement or even attempts to do so.

Because Plaintiffs ask the Court to solve a non-justiciable problem for them at the expense of County Defendants, the Court should dismiss their Complaint as to County Defendants.

ARGUMENT AND CITATION OF AUTHORITY

I. Legal standard.

Plaintiffs misapply the relevant legal standard for a Motion to Dismiss. It is true that a 12(b)(6) motion enjoys a high degree of deference from the Court. But Defendants also asserted as basis to dismiss under Fed. R. Civ. P. 12(b)(1) in their Motion. Despite noting this in County Defendants' brief, Plaintiffs fail to address it in their Response. Plaintiffs' silence on the subject notwithstanding, it has a material impact on the degree of deference owed to Plaintiffs' allegations even at this early stage of litigation:

Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that **the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.** In short, **no presumptive truthfulness attaches to plaintiff's allegations,** and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, **the plaintiff will have the burden of proof that jurisdiction does in fact exist.**

Eaton v. Dorchester Dev., Inc., 692 F.2d 727, 732 n.9 (11th Cir. 1982) (emphasis added).

II. This is an issue of Article III injury, not mootness.

Plaintiffs also argue mootness to counter the standing argument advanced by County Defendants that Plaintiffs' asserted injuries here are too remote and rely on a speculative chain of events. But mootness is not at issue.

Instead, the question is one of injury-in-fact—specifically, whether the Plaintiffs’ claims are a “daisy chain” of merely possible events.

As alluded to in County Defendants’ principal brief, this election occupies different territory than that of prior elections on which the Plaintiffs base their Complaint. And for this reason, this is not, as Plaintiffs suggest, a “situation [that] is capable of repetition, yet evading review.” [Doc. 111, p. 12] quoting *DeMaio v. Democratic Nat. Committee*, 555 F.3d 1343, 1345 (11th Cir. 2009). To the contrary, while Plaintiffs call on what they perceive as election misconduct over the last ten or more years, the November election represents an unusual situation. It is the first general election where Georgia will use its new election equipment (the BMDs); it is the first general election after the sweeping election changes provided by Georgia’s legislature through H.B. 316; it is the first election where poll workers will have familiarity and experience with a new electoral system; and it is the first election following the difficult circumstances election officials faced with a novel virus and limiting the availability of poll workers creating difficulties with establishing voting locations.

Nothing about this election looks like the elections of the past. And nothing about the Plaintiffs’ prior alleged injuries are capable of repetition, yet evading review. Instead, this is a new electoral system for Georgia. And

Plaintiffs' complaint relies on a speculative chain of events too attenuated to survive dismissal. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

III. Long lines are not a practice of voting.

Plaintiffs assume that lines in and of themselves are a practice of voting that is actionable. [Doc. 111, pp. 24-25]. But long lines are a symptom and Plaintiffs concede they simply do not know the cause of them. They could be caused by anything from significant voter enthusiasm to any of the list of items in Plaintiffs' Complaint: improper allocation of resources, technical problems, timing issues, equipment delivery, lack of paper pollbook backups, or improper training. [Doc. 1, p. 79]. But in the end, Plaintiffs simply do not attribute the harms to specific acts of County Defendants.

Challenges under *Anderson/Burdick* identify specific election *practices*. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 430, 112 S. Ct. 2059, 2061 (1992) (prohibition on write-in voting); *Anderson v. Celebrezze*, 460 U.S. 780, 782, 103 S. Ct. 1564, 1566 (1983) (early filing deadline); *Norman v. Reed*, 502 U.S. 279, 282, 112 S. Ct. 698, 702 (1992) (requirement of nominating petition). Plaintiffs challenge lines in and of themselves. They have several ideas about how to fix them, but do not challenge, for example, O.C.G.A. § 21-2-367(b) on the number of ballot-marking devices per elector or Ga. Comp. R. & Regs. r. 183-1-12-.19 on the use of paper pollbook backups.

Plaintiffs cite no authority for the concept that challenging lines standing alone is a valid claim under *Anderson/Burdick*.

IV. Plaintiffs' claims are barred by the political-question doctrine.

Plaintiffs continue to confuse adjudicating particular election practices—which federal courts routinely undertake—with this case, where Plaintiffs' Complaint seeks massive changes to Georgia's election system.

Plaintiffs' Complaint contains no judicially manageable standards, so their claims fail under the political-question doctrine. Plaintiffs' response is to attempt to distinguish *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) because it involved partisan gerrymandering. [Doc. 111, pp. 28-29]. But Plaintiffs miss the point—County Defendants only analogized to the holding in *Rucho*, like Judge William Pryor did in the now-majority opinion in *Jacobson*: “a complaint can both fail to state a constitutional violation and be nonjusticiable if there are no judicially discernible and manageable standards to adjudicate it.” *Jacobson v. Fla. Sec’y of State*, No. 19-14552, 2020 U.S. App. LEXIS 28078, at *65 (11th Cir. Sep. 3, 2020).

Plaintiffs ask this Court to determine how long is “unreasonably long” for lines in voting, what the best method of fixing long lines would be, and second-guess equipment-allocation decisions made by state and county officials. [Doc. 1, p. 79]. They also seek relief requiring “sufficient” and

“equitable” distribution of “election resources,” including “sufficient” and “adequately trained” poll workers and a variety of other “sufficient” resources and “clear” guidance. *Id.* These are not claims that are “familiar and manageable” in the context of specific voting practices, *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 399 (5th Cir. 2020), but are making requests for wholesale rewrites of the election system of the State of Georgia.

Far from being “obvious” and “measurable,” [Doc. 111, p. 22], to grant Plaintiffs’ requested relief, this Court must determine “how much” of a long line is “too much” and must then decide on “competing visions” of how to properly administer elections.² *Jacobson*, 2020 U.S. App. LEXIS 28078, at *63-64, *75. Finding Plaintiffs’ claims barred by the political-question doctrine does not preclude challenges to particular voting practices where there are judicially manageable standards. It simply recognizes the proper place of the courts in the administration and conduct of elections. *Agre v. Wolf*, 284 F. Supp. 3d 591, 599 (E.D. Pa. 2018).

² How an order of this Court will magically make more poll workers appear on the scene is left unaddressed by Plaintiffs. See Mark Niese, *Election depends on hiring many new poll workers across Georgia*, Atlanta J.-Const. (August 26, 2020) available at <https://www.ajc.com/politics/election-depends-on-hiring-many-new-poll-workers-across-georgia/UPWQRQ6KXFAENAZFCBPSK6KTYI/> (highlighting challenges in recruiting poll workers).

CONCLUSION

Plaintiffs' Complaint fails at the first hurdle it must pass—this Court's limited jurisdiction. This Court should dismiss Plaintiffs' Complaint and return Plaintiffs to the policy-making bodies in this State.

Respectfully submitted this 22nd day of September, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing REPLY BRIEF IN SUPPORT OF COUNTY DEFENDANTS' MOTION TO DISMISS has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Bryan P. Tyson
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