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

BLACK VOTERS MATTER FUND, MEGAN GORDON, PENELOPE REID, and ANDY KIM, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia; DEKALB COUNTY BOARD OF REGISTRATION & ELECTIONS; ANTHONY LEWIS, SUSAN MOTTER, DELE LOWMAN SMITH, SAMUEL E. TILLMAN, and BAOKY N. VU, in their official capacities as Members of the DeKalb County Board of Registration & Elections; and ERICA HAMILTON, in her official capacity as Director of Voter Registration and Elections, and all others similarly situated,

Defendants.

CIVIL ACTION

FILE NO. 1:20-cv-01489-AT

RESPONSE OF SECRETARY OF STATE BRAD RAFFENSPERGER IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

Secretary of State Brad Raffensperger (the "Secretary") submits this response to Plaintiffs' Second Motion for Temporary Restraining Order

and/or Preliminary Injunction and for Expedited Briefing ("Second Motion"). [Doc. 93]. In addition to all of the arguments the Secretary has already advanced, the Second Motion should be denied for at least three additional reasons: (1) Plaintiffs' opportunity to participate in an August runoff election is entirely speculative; (2) the COVID-19 virus may burden no one's right to vote in November; and (3) Plaintiffs' requested relief and injury are not redressable or traceable to the Secretary.

With this Response, and as Plaintiffs have done, the Secretary expressly incorporates and relies upon his arguments presented in the following pleadings and their exhibits: (1) Brief in Support of the Secretary's Motion to Dismiss [Doc. 67-1]; (2) Reply Brief in Support of the Motion to Dismiss [Doc. 87]; (3) Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction [Doc. 51]; (4) Response to the Court's Inquiry [Doc. 76]; (5) Response to the Court's Sua Sponte Inquiry [Doc. 54]; (6) Response to Plaintiffs' Supplemental Letter [Doc. 78]; and (7) Response to Plaintiffs' Supplemental Declaration [Doc. 79].

This Brief will focus on the additional problems with Plaintiffs' requested relief for the August and November elections.

INTRODUCTION

Plaintiffs' eleventh hour Second Motion should be denied. As with Plaintiffs' First Motion for Preliminary Injunction (the "First Motion") [Doc. 2], Plaintiffs fail to meet their burden of "clearly" satisfying each of the four elements required to grant the extraordinary relief they seek. McDonalds Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998). In fact, since Plaintiffs filed their First Motion, their burden has grown even steeper. The day before this Court denied Plaintiffs' First Motion, the Eleventh Circuit decided the case of Jacobson v. Florida Secretary of State, No. 19-14522, 2020 WL 2049076 (11th Cir. Apr. 29, 2020), which provides further grounds to deny Plaintiffs' Second Motion because they can establish neither a concrete injury nor traceability or redressability. In addition, because Plaintiffs expressly seek relief only against the Secretary [Doc. 2 at 2; Doc. 93 at 2], they have failed to join parties necessary to achieve the relief they seek.

ADDITIONAL FACTS

Plaintiffs' Second Motion "is filed solely on behalf of the Original Plaintiffs, Plaintiffs Black Voters Matter Fund and Megan Gordon." [Doc. 93 at 2.] Relief is sought only against the Secretary. [Id.] "The main difference" between the Second Motion and the First Motion is that the Second Motion

"seeks relief for August and November" only. [Id.] Based on the First Motion, the Second Motion seeks the following relief:

1. "Requiring the Secretary of State to issue guidance to all counties that they must provide postage prepaid envelopes with absentee ballots;" and
2. "Requiring the Secretary of State to revise the absentee ballot application form such that they can be mailed in with postage prepaid and require county election officials to use the revised form."

[Doc. 2 at 1-2.][1]

ADDITIONAL ARGUMENT AND CITATION TO AUTHORITY

Plaintiffs' Second Motion does not present one of those "rare instances in which the facts and law are clearly in [Plaintiffs'] favor." Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp., 441 F.2d 560, 561 (5th Cir. 1971).[2] Indeed, Plaintiffs' case has only worsened. Especially after Jacobson, Plaintiffs cannot "clearly" establish that they will satisfy each of the four requirements to obtain the "extraordinary" relief they seek: (1) a substantial

[1] Plaintiffs' Second Supplemental Brief in Support of their [First] Motion for Preliminary Injunction proposed "modified … injunctive relief for June" only. [Doc. 44 at 2.]

[2] In Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1210 (11th Cir. 1981), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit adopted prior to October 1, 1981.

likelihood of success on the merits; (2) a "substantial" threat of irreparable injury absent an injunction; (3) that the alleged injury outweighs the harm to the Secretary; and (4) that granting the injunction would be in the public's interest. Black Voters Matter Fund v. Raffensperger, Civil Action No. 1:20-CV-01489-AT, 2020 WL 2079240 at *2 (N.D. Ga. Apr. 30, 2020) (citing McDonald's Corp., 147 F.3d at 1306).

Independent of these factors, the Court should not reward Plaintiffs' decision to wait almost two weeks between the denial of the First Motion and the filing of the Second Motion. Plaintiffs have demanded that the Secretary respond in an incredibly compressed time frame, and they have increased the burden on this Court even more by depriving it of any real time to weigh the issues raised. Plaintiffs know this, and it weighs strongly against them.

I. Plaintiffs Cannot Show A Likelihood Of Success On The Merits.

This Court has not addressed the merits of Plaintiffs' legal theories, Black Voters Matter Fund, 2020 WL 2079240 at *5, and the Secretary adopts and rests on his prior pleadings to address the substantive merits of Plaintiffs' claims.[3]

[3] This Court need not even address Plaintiffs' Second Motion, and instead should grant the Secretary's Motion to Dismiss the Amended Complaint. [Doc.

Since the briefing on the First Motion, however, the law in the Eleventh Circuit has sharpened, and not to Plaintiffs' benefit. Specifically, Jacobson highlights that Plaintiffs have no injury and sued the wrong party. In Jacobson, a Florida District Court ordered various forms of relief against the Florida Secretary of State, including (1) ordering local election officials not to enforce a particular election law addressing ballot order, and (2) providing local election officials with "written guidance" of the court's decision. 2020 WL 2049076 at *3. The Eleventh Circuit reversed and decided the plaintiffs lacked standing to obtain such relief. Id. at *1. Respectfully, this Court should do the same.

A. Plaintiffs Have No Injury In Fact.

Plaintiffs have offered no evidence to establish an injury arising out of the August or November elections. First, because Plaintiffs seek "prospective relief to prevent future injuries … [they] must prove that their threatened injuries are 'certainly impending.'" Jacobson, at *4 (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013)). Neither Plaintiff has an impending injury arising out of the potential August elections, because there

90.] See Georgia Shift v. Gwinnett Cty., 1:19-CV-01135-AT, 2020 WL 864938, at *2 (N.D. Ga. Feb. 12, 2020) ("The Court must first address Defendants' jurisdictional arguments, before considering any merits-based arguments for dismissal.")

is no guarantee that any runoff will occur. This is true of Count I (per se poll tax claim) and Count II (Anderson/Burdick burden on voting claim). Even if there were runoff elections in August, there is no evidence that Plaintiff Gordon would have an opportunity to vote in any of them. This is dispositive as to her (and the putative class's) claims. Similarly, the Black Voters Matter Fund ("Fund") cannot show that it will be educating any voters about potential August runoffs. Plaintiffs have not offered any evidence to the contrary, nor can they. This ends the inquiry.

Second, for purposes of Count II, any purported injury arising out of the November election is speculative and "certainly [not] impending." Clapper, 568 U.S. at 401. Specifically, Gordon claims she cannot vote in person because of the COVID-19 pandemic. [Doc. 93-1 at ¶ 14.] This supposedly compels her to vote by mail [id.] and, therefore, utilize the stamps she already has (though the United States Postal Service will deliver her ballot anyway, or she could hand deliver it to county officials). [Doc. 51 at 4-6, 15-16 (Secretary's Brief in Opposition to the First Motion).] Similarly, the Fund repeatedly cited the virus as the actual cause of its purported injury. See, e.g., Prelim. Inj. Hr'g Tr. at 50; Doc. 79. The problem for Plaintiffs, however, is that they offered no evidence that the virus will remain prevalent six months from now. Indeed, Plaintiffs have not satisfied their burden to

provide any epidemiological evidence as to whether, or to what degree, the virus may impact the November elections. It is anyone's guess how or if they will face an injury in November at all.[4] Put simply, because the November election is months away, and because there is no consensus (much less evidence) on what the impact of the COVID-19 virus will be at that time, Plaintiffs cannot show an "impending" injury arising out of the general election. Clapper, 568 U.S. at 401.

Third, the Fund's purported injury—arising from both elections and for both counts for relief—cannot withstand judicial scrutiny after Jacobson. The Fund has no members and, consequently, neither can nor does claim associational standing. 2020 WL 2049076 at *7; Doc. 93-1 at ¶ 13 (Amended Complaint); Prelim. Inj. Hr'g Tr. at 48-49. To demonstrate a direct injury, the Fund must show that the Secretary's "illegal acts impair [the Fund's] ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." Jacobson, 2020 WL 2049076 at *8 (citing Fla. State Conference of NAACP v. Browning, 522 F.3d 1153, 1165 (11th Cir. 2008)). The Fund has not provided any evidence of "what activities [it] would

[4] For similar reasons, Plaintiffs' claims regarding the November election are not ripe. [See Doc. 67-1 at 17-21 (Secretary's Brief in Support of Motion to Dismiss); Doc. 87 at 15 (Secretary's Reply Brief in Support of Motion to Dismiss).]

divert resources away from in order to spend additional resources on" what can only be described as the Secretary's inaction (e.g., not ordering the counties to pay for postage in the August and November elections). Jacobson, 2020 WL 2049076 at *8 (emphasis in original). Consequently, and after Jacobson, there is no evidence in the record to establish any kind of cognizable injury for the Fund.

B. *Jacobson* Precludes Plaintiffs' Showing Of Traceability And Redressability.

Even if the Plaintiffs could "clearly" establish an injury, that harm "would neither be traceable to the Secretary nor redressable by relief against [him]." Jacobson, 2020 WL 2049076 at *9. As in Jacobson, the "problem for the [Plaintiffs] is that [Georgia] law tasks [county officials], independently of the Secretary" with the responsibility to respond to absentee ballot requests and mail absentee ballot packets to voters. Id.; O.C.G.A. § 21-2-381; Doc. 51 at 4-6. Consequently, because the Secretary "'didn't do (or fail to do) anything that contributed to [their] harm,' the voters and organizations 'cannot meet Article III's traceability requirement.'" Jacobson, 2020 WL 2049076 at *9 (emphasis added) (citing Lewis v. Governor of Ala, 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc)). As in Jacobson, the counties' decisions whether to pay or not pay for voters' postage, directly or indirectly, is not an

injury traceable to the Secretary. That claim, if any, lies against the counties themselves, and Plaintiffs have expressly disavowed any form of relief against them. [Doc. 93 at 2.]

Further, after Jacobson, traceability and redressability are not established by merely citing generally to the Secretary's rulemaking authority or his status, in some contexts, as the "chief election officer." 2020 WL 2049076 at *10, 13. Yet, that is the precise claim Plaintiffs make: "no further injunction is necessary because county officials follow the Secretary of State's guidance." [Doc. 2 at 2.] This too warrants the denial of the Second Motion.

More fundamentally, Plaintiffs have advanced no argument or authority for the proposition that the Secretary could effectively order counties to pay the cost of postage. No statute authorizes the Secretary to do so. Plaintiffs themselves concede that no law even addresses the specific issue of postage. [Doc. 84 at 23.] In Jacobson, the Eleventh Circuit specifically rejected that relief is available under such circumstances:

> the only relief that might possibly redress any injuries … would be an injunction ordering the Secretary to promulgate a rule requiring [local election officials to act] contrary to the … statute. … Any such relief would have raised serious federalism concerns, and it is doubtful that a federal court would have the authority to order it.

2020 WL 2049076 at *13. Put simply, because the Secretary lacks the authority to compel local election officials to buy postage for voters, this Court cannot order the relief that Plaintiffs seek, or if the Court did order the sought-after relief, it would be hollow, because the Secretary could not enforce it. Either way, Plaintiffs cannot prevail on their claims.

II. Plaintiffs Will Not Suffer Irreparable Injury Absent A Preliminary Injunction.

As the Eleventh Circuit has emphasized, an asserted irreparable injury "must be neither remote nor speculative, but actual and imminent." NE Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990). In addition to the reasons advanced by the Secretary in prior briefing, Plaintiffs cannot clearly establish an "actual and imminent" harm, because they have no way of knowing if there will be runoff elections or if the COVID-19 virus will be a factor in the administration of the November election. Id.

III. Balancing The Equities And Public Interest.

This Court denied Plaintiffs' First Motion because it was not in the public interest. Black Voters Matter Fund, 2020 WL 2079240 at *3-4.[5] While the Court limited its holding to the June primary election, this Court's reasoning and the Secretary's other arguments apply with equal force now. Id. at *4 (citing Reynolds v. Sims, 377 U.S. 533, 585 (1964)).

There is also a new reason to deny the Second Motion: it seeks to impose significant and material costs on counties that are not present to defend themselves. See Infant Formula Antitrust Litig., MDL 878 v. Abbott Labs., 72 F.3d 842, 842-43 (11th Cir. 1995) (holding that the district court lacked subject matter jurisdiction to issue a preliminary or permanent injunction against a nonparty); Additive Controls & Measurement Sys., Inc.

[5] In its prior order, the Court said that the Defendants "previously represented to the Court" that voters would receive a security envelope. 2020 WL 2079240 at *5. The Court is correct. But, the Secretary did not learn of the inclusion of a security sleeve instead of a security envelope until after the hearing on April 24, 2020. See Decl. of Gabriel Sterling ¶ 15 (attached as "Exhibit 1") (previously filed as [Doc. 33-2] in Coalition for Good Governance, et al., v. Raffensperger, et al., Civil Action No. 1:20-CV-01677-TCB (N.D. Ga. May 11, 2020)). As a legal matter, O.C.G.A. § 21-2-384(b) authorizes the Secretary to determine the "size and shape" of the security envelope. Further, O.C.G.A. § 21-2-386(c), provides that failure to use the security envelope does not spoil an absentee ballot.

v. Flowdata, Inc., 96 F.3d 1390, 1394 (Fed. Cir. 1996) ("Courts of equity have long observed the general rule that a court may not enter an injunction against a person who has not been made a party to the case before it.").

There are federalism implications to Plaintiffs' requested relief as well:

> Equitable remedies are powerful, and with power comes responsibility for its careful exercise. These remedies can affect nonparties to the litigation in which they are sought; and when, as in this case, they are sought to be applied to officials of one sovereign by the courts of another, they can impair comity, the mutual respect of sovereigns—a legitimate interest even of such constrained sovereigns as the states and the federal government.... [T]here is not an absolute right to an injunction in a case in which it would impair or affront the sovereign powers or dignity of a state or a foreign nation.

McKusick v. City of Melbourne, Fla., 96 F.3d 478, 487–88 (11th Cir. 1996).

That Plaintiffs named DeKalb County as a defendant in this lawsuit does not save them. First, Plaintiffs do not seek direct relief against DeKalb County in their Second Motion, but DeKalb County will bear the financial burden of Plaintiffs' proposed relief.[6]

Second, there are 158 other counties in Georgia that should be provided with the opportunity to decide whether they want to pay for all absentee

[6] DeKalb County has previously asked the Court to defer ruling on potential August and November elections to determine the "conditions" at that time. (Prelim. Inj. Hr'g Tr. at 128.)

voters' postage. This is particularly true now given the collapsing sales tax revenue (which provides a significant part of county revenue in Georgia) caused by the COVID-19 virus.[7] It would be inequitable to issue an order compelling the spending of county resources without bringing the counties into the lawsuit. See Toney v. White, 476 F.2d 203, 207 (5th Cir. 1973) (citing Provident Tradesman Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968)) (Rule 19 determinations "bottomed on equitable principles"). These counties should have an opportunity to be heard, and Plaintiffs' compressed time frame makes that impossible. The record before the Court is simply insufficiently developed to warrant the sweeping changes that Plaintiffs seek.

CONCLUSION

Nothing has changed since this Court denied Plaintiffs' First Motion except that the law in the Eleventh Circuit has made it clearer that Plaintiffs are not entitled to the relief they seek. They have again failed to satisfy their heavy burden to obtain a mandatory injunction, and their burden of persuasion has become insurmountable after the Jacobson decision. For all

[7] See Ga. Dep't. of Rev., April Net Tax Revenues Fall -35.9%, (May 6, 2020), available at: https://dor.georgia.gov/press-releases/2020-05-06/april-net-tax-revenues-fall-359

the reasons advanced by the Secretary in this and prior pleadings, this Court should deny Plaintiffs' Second Motion.

Respectfully submitted this 14th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing RESPONSE OF SECRETARY OF STATE BRAD RAFFENSPERGER IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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