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

BLACK VOTERS MATTER FUND, et al.,

Plaintiffs,

vs.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia, et al.,

Defendants.

Civil Action No.: 20-cv-1489-AT

PLAINTIFFS BVM AND GORDON'S REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION AND FOR EXPEDITED BRIEFING

The Secretary's opposition brief essentially boils down to two overarching propositions: (1) that *Jacobson v. Fla. Sec'y of State*, --- F.3d ---, 2020 WL 2049076 (11th Cir. 2020) means that Plaintiffs Black Voters Matter Fund and Megan Gordon (hereinafter "Original Plaintiffs") lack standing (with respect to injury and traceability), Doc. 97 at 4-11; and (2) that the remaining preliminary injunction factors ("equities") weigh in the Secretary's favor, *id.* at 5, 12-15.

Although the Secretary's brief resurrects some old arguments, Plaintiffs will strive not to repeat prior arguments and will only address new arguments.

I. THE COVID-19 PANDEMIC IS LIKELY TO PERSIST THIS YEAR

Because the Secretary's arguments about COVID-19 underlie both his arguments, Plaintiffs address it first.

Defendants argue that Plaintiffs "offered no evidence that the virus will remain prevalent six months from now," and that plaintiffs have not "provide[d] any epidemiological evidence." Doc. 97 at 7-8. This is untrue.

Plaintiffs previously submitted the Declaration of Dr. Arthur L. Reingold in support of their reply brief. Doc. 57-1 (hereinafter "Reingold Decl."). Dr. Reingold is a medical doctor, a public health expert in the area of infectious diseases and epidemiology, and the Division Head of Epidemiology and Biostatistics at the University of California, Berkeley, School of Public Health. Reingold Decl. ¶¶ 1, 3. He spent eight years at the Centers for Disease Control and Prevention ("CDC"), has directed or co-directed the CDC-funded California Emerging Infections Program for more than 25 years, and served as President of both the Society for Epidemiologic Research and the American Epidemiological Society. *Id.*

As Dr. Reingold explains, social distancing measures including self isolation and maintaining at least six feet of space between people (as well as consistent

hygiene practices) are the only known effective measures for protecting against transmission of COVID-19. *Id.* ¶ 10. Dr. Reingold further explains that "transmission of the virus will continue through the population until the development and widespread use of a vaccine and/or her immunity." *Id.* ¶ 12. No vaccine currently exists and will likely not for at least another year, at least for the public at large. Reingold Decl. ¶¶ 10-13. In addition, effective herd immunity requires "[a]pproximately 80-95% of a population [to] be immune," a scenario that requires either a vaccine or immunity from previous infection, and we do not yet know whether previous infection results in immunity and if so for how long. *Id.* ¶¶ 14-15.

"As a result, even if transmission slows due to behavioral interventions such as social distancing and stay-at-home orders, we can expect resurgences of COVID-19, including significant community transmission, throughout 2020 and into 2021 across the United States, until the development and widespread use of a vaccine. Such resurgence is particularly likely if/when these behavioral modifications are lifted when community transmission is still continuing," *id.* ¶ 15, as is the case in Georgia. "Polling locations are a prime area for increased transmission" of the COVID-19 virus "and are highly likely to cause increased infection." *Id.* ¶ 17. There is, accordingly, ample basis to conclude that COVID-19

will continue to circulate in our communities throughout the rest of this year at least, and continue to make voting by mail the only meaningful way for many voters to participate in the August and November elections without severe risk to their health. See id. ¶ 17 ("Widespread vote-by-mail or absentee balloting would be a much safer option for public health, in light of COVID-19[.]").

Plaintiffs' arguments are not wholly dependent upon this declaration, but Plaintiffs dispute the Secretary's assertion that they provided "no evidence."

II. *JACOBSON* DOES NOT WARRANT DISMISSAL OF THIS ACTION AGAINST THE SECRETARY

The Secretary argues that *Jacobson v. Fla. Sec'y of State*, --- F.3d ---, 2020 WL 2049076 (11th Cir. 2020) means that Plaintiffs Black Voters Matter Fund and Megan Gordon (hereinafter "Original Plaintiffs") lack standing. This brief will not repeat prior arguments about standing, Doc. 84 at 24-29, and will solely be limited to explaining why *Jacobson* is distinguishable. As stated below: (A) Plaintiff Black Voters Matter Fund ("BVM") has standing under *Jacobson*; (B) Plaintiff Megan Gordon has standing under *Jacobson*; and (C) the injury is traceable to the Secretary under *Jacobson*. Indeed, *Jacobson* helps illustrate why Plaintiffs have standing.

It is worth emphasizing *Jacobson*'s caution that every element of standing "'must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation.'" *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). In *Jacobson*, the case had reached a bench trial and the evidence did not demonstrate standing. *Id.* Here, we only have allegations and preliminary evidence so far. And it based on those that Plaintiffs have established standing at this stage of litigation.

The Secretary argues with respect to both Original Plaintiffs that they allegedly lack standing because there is no guarantee that the COVID-19 pandemic may be over in a matter of months. This is addressed *supra* Part I. In addition, these arguments appear to repackage the arguments about ripeness that the Secretary appears to have abandoned. Doc. 84 at 29-34; Doc. 87. The Secretary also argues that there is no guarantee of an August runoff, but the equities warrant relief tomorrow given the Secretary's alleged deadline, as explained *infra* Part III.

A. Plaintiff Black Voters Matter Fund Has Standing Under *Jacobson*

BVM has presented facts demonstrating injury that the plaintiffs in *Jacobson* failed to do. In *Jacobson*, the court ruled that the organizational plaintiff lacked organizational standing because they did not "explain[] what activities the [organizations] would divert resources away *from* in order to spend additional

resources on combatting [the challenged policy]." *Jacobson*, 2020 WL 2049076, at *9. BVM has. As explained in prior briefs, Plaintiff Black Voters Matter Fund has diverted, and anticipates that it will divert, funds away from educating voters about all other aspects of voting by mail, towards helping voters overcome the postage requirement. *See* Doc. 84 at 26-28.

The Secretary also sporadically argues that BVM has not established injury arising from the August and November elections right now. But BVM has provided sworn statements that logistically, all preparations must start now even for November, and that they are struggling to remain in a "holding pattern" while waiting to see how this Court rules. Doc. 77-1 at ¶¶ 27-30.

B. Plaintiff Gordon Has Standing under *Jacobson*

Plaintiff Gordon also has standing under the principles of *Jacobson*, in that she has satisfied the injury requirements that the plaintiff voters in *Jacobson* failed to do.

First, *Jacobson* ruled that the individual voter plaintiffs lacked standing because there was "no evidence about any injuries those two individuals suffered in the past or may suffer in the future." *Jacobson*, 2020 WL 2049076 at *5. It is unclear whether the Secretary's current attack on standing is facial or factual. Under either posture, Plaintiffs have established standing so far. For the reasons set

forth in Plaintiffs' prior brief, Doc. 84 at 24-29, Plaintiffs' allegations, unlike in *Jacobson*, do explain the "injuries that [Original Plaintiffs] suffered in the past or may suffer in the future." Original Plaintiffs' sworn statements also establish this injury, namely, the burdens of obtaining postage for voters during the COVID-19 pandemic. *See* Docs. 2-2; 2-5; 75 at 32-65; 77-1.

For standing purposes, the Eleventh Circuit has suggested that voting burdens such as the burdens asserted here establish standing even where there is no outright vote denial. *See Salcedo v. Hanna*, 936 F.3d 1162, 1167 (11th Cir. 2019) (injury need only be an "identifiable trifle," such as "a fraction of a vote" "and a $1.50 poll tax" (citation omitted)). And of course, outright vote denial is not required for either the poll tax or *Anderson-Burdick* claims.[1] Any suggestion by the Secretary that there is no standing because getting postage is easy is a question for the merits (which this brief need not rehash), not standing. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (standing "in no way depends on the merits" of the claim).

[1] Plaintiffs will not repeat arguments in response to the Secretary's repeated suggestion—made again here—that voting impossibility must be proven, including for *Anderson-Burdick* claims. *See, e.g.*, *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016) (government violates *Anderson-Burdick* by imposing unreasonable burdens on voters even when the governmental interests are as weighty as preventing voter fraud).

Second, *Jacobson* found a lack of standing for the individual voters because the voters failed to "offer any evidence at trial showing disadvantage to *themselves as individuals*." *Jacobson*, 2020 WL 2049076, at *5 (emphasis added). *Jacobson* was a case challenging Florida's ballot rule that the candidate of the political party who last won the election gets to be listed first. But the voter's "injury" was that the political party she preferred would have their votes diluted, which was "insufficient to prove that *her individual vote* will be diluted." *Id.* at *7 (emphasis added); *see also id.* (no voter standing where lawsuit "presents a dispute 'about group political interests, not individual legal rights'") (citation omitted).

Here, Ms. Gordon has alleged a specific "individual legal right." *Id.* Under the poll tax theory, Ms. Gordon asserts her right not to have to choose between using a postage stamp, which she does not want to pay for, and voting in-person during the COVID-19 pandemic. Under *Anderson-Burdick*, Ms. Gordon asserts her right not to have to overcome the burdens of voting by mail during this pandemic when the state's interests in raising money are illegitimate. Unlike in *Jacobson*, the merits of this case have nothing to do with electoral outcomes or the interests of one political party over another.

C. The Postage Requirement is Traceable to the Secretary Based on the Evidence So Far

Jacobson further ruled that even if the plaintiffs had a concrete injury, they still lacked standing because "any injury would be neither traceable to the Secretary not redressable by relief against her." *Jacobson*, 2020 WL 2049076 at *5. Both the pleadings and the evidence so far establish that the postage requirement is traceable to the Secretary.

Unlike in *Jacobson*, the statutes here do not clearly place responsibility for any postage requirement onto the counties—all parties agree the statutes are silent. *See Jacobson*, 2020 WL 2049076 at *13 (Secretary wrong party where statute clearly placed responsibility for the allegedly unconstitutional act on the counties); *but see Martin v. Kemp*, 341 F. Supp. 3d 1326, 1329-32, 1341 (N.D. Ga. 2018) (entering preliminary injunction solely against the Secretary even where the statutes explicitly made counties responsible for the signature matching procedure being challenged as unconstitutional).

Thus, at least in this case, traceability is a factual matter, and the allegations of the Amended Complaint (Doc. 88)[2] satisfy this bar. The pleading alleges that

[2] The Amended Complaint is now the operative complaint but as noted previously, Plaintiffs do not rely on any of the new allegations of the Amended Complaint. The allegations relied upon here are identical to those in the original Complaint.

the Secretary of State's Office explicitly requires voters to affix postage on envelopes, Doc. 88 at ¶ 34, and that—as a *de facto* matter—the counties follow the Secretary's guidance, *id.* at ¶¶ 19-20, even if the counties are the ones generally responsible for physically handling absentee ballots, *id.* at ¶ 19. These same allegations plausibly establish that providing injunctive relief solely with respect to the Secretary *can* redress Plaintiffs' injuries. *Id.*

The evidence so far also establishes traceability to the Secretary. The sworn statements of the Secretary of State's Office, its explicit online instructions to affix postage, and the absentee ballot envelope template they created, all point to the Secretary as the responsible party. Docs. 2-4; 40; 51 at ¶¶ 8-9; 54 at 3; 75:23-25. The Secretary of State's Office has also testified that the Secretary would be bureaucratically burdened even if all counties lifted the postage requirement. *See* Doc. 75 at 93:3-14; 99:18-21; *Support Working Animals, Inc. v. DeSantis*, --- F. Supp. 3d ----, 2020 WL 1991479, at *7 n.8 (N.D. Fla. Apr. 27, 2020) (applying *Jacobson*, ruling that the Secretary of State is a proper defendant even where the Secretary involvement in the process was merely "clerical"). As for redressability, the entire premise of the Secretary's opposition to a preliminary injunction is their refusal to cure Plaintiffs' injuries, and the Secretary has never disputed that the counties follow their guidance.

The Secretary argues that, like in *Jacobson*, Plaintiffs' traceability arguments cling solely to a statute that generically names the Secretary as the "chief election officer." Doc. 97 at 10. But Plaintiffs do not do so here, nor do Plaintiffs rely solely on the fact that the Secretary issues guidance to the counties. As shown above, the Secretary not only issues guidance to counties, the Secretary has issued guidance to counties *specifically with respect to the postage requirement* and other absentee ballot issues. But Plaintiffs rely on facts, not statutes. Indeed, in *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1329-32, 1341 (N.D. Ga. 2018), even where the statutes were clear that counties were responsible for a signature matching procedure that the plaintiffs challenged as unconstitutional, the court still entered an injunction solely against the Secretary, ordering him to issue guidance to all counties. The Eleventh Circuit subsequently denied the Secretary's request for a stay. *See Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262 (11th Cir. 2019).

In sum, whether the Secretary or the counties are responsible for the postage requirement is a factual question suitable for discovery, especially where, as here, the statute is silent. Discovery will help demonstrate (hopefully) once and for all who is responsible, though the likely answer is both. For now, the allegations are sufficient to show that the injury is traceable to the Secretary.

III. THE EQUITIES HAVE NOT CHANGED AND TILT IN PLAINTIFFS' FAVOR

Timing. The Secretary's equities arguments about August boil down to a "heads I win tails you lose" approach about timing—the kind of well-worn timing trap that elections officials routinely raise in voting cases. This Court is well aware of that strategy. *See* Doc. 75 at 130:6-12 ("It is giving me great pause about waiting very long relative to August . . . wait and wait and then be too late, which is a constant issue on election cases.").

Under the Secretary's belief, if it is not clear if the August runoffs are happening, then it is too early to grant relief. But if the August runoffs do end up happening, then it will be too late to grant relief. The implications of this Catch-22 argument are remarkable. In essence, the Secretary argues that all motions for a preliminary injunction—indeed, even permanent relief—challenging the constitutionality of any aspect of the absentee balloting process for runoffs are always void.

The equities do not countenance such an absurd result. If the Secretary must prepare as early as May 15 to order absentee ballot materials for the August runoff, then the equities warrant an injunction on or before May 15 to give organizations like Plaintiff Black Lives Matter Fund ("BVM") and voters equal advance notice to overcome the postage requirement for an August runoff. Indeed, BVM has

sworn that preparations must be made as soon as possible, even for the November elections. Doc. 77-1 at ¶¶ 27-30. The Secretary's logistical concerns are not more important that BVM's logistical concerns.

Nor does the public interest warrant such delay. Plaintiffs will not belabor the point that voters highly susceptible to COVID-19 (as well as all voters) have substantial difficulties obtaining postage during this epidemic. Such voters need as much advance notice as possible so they can figure how to obtain postage without contracting COVID-19. *See, e.g.*, Doc. 24 (Declaration of Delinda Bryant). The interests of these voters well outweigh the Secretary's logistical concerns.

Indeed, the Secretary's logistical concerns are relatively minimal. If the Secretary orders prepaid postage envelopes tomorrow, and the August runoff does not happen, the Secretary does not lose much money, if any, on prepaid postage because postage is charged only when the envelope is returned by mail.

The Secretary gestures at an argument that Plaintiffs' second motion for a preliminary injunction allegedly came too late. Doc. 97 at 5. Counsel for Plaintiffs acknowledge that the timing of the Amended Complaint, originally intended to advance an alternative argument to DeKalb's motion to dismiss, have unexpectedly (to Plaintiffs' Counsel, not the Court) caused significant procedural problems with respect to the pending motion for a preliminary injunction. But the Defendants do

not dispute that this second motion has not caused any prejudice to them (with respect to the original parties). Doc. 93. Nor have Defendants argued that the Amended Complaint has materially impacted the pending motion for preliminary injunction.[3]

Finances. The Secretary raises concerns about finances, including a "new" argument that an injunction would hurt the counties. It is not clear why financial concerns are more urgent for the counties "now," then they were when the Secretary initially raised financial concerns several weeks prior. It is also worth noting that the Secretary's finances arguments on behalf of DeKalb seems markedly more strident than the finances arguments by DeKalb. *See* Doc. 75 at 128. In any event, Plaintiffs will not repeat prior arguments about the government's financial interests.

Injunction. The Secretary then argues that it is inappropriate to issue an injunction against the counties. But Plaintiffs are not seeking a preliminary

[3] Plaintiffs' acknowledge that this second motion still may not have addressed the Court's procedural concerns. To protect Plaintiffs' interests, Plaintiffs respectfully note that they do not waive the argument that an amended pleading does not necessarily have a material impact on any pending motion for a preliminary injunction when the pending motion is not reliant on any changes in the amended pleading, particularly where the defendants have not so argued. *Cf. e.g.*, Exhibit A (docket sheet of voting litigation where Amended Complaint was filed in the middle of motion for preliminary injunction briefing).

injunction against the counties, and Plaintiffs have said so from day one. Doc. 2. Further, Plaintiffs' motion sought relief solely from the Secretary out of *respect* for federalism. Guidance from the Secretary to the counties is more respectful to the counties than a court injunction against the counties. As Plaintiffs have stated, they may seek relief from particular counties that do not follow the Secretary's guidance, but that is an issue for another day, and might not even involve the Secretary at all if or when that happens.

CONCLUSION

For these reasons and those set forth in the opening brief, Original Plaintiffs' motion for a temporary restraining order and/or preliminary injunction should be granted.

Respectfully submitted this 14th day of May, 2020.

Sean Young
Attorney Bar Number: 790399
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, GA 30357
Telephone: (678) 981-5295
Email: syoung@acluga.org

Sophia Lin Lakin
Dale E. Ho
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor

New York, NY 10004
Telephone: 212-519-7836
Email: slakin@aclu.org
dho@aclu.org

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to N.D. Ga. Local Civil Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with N.D. Ga. Local Civil Rule 5.1(C) in Times New Roman 14-point typeface.

Sean Young
Attorney Bar Number: 790399
Attorney for Plaintiffs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, GA 30357
Telephone: (678) 981-5295
Email: syoung@acluga.org

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

Sean Young
Attorney Bar Number: 790399
Attorney for Plaintiffs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, GA 30357
Telephone: (678) 981-5295
Email: syoung@acluga.org