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

COALITION FOR GOOD GOVERNANCE, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State; *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:20-CV-01677-TCB

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

Defendants Secretary of State Brad Raffensperger, and State Election Board Members Rebecca N. Sullivan, David J. Worley, Matthew Mashburn, and Ahn Le (collectively, "Defendants") file this Response in Opposition to Plaintiffs' Motion to Alter or Amend Judgment ("Plaintiffs' Motion").

INTRODUCTION

This Court should deny Plaintiffs' Motion for three reasons. First, the June primary is not a future event; it is already underway, beginning when in-person early voting commenced on Monday, May 18. Second, this Court

correctly ruled on the political-question doctrine, and Plaintiffs were provided ample notice and opportunity to make their arguments at oral argument (and did not address it in their later-filed supplemental brief). Third, this Court also correctly denied Plaintiffs' Motion for Preliminary Injunction because there are no manageable judicial standards to address their claims, nor any act of government giving rise to Plaintiffs' Complaint.

ARGUMENT AND CITATION OF AUTHORITY

The only bases for granting a Rule 59 motion are "[1] newly-discovered evidence or [2] manifest errors of law or fact." *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999). Further, "[t]he decision to alter or amend a judgment is committed to the sound discretion of the district court." *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006).

Plaintiffs do not claim to have discovered new evidence or that this Court made a manifest error of fact. The sole basis on which Plaintiffs seek reconsideration of this Court's order is an alleged manifest error of law. (Doc. 48, p. 12). As discussed below, it is now too late for this Court to address Plaintiffs' claims because the election is underway. But even if it was not too late, this Court made no error of law and Plaintiffs raise no arguments that

they could not have "raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005).

I. It is now too late for this Court to consider Plaintiffs' claims.

Only last month, the Supreme Court of the United States addressed another case where plaintiffs sought to enjoin an upcoming election based on claims arising out of the COVID-19 virus's impact on a Wisconsin election. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020) ("*RNC*"). In *RNC*, the Supreme Court reviewed a decision of a Wisconsin District Court that ordered absentee ballots received after the state statutory deadline to still be counted. The Court concluded that such relief "fundamentally alter[ed] the nature of the election." *Id.* at 1207. The Court then reversed the district court, noting that changing the election protocols so close to the election "contravened this Court's precedents … This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* *RNC* is consistent with prior Supreme Court precedent cited in the decision. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S.Ct. 9 (2014).

This case is no different from *RNC*; in fact, the relief Plaintiffs seek is far more "fundamental[ ]" to the election than that sought in Wisconsin. Early voting across Georgia has already commenced (Doc. 33-1 at ¶ 17), and reports indicate that over 15,000 voters cast an in-person early ballot on Monday, May 18, alone.[1] This is in addition to the approximately 400,000 voters who have already cast an absentee ballot by mail.[2] (For reference, total turnout for the 2016 general primary election was close to 900,000 voters.[3]) In addition, Plaintiffs seek far more dramatic relief than that sought for Wisconsin elections in *RNC*. Here, Plaintiffs seek no less than to postpone the date of the election; mandate an entirely different method of in-person voting; mandate counties to set up everything from drive-thru voting to "pop-up" precincts; and declare at least three state statutes unconstitutional. When these facts are taken into consideration, it is readily apparent that this Court was right to dismiss Plaintiffs' Complaint, and it should deny

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[1] Mark Niesse, "More Georgians voted by mail than in person on Day 1 of early voting," Atlanta J. & Const. (May 19, 2020), https://www.ajc.com/news/state--regional-govt--politics/more-georgians-voted-mail-than-person-day-early-voting/2cEjDG3MTAAwZDyiv9zG7K/

[2] *Id.*

[3] May 24, 2016 General Primary Results, https://results.enr.clarityelections.com/GA/60041/174358/en/summary.html (totaling top-line races for Republican and Democratic voters).

Plaintiffs' most recent motion as well. Put simply, the weight of the Supreme Court's precedent in *RNC* forecloses any relief on Plaintiffs' Motion.

RNC is not the only Court precedent that bars Plaintiffs' relief at this stage. The Supreme Court previously ruled that even *potentially meritorious attempts* to change the rules of an election should be rejected if they arise too late in time:

> [O]nce a State's [election-related] scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. **However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief** in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.

Reynolds v. Sims, 377 U.S. 533, 585 (1964) (emphasis added). Thus, even if Plaintiffs' claims were meritorious, and they are not, precedent weighs strongly against awarding them any relief now.

II. This Court correctly applied the political-question doctrine.

This Court correctly recognized its obligation "to inquire into subject-matter jurisdiction." *Bing Quan Lin v. United States AG*, 881 F.3d 860, 866 (11th Cir. 2018) (quoting *Galindo-Del Valle v. Att'y Gen.*, 213 F.3d 594, 599 (11th Cir. 2000)). As explained below, Plaintiffs have shown no error of law in this Court's determination that this case only presented non-justiciable political questions.

A. This Court correctly determined this case was barred by the political-question doctrine.

A court's determination of whether the political-question doctrine applies to a case turns on the *type of question* that court is required to decide. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358 (11th Cir. 2007). A "case-by-case inquiry" is required because application of the doctrine requires a "delicate exercise in constitutional interpretation." *Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 706 (1962). This analysis necessarily requires a court to analyze the merits of a case "to determine whether a case

or controversy exists." *Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum etc.*, 577 F.2d 1196, 1202 n.9 (5th Cir. 1978).[4]

1. *This Court correctly considered the Constitution's explicit commitment of the administration of elections to Congress and state legislatures.*

Plaintiffs first claim that this Court erred because the "coordinate political department" to which the constitutional text commits an issue must be another branch of the *federal* government.[5] (Doc. 48, pp. 14-17). But in so doing, Plaintiffs ignore this Court's order, which recognized that the Elections Clause "commits the administration of elections to *Congress* and state legislatures—not courts." (Doc. 43, p. 9) (emphasis added). Plaintiffs fail to address this Court's actual holding by attacking only the reference to state legislatures.

Plaintiffs also miss a critical point in their attack. The political-question doctrine is focused on the proper role of the *federal courts*—it "protects the separation of powers *and* prevents federal courts from overstepping their constitutionally defined role." *McMahon*, 502 F.3d at 1357

[4] 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.

[5] Plaintiffs rely on *Comer v. Murphy Oil USA*, 585 F.3d 855, 872–73 (5th Cir. 2009) at (Doc. 48, p. 13), but that decision was vacated by the en banc court. *See Comer v. Murphy Oil USA*, 607 F.3d 1049, 1055 (5th Cir. 2010).

(emphasis added). Federal courts clearly have a role in the enforcement of election regulations, as Defendants explained in their brief on the motion to dismiss. (Doc. 32-1, p. 15 n.4). *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968), which Plaintiffs cite, is completely consistent with this approach: enumerated powers "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Id*. at 29.

Williams dealt specifically with a single election practice—ballot access for political parties. *Id*. at 24. That is nothing like this case, where Plaintiffs instead sought a "detailed judicial supervision of the election process [that] would flout the Constitution's express commitment of the task to the States." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 208, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring); *see also Curling v. Sec'y of State of Ga.*, 761 F. App'x 927, 934 (11th Cir. 2019) (distinguishing between simple injunctive relief and relief "directing the precise way in which Georgia should conduct voting" for purposes of 11th Amendment immunity). While Plaintiffs framed their case as one arising under the Fourteenth Amendment, their Complaint actually required the Court to substitute its own judgment for state election codes in areas in which Congress has not legislated. (Doc. 43, p. 9).

Under Plaintiffs' approach, the Elections Clause's express reservation of the regulation of elections to state legislatures, subject to Congressional authority, places no limitations on federal-court jurisdiction. Instead of the enforcement of the First and Fourteenth Amendment being "generally unobtrusive to States in promulgating election regulations," *Agre v. Wolf*, 284 F. Supp. 3d 591, 599 (E.D. Pa. 2018) (three-judge court), Plaintiffs advocate for a world where they could use the First and Fourteenth Amendments to allow federal courts to oversee every jot and tittle of state election codes. As this Court correctly recognized, this approach is not supported by the text of the Constitution, nor Supreme Court precedent. *Id.*; (Doc. 43, p. 11). Plaintiffs have offered no basis for this Court to reconsider its ruling that relied on the explicit text of the Constitution regarding the role of the judiciary in overseeing election administration and applied it to Plaintiffs' unusually broad claims in this case.

2. *This Court correctly found there were no judicially manageable standards that could be applied to Plaintiffs' claims.*

Plaintiffs' renewed arguments about judicially manageable standards hold even less water. Plaintiffs essentially claim that, because courts have applied balancing tests to specific election regulations in the past, judicially manageable standards must exist. (Doc. 48, p. 18).

If Plaintiffs were correct, the Supreme Court was wrong when it found federal courts have no commission to act in the absence of "legal standards to guide us in the exercise of such authority." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). That case also involved plaintiffs alleging a burden on their constitutional rights. *Id.* at 2504. But the Court still found those claims barred by the political-question doctrine because of the lack of manageable standards—the same reasons cited by this Court: "there are no discernable and manageable standards to decide issues such as how early is too early to hold the election or how many safety measures are enough." (Doc. 43, p. 10).

Plaintiffs' extended quote from Judge William Pryor's concurrence in *Jacobson* offers nothing of value because it was from the portion of the concurrence dealing with burden, not from Judge Pryor's discussion of justiciability, where he explained that the plaintiffs' "complaint is inherently standardless." *Jacobson v. Fla. Sec'y*, 2020 U.S. App. LEXIS 13714 at *69 (11th Cir. Apr. 29, 2020). That is exactly the problem with Plaintiffs' Complaint here—there was and is no way for the judiciary to make the determinations necessary to reach the issues it alleged.

Plaintiffs were unable to identify any manageable standards for this Court to assess the scope of Plaintiffs' claims and the relief they sought at the hearing despite fully arguing this point. Their motion does not even attempt

to offer proposed standards for this Court's use in determining when "to hold an election or how many safety measures are enough." (Doc. 43, p. 10).

How early is too early? How many safety measures are necessary to make the election safe? Plaintiffs do not even hazard a guess in their motion—all they offer is the conclusory statement that their claims are "manifestly justiciable." (Doc. 48, p. 22).

Plaintiffs have not shown that any manageable standards exist for this case and have shown no reason why this Court's order on the political-question doctrine was based on a manifest error of law.

B. This Court correctly determined that Plaintiffs were not likely to succeed on the merits.

For similar reasons, Plaintiffs have also failed to show a manifest error of law in this Court's conclusion that Plaintiffs' Motion for Preliminary Injunction was unlikely to succeed on the merits. (Doc. 43, p. 11 n.3). As this Court pointed out in both the hearing and the Order, Plaintiffs have not alleged any state action that is causing harm. (*Id.* at p. 10-11 n.2); (Doc. 52 at 22; Doc. 13 at 14-15). Instead, the "real problem here is COVID-19." (Doc. 43 p. 11, n.10). This reality presents the fundamental flaw with Plaintiffs' *Anderson/Burdick* claim.

For example, Plaintiffs do not allege that requiring the use of ballot marking devices ("BMDs") for in-person voting is a per se violation of the Constitution.[6] *See* O.C.G.A. § 21-2-300. Nor do Plaintiffs' allege that having the election on June 9 is inherently unconstitutional. It is the specter of COVID-19, according to Plaintiffs, which makes the decision of Georgia's election officials to hold the election on June 9 unconstitutional; but in the same breath, Plaintiffs advocate that an order from the federal judiciary changing the election to June 30 would remedy this alleged unconstitutionality. What makes an election unconstitutional on June 9 but not on June 30 is anyone's guess.

Putting aside that the Centers for Disease Control ("CDC") recently revised its guidelines to advise that the risk of transmission is relatively low from COVID-19 appearing on surfaces, Plaintiffs have not shown that touching hand-marked paper ballots or postponing the election to June 30

[6] Plaintiffs also argue that O.C.G.A. § 21-2-367(b), which requires at least one BMD per 250 voters in a precinct, is unconstitutional. They never addressed the ability of county officials to require voters to wait outside the enclosed space to accommodate social distancing, and their remaining arguments are no different from the arguments against the BMDs themselves. *See* (Doc. 52 at 54).

would be any safer.[7] *See, e.g.,* (Doc. 1, ¶ 40 (acknowledging that Plaintiffs cannot predict the course of the virus). Much less have they articulated any "discernible and manageable standard[] to decide … how early is too early to hold the election." (Doc. 43 at 10). Nothing in Plaintiffs' Motion changes that conclusion.

Equally fatal to Plaintiffs' claims is that they have not shown (1) that any voter is more likely to vote if Election Day is postponed, or (2) that the mandated use of hand-marked paper ballots would cause one more person to exercise their right to vote. Even if they had, Plaintiffs have provided zero evidence to counter the State's documented concern of the administrative and fiscal cost of granting Plaintiffs' relief. (Docs. 33-1 to 33-3). This is fatal under any *Anderson/Burdick* analysis. *See Ohio Democratic Party v. Husted,* 834 F.3d 620, 635 (6th Cir. 2016); *Wilson v. Birnberg,* 667 F.3d 591, 601 (5th Cir. 2012).

The other statute Plaintiffs claim is unconstitutional is Code Section 21-2-386(a), which requires absentee ballots (other than those from overseas

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[7] *See* Korin Miller, *CDC: Coronavirus mainly spreads through person-to-person contact and 'does not spread easily' on contaminated surfaces*, Yahoo Life (May 19, 2020), https://news.yahoo.com/cdc-coronavirus-mainly-spreads-through-persontoperson-contact-and-does-not-spread-easily-on-contaminated-surfaces-153317029.html

and military voters) to be in the hands of county election officials by the time polls close on election day. Here too, the concern is based on the COVID-19 virus's potential to cause a slowdown in mail delivery. In this light, Plaintiffs have provided no evidence of how the statutory deadline impermissibly burdens anyone's right to vote or that any declarant is unlikely to vote because of its enforcement. In other words, Plaintiffs have not shown any state action that is burdening anyone's right to vote. Plaintiffs also failed to show how their requested relief, extending the deadline another three days, is based on a "discernable and manageable standard." (Doc. 43 at 10).[8]

Ultimately, Plaintiffs have not shown any error of law, because they have not shown any constitutional violations that can be attributed to the State, the State's response to the COVID-19 virus, or that the Plaintiffs' proposed remedies would lessen any alleged burdens on the right to vote.

[8] Plaintiffs' citation to other cases filed in this District is not persuasive. In none of those cases did the Secretary raise the non-justiciability and/or that there was a complete lack of manageable standards to determine the existence or degree of purported constitutional violations. *Curling v. Raffensperger*, 397 F. Supp. 3d 1334 (N.D. Ga. 2019); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1341 (N.D. Ga. 2018); *Ga. Coalition for the Peoples' Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018).

III. Plaintiffs could have raised these arguments prior to the entry of judgment.

Plaintiffs sought to have this case heard as quickly as possible and this Court provided expedited briefing as requested by Plaintiffs. (Docs. 12, 13, 23). As Plaintiffs admit, they received Defendants' motion to dismiss three days before the hearing and were notified by the Court the day before the hearing that they should be prepared to respond to the entirety of the Defendants' motion, including the portions on the political-question doctrine. (Doc. 48, pp. 7-8). During the hearing, Plaintiffs answered this Court's questions regarding the jurisdiction of the Court under the political-question doctrine and made some of the same arguments they now raise in their motion to alter or amend. (Doc. 52 at 16:3-14 (arguing federal versus state issue under first *Baker* factor on political question), 16:15-24 (presenting argument on Judge Pryor's concurrence in *Jacobson*)).

While it is true that a court cannot "dismiss a complaint with prejudice without affording the plaintiff a reasonable opportunity to present arguments (oral or written) or evidence relevant to the challenged defect in pleading," *English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993), that is not what happened here. *Compare In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 117 (2d Cir. 2000) ("The opportunity to respond is judged under a reasonableness

standard: a full evidentiary hearing is not required; the opportunity to respond by brief or oral argument may suffice"). Plaintiffs had a full opportunity to respond in a hearing on Defendants' motion to dismiss, which addressed jurisdictional issues necessary for this Court to rule on Plaintiffs' motion for preliminary injunction.

Plaintiffs have cited no authority that the failure to allow a written response on all portions of a motion to dismiss is insufficient—especially when Plaintiffs (1) were aware the hearing they requested would include all elements of the motion to dismiss and (2) actually made arguments in responding to Defendants' brief on the political-question doctrine. That Plaintiffs now wish they had argued differently is not enough. "The purpose of a Rule 59(e) motion is not to raise an argument that was previously available, but not pressed." *Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998). Plaintiffs had an opportunity to raise the issues contained in their motion "prior to the entry of judgment," *Michael Linet, Inc.*, 408 F.3d at 763, but did not do so. This Court should not alter or amend its order.

CONCLUSION

Plaintiffs wish this Court reached a different conclusion on their Complaint. But this Court should not modify its prior (correct) ruling dismissing this case. It is now too late to afford the relief sought in the Complaint, because the election about which the Complaint complains is ongoing. This Court correctly applied the political-question doctrine. And the Court correctly found that Plaintiffs were unable to point to any state action or policy. This Court should deny Plaintiffs' Motion.

Respectfully submitted, this 22nd 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 **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT** has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(C).

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