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

THE NEW GEORGIA PROJECT, *et al.*,

Plaintiffs,

v.

CIVIL ACTION FILE
NO. 1:20-cv-01986-ELR

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

Defendants.

REPLY BRIEF IN SUPPORT OF COUNTY DEFENDANTS' CONSOLIDATED MOTION TO DISMISS

After all of Plaintiffs' spin maneuvers on County Defendants' Motion to Dismiss, this stubborn fact remains: "[t]he real problem here is COVID-19"—not the conduct of County Defendants or the constitutionality of Georgia's Election Code—and "that fact is important when weighing the Defendants' management of the election." *Coal. for Good Governance v. Raffensperger*, No. 1:20-cv-1677-TCB, 2020 U.S. Dist. LEXIS 86996, at *9 n.2 (N.D. Ga. May 14, 2020). Plaintiffs' Response Brief shows they pulled County Defendants along for this judicial ride even though they cannot identify any non-conjectural injury or trace their speculative claims of injury to County Defendants' actions.

Plaintiffs also bizarrely assert that the mere act of having to expend any effort at all to apply for an absentee ballot constitutes an undue burden on voting under the *Anderson-Burdick* analysis and defies the 26th Amendment's prohibition against age discrimination. All the while, the Election Code explicitly provides the *same* method for *all* eligible Georgia voters—even these Plaintiffs—to apply for and receive an absentee ballot in time for the upcoming November election. Thus, Plaintiffs can neither demonstrate an impermissible burden on voting under *Anderson-Burdick* nor show that County Defendants denied or abridged their rights under the 26th Amendment.

Plaintiffs further pursue remedies against County Defendants that are barred by the political-question doctrine. Although the "spread of the [COVID-19] has not given 'unelected federal jud[ges]' a roving commission to rewrite state election code," that is exactly what Plaintiffs ask the Court to do. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020) (*"Abbott"*). In short, COVID-19 does not remove Plaintiffs' duty to establish standing and state plausible claims for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (plaintiffs must show "more than a sheer possibility that a defendant has acted unlawfully."). Thus, the Court should dismiss this case—or at least dismiss County Defendants.

ARGUMENT AND CITATION OF AUTHORITY

I. This case should be dismissed because Plaintiffs lack standing.

Plaintiffs lack standing because they (1) do not adequately allege an injury-in-fact and (2) cannot show traceability and redressability since they failed to name all 159 counties as defendants. (Doc. 82-1 at 4-13.) Plaintiffs' response confirms this. (Doc. 97 at 5-12.) Plaintiffs show no injury-in-fact attributed to County Defendants and concede that County Defendants are unnecessary to the relief sought. (*Id.*) Therefore, Plaintiffs lack standing and this case should be dismissed, or at the very least, dismissed as to County Defendants.[1]

[1] Plaintiffs request in a footnote that the Court permit them to amend their Complaint for a second time to rope in more county boards. (Doc. 97 at n. 5.) That request should be denied because the Court is without jurisdiction to join nonparties because the Plaintiffs *do not have standing*. *Jacobson*, 957 F.3d at 1209 ("If a plaintiff sues the wrong defendant, an order enjoining the correct official who has not been joined as a defendant cannot suddenly make the plaintiff's injury redressable."). Even if jurisdiction existed, Plaintiffs cannot amend at this late juncture because the proposed amendments do not comply with Rule 15, cannot be requested in a response brief, are futile, and would prejudice new parties. The hearing on Plaintiffs' request for a preliminary injunction is set for August 11, 2020, and without notice to every other county board, this Court cannot award Plaintiffs' requested injunctive relief as to the county boards. Fed. R. Civ. 65(a)(1). Thus, if the Court finds that Plaintiffs failed to name necessary parties, the only proper result is for the Court to deny the request for injunctive relief and dismiss this action.

A. Plaintiffs do not allege an injury-in-fact.

Plaintiffs do not show a "substantial likelihood" that they will suffer actual or imminent injury, but instead merely posit general fears and inconvenience while speculating about what *could* occur because they *may* not be able to vote how they *prefer* or *feel* most comfortable. (Doc. 82-1 at 5-10.) Thus, Plaintiffs identify only hypothetical and conjectural future "injuries"—rooted in no more than their unfounded beliefs or fears (that may or may not come true) about selective election practices. (*Id.*)

In their response, Plaintiffs baldly contend that their injuries are not speculative and that they "need not allege complete disenfranchisement" to show injury. (Doc. 97 at 6.) But this argument fails as to NGP because NGP does not identify any "realistic danger" of future injury, as the Amended Complaint only recites vague assertions of "merely hypothetical or conjectural" injury. *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008). Likewise, the argument fails as to the Individual Plaintiffs who merely contend that their purported "burdens" on voting establish an injury-in-fact, based on the case of *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1351 (11th Cir. 2005). (Doc. 97 at 6). However, *Cox* is inapplicable and does not establish Individual Plaintiffs' standing.

In *Cox*, plaintiff Earline Crawford gave the Wesley Foundation her voter

registration form to notify the state of her changed address. 408 F.3d at 1351. The Secretary's office rejected a group of forms including Crawford's because, in its view, Georgia law prohibited anyone but registrars, deputy registrars, or otherwise authorized persons from accepting or collecting voter registration forms. *Id*. Crawford sued for alleged violations of her rights under the National Voter Registration Act, and the Eleventh Circuit found she had standing because her complaint alleged that the Secretary's office *rejected* her form in violation of her rights under the NVRA. *Id.* at 1352. The Eleventh Circuit held that Crawford's injury was to a "statutory right" under the NVRA, and that she thus had standing because "where an alleged injury is to a statutory right, standing exists even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Id.*

Here, unlike in *Cox*, Individual Plaintiffs cite no injury caused by State action—let alone by County Defendants. Nor have Individual Plaintiffs incurred an injury to a statutory right. Instead, Individual Plaintiffs merely claim they "intend to vote absentee" and that they suffer inconvenience by their individual circumstances and thoughts about Georgia's current voting procedures. Even so, an "inconvenience" is not an injury for standing purposes. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) ("For most voters who need them, the inconvenience of making a trip to the BMV,

gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) ("The ordinary burdens of producing a photo identification to vote, which the Supreme Court described as arising from life's vagaries, do not raise any question about the constitutionality of' the Georgia statute."). *See also Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) ("While it may be true that having to drive to an early voting site and having to wait in line may cause people to be inconvenienced, inconvenience does not result in a denial of meaningful access to the political process. Nor does the Court have the authority to order the opening of additional sites based merely on the convenience of voters."). *Cf. Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) ("[E]very polling place will, by necessity, be located closer to some voters than to others.").

Likewise, Individual Plaintiffs cannot attribute an injury to the costs of a stamp to mail an absentee ballot for standing purposes, as they now contend. (Doc. 97 at 7.) Individual Plaintiffs cite no case law to support their contention. Moreover, the costs of a stamp are voluntary and, of course, Individual Plaintiffs can obtain postage from third parties, including the New Georgia

Project. Individual Plaintiffs by no means must mail in their absentee ballots, as there are alternatives for delivery and Individual Plaintiffs also can freely vote in person. These alternatives undermine Individual Plaintiffs' contention that they have suffered an injury. *See, e.g.*, *In re Equifax, Inc.*, 2019 U.S. Dist. LEXIS 34268, at *1 (N.D. Ga. Jan. 28, 2019) (plaintiffs did not adequately allege injury-in-fact because voluntary costs they took in response to data breach may have occurred with or without the breach).

To vote absentee, there is no mailing requirement, and in turn, no requirement on Individual Plaintiffs to pay postage to vote in the election. The lack of any such requirement shows that Individual Plaintiffs have suffered no injury. Both NGP and Individual Plaintiffs "cannot manufacture standing by choosing to make expenditures [or not utilize non-burdensome means of voting] based on hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402, 133 S. Ct. 1138, 1143 (2013). Therefore, Plaintiffs fail to meet their burden of establishing an injury-in-fact, and they lack standing.

B. Plaintiffs do not allege traceability and redressability because they have not sued all 159 counties and do not even satisfy pleading requirements as to County Defendants.

Plaintiffs cannot satisfy the causation requirement of standing under *Jacobson v. Fla. Sec'y*, 957 F.3d 1193, 1197 (11th Cir. 2020). Instead, they opted

to cherry-pick only 17 of 159 county boards of election even though this Court cannot issue injunctive relief as to absent parties. (Doc. 82-1 at 10-13.)

In response, Plaintiffs argue they have named as Defendants the Secretary of State and all members of the Georgia State Election Board ("State Defendants"), and that these State Defendants have the "power to fully redress Plaintiffs' injuries statewide." (Doc. 97 at 8-10.) Accepting this contention at face value, it raises the question: ***why did Plaintiffs haul County Defendants into this action in the first place?*** Plaintiffs' position on this point warrants immediate dismissal of the County Defendants.

County Defendants suspect Plaintiffs named them as parties because of the Eleventh Circuit's ruling in *Jacobson*, which provides that this Court cannot enjoin "absent nonparties"—including the other 142 county parties that Plaintiffs chose not to name and lack a chance to be heard. Plaintiffs contend, however, that the 2020 *Jacobson* decision is distinguishable because that case involved the Florida Secretary of State and Florida state law, citing in support the 2011 opinion in *Grizzle v. Kemp*, 634 F.3d 1314, 1316 (11th Cir. 2011). (Doc. 97 at n. 3.) They are wrong.

Rather, *Grizzle*, which predates *Jacobson*, applied a proper-party analysis and did not consider standing, thus making it a "drive-by jurisdictional ruling" that either has no precedential effect or is limited to the

proper-party context. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Unlike Georgia law and contrary to Plaintiffs' contention, the Florida law considered in *Jacobson* empowered its Secretary of State to redress the alleged harm and required the Florida Secretary to "[o]btain and maintain uniformity in the interpretation and implementation of the election laws" and to "[p]rovide written direction and opinions to the supervisors of elections." Fla. Stat. § 97.012. And even with this Florida law, the Eleventh Circuit explained, "[t]o satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Jacobson*, 957 F.3d at 1207.

Plaintiffs' reliance on three district court opinions cited in their brief is equally unavailing. (Doc. 97 at 11.) None of those cases involved the sweeping changes to the election laws posed by Plaintiffs in this case, and all of them pre-date *Jacobson*. In sum, if the Court accepts Plaintiffs' position that *Jacobson* is not controlling, and that complete relief is possible by naming only the State Defendants, then County Defendants should be dismissed from this action as redundant and unnecessary. On the other hand, if the Court accepts that *Jacobson* is controlling, then Plaintiffs lack standing because they did not name all the county boards of election. So, either County Defendants must be

dismissed or Plaintiffs' claims for injunctive relief must fail. Under either scenario, Plaintiffs accomplish nothing by arbitrarily suing the members of 17 county boards of election and subjecting them to defense costs and the rigors of litigation. Finally, they fail to trace the alleged injury to County Defendants. *Jacobson*, 957 F.3d at 1201.

II. Plaintiffs' absentee-ballot challenges are not viable as there is no right to a method of requesting an absentee ballot under *Anderson-Burdick* or the 26th Amendment.

Plaintiffs do not allege that County Defendants denied them or will likely deny them an absentee ballot for the upcoming November election. Most importantly, Plaintiffs cannot evade this irrefutable matter of law and fact that is fatal to their attacks: ***All eligible Georgia voters, including Plaintiffs, can apply for and vote by absentee ballot by mail regardless of age***. O.C.G.A. § 21-2-381(a)(1)(A).

Written broadly, the Election Code states that "any absentee elector" who "desires to vote [via absentee ballot]" can apply either "by mail, by facsimile transmission, by electronic transmission, or in person in the registrar's or absentee ballot clerk's office" for "an official ballot." O.C.G.A. § 21-2-381(a)(1)(A). The Election Code's absentee-ballot option applies to *any type of election*, including "the primary or election, or runoff." *Id.* And the Election Code defines "absentee elector" as "***an elector*** of this state or a

municipality thereof who casts a ballot in a primary, election, or runoff ***other than in person at the polls*** on the day of such primary, election, or runoff." O.C.G.A. § 21-2-380(a)(emphasis added). The plain language does not qualify or place an age restriction on absentee-elector status in Georgia.

All the same, Plaintiffs nit-pick a later subsection that actually assists voters, allowing those of "advanced age or disability or [satisfying the requirement under the federal Uniformed and Overseas Citizens Absentee Voting Act]" to make one application for an absentee ballot for a presidential preference primary (and any runoffs) and its following general election (and any runoffs). *See* O.C.G.A. § 21-2-381(a)(1)(G). But aside from a "presidential" primary or election, all eligible Georgia voters, including those satisfying O.C.G.A. § 21-2-381(a)(1)(G), must "always" submit a "separate and distinct application for an absentee ballot . . . for any special election or special primary." *Id*. Although the application deadlines could be a problem for Plaintiffs if they fail to timely apply for an absentee ballot, the requirements imposed by the Election Code in no way present impermissible age-based discrimination under either *Anderson-Burdick* or the 26th Amendment.

In support of their *Anderson-Burdick* argument that strict scrutiny applies, Plaintiffs mistakenly contend that age is a suspect class and "absentee voting will be many Georgians' only safe way to exercise the franchise in

November." They are wrong because rational basis review is all that is required in cases like this where Plaintiffs can exercise their franchise in many ways, including by absentee ballot. *See McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 803 (1969); *Abbott*, 961 F.3d at 403-404 ("states refusal to provide a mail-in ballot does not violate equal protection unless—again—the state has 'in fact absolutely prohibited' the plaintiff from voting.")

Plaintiffs present no justification for transforming age into the suspect classes of "wealth, creed, or color." *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."). In any event, Plaintiffs spotlight a 1971 Senate Report while leaving out the conclusion: the Supreme Court "considered claims of unconstitutional age discrimination under the Equal Protection Clause [four] times" after 1971 and "[i]n all [four] cases . . . held that the age classifications at issue did not violate the Equal Protection Clause." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) *citing Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991); *Vance v. Bradley*, 440 U.S. 93, 102-103, n. 20 (1979); *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 317 (1976) (per curiam). The Senate was wrong in 1971 and so are Plaintiffs today.

In sum, lesser burdens like the absentee-ballot-application process trigger less-exacting review, and "important regulatory interests will usually

be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Plaintiffs present no viable route for evading this conclusion.

Similarly, Plaintiffs cannot square their 26th Amendment claim with *McDonald*. Plaintiffs make no plausible allegation that Georgia "denied or abridged that right [as] properly qualified voters may exercise the franchise." *Abbott*, 961 F.3d at 409.[2] Because the Election Code offers eligible Georgia voters a buffet of voting options, including the option to apply for an absentee ballot if they so choose, Plaintiffs' allegations do not support an inference that County Defendants violated the 26th Amendment. *E.g.*, *Goosby v. Osser*, 409 U.S. 512, 521 (1973) (allowing claims to proceed because plaintiffs "allege[d] that, unlike the appellants in *McDonald*, the Pennsylvania statutory scheme absolutely prohibits them from voting.").

Plaintiffs also cite authorities from other courts claiming that Georgia's absentee ballot requirements violate the 26th Amendment, but none are

[2] Plaintiffs relied heavily in their Amended Complaint on the district court case the Fifth Circuit overturned in *Abbott*. That case involved a mail-in ballot statute that only extended mail-in ballots to Texas voters over the age of 65. Georgia's Election Code is broader, extending the absentee ballot to all who apply and are otherwise eligible.

availing. Instead, all the cases Plaintiffs rely on involve targeted discrimination of "minors", "young voters", or college students.[3] Unlike those cases, the Election Code makes no such facially discriminatory distinction as Plaintiffs contend. *All eligible Georgia voters can apply for and receive an absentee ballot if they choose*. O.C.G.A. § 21-2-381(a)(1)(A). And the definition of "absentee elector" makes no age-based distinctions. O.C.G.A. § 21-2-380(a). Therefore, Plaintiffs' claims under both *Anderson-Burdick* and the 26th Amendment lack merit and should be dismissed.

III. The political-question doctrine forbids Plaintiffs' requests for the Court to shape remedies better left to the legislature.

Plaintiffs continue to ask the Court to concoct an impermissible remedy based on a political question. Although the State could make different policy decisions, that "is a matter for legislative, rather than judicial, consideration." *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003).

Because Plaintiffs' Amended Complaint contains no judicially managed standards, their claims fail under the political-question doctrine. Plaintiffs'

[3] For example, in the *Colo. Project--Common Cause v. Anderson*, 178 Colo. 1, 7, 495 P.2d 220, 223 (1972), relied on by Plaintiffs, Colorado "define[d] 'young voters' as those who will be eighteen but have not attained the age of twenty-one before the next election to vote for initiated measures, and their ability to circulate and sign initiative petitions." Of course, as Plaintiffs admit, the 26th Amendment owes its entire existence on the decision to change the constitutionally ensured minimum voting age from 21 to 18.

only response is to argue that *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), is not controlling because it involved partisan gerrymandering. (Doc. 97, pp. 18-19.) But Plaintiffs miss the point—County Defendants only analogized to the holding in *Rucho*, just as Judge William Pryor did in his concurrence in *Jacobson*. 957 F.3d at 1213 (11th Cir. 2020) (political question when "[n]o judicially discernable and manageable standards" available).

Plaintiffs provide no basis for this Court to determine how "safe" is "safe enough" to conduct an election in a pandemic, nor do they offer any basis why five business days to receive absentee ballots is constitutional, but six days is not. Finding Plaintiffs' claims in this case barred by the political-question doctrine does not preclude challenges to particular voting practices subject to judicially manageable standards; it simply recognizes the separation of powers and 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).

CONCLUSION

Plaintiffs try in earnest to use COVID-19 to paper over their claims' deficiencies. But for all the reasons set forth here, the Court should not cast the blame for COVID-19 on County Defendants. Instead, the Court should dismiss this case or at least dismiss County Defendants because Plaintiffs lack standing and do not state a plausible claim for relief against them.

Respectfully submitted this 24th day of July, 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' CONSOLIDATED 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).

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