UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE NEW GEORGIA PROJECT, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, Defendants.	Civil Action No. 1:21-cv-01229-JPB

PLAINTIFFS' RESPONSE IN OPPOSITION TO SPALDING COUNTY DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

On May 17, Plaintiffs filed an amended complaint, which added the five publicly identified members of the Spalding County Board of Elections and Voter Registration as defendants ("Spalding Defendants"). Shortly afterwards, Plaintiffs served the Spalding Defendants through the county's Elections Supervisor, Marcia Ridley. She advised the process server that she could accept service for all the sued Board members. ECF Nos. 46, 46-1, 46-2, 46-3, & 46-4.

Now, in their motion to dismiss, the Spalding Defendants deny that Ms. Ridley had any service-related authority—despite her title as Elections *Supervisor*, her duties as administrative director, her own assurances of her authority, and Georgia law authorizing service on a public body's clerk or agent—but offer little else to support this assertion. They provide no evidence that service on Ms. Ridley was insufficient and simply ask the Court to take them at their word. For that reason alone, their motion to dismiss for improper service must be denied. *Olofindayo v. Associated Credit Union*, 1:16-CV-00587-SCJ-CMS, 2016 WL 11584200, at *4 (N.D. Ga. Aug. 18, 2016) ("Where, like here, a defendant in a lawsuit challenges the sufficiency of service, the defendant bears the burden of showing improper service."). But even if they *had* provided some evidence disputing service, Plaintiffs' service of process on the Elections Supervisor is sufficient because she more than

meets the meaning of "clerk" or "agent authorized" to accept service under Georgia law.

The Spalding Defendants' other grounds for dismissal are just as unpersuasive. They claim that Plaintiffs' omission of three new Board members as defendants—who were unknown to Plaintiffs at the time of filing and remain unidentified on the Board's website as of this filing, in publicly available minutes, and in the Spalding Defendants' motion—warrants dismissal of the Amended Complaint, but they then concede that this Court must join the new Board members as parties under the Federal Rules of Civil Procedure. None of this warrants dismissal; even if some of the named Board members have been replaced, public officers' successors are automatically substituted when the original public officer leaves office. Fed. R. Civ. P. 25(d). Finally, the Spalding Defendants also adopt the State Defendants' standing arguments, which Plaintiffs rebutted in their opposition to the State Defendants' motion to dismiss. *See generally* ECF No. 54.

While the Spalding Defendants' balk at their inclusion in this action because Plaintiffs do not allege the Board has "engaged in any wrongdoing," MTD 3, their objection misses the point of injunctive relief. Plaintiffs seek an injunction to prevent the Spalding Defendants from enforcing SB 202, which violates the U.S. Constitution and the Voting Rights Act. In other words, Plaintiffs ask this Court to

prevent the Spalding Defendants from implementing and enforcing unconstitutional and illegal state laws. That the Spalding Defendants do not have authority to "enact voting legislation" and lack "discretion over whether to follow" state law is immaterial. MTD 4. This Court has broad authority to enjoin the Spalding Defendants from following state laws that violate the U.S. Constitution and federal laws. *See, e.g.*, *Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) ("It has long been a settled principle that federal courts may enjoin unconstitutional action by state officials.") (citations omitted). For these reasons, the Spalding Defendants' motion to dismiss should be denied.

LEGAL STANDARD

Defendants bear the heavy burden of demonstrating insufficiency of service of process. *Patterson v. Coleman*, 252 Ga. 152, 153 (1984); *Adams v. DeKalb Cnty., Ga.*, 1:05-CV-2737-TCB, 2006 WL 3266616 at *2 (N.D. Ga. Nov. 8, 2006). "An objection to service of process must be specific and must point out in what manner the plaintiff has failed to satisfy the requirements of the service provision utilized." *Wilson v. Jordan Auto's*, 1:08–CV–3778–JFK, 2009 WL 700391, at *3 (N.D. Ga. Mar. 16, 2009) (quotation and citation omitted). If the court cannot determine from looking at the summons, the return of service, or other supporting evidence that the defendant was not properly served, "the defendant has not sufficiently raised a

challenge to service of process and any such challenge is waived." *Id*.

Further, while a complaint can be dismissed for "failure to join a party under Rule 19," Fed. R. Civ. P. 12(b)(7), a court must first determine whether the party is necessary and, if so, "the court must order that the person be made a party." Fed. R. Civ. P. 19(a)(2). In considering whether a party must be joined, courts must "eschew formalism in favor of flexible practicality." *City of Marietta v. CSX Transp., Inc.*, 196 F.3d 1300 (11th Cir. 1999) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118–19 (1968)). In cases of public officers' successors, courts must "order substitution at any time" when public officers "cease[] to hold office while the action is pending." Fed. R. Civ. P. 25(d).

ARGUMENT

I. Plaintiffs properly served the Spalding Defendants through the Spalding County Elections Supervisor.

The Spalding Defendants' attempt to disclaim their Election Supervisor's authority to accept service is irreconcilable with federal and state rules of civil procedure. Under FRCP 4(j)(2), parties serving local governments can follow the procedures for service of process detailed in state law. In Georgia, service in civil lawsuits "against any . . . public body . . . [is] to the chief executive officer or *clerk* thereof," or, "[i]n all other cases . . . to an *agent authorized by appointment or by law to receive service of process*." O.C.G.A. § 9-11-4(e)(5), (7) (emphases added).

Here, Plaintiffs' process server left the Spalding Defendants' summonses and copies of the amended complaint with the Elections Supervisor of Spalding County, Marcia Ridley. *See* ECF Nos. 46, 46-1, 46-2, 46-3, & 46-4 (affidavits of service for Spalding Defendants). Ms. Ridley is an integral part of the Board's administration. According to the act passed by the General Assembly creating the Spalding County Board of Elections and Registration, the Elections Supervisor is the Board's "administrative director." Ga. L. 1987, p. 4432, § 12. Part of her duties is to "administer and supervise [the] conduct of elections, primaries, and registration of electors for the county." *Id*. The Elections Supervisor "serve[s] at the pleasure of the board." *Id*.

Without offering any evidence, the Spalding Defendants simply assert that Ms. Ridley could not accept service, despite her assertions that she could. "Merely stating this fact, however, does not make it true." *Russell v. Muscogee Cnty. Sch. Dist.*, 341 Ga. App. 229, 233 (Ga. App. 2017) (reversing lower court's dismissal for improper service because defendant failed to carry its burden demonstrating service on school board assistant was improper). In other words, the Spalding Defendants "bore the burden of coming forward with evidence that" the Ms. Ridley "was not a 'clerk' within the meaning of the statute" but failed to do so. Their total lack of evidence falls far short of establishing insufficiency of service.

Even more, their failure to provide even an affidavit constitutes waiver of their argument. Courts in this district have denied motions to dismiss for insufficient service when, as here, defendants relied on bald assertions in their briefs that were "not supported by any evidence." *Wilson*, 2009 WL 700391 at *4; *see also Binns v. City of Marietta Hous. Auth.*, 1:07-CV-0070-RWS, 2007 WL 2746695 at *2 (N.D. Ga. Sept. 18, 2007) (collecting cases when courts have "found waiver where the defendant failed to include an affidavit or other evidence in support of its claim of insufficient service"). In short, the Spalding Defendants' failure to submit an affidavit leaves this Court with "no basis upon which to consider the merits of Defendant[s'] objection to service" and this alone is enough to warrant denial of their motion for improper service. *Wilson*, 2009 WL 700391 at *4.

Even if the Spalding Defendants had accompanied their motion with any sort of evidence, Ms. Ridley—the Elections Supervisor of Spalding County—is in fact a "clerk" and "agent authorized by appointment or by law" for purposes of proper service. O.C.G.A. § 9-11-4(e)(5), (7). *First*, Ms. Ridley's duties as the Board's administrative director establish her as a "clerk" of a "public body." O.C.G.A. § 9-11-4(e)(5). Georgia courts have explained that the word "clerk," in the context of serving a public body, "shall be given [its] ordinary significance." *Summerlin v. Ga. Pines Cmty. Serv. Bd.*, 278 Ga. App. 831, 834 (2006), *aff'd*, 282 Ga. 339 (2007).

This term encompasses "a manager whose duties include keeping records or accounts and, thus, a clerk," *id.*, which lines up directly with Ms. Ridley's job title as *supervisor* and the statutory language designating her the Board's administrative director.

Second, service was proper on Ms. Ridley in her capacity as an "agent authorized by appointment or by law to receive service of process." O.C.G.A. § 9-11-4(e)(7). The Eleventh Circuit has recognized that Georgia cases "do not create a high threshold for the amount of authority necessary to make an employee a valid agent to receive process." *Henderson v. Cherry, Bekaert & Holland*, 932 F.2d 1410, 1412-13 (11th Cir. 1991); *Lee v. Bank of America, N.A.*, 7:13-cv-8 (HL), 2013 WL 2120312, at *2 (M.D. Ga. May 15, 2013) (describing how the bar for qualifying as an "agent" for service of process purposes under Georgia law "is not high"). Because the point of service "is to transmit notice of suit" to the defendants, service can be effectuated on an agent who can "afford reasonable assurance" that she will inform her superiors of the service of process. *Scott v. Atlanta Dairies Coop.*, 239 Ga. 721, 724 (1977). As a result, Georgia courts have recognized a variety of administrative employees as valid agents who have properly accepted service. *See, e.g., Adams*, 2006 WL 3266616 at *2 (holding legal secretary in county's law department could accept service in lawsuit against Dekalb County); *Murray v. Sloan Paper Co.*, 212

Ga. App. 648, 649 (1994) (holding service was proper on administrative assistant); *Ogles v. Globe Oil Co., USA*, 171 Ga. App. 785, 785 (1984) (holding service in lawsuit against company was proper on manager who was "responsible for . . . daily operations" of single store); *Northwestern Nat'l Ins. Co. v. Kennesaw Transp.*, 168 Ga. App. 701, 702 (1983) (holding service was proper on personal secretary who "led the officers to believe that she was in charge of the office and was authorized to accept service"). Ms. Ridley is the Board's administrative director and she serves at the Board's pleasure. Ga. L. 1987, p. 4432, § 12. There is no better-suited individual than Ms. Ridley—the Board's supervisor, charged by statute to be the administrative director—to accept service for the Board and "transmit notice of suit" to the Spalding Defendants. *Scott*, 239 Ga. at 724.

Finally, Ms. Ridley represented to Plaintiffs' process server that she could accept service on behalf of the Spalding Defendants. ECF Nos. 46, 46-1, 46-2, 46-3, & 46-4. Georgia courts have recognized this sort of representation is sufficient for proper service of process. *Northwestern Nat'l Ins. Co.*, 168 Ga. App. at 702 (affirming lower court when employee accepting service "led the [process servers] to believe she . . . was authorized to accept service"). The Spalding Defendants rely on two inapposite cases in arguing around Ms. Ridley's representations, but neither decision helps them. *Headrick v. Fordham*, 154 Ga. App. 415 (1980), involved

service on the defendant's personal secretary who, as even the process service acknowledged, performed nothing more than "ministerial duties as opposed to managerial duties." *Id*. at 417. The defendant, meanwhile, offered evidence that the secretary "occupied [no] managerial position over other personnel" and was "a secretary and nothing more." *Id*. As another court summarized in discussing *Headrick*, "the uncontroverted evidence showed . . . [she was] unauthorized to receive service of process." *Murray*, 212 Ga. App. at 649. That is plainly not the case here, where Ms. Ridley occupies a supervisory role and the Spalding Defendants have provided *no* evidence—much less uncontroverted evidence—in support of their position. The Spalding Defendants' reliance on *News-Press Publishing Company, Inc. v. Kalle*, 173 Ga. App. 411 (1985), fares no better. There, plaintiffs served a secretary who claimed she was authorized to accept service, but the defendant, in an affidavit, denied the secretary was his agent. *Id*. at 411. Here, again, the Spalding Defendants have failed to provide any documentation outlining Ms. Ridley's responsibilities or lack of agency relationship to the members of the Board. This is fatal to the Spalding Defendants' insufficient-service arguments. *Supra* at 6-7.

II. The Spalding Defendants' revelation that certain board members have been replaced does not warrant dismissal of any claims.

The Spalding Defendants concede that when an indispensable party does not

join a lawsuit and that party is capable of being joined, "the court must order that the person be made a party." Fed. R. Civ. P. 19(a)(2); MTD at 10. Their recognition of this straightforward rule undercuts their demand for dismissal on the thin basis that Plaintiffs named three members of the Board of Elections and Registration who have been replaced by new members at some point in the recent past.

The three Spalding Defendants who apparently no longer serve on the Board but were named as defendants—Margaret Bentley, Glenda Henley, and Vera McIntosh—appeared on the Spalding County website as Board members when Plaintiffs filed their amended complaint. In fact, they *still* are identified as Board members as of June 28. *See* Ex. A. Furthermore, the most recent available minutes of the Board's monthly meeting shows that the five named Spalding Defendants were in attendance.[1] And Ms. Ridley accepted service on their behalf without directing the process server that they had been replaced. ECF Nos. 46, 46-1 & 46-3. Thus, it remains unclear who the new Board members are, when their terms began, or if they have even begun yet. Nor are the Spalding Defendants any help in their motion; they fail to identify any changes to the Board's membership or when any change happened.

[1] Spalding County Board of Elections & Registration, Monthly Meeting Minutes (Apr. 13, 2021), *available at* https://www.spaldingcounty.com/wp-content/uploads/2021/06/Board-of-Elections-04.13.21-REG-MTG-MINUTES.pdf.

In any event, this Court has ample authority to add any new Board members as parties to this lawsuit, and the new Board members can be "automatically substituted" as parties. Fed. R. Civ. P. 25(d); *see also* Fed. R. Civ. P. 19(a)(2). Plaintiffs sued the Spalding Defendants in their official capacities only; in other words, the lawsuit is against whoever sits on the Board. *See* Fed. R. Civ. P. 25, Advisory Comm. Notes (explaining that "official capacity" means "against the government or the office or the incumbent thereof whoever he may be from time to time during the action"). The Federal Rules of Civil Procedure contemplate this precise situation: when one public officer is replaced by another, "[a]n action does not abate"; rather, "[t]he officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25(d). Dismissal on these grounds is improper. Instead, Plaintiffs' successors, once identified, may be "automatically substituted" as parties. Fed. R. Civ. P. 25(d).

III. As detailed in their opposition to the State Defendants' motion to dismiss, Plaintiffs have standing and have stated a claim for relief.

Finally, the Spalding Defendants join the State Defendants' arguments that Plaintiffs lack standing and have allegedly failed to state a claim. MTD at 11–12; *id.* at 12 n.3. As detailed in Plaintiffs' response in opposition to the State Defendants' motion to dismiss, however, all individual and organizational Plaintiffs have standing, *see* ECF No. 54 at 3–12, and they have stated claims on which this Court

can grant relief, *id.* at 12–24. Plaintiffs adopt those arguments in full here.

CONCLUSION

For the foregoing reasons, the Spalding Defendants' Motion to Dismiss should be denied.

Respectfully submitted, this 28th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a point size of 14.

Dated: June 28, 2021.

s/ *Uzoma N. Nkwonta*
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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Dated: June 28, 2021.

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