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 THE FULTON DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Georgia law gives county election boards a key role in implementing and enforcing the election code. The members of the Fulton County Registration and Elections Board (collectively, the "Fulton Defendants"), for example, are responsible for conducting elections, registering voters, and implementing absentee balloting procedures, among other duties, within Fulton County, and they are tasked with implementing and enforcing many of the challenged provisions in SB 202. Despite all this—and notwithstanding rulings from the Eleventh Circuit and this District holding that county elections officials were the proper defendants in lawsuits challenging county-level enforcement of state election laws—the Fulton Defendants have filed a motion to dismiss Plaintiffs' amended complaint (the "Complaint"), claiming that they are not proper defendants and that the organizational Plaintiffs have not established the elements of Article III standing.

The Court need not address these meritless arguments, however, because the Fulton Defendants' motion does not contest (and fails even to acknowledge) the organizational Plaintiffs' assertion of associational standing—which provides a separate and independent basis to invoke this Court's subject matter jurisdiction. Nor do the Fulton Defendants contest the standing of any individual Plaintiff, including Jauan Durbin, a registered voter in Fulton County who will unquestionably be

injured by the Fulton Defendants' enforcement of SB 202. *See Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999) (noting that where one plaintiff has standing, the court need not delve into the standing of other plaintiffs). These omissions alone warrant the denial of the Fulton Defendants' motion.

But even in a world where the Fulton Defendants *had* challenged the organizational Plaintiffs' associational standing and the standing of the individual Plaintiffs, their arguments are flawed at every turn. The Complaint details the concrete, particularized, and certainly impending injuries that Plaintiffs have suffered and will continue to suffer if the challenged provisions in SB 202 are not enjoined—injuries that will occur once the Fulton Defendants implement and enforce the challenged provisions of SB 202, as they are tasked to do.

This same duty to enforce SB 202's provisions also demonstrates that Plaintiffs' injuries are fairly traceable to the Fulton Defendants. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253 (11th Cir. 2020) (holding that plaintiffs' injuries were "traceable only to" the county election officials who enforced allegedly unconstitutional state election laws). If the Secretary and the State Election Board are appropriately named in this lawsuit because of their enforcement duties, as the Fulton Defendants recognize, *see, e.g.*, Mot. at 3, 9, then so too are the members of the county election boards. Indeed, the Fulton Defendants do not even appear to

dispute that a court order enjoining their enforcement of SB 202 will relieve injuries suffered by organizational Plaintiffs, which operate in Fulton County, and by individual Plaintiff Jauan Durbin, who resides in Fulton County and whose ability to vote early in person (or, if necessary, to vote absentee) will be determined by Fulton County officials. *See* Am. Compl. ¶ 29; *I.L. v. Alabama*, 739 F.3d 1273, 1282 (11th Cir. 2014) (noting that "relief which remedies at least some of the alleged injuries is sufficient to establish redressability" (citing *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310-11 (11th Cir. 2001)).

Having failed to refute each of the permissible bases for standing asserted by Plaintiffs, or to advance any plausible argument that county election officials cannot be enjoined from enforcing unconstitutional election laws, the Fulton Defendants' motion to dismiss should be denied.

BACKGROUND

As detailed in the Complaint, Black voters in Georgia found breakthrough success in the last election cycle when they elected a Black candidate to the U.S. Senate and awarded the state's electoral college votes to the Democratic presidential candidate. *See, e.g.*, Am. Compl. ¶¶ 38-56. The General Assembly responded by rushing SB 202—a massive bill that is stuffed with restrictions on the right to vote—through the legislative process on paper-thin pretext. *See id.* ¶¶ 111-27. Many of SB

202's provisions violate federal law by, among other things, creating an undue burden on the right to vote, in violation of the First and Fourteenth Amendments; violating Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, *et seq.*; interfering with freedom of political association, expression, and speech, in violation of the First Amendment; and by imposing an immaterial voting requirement on absentee voters, in violation of the Civil Rights Act, 52 U.S.C. § 10101. *See id.* ¶¶ 155-97.

Plaintiffs include three affected Georgia voters and three organizations working to empower vulnerable communities in Georgia. The individual Plaintiffs are Elbert Solomon, a 70-year-old Black man who is registered to vote in Spalding County; Fannie Marie Jackson Gibbs, a 67-year-old Black woman who is registered to vote in Brooks County; and Jauan Durbin, a 22-year-old recent graduate of Morehouse College who is registered to vote in Fulton County. *See* Am. Compl. ¶¶ 26, 28, 29. The organizational Plaintiffs are The New Georgia Project ("NGP"), a nonpartisan, community-based nonprofit organization based in Fulton County, Georgia; Black Voters Matter Fund ("BVMF"), a nonpartisan civic organization whose goal is to increase power in communities of color; and Rise, Inc. ("Rise"), a student-led 501(c)(4) nonprofit organization that runs statewide advocacy and voter mobilization programs in Georgia. *Id.* ¶¶ 17, 21, 23. Each Plaintiff has alleged that they will be harmed by SB 202. *See, e.g.*, *id.* ¶¶ 20 (NGP), 22 (BVMF), 24 (Rise),

27 (Mr. Solomon), 28 (Ms. Gibbs), 29 (Mr. Durbin).

The individual and organizational Plaintiffs collectively challenge eleven provisions in SB 202 under federal law. The challenged provisions are varied and range from new and burdensome absentee balloting requirements, to drop box restrictions, to criminal prohibitions on offering food and water to individuals near polling places. Georgia law places the responsibility for implementing and enforcing the challenged restrictions with different government actors. For example, the Secretary of State is responsible for designing and making available Georgia's absentee ballot application form. SB 202, § 25; Am. Compl. ¶ 30. Members of the State Election Board are charged with enforcing county compliance with new voter challenge provisions. SB 202, §§ 15, 16; Am. Compl. ¶ 31. And members of county elections and registration boards are tasked with enforcing new identification requirements for absentee voters, issuing absentee ballots during the newly shortened distribution period, designating mobile polling places under SB 202's severe constraints, and holding speedy hearings on voter registration challenges in their counties. SB 202, §§ 15, 16, 20, 25; Am. Compl. ¶¶ 33-35, 82.

Because different officials are responsible for implementing and enforcing different parts of SB 202, Plaintiffs have appropriately sued the Secretary of State, the State Election Board, county law enforcement officials, and the members of the

county boards of elections and registration—including the Fulton Defendants—for the counties in which the three individual Plaintiffs are registered to vote.

LEGAL STANDARD

Where, as here, a motion to dismiss under Rule 12(b)(1) facially attacks the legal sufficiency of a complaint's allegations in support of subject matter jurisdiction, the complaint's allegations are "taken as true," *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990), and "general factual allegations of injury resulting from the defendant's conduct" are sufficient to withstand the motion, *Worthy v. City of Phenix City*, 930 F.3d 1206, 1214 (11th Cir. 2019).[1]

ARGUMENT

At least four named Plaintiffs—organizational Plaintiffs NGP, BVMF, and Rise, and individual Plaintiff Jauan Durbin—have standing to raise claims against the Fulton Defendants. Each of those Plaintiffs more than satisfies the "irreducible constitutional minimum" for Article III standing by alleging an injury-in-fact that is actual or imminent, fairly traceable to the Fulton Defendants, and likely to be

[1] In passing, the Fulton Defendants ask the Court to dismiss the Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See* Mot. at 4; *id.* at 5 (setting out the legal standard for a 12(b)(6) motion). But they fail to make any argument related to Rule 12(b)(6) and have thus waived it. *See, e.g.*, *United States v. Hesser*, 800 F.3d 1310, 1327 n.28 (11th Cir. 2015) (an argument not developed in a brief is waived).

redressed by a favorable decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). And so long as the Court is satisfied that at least *one* Plaintiff "has standing to bring all claims in an action, [it] need not inquire into the standing of the others." *Am. Iron & Steel Inst.*, 182 F.3d at 1274 n.10 (quotation in parenthetical, citing *Planned Parenthood of the Atlanta Area, Inc. v. Miller*, 934 F.2d 1462, 1465 n.2 (11th Cir. 1991)); *see also, e.g.*, *Vill. Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977); *Brown v. Azar*, 497 F. Supp. 3d 1270, 1277 (N.D. Ga. 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1333 (N.D. Ga. 2018).[2]

I. Plaintiffs allege concrete, particularized injuries-in-fact that are certainly impending.

A. Organizational Plaintiffs.

At the outset, the Fulton Defendants' motion challenges only one of the organizational Plaintiffs' two bases for standing: diversion of resources. *See* Mot. at

[2] In the introduction to their motion, the Fulton Defendants argue that Plaintiffs have a "jurisdictional obstacle of lack of prudential standing." Mot. at 4. But the arguments in the motion advocate for dismissal on *constitutional* standing grounds. To the extent the Fulton Defendants intended to raise a prudential standing argument, they have failed to develop it and have thus waived it. *See Hesser*, 800 F.3d at 1327 n.28; *see also Young v. City of E. Point*, No. 1:18-CV-1206-TCB, 2018 WL 8949790, at *2 (N.D. Ga. Oct. 23, 2018) ("Unlike constitutional standing, prudential standing arguments may be waived." (citing *Bd. of Mississippi Levee Comm'rs v. EPA*, 674 F.3d 409, 417 (5th Cir. 2012), in parenthetical)).

7-10. The motion completely ignores that NGP and Rise have also asserted associational standing, which is an independent basis for this Court's jurisdiction. *See Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1316 (11th Cir. 2021); Am. Compl. ¶¶ 17-24. In any event, the arguments the Fulton Defendants do make largely mirror those raised by the State Defendants in their motion to dismiss, and they fail for the reasons Plaintiffs detailed in their opposition to that motion and as set forth below. *Compare* Mot. at 7-10 *with* ECF No. 45-1 at 4-13 (State Defendants' motion to dismiss); *see also* ECF No. 54 at 3-10 (Plaintiffs' response in opposition).

1. *The organizational Plaintiffs sufficiently allege injuries in fact that are concrete and imminent.*

The organizational Plaintiffs adequately allege concrete and particularized injuries-in-fact under a diversion of resources theory of standing. The rule is simple: "a voting law can injure an organization enough to give it standing 'by compelling [it] to devote resources' to combatting the effects of the law that are harmful to the organization's mission." *Common Cause Indiana v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019) (quoting *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd* 553 U.S. 181 (2008)). The "fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165

(11th Cir. 2008).

Each organizational Plaintiff unquestionably satisfies this test. Because of the burdens that SB 202 imposes on voters, NGP, BVMF, and Rise must divert and expend resources to "educat[e] volunteers and voters on compliance" with the new law, *id*. at 1166, "to locate and assist" potentially affected voters, *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014), and to manage an expected transition between absentee voting and in-person voting, *see Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009). Am. Compl. ¶¶ 20 (NGP), 22 (BVMF), 24 (Rise). Indeed, district courts have *already* held that NGP and BVMF have standing to challenge election practices based on similar allegations. *See New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1286-87 (N.D. Ga. 2020); *Black Voters Matter Fund v. Raffensperger*, 478 F. Supp. 3d 1278, 1299-1303 (N.D. Ga. 2020).

In an effort to overcome clear Eleventh Circuit precedent, the Fulton Defendants argue that the organizational Plaintiffs lack standing in their own right because they do not allege they will divert resources away from their "core mission[s]." Mot. at 10. But that theory would mean that only organizations with missions completely unrelated to SB 202 would have standing, while those organizations actually involved in voter engagement—and thus most likely to be impacted by SB 202—would not. That is not the law in the Eleventh Circuit, and it

does not make any sense.

The Fulton Defendants cite only one appellate opinion in support of their novel argument, *Common Cause Indiana v. Lawson*, but that decision does not help them here. There, the Seventh Circuit reaffirmed that "a voting law can injure an organization enough to give it standing 'by compelling [it] to devote resources' to combatting the effects of that law that are harmful to the organization's mission." 937 F.3d at 950. And it held that the plaintiff voter advocacy organizations had standing to challenge a voter purge because it would require them "to increase the time or funds (or both) spent on certain activities to alleviate potentially harmful effects of" the challenged statute, "such as voter confusion, erroneous registration removal, and chaos at the polling place; and their missions will be thwarted, because even with those extra efforts, confusion around [the new law] and the need to combat it will displace other projects they normally undertake." *Id*. at 952.

The Seventh Circuit then went on to *reject* the theory now pushed by the Fulton Defendants—that diversion-of-resources standing requires "a seismic shift from work within the organization's mission to work outside of it." *Id*. at 954. Instead, the Seventh Circuit explained that the Supreme Court has recognized standing when an organization's "ability to do work *within* its core mission" is impaired. *Id*. (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

The Seventh Circuit also commented that it was unclear why "an organization would undertake any additional work if that work had nothing to do with its mission. And it would be an inside-out world indeed if organizations had standing to assert only interests that they shared with the general public." *Id.* at 955.[3]

The Fulton Defendants try to overcome the organizational Plaintiffs' standing by arguing that their injuries are "speculative," Mot. at 7-9, but that argument fails, too. For standing purposes, prospective injuries must be "imminent," which "requires only that the anticipated injury occur with some fixed period of time in the future, not that it will happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months." *Browning*, 522 F.3d at 1161. As the Supreme Court has put it, although a plaintiff must establish "a realistic danger of

[3] The Fulton Defendants also cite *Georgia Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cnty. Bd. of Registrations & Elections*, 499 F. Supp. 3d 1231 (N.D. Ga. 2020) ("*Galeo*"), which is presently on appeal. There, the district court held that a civil rights organization lacked standing to challenge the government defendants' failure to distribute bilingual absentee ballot applications because the defendants did not have a duty to do so under federal law and the matter was moot. *Id*. This case is distinguishable because the Fulton Defendants are responsible for enforcing election procedures that violate federal law. To the extent *Galeo* also required the plaintiff to allege a diversion of resources away from "core activities" to activities of some other "nature," the court invented a novel test directly at odds with binding case law. *See, e.g.*, *Browning*, 522 F.3d at 1158, 1165-66 (finding an injury-in-fact where the organizational plaintiffs had to divert resources *between* their missions of "increase[ing] voter registration and participation among members of racial and ethnic minority communities in Florida"); *Arcia*, 772 F.3d at 1341-42 (same).

sustaining a direct injury as a result of the statute's operation or enforcement," it "does not have to await the consummation of threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

In *Browning*, the court recognized there was nothing hypothetical about the injuries that plaintiff organizations attributed to Florida's new identification requirement for voter registration applications. The new law mandated the denial of certain applications, and those denials would occur before the next scheduled elections. 522 F.3d at 1161. Because the plaintiffs alleged "that they intend to increase voter registration efforts and anticipate[d] increased registration applications ahead of the upcoming presidential election," the court concluded that "[t]his is sufficient to meet the immediacy requirement[.]" *Id*.

The same is true here. Once SB 202 was enacted, its requirements—and the associated burdens of compliance—became concrete. There is no uncertainty as to whether Plaintiffs will be affected by SB 202. Indeed, even the portion of the Complaint the Fulton Defendants label "speculative" alleges that Plaintiffs *will* be harmed: the NGP "***will also be forced to divert resources*** from its day-to-day voter registration activities to educate voters about and otherwise combat the suppressive effects of [SB 202]. Likewise, [SB 202] threatens to undermine NGP's mission of civically engaging Georgians because, under the Bill, even eligible and registered

voters *are* denied the ability to vote or may not have their ballots counted." Mot. at 8 (quoting Am. Compl. ¶ 20) (first emphasis in original; second emphasis added). For that reason, the cases cited by the Fulton Defendants are either inapposite or actually support Plaintiffs' position. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (denying standing where plaintiffs challenging surveillance measures could not demonstrate their own communications would ever be surveilled); *Summers v. Earth Island Inst.*, 555 U.S. 488, 500 (2009) (denying standing where environmental organizations failed to show any of their members would ever visit the land at issue); *cf. Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277, 1280-81 (11th Cir. 2020) (holding that a political party's injuries under a ballot-access statute were "certainly impending" because they would "occur only months from now" and there was "every reason to believe" the government would enforce the statute).

As in *Browning*, SB 202 has already erected new obstacles that voters must navigate to prove their identity. Mobile polling places and outdoor drop boxes are gone. The time available for voters to mark their absentee ballot or vote early in person has been truncated. These and other changes brought about by SB 202 are Georgia law; no additional contingent action is necessary to pose the "substantial likelihood" that voters served by the organizational Plaintiffs will face additional

obstacles and fewer accommodations in each successive election. *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1340 (11th Cir. 2000).

2. NGP and Rise allege associational standing.

NGP and Rise also have standing on behalf of their members and constituents. For both organizations: (1) their members would otherwise have standing to sue in their own right; (2) the interests they seek to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Greater Birmingham Ministries*, 992 F.3d at 1316.

The Fulton Defendants have not advanced any argument challenging the associational standing of NGP and Rise. Nor could they successfully do so: the Complaint alleges more than enough facts to establish associational standing at the motion to dismiss stage. *See, e.g.*, *Suncoast Waterkeeper v. City of Gulfport*, No. 8:17-CV-35-T-24 MAP, 2017 WL 1632984, at *7 (M.D. Fla. May 1, 2017) (denying motion to dismiss that challenged associational standing because the plaintiff's "allegations [were] sufficient at the pleading stage, since it alleges that its members have been, are being, and will continue to be adversely affected by Defendant's" unlawful behavior); *see also Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists, Inc.*, 393 F. Supp. 2d 1362, 1370-72 (M.D. Ga.

2005) (denying motion to dismiss that challenged associational standing because the allegations in the complaint were sufficient on their face). For this reason alone, the Court should deny the Fulton Defendants' motion. *See, e.g.*, *Int'l Telecomms. Exch. Corp. v. MCI Telecomms. Corp.*, 892 F. Supp. 1520, 1531 (N.D. Ga. 1995) ("Normally, a party may not raise new grounds for granting its motion in a reply.").

B. Individual Plaintiff Jauan Durbin.

The Fulton Defendants also do not challenge the standing of individual Plaintiff Jauan Durbin, and for good reason. Mr. Durbin is a registered voter in Fulton County. Am. Compl. ¶ 29. SB 202 will make it more difficult for Mr. Durbin to vote, for example by limiting the number of early voting days in future elections, forcing him to comply with additional burdensome ID requirements to vote absentee, restricting his access to drop boxes, and reducing the amount of time that he has to obtain and submit an absentee ballot. *Id.* Those allegations amount to injuries-in-fact that far surpass the "trifle" required by Article III. *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (rejecting argument that an injury must be "significant").

Consistent with this low threshold, the Eleventh Circuit regularly rejects challenges to the standing of individuals who face burdens in the voting process. "A plaintiff need not have the franchise wholly denied to suffer injury. Any concrete,

particularized, non-hypothetical injury to a legally protected interest is sufficient." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005). In *Billups*, for example, the court recognized that even voters who had an acceptable form of photo ID had standing to challenge a Georgia statute requiring them to produce that ID to vote. *See* 554 F.3d at 1351. Just as a modest poll tax may be challenged by those who can afford to pay it, "[r]equiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing." *Id*. at 1351-52.

Like so many Black Georgians, Mr. Durbin will be forced to navigate new barriers to methods of voting he used before and plans to use again. *See* Am. Compl. ¶ 29. That is enough to establish an injury-in-fact. *See Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005) (noting "[i]njury-in-fact is not Mount Everest" and the pleading requirement is "very generous"). The Fulton Defendants do not contest any of this, and because only one plaintiff needs to establish Article III standing for the case to proceed, the Court should deny the Fulton Defendants' motion for this reason alone. *See Am. Iron & Steel Inst.*, 182 F.3d at 1274 n.10.

II. Plaintiffs' injuries are fairly traceable to the Fulton Defendants.

The organizational Plaintiffs and Mr. Durbin have alleged injuries that are the

direct result of the Fulton Defendants' enforcement of SB 202, and are thus "traceable" to the Fulton Defendants' actions. *See Spokeo*, 136 S. Ct. at 1547. The traceability requirement is not a high hurdle. "Even a showing that a plaintiff's injury is indirectly caused by a defendant's actions satisfies the fairly traceable requirement." *Resnick v. AvMed, Inc*., 693 F.3d 1317, 1324 (11th Cir. 2012). And as the Eleventh Circuit recently put it, a plaintiff "has standing to pursue [its] claims so long as even a small part of the injury is attributable" to the defendant. *Losch v. Nationstar Mortg. LLC*, 995 F.3d 937, 943 (11th Cir. 2021) (traceability requirement satisfied because "we can't say that [the defendant] caused *none* of [plaintiff's] damage").

Here, the Complaint alleges that the Fulton Defendants are responsible for administering and enforcing the election code in Fulton County—including several of the challenged provisions in SB 202—which is more than enough to show traceability. *See Indep. Party of Fla.*, 967 F.3d at 1281 (finding the fairly traceable requirement satisfied because the Secretary of State "enforce[d]" the "challenged ballot-access provisions"); Am. Compl. ¶ 35 (collecting citations to Georgia law). Among other responsibilities, the Fulton Defendants oversee the conduct of primaries and elections, voter registration, and absentee balloting procedures. *See* Am. Compl. ¶ 35. Further, SB 202 tasks the Fulton Defendants with implementing

various provisions of that bill in Fulton County, including by enforcing new ID requirements for absentee voters, issuing absentee ballots during the newly shortened distribution period, designating mobile polling places, and holding hearings on voter registration challenges. *See id.* ¶¶ 33-35, 82; SB 202, §§ 15, 16, 20, 25.

Contrary to the Fulton Defendants' claims, there is nothing arbitrary about their inclusion in this lawsuit. Mr. Durbin is a registered voter in Fulton County, all three organizational Plaintiffs operate in Fulton County, among other areas in Georgia, and Plaintiff NGP is even based in Fulton County. *Id.* ¶¶ 17, 21, 23, 25. The Complaint alleges and explains that the Fulton Defendants are responsible for enforcing parts of SB 202—and thus for causing Mr. Durbin's and the organizational Plaintiffs' injuries. It should come as no surprise that the Fulton Defendants' implementation and enforcement of SB 202 would injure the county's residents. And it is settled law that such injuries are traceable to the election official that enforced the challenge law. *See Browning*, 522 F.3d at 1159 n.9 (explaining how "causation is apparent" when election official was tasked with administering law that forced plaintiffs to "divert time and resources to comply" with it); *supra* at 5-6.

The Fulton Defendants fail to grapple with these authorities and instead appear fixated on their lack of involvement in the *enactment* of SB 202. Mot. at 10-

11. But these arguments also miss the point. Nobody is claiming that the Fulton Defendants had anything to do with the law's passage. Nor is that question relevant to Article III standing. Instead, the traceability analysis asks who is responsible for *implementing or enforcing* SB 202. *See Jacobson*, 974 F.3d at 1253 (plaintiffs' injuries are "traceable only to" the officials who would actually enforce the challenged law). In Fulton County, the answer is the Fulton Defendants.

The Fulton Defendants' attempts to distinguish *Jacobson*, which found that county elections supervisors were appropriate defendants because they had "'authority to *enforce* the complained-of provision,' as the causation element of standing requires," *id.* at 1253, 1257 (quoting *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1299 (11th Cir. 2019) (en banc)), cannot be reconciled with the Eleventh Circuit's own subsequent decisions applying the case. *See Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 WL 7488181, at *2 (11th Cir. Dec. 21, 2020) (holding that, under *Jacobson*, plaintiffs should have named county election officials, not state officials, in lawsuit challenging signature matching procedures). District courts in this Circuit have followed suit. *See Trump v. Kemp*, No. 1:20-CV-5310-MHC, 2021 WL 49935, at *5 (N.D. Ga. Jan. 5, 2021) (finding that, under *Jacobson*, plaintiff's election-related due process claim was fairly traceable only to county election officials, not to Georgia's governor or secretary of

state).

Plaintiffs' injuries are therefore traceable to the Fulton Defendants, who enforce the challenged provisions.

III. Plaintiffs' injuries will be redressed by the Fulton Defendants.

Finally, the organizational Plaintiffs and Mr. Durbin have shown that their injuries will be redressed by a favorable decision against the Fulton Defendants. *See Spokeo*, 136 S. Ct. at 1547; *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1126-27 (11th Cir. 2019) ("To have Article III standing, a plaintiff need not demonstrate anything 'more than . . . a substantial likelihood' of redressability." (citation omitted)), *cert. denied*, 140 S. Ct. 2828 (2020). As noted above, the organizational Plaintiffs operate in Fulton County, and Mr. Durbin is a registered voter who lives in Fulton County. *See supra* at 7-16. Because each of these Plaintiffs will be injured by the Fulton Defendants' enforcement of SB 202, an injunction of that enforcement will redress their harms. *See, e.g.*, *Browning*, 522 F.3d at 1159 n.9 ("An injunction against the enforcement of [the challenged election law] would also redress this [diversion-of-resources] injury" because it would "free[] up the organizations.").

The Fulton Defendants wrongly argue that, because Plaintiffs have only sued a subset of Georgia's 159 counties, Plaintiffs' claims for relief cannot be fully redressed. Mot. at 13. But the law does not require a plaintiff to name every

defendant that has injured it, nor does it require Plaintiffs to seek redress for their entire injury in order to establish standing. *See, e.g.*, *I.L.*, 739 F.3d at 1282 (noting that "relief which remedies at least some of the alleged injuries is sufficient to establish redressability" (citing *Made in the USA Found.*, 242 F.3d at 1310-11)). They also ignore that an injunction against the State and Fulton Defendants *will* fully redress *Mr. Durbin's* injuries.

The Fulton Defendants' reliance on *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), and *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004), is misplaced. Mot. at 15. The Supreme Court expressly limited *Bush* to its facts because "the problem of equal protection in election processes generally presents many complexities." *Bush*, 531 U.S. at 109. The Supreme Court has not cited *Bush* in a majority opinion at all since then, and the Eleventh Circuit has cited it in a majority opinion only once to *reject* the plaintiffs' claim that variances in manual recount procedures between counties created an equal protection problem. *See Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006). But even if *Bush* had further application, the Fulton Defendants ignore that the case addressed the absence of clear procedures in a statewide recount—a remedy issued only after extensive litigation—which the Supreme Court found "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter . . . ." *Bush*, 531

U.S. at 109. "The question before the Court [was] not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id*. *Bush*'s equal protection holding is simply not relevant here, and any argument that presumes a remedy at this early stage in the proceedings is woefully premature.

In any event, the Fulton Defendants plainly lack standing themselves to assert an equal protection interest on behalf of residents of other counties. Moreover, any injury suffered by those residents would result *not* from a court order that prohibited elections officials in Fulton County from inflicting the injuries alleged in the complaint on their voters, but from SB 202's challenged provisions and the burdens they impose on the franchise. That is, any injuries suffered by residents of other counties would only be fairly traceable to the actions of their *own* county officials, who would bear the responsibility for creating a constitutional violation by enforcing unconstitutional laws. *See*, *e.g.*, *Trump v. Boockvar*, 502 F. Supp. 3d 899, 913 (M.D. Pa. 2020) (holding that plaintiffs whose votes were rejected under procedures used in their counties lacked standing to sue other counties that adopted more lenient procedures because their injuries were not fairly traceable to, or redressable by, those counties), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377 (3d Cir. 2020). The Fulton Defendants cannot defeat Plaintiffs' clear

standing by making an argument on behalf of nonparties who lack standing to raise it in the first place.

None of the threshold elements of standing require the Court to hypothesize about the possible impact on third parties of any potential injunctive relief the Court may grant. *See, e.g.*, *Billups*, 554 F.3d at 1349 (listing the three elements of Article III standing); Wright & Miller, 13A Fed. Prac. & Proc. Juris. § 3531.6 (3d ed.) (noting the "general principle that uncertainty about appropriate remedies often should not be resolved at the outset of an action by denying standing").[4]

[4] The Fulton Defendants' wholly undeveloped *Bush v. Gore* argument also fails on the merits. The constitutional violation in *Bush* stemmed from the Florida Supreme Court's creation of a standardless "statewide remedy" that failed to give "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness [were] satisfied." 531 U.S. at 109; *see also id.* ("The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer."). Here, by contrast, the Court can ensure that any remedy it enters has standards that pass constitutional muster. Regardless, courts regularly entertain constitutional challenges brought by voters—like Mr. Durbin—against their county election officials. *See, e.g.*, *Nemes v. Bensinger*, 467 F. Supp. 3d 509, 522 (W.D. Ky. 2020) (finding standing where voters sued state elections officials and some county elections officials); *Miller v. Blackwell*, 348 F. Supp. 2d 916, 920 (S.D. Ohio 2004) (holding that individual voters had standing to sue county defendants "because they are the entities implementing the procedures that likely infringe upon Plaintiff Voters' constitutional rights"). If the Fulton Defendants' interpretation of *Bush* were correct, individual voters would not have standing to bring constitutional claims against their local election officials. That is not, and cannot be, the law.

CONCLUSION

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

Respectfully submitted, this 8th day of July, 2021.

Halsey G. Knapp, Jr.
Georgia Bar No. 425320
Joyce Gist Lewis
Georgia Bar No. 296261
Adam M. Sparks
Georgia Bar No. 341578
KREVOLIN & HORST, LLC
1201 W. Peachtree St., NW
One Atlantic Center, Suite 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
hknapp@khlawfirm.com
jlewis@khlwafirm.com
sparks@khlawfirm.com

/s/ *Uzoma N. Nkwonta*
Uzoma N. Nkwonta*
Jacob D. Shelly*
Zachary J. Newkirk*
Jyoti Jasrasaria*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
unkwonta@perkinscoie.com
jshelly@perkinscoie.com
znewkirk@perkinscoie.com
jjasrasaria@perkinscoie.com

Laura Hill*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-3349
Facsimile: (206) 359-4349
LHill@perkinscoie.com

Counsel for Plaintiffs
*Admitted *pro hac vice*

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: July 8, 2021.

s/ *Uzoma N. Nkwonta*
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 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: July 8, 2021.

s/ *Uzoma N. Nkwonta*
Counsel for Plaintiffs