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

THE NEW GEORGIA PROJECT, *et al.*	:	
	:	
Plaintiffs,	:	CIVIL ACTION FILE NO.:
vs.	:	
	:	1:21-cv-01229-JPB
BRAD RAFFENSPERGER in his official capacity as the Georgia Secretary of State, *et al.*,	:	
	:	
Defendants.	:	

REPLY BRIEF IN SUPPORT OF BROOKS COUNTY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Plaintiffs' First Amended Complaint [Doc. 39], which arbitrarily named four sets of county election officials as defendants, including the Brooks County Board of Elections and its Director of Elections ("Brooks County Defendants"), did not set forth facts sufficient to demonstrate standing to seek relief against the counties. After Brooks County Defendants moved to dismiss the Amended Complaint [Doc. 74], Plaintiffs' Response in Opposition to County Defendants' Motion to Dismiss [Doc. 76] still failed to allege sufficient facts or otherwise demonstrate that they have suffered an injury-in-fact which is traceable to or redressable by the County

Defendants in general or the Brooks County Defendants specifically. Accordingly, this Court does not have jurisdiction over the claims asserted against the Brooks County Defendants, who, therefore, request that the Court dismiss all claims against them pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

A. Organizational Plaintiffs Have Failed to Allege a Sufficiently Definite Injury in Fact

Plaintiffs attempt to argue in their Response to Brooks County's Motion to Dismiss that they plead facts sufficient to establish a concrete "diversion of resources" injury for each organizational plaintiff. [Doc. 76, pp. 8-9]. In support of their assertion of a cognizable injury, Plaintiffs allege that they "must divert and expend resources to 'educat[e] volunteers and voters on compliance' with the new law,"…'to locate and assist' potentially affected voters,…and to manage an expected transition between absentee voting and in-person voting." [Doc. 76, p. 9, citations omitted].

Plaintiffs mischaracterize the argument of Brooks County Defendants, claiming that the motion dismiss advocated for the position that "diversion-of-resources standing requires 'a seismic shift from work within the organization's mission to work outside of it.'" [Doc. 76, p. 11]. However, Brooks County Defendants never took such a position, but simply noted that Plaintiffs cannot allege

an injury-in-fact "based solely on the baseline work they are already doing." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019) and noting that organizations "cannot convert ordinary program costs into an injury in fact" but "must show that the disruption is real and its response is warranted." *Id*.

This mischaracterization in the Response brief was no doubt an effort to distract from the deficiently plead allegations of injury-in-fact in the First Amended Complaint. Meanwhile, Plaintiffs continued to ignore recent precedent, including precedent from this Court, which previously ruled in *Ga. Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cty. Bd. of Registrations & Elections*, 499 F. Supp. 3d 1231, 1240 (N.D. Ga. 2020), that organizational plaintiffs must show "what they would have to divert resources away from in order to spend additional resources on combatting the effects of [the complained of regulation]." If a plaintiff claims that part of its mission is to educate and inform voters regarding voting laws, "there is no indication that [a plaintiff] would in fact be diverting any resources away from the core activities it already engages in by continuing to educate and inform…voters." *Id*.

Likewise, while Plaintiffs focus on older cases such as *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008) in defense of their theory of resource diversion, they continue ignoring the more recent precedent on this issue in

Jacobson v. Fla. Sec'y of State, 974 F.3d 1236 (11th Cir. 2020), where the Court ruled that concrete injury is not established unless Plaintiffs also demonstrate what activities the organizations would have to divert resources away from: "Although resource diversion is a concrete injury, neither [witness] explained what activities the [organizational plaintiffs] would divert resources away from in order to spend additional resources on combatting the [complained of provision], as precedent requires." *Id* at 1250.

Despite being cited to these recent cases, Plaintiffs have still failed to explain how their Amended Complaint alleges which activities resources will be diverted *from*, in order to engage in these "new" activities. Rather, each of the alleged actions Plaintiffs claims they must take are already part of their core activities. Following Plaintiffs' argument to its logical conclusion, these organizations would suffer a cognizable injury anytime there is a change in election law or administration about which they wish to provide education or support. Indeed, under such a theory even a change to election laws or rules which these Plaintiffs support would amount to an injury-in-fact because they would have to "divert resources" to educate their members and constituents about the changes so that their members could take advantage of the new provisions.

In addition, rather than pleading concrete steps they've taken or imminent injuries, Plaintiffs continue to point to steps that they *will take* in response to SB 202. [Doc. 76, p. 13]. To be sure, Plaintiffs are very careful to use affirmative language and avoid qualifiers in their Amended Complaint and in their Response, asserting that hypothetical future events definitively "will" happen. Despite this overly confident language, the reality is that Plaintiffs have not demonstrated any concrete past injury, nor have they made a case for the imminent threat of a particularized injury. Where a "hypothetical future harm" is not "certainly impending," plaintiffs "cannot manufacture standing merely by inflicting harm on themselves." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416, 422 (2013); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 931 (11th Cir. 2020) (affirming dismissal of claims for lack of standing based on plaintiff's claims of injury due to his own efforts to protect against potential identity theft in the future). Plaintiffs' assertions that they will divert resources from one voter engagement activity to a different voter engagement activity is precisely the type of "self-inflicted harm" that cannot be used to manufacture standing.

B. Plaintiff Gibbs has failed to demonstrate a particularized injury

With regard to the individual standing of Plaintiff Gibbs, the Response brief merely repeats assertions that she will be required to comply with ID requirements

to vote absentee, or navigate to a drop box that may not be where it once was, or wait in line at a polling place, deeming those normal voting regulations to be "burdensome." [Doc. 76, p. 15]. However, as the Supreme Court recently noted in *Brnovich v. Democratic Nat'l Comm*., 141 S. Ct. 2321, 2338 (2021):

> …every voting rule imposes a burden of some sort. Voting takes time and, for almost everyone, some travel, even if only to a nearby mailbox. Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules. But because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is "equally open" and that furnishes an equal "opportunity" to cast a ballot must tolerate the "usual burdens of voting." *Crawford v. Marion County Election Bd.*, 553 U. S. 181, 198, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008)

Moreover, Plaintiff Gibbs cannot demonstrate a particularized injury simply because she prefers one method of voting over another. In *Wood v. Raffensperger*, 981 F.3d 1307, 1315 (11th Cir. 2020) the 11th Circuit Court of Appeals noted: "Even if we assume that absentee voters are favored over in-person voters, that harm does not affect [plaintiff] as an individual—it is instead shared identically by the four million or so Georgians who voted in person this November. '[W]hen the asserted harm is . . . shared in substantially equal measure by . . . a large class of citizens,' it is not a particularized injury. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Accordingly, Ms. Gibbs has not demonstrated a particularized

injury simply by speculating that it may be harder to vote by her preferred method in some future election.

C. Plaintiffs Have Failed to Demonstrate that Their Alleged Injuries are Traceable to or Redressable by the County Defendants.

In response to the Brooks County Defendants' argument that Plaintiffs' claims are not traceable to the County Defendants, Plaintiffs argue that because the County Defendants must implement the provisions at issue, the claims are automatically traceable to them.[1] Predictably, Plaintiffs continue to rely on an improper reading of *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020) for their position that all that is needed to show causation for standing purposes is redressability, i.e., that the Court could address their injuries by ordering the County Defendants not to enforce the complained-of provisions of SB 202. This position is incomplete and fails to address traceability.

While the Court in *Jacobson* did state in dicta that "any injury would be traceable only to 67 [county] Supervisors of Elections and redressable only by relief

[1] Plaintiffs claim that Brooks County Defendants have not been arbitrarily included in this lawsuit because individual Plaintiff Gibbs is a registered voter in Brooks County [Doc. 76, p. 18]. However, as noted above Ms. Gibbs has not plead a concrete and particularized injury-in-fact sufficient to reach the second and third prongs of the standing test set forth in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

against them," (*Id*. at 1253), the issue before the Court was traceability of claims to the Florida Secretary of State, who was the only defendant to the action. Because "the Supervisors are independent officials under Florida law who are not subject to the Secretary's control," the Court held that the plaintiffs' ballot order claims were not traceable to the Secretary of State. *Id*.

The redressability portion of the *Jacobson* opinion relies, in large part, on the precedent in *Lewis v. Governor of Ala*., 944 F.3d 1287, 1296, where the Court held that plaintiffs could not show redressability because the defendant – the Attorney General of Alabama - lacked the authority to enforce the statute at issue. *Id*., 944 F.3d at 1296-1301. However, neither the *Lewis* court nor the *Jacobson* court held that the existence of authority to implement a subject statute is, by itself, dispositive of the traceability question.

Indeed, the *Lewis* court, expounding upon *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992), made it clear that more is required than simply naming a government party with the ability to enforce the complained of regulation:

> …where, as is perhaps typically the case, "the plaintiff is himself an object of the [regulatory] action (or forgone action) at issue," there is "ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." But when…"a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else"—there, the funding agencies—"much more is needed" to establish standing. The reason is because "[i]n that circumstance,"

> both the traceability and redressability inquiries "hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." In other words, when "[t]he existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of . . . discretion the courts cannot presume either to control or to predict," plaintiffs must demonstrate that "those choices have been or will be made in such a manner as to produce causation and permit redressability of injury."

Lewis, 944 F.3d 1287, at 1304-05.

In this case the organizational Plaintiffs' claims are based largely upon speculation about unfettered choices made by independent actors. For example, many of the claims in the Amended Complaint focus on how SB 202 will affect absentee voting, but what method to use for voting is a distinctly individual choice that can vary for a person from election to election. Likewise, the organizational Plaintiffs make vague projections that they may or may not shift resources around within their budgets to address SB 202, but those budgeting decisions will no doubt be affected by the internal policy and fiscal decisions of its governing board, as well as the decisions of the other 155 counties not named in this suit on how they implement the provisions at issue. These independent actions of third parties cannot be used to manufacture standing for the organizational Plaintiffs.

Likewise, simply naming an arbitrary set of county election officials as defendants does not meet Plaintiffs' burden to demonstrate traceability and

redressability. Instead, Plaintiffs must demonstrate how their alleged future injuries are traceable to and redressable by County Defendants' conduct. *See, e.g.*, *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011) (alleged injury cannot "result [from] the independent action of some third party not before the court"). Traceability does not exist where "an independent source would have caused [plaintiff] to suffer the same injury." *Swann v. Sec'y, Georgia*, 668 F.3d 1285, 1288 (11th Cir. 2012). The members of organizational Plaintiffs make individual choices about what methods and when to vote in any given election cycle, and Plaintiff cannot manufacture standing for itself simply by alleging some of its members feel more burdened by the very same provisions that provide more flexibility to others.

Further, even though Plaintiffs point to several provisions of SB 202 which local elections officials and staff implement – restricted timeframes to request and receive absentee ballots, O.C.G.A. §§ 21-2-381, 21-2-386, the limits on access to drop boxes, *id*. § 21-2-382, the prohibition against proactive mailing of absentee ballot applications, id., new identification requirements for absentee voting , *id*. §§ 21-2-381, 21-2-386 – those provisions do not impart any discretion to County Defendants with regard to their implementation. In addition, at least one of the provisions being challenged by Plaintiffs, the criminalization of assistance in

returning completed absentee ballot applications, is not enforced by County Defendants but local law enforcement. *See* O.C.G.A. 21-2-381(a)(C)(ii) ("Handling a completed absentee ballot application by any person or entity other than as allowed in this subsection shall be a misdemeanor.")

In essence, Plaintiffs seek to place Brooks County and the other County Defendants between the proverbial rock and a hard place, demanding that county election officials preemptively defy SB 202 if they don't wish to be a party to this lawsuit, without any court order or other authority granting the counties permission to ignore the complained-of provisions, or risk having to pay attorney's fees to Plaintiffs if they follow the requirements of the law. Such an unjust outcome cannot have been the aim of the Court in *Jacobson*, or any other case which addresses the issue of redressability.

Moreover, Plaintiffs continue to simply argue that they do not have to sue all county election officials in Georgia to obtain the requested relief, even though they allege that their organizations operate throughout the state. [Doc. 39 ¶¶ 17, 21, 23]. In doing so the Plaintiffs tacitly admit the relief they seek would lead to "arbitrary and disparate treatment to voters in its different counties," *Bush v. Gore*, 531 U.S. 98, 107, 121 S. Ct. 525, 531 (2000), with four counties bound by an order from this Court and the remaining 155 counties following existing law.

Although Plaintiffs cite several inapposite cases that stand for the proposition that even a partial remedy would satisfy the requirement of redressability, none of those cases involved enjoining election officials in only certain areas of a state, while leaving the rest of the state unbound by the relief ordered. And while Plaintiffs assert that *Bush v. Gore* is an isolated and rarely relied upon precedent, this Court has repeatedly relied upon it for the exact proposition on which County Defendants have set forth – that the Court cannot grant relief which would result in disparate treatment of voters across Georgia. *See, e.g., Curling v. Raffensperger*, 397 F. Supp. 3d 1334, 1403 (N.D. Ga. 2018) (finding that continued use of voting machines could result in disparate treatment of voters under *Bush v. Gore*); *Black Voters Matter Fund v. Raffensperger*, No. 20-cv-01489-AT, 2020 WL 2079240, at *3 N.D. Ga. 2020) (noting that the injunctive relief requested by plaintiffs "could yield a measure of disparity in postage relief as a practical matter, that would touch on the Court's weighing of the public interest factor for the June 2020 Election."). A remedy that leads to unequal treatment of voters based upon which counties Plaintiffs chose to sue would create more problems than it resolves.

Consequently, because Plaintiffs have failed to clearly articulate in their Amended Complaint how their claimed injuries are traceable to and redressable by the Brooks County Defendants, they have not carried their burden of demonstrating

standing to sue the counties. For all the reasons set forth above and in Brooks County Defendants' Brief in Support of County Defendants' Motion to Dismiss First Amended Complaint [Doc. 74], County Defendants request that the Court enter an order dismissing all claims against them in Plaintiffs' First Amended Complaint.

Respectfully submitted this 10th day of August, 2021.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

The undersigned hereby certifies that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1 of the Northern District of Georgia, using a font type of Times New Roman and a point size of 14.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10th, 2021, I electronically filed the foregoing REPLY BRIEF IN SUPPORT OF BROOKS COUNTY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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