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

KAREN FINN, et al. Plaintiffs, vs. COBB COUNTY BOARD OF ELECTIONS AND REGISTRATION, et al. Defendants.	:	Civil Action File No.: 22-cv-2300-ELR

BRIEF IN SUPPORT OF MOTION TO DISMISS OR TO JOIN NECESSARY PARTIES

I. INTRODUCTION

Plaintiffs have filed a Complaint for Declaratory and Injunctive Relief alleging that the Cobb County Board of Education ("School Board") and the State Legislature improperly used race to gerrymander the maps adopted during the Cobb County School District's recent redistricting process. Yet rather than naming and seeking relief against the parties whose conduct allegedly violated their constitutional rights, Plaintiffs instead made the puzzling decision to only name as defendants the Cobb County Board of Elections and Registration ("Elections Board") and the county's Elections Director, Janine Eveler (collectively "Election Defendants"). In fact, aside from their identification as parties, Election Defendants

do not even appear in the Complaint until nearly the final page, where the Prayer for Relief contains one single mention: a request that the Court order them not to hold elections using the challenged district maps. [Doc. 1, ¶ 174].

However, Plaintiffs are not entitled to sue the Election Defendants simply because they need a party against whom the Court might issue an injunction. They also must plead and demonstrate the other elements of prudential standing, including some form of injurious conduct that is fairly traceable to the Election Defendants. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) ("To establish standing, in addition to demonstrating an injury-in-fact, Plaintiffs must also show a 'causal connection between [their] injury and the challenged action of the defendant—i.e., the injury must be fairly…trace[able] to the defendant's conduct'...." Additionally, the failure of Plaintiffs to join the parties whose actions resulted in the ostensibly gerrymandered maps puts the Election Defendants in the unjust position of potentially being held liable under 42 U.S.C. §1983 for actions over which they have no discretion. Nowhere in the list of powers and duties granted to county election superintendents in O.C.G.A. § 21-2-70 is the authority to reject or even evaluate district maps for claims of racial gerrymandering or other voting rights claims. Yet here Plaintiffs ask the Court to hold the Election Defendants responsible in a §1983 civil rights action without even brining in the parties who have allegedly

deprived them of their rights. Allowing this action to proceed solely against the Election Defendants would them subject to inconsistent obligations: a statutory duty to conduct elections using the school district maps adopted by the State Legislature, and an obligation to pay damages and attorney's fees under 42 U.S.C. §1983 if those maps, over which they have no control, are determined to be racially gerrymandered.

Additionally, failure to include the School Board and the State of Georgia as parties deprives them of the ability to protect their interest in the maps they created. Likewise, the Election Defendants show the Court that primary elections have already been held in two of the challenged districts (*See*, Declaration of Janine Eveler, filed concurrent with this motion) and the winners of those primaries would have an interest in the outcome of this action. Accordingly, this Court should not allow this matter to proceed without either joining the indispensable parties or, if they cannot be joined, dismissing the action.

II. STATEMENT OF RELEVANT FACTS

For purposes of this motion the relevant facts are very limited. Plaintiffs spend most of the first 56 pages of their Complaint detailing acrimony among the current School Board members, describing the actions of the School Board and the State Legislature in the redistricting process, and setting out the alleged problems

with the new district maps. [Doc. 1, pp. 1-7, 12-56]. The Election Defendants are referenced in only two places in the entire Complaint: in the list of identified parties [Doc. 1 ¶¶ 42-43] and in the Prayers for Relief, where Plaintiffs ask the Court enjoin the Election Defendants from holding elections using the challenged district maps [Doc. 1 ¶ 174(b)]. Plaintiffs only set forth a single claim for relief pursuant to 42 U.S.C. §1983, asserting that the redistricting process and the resulting maps violate their rights to Equal Protection the Fourteenth Amendment. [Doc 1 ¶¶ 170-173]. Notably, nothing in the statement of facts nor the claim for relief allege that the Election Defendants have engaged in any conduct that could be alleged to be a violation of Plaintiffs' rights.

Given the complete dearth of factual allegations involving the Election Defendants, Plaintiffs appear to have included them solely for purposes of redressability. However, the Plaintiffs have not alleged facts sufficient to show an injury-in-fact that is fairly traceable to the actions of the Election Defendants. They simply do not have standing to assert their claims against the Election Board or Ms. Eveler and cannot achieve it by claiming injuries traceable to parties they have refused to join in this action and then skipping straight to the third prong of the prudential standing test to ask for an injunction.

Even construing the lengthy recitation of facts in the light most favorable to Plaintiffs, no amount of leeway can overcome the jurisdictional obstacle of lack of prudential standing. Accordingly, this Court does not have jurisdiction over the claims asserted against the County Defendants, and the County Defendants therefore request that the Court dismiss all claims against them pursuant to Fed. R. Civ. P. 12(b)(1). If the Court declines to dismiss the Complaint, at a minimum, it is obligated to join all indispensable parties under Fed. R. Civ. P. 19.

III. ARGUMENT AND CITATION TO AUTHORITY

A. Standard for Motion to Dismiss

"[A] motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) can be based upon either a facial or factual challenge to the complaint." *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). "A facial attack on the complaint requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Id.* "

When evaluating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321—

22 (11th Cir. 2012). To survive Rule 12(b)(6) scrutiny, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

B. Plaintiffs lack standing to bring claims against the Election Defendants

"Article III of the Constitution limits federal courts to adjudicating actual 'cases' and 'controversies.'" *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1210 (11th Cir. 2019); U.S. Const. art. III, § 2. "To have a case or controversy, a litigant must establish that he has standing," which requires proof of three elements. *United States v. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, (2000). "The plaintiff bears the burden of establishing each element." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1268 (11th Cir. 2019).

"It is not enough that [plaintiff] sets forth facts from which [the court] could imagine an injury sufficient to satisfy Article III's standing requirements." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 976 (11th Cir. 2005). Instead, "plaintiff has the burden to clearly and specifically set forth facts sufficient to satisfy Art. III standing requirements." *Id*. "If the plaintiff fails to meet its burden, this court lacks the power to create jurisdiction by embellishing a deficient allegation of injury." *Id*.

Further, "when plaintiffs seek prospective relief to prevent future injuries, they must prove that their threatened injuries are "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

To establish standing Plaintiffs must show an injury-in-fact, and also a "causal connection between [their] injury and the challenged action of the defendant—i.e., the injury must be fairly…trace[able] to the defendant's conduct..." *Lewis v. Governor of Ala*., 944 F.3d 1287, 1296 (11th Cir. 2019) (internal quotes removed). The crux of Plaintiffs' lawsuit is that the "[School] Board and state legislators' use of race as the predominant factor in drawing the Challenged Districts, without narrowly tailoring that use to comply with a compelling governmental interest, violates the Equal Protection Clause..." [Doc. 1, ¶ 4]. Yet nowhere in the Amended Complaint do Plaintiffs bother to explain how their supposed injuries are traceable to the Election Defendants.

Plaintiffs likely felt compelled to include the Election Defendants, in part, due to the opinion of the 11th Circuit Court of Appeals in *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245-46 (11th Cir. 2020). In that case, several voters and organizations brought an action challenging the Florida statute which sets the order of candidates' names on the ballot. The *Jacobson* Court ruled that the plaintiffs failed to demonstrate standing to seek relief against the Florida Secretary of State because her office does not enforce the ballot order provision, noting that only the 67 county Election Supervisors are responsible for preparing the ballots. *Id* at 1253.

The result of that ruling has been that some subset of county election officials has been named in most election related lawsuits filed in the 11th Circuit since then, including multiple suits currently pending before this Court. *The New Georgia Project et al. v. Raffensperger et al.*, Case No. 1:21-cv-01229-JPB; *Georgia State Conference of the NAACP et al. v. Raffensperger et al.*, Case No. 1:21-cv-01259-JPB; *Asian Americans Advancing Justice-Atlanta, et al. v. Raffensperger et al.*, Case No. 1:21-cv-01333-JPB, etc. However, simply naming the Board of Elections and the Elections Director as defendants because they run the local election does not meet the Plaintiffs' burden to demonstrate traceability and redressability. "It is the plaintiff's burden to plead and prove…causation…" *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1266 (11th Cir. 2011). See also, *Bischoff*

v. Osceola Cnty., Fla., 222 F.3d 874, 878 (11th Cir. 2000) ("The party invoking federal jurisdiction bears the burden of proving standing"). "Article III standing requires that the plaintiff's injury be 'fairly traceable' to the defendant's actions and redressable by relief against *that* defendant." *Jacobson,* 974 F.3d 1236, at 1256, citing to *Lewis*, 944 F.3d at 1298, 1301.

Indeed, the Election Defendants are in a similar position to the Florida Secretary of State in the *Jacobson* because in the plaintiffs in that case "…offered no…evidence that the Secretary plays any role in determining the order in which candidates appear on ballots." *Id* at 1253. Similarly, Plaintiffs in the present action have not plead any allegation that the Election Defendants played any role in creating, evaluating, accepting, rejecting, or otherwise exercising any control over the district maps or the redistricting process. Accordingly, as in the *Jacobson* case, "because the [Election Defendants] didn't do (or fail to do) anything that contributed to [their] harm," the voters and organizations "cannot meet Article III's traceability requirement." *Id*., citing to *Lewis v. Governor of Ala*., 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc).

The Complaint is bereft of any factual allegations tying Plaintiffs' alleged injuries – even future injuries - to the Election Defendants. [Doc. 1]. The only factual allegation regarding Election Defendants appears in the "PARTIES" section of the

Complaint where it states they are "charged with overseeing the conduct of Cobb County elections and implementing laws and regulations, including with respect to the Challenged Districts at issue in this litigation." [Doc. 1, ¶¶ 42-43]. However, the *Jacobson* Court was very clear that voters may not rely on an official's "general authority" over elections in order to establish traceability. *Jacobson* at 1254 ("the voters and organizations likewise cannot rely on the Secretary's general election authority to establish traceability.") Rather, Plaintiffs here must show that the Election Defendants have some type of control over the creation or use of the injurious maps in order to demonstrate causality.

Georgia's election law gives no such authority to the county election superintendent or the county's election staff. O.C.G.A. §21-2-70. Accordingly, because Plaintiffs have failed to articulate in their Complaint how their claimed injuries are traceable to and redressable by the Election Defendants, they have not carried their burden of demonstrating standing to sue them.

C. Plaintiffs have failed to join indispensable parties

Federal Rule of Civil Procedure 12(b)(7) provides for dismissal when a plaintiff fails "to join a party under Rule 19." Rule 19 provides a "two-part test for determining whether an action should proceed in a nonparty's absence." *City of Marietta v. CSX Transportation, Inc.*, 196 F.3d 1300, 1305 (11th Cir. 1999). "The

first question is whether complete relief can be afforded in the present procedural posture, or whether a nonparty's absence will impede either the nonparty's protection of an interest at stake or subject [existing] parties to a risk of inconsistent obligations." *Id*. (citing Fed. R. Civ. P. 19(a)(1)-(2)). If the Court determines that the non-party's absence will impede its rights, "and the nonparty cannot be joined," the court proceeds to the second step in the analysis and considers whether in "equity and good conscience the action should proceed among the parties before it, or should be dismissed." Id. (citing Fed. R. Civ. P. 19(b)). This analysis should not be formalistic, but rather based on "flexible practicality." *Id*. (citing *Provident Trades men' s Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-19, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)).

The determination of whether a party is a "necessary party" comes down to whether "'(1) in that person's absence, the court cannot accord complete relief among existing parties,' or (2) where the absent party claims an interest relating to the action, disposing of the action without the absent party may 'as a practical matter impair or impede the person's ability to protect the interest; or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.'" *Santiago v. Honeywell Int'l, Inc*., 768 F. App'x 1000, 1004 (11th Cir. 2019), citing Fed. R. Civ. P. 19(a)(1)

The vast majority of the allegations in the Complaint focus on the district maps created by the School Board and adopted by the State of Georgia, or the history and procedures that led to those maps. Neither the Elections Board nor Ms. Eveler have any authority regarding the drawing of district maps or the enactment of redistricting legislation in the State of Georgia, nor do they have any discretion over whether to follow the laws passed by the Legislature. The only interest the Election Defendants have in this matter is the legal obligation to conduct elections using the maps adopted by the State. They do not have any interest in either defending or challenging the constitutionality of the adopted maps. Accordingly, if this action moves forward without joining the School Board and the State, Plaintiffs would be asserting claims about the new school board district maps without giving the parties who had an actual interest in creating and adopting the maps a chance to defend them. [1]

[1] Election Defendants are unaware of any reason that the School Board could not be named as defendants in this matter. To the extent that Plaintiffs may wish to argue that the State of Georgia cannot be joined because they are protected by sovereign immunity, it should be noted that this Court has recently held that: "The adoption of the Fourteenth and Fifteenth Amendments overrode any sovereign immunity to which states themselves might otherwise have been constitutionally entitled—and Section 2 [of the Voting Rights Act] is a valid expression of congressional enforcement power under those amendments." *Rose v. Raffensperger*, 511 F. Supp. 3d 1340, 1361 (N.D. Ga. 2021), citing to *United States v. Marengo Cty. Com.*, 731 F.2d 1546, 1557 (11th Cir. 1984).

Further, as demonstrated by the Declaration of Janine Eveler, there are candidates who have already won primary elections in two of the challenged districts, Ward 2 and Ward 6: Stephen M. George was declared the winner of the Republican Primary for Board of Education District 2, Becky Sayler was declared the winner of the Democratic Primary for Board of Education District 2, and Nicole Davis was declared the winner of the Democratic Primary Board of Education District 6. See, Declaration of Janine Eveler, ¶¶ 5-9. These candidates, now running for election in the General Election in the new districts this November have a clear interest in whether those districts are to be upheld.

Finally, and most importantly for Election Defendants, allowing this action to proceed without the School Board or State of Georgia as defendants would result in inconsistent obligations. The Election Defendants have a duty to run elections using the maps adopted by the State Legislature and signed into law by the Governor. If the Court allows Plaintiffs to name the Election Defendants as the sole defenders of their §1983 claim, that puts them in the unjust position of subjecting them to liability for civil rights violations over which they have no control.

III. CONCLUSION

Plaintiffs have the burden to clearly plead and prove the basic elements of standing in order to bring claims against the Election Defendants in this matter.

Bochese, *supra* 405 F.3d at 976. Plaintiffs have not met that burden in their Complaint, even construing the facts alleged by them in their favor. Plaintiffs have not alleged in their Complaint that actions traceable to the Election Defendants have or will imminently cause a concrete injury.

Alternatively, if the Court permits this matter to move forward it should join necessary parties to this action under Fed. R. Civ. P. 19. In particular, the School Board and the State of Georgia, as the parties who were responsible for the creation and adoption of the maps should be joined to defend their interests in the maps. Likewise, the candidates who have already been elected in the recent primary elections that used the new maps should be permitted to weigh-in on this challenge.

Accordingly, and for all the reasons set forth above, Election Defendants request that the Court enter an order dismissing all claims against them in Plaintiffs' Complaint, or at a minimum, require the joinder of all necessary parties.

Respectfully submitted this 29th day of July, 2022.

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CERTIFICATE OF COMPLAINCE 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 July 29, 2022, I electronically filed the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS OR TO JOIN NECESSARY PARTIES 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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