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

DEMOCRATIC PARTY OF GEORGIA, INC., *et al.*

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

CIVIL ACTION

FILE NO. 1:19-cv-05028-WMR

DEFENDANTS STEPHEN DAY, JOHN MANGANO, ALICE O'LENICK, BEN SATTERFIELD, AND BEAUTY BALDWIN'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants Stephen Day, John Mangano, Alice O'Lenick, Ben Satterfield, and Beauty Baldwin (collectively the "Gwinnett Defendants") move to dismiss Plaintiffs' claims in their entirety pursuant to Fed. R. Civ. P. 12(b)(1) and (6). In support of this motion, Gwinnett Defendants rely on their Brief in Support of Motion to Dismiss Plaintiffs' Complaint, which is filed with this motion.

Respectfully submitted this 23rd day of December, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing DEFENDANTS STEPHEN DAY, JOHN MANGANO, ALICE O'LENICK, BEN SATTERFIELD, AND BEAUTY BALDWIN'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT has been prepared in Century Schoolbook 13-point, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Bryan P. Tyson
Bryan P. Tyson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
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DEMOCRATIC PARTY OF GEORGIA, INC., *et al.* *Plaintiffs*, v. BRAD RAFFENSPERGER, *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:19-cv-05028-WMR

GWINNETT DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

INTRODUCTION

Under federal law, Gwinnett County is the only county in the state of Georgia required to print all of the information on absentee-ballot envelopes in two languages: English and Spanish. 81 Fed. Reg. 233, 87533. Plaintiffs do not complain that any required information is missing from the ballot envelopes. Rather, Plaintiffs complain that the font size is too small to be legible. The proper font size on election materials is not a question appropriate for resolution by a federal court. "Although federal courts closely scrutinize state laws whose very design infringes on the rights of voters, federal courts will not intervene to *examine the validity of individual ballots*

or supervise the administrative details of a local election." *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986) (emphasis added). But even if it was a proper question for judicial resolution, Plaintiffs ignore the position in which Gwinnett County finds itself: the font size must be small enough to accommodate the amount of information state and federal law requires on an envelope that is subject to size and content requirements mandated by the state.

More fundamentally, however, Plaintiffs lack standing to bring their claims against Gwinnett Defendants. They have failed to plead an injury in fact and their alleged harm is not fairly traceable to or redressable by Gwinnett Defendants. And even if it were, the Court is not capable of fashioning relief against Gwinnett Defendants because the actions about which Plaintiffs complain are not committed exclusively to county discretion. Finally, Plaintiffs' claims are not ripe for this Court to adjudicate because Gwinnett Defendants have not yet determined the absentee-ballot-envelope design for the 2020 elections.

STATEMENT OF FACTS

In a multi-count Complaint, Plaintiffs aim just one count at Gwinnett Defendants, alleging a violation of the First and Fourteenth amendments to the United States Constitution and 42 U.S.C. § 1983. [Doc. 1 at ¶¶ 70-77].

This single count centers on two distinct issues that, taken together, form by the basis of Plaintiffs' claim against Gwinnett Defendants.

First, Plaintiffs broadly contest the propriety the notification procedure required by the state of Georgia with respect to mail-in absentee ballots, but only reference Gwinnett County's notification processes in passing. O.C.G.A. § 21-2-386(a)(1)(C). For mail-in absentee ballots, voters across the state are required to swear an oath attesting to the accuracy of their vote and affix their signature to the ballot. O.C.G.A. § 21-2-384, *et seq*. In the event an absentee voter omits the required signature, or otherwise fails to properly complete his or her signature, Georgia law requires the county clerk to reject the ballot, and "promptly notify the elector of such rejection" so that they may "cure the problem resulting in the rejection of the ballot." O.C.G.A. § 21-2-386(a)(1)(C); [Doc. 1, ¶ 6]. Unlike their claims against the State Defendants, Plaintiffs do not challenge Gwinnett Defendants' interpretation of "promptly notify," or allege that Gwinnett Defendants' conduct violates state law except to generally attack "Gwinnett's ineffective notice procedures" in a brief reference while attacking the envelope's design. [Doc. 1 at ¶ 74].[1]

[1] As noted by the parties in a filing last week, a new rule from the State Election Board may eliminate or substantially change the challenges to the notification process under state law. *See* [Doc. 24, p. 2].

Second, Plaintiffs claim they have been harmed "due to the deficient design of the County's absentee ballot envelope." [Doc. 1 at ¶ 47]. Plaintiffs do not identify exactly how the absentee ballot design is deficient, but list a number of factors about which they are dissatisfied:

> The oath is printed on absentee ballot envelopes in small, approximately 6.5-point font in both English and Spanish. At the top of the envelope, the English and Spanish oaths are on top of each other; but on the bottom, the English and Spanish oaths for assisting electors are on the left and the right side respectively. The envelope's poor design is cramped and difficult for voters to read and understand.[2]

[Doc. 1, ¶ 48]. Apart from a declaratory judgment declaring the ballot design unconstitutional, Plaintiffs are seeking only prospective relief for alleged future harm in forthcoming elections because "it is *anticipated* that Gwinnett County's updated absentee ballot envelope will be substantially similar to the format set out above…" [Doc. 1 at ¶ 50] (emphasis added). Plaintiffs do not explain why they are anticipating a similar ballot nor do they plead any particularized knowledge about the 2020 absentee-ballot design apart from mere speculation that it might look the same or substantially similar to previous iterations. This renders Plaintiffs' claims especially lacking given

[2] Gwinnett County is the only county in Georgia that is required by law to print both English and Spanish voting materials. This requirement creates issues for ballot design that are not present in other Georgia counties.

the recent changes in the language to be included on absentee ballot envelopes under the revised version of O.C.G.A. § 21-2-384(c).

ARGUMENT AND CITATION TO AUTHORITY

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, 677 (2009). While this Court must assume the veracity of well-pleaded factual allegations, it is not required to accept as true legal conclusions when they are "couched as [] factual allegation[s]." *Iqbal*, 556 U.S. at 678-79. A complaint must also be dismissed under Fed. R. Civ. P. 12(b)(1) if it has not alleged a sufficient basis for subject-matter jurisdiction for a federal court. *Stalley v. Orlando Reg'l Healthcare Sys*., 524 F.3d 1229, 1232 (11th Cir. 2008).

Plaintiffs' claims against Gwinnett Defendants rest primarily on their challenge to the design of Gwinnett County's absentee-ballot envelope, [Doc. 1, p. 35], but also reference what Plaintiffs allege are "ineffective notice procedures for [mail-in] absentee ballots," [Doc. 1 at ¶ 74].

I. This Court lacks jurisdiction because it does not involve itself in the minutiae of state election procedures.

Plaintiffs ask this Court to decide whether the U.S. Constitution, which specifically reserves most authority regarding the integrity and efficiency of elections to states, speaks to the design of *absentee-ballot envelopes*. U.S. Const. Art I, § 4, cl. 1; *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see also Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006). "[T]he framers of the Constitution intended the States to keep for themselves, as provided by the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (voters do not have an absolute right to vote in any way they choose).

Plaintiffs' claim against Gwinnett Defendants regarding ballot design is directly contrary to the separation of powers between state and federal governments: "Although federal courts closely scrutinize state laws whose very design infringes on the rights of voters, federal courts will not intervene to *examine the validity of individual ballots or supervise the administrative details of a local election*." *Curry*, 802 F.2d at 1314 (emphasis added); accord *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970) ("Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of

virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law").

Plaintiffs invite this Court to involve itself in tinkering with election machinery to the point that it is reviewing the font-size and design decisions on envelopes sent to voters. This is not a case where the "very integrity of the electoral process" is brought into doubt. *Curry*, 802 F.2d at 1316-17. At the very best, Plaintiffs claim that voters may be subject to a "heightened risk" of ballot rejection if they do not follow instructions. [Doc. 1 at ¶ 75]. Plaintiffs do not allege that the "integrity of the electoral process" is brought into doubt by a font-size choice. Plaintiffs do not like a design that is ultimately required by state and federal law, but they have shown no basis for the Court to involve itself in decisions about ballot design. *Curry*, 802 F.2d at 1316-17.

II. This Court lacks jurisdiction because Plaintiffs do not have standing to bring the claims in their Complaint.

A party invoking federal jurisdiction bears the burden of establishing standing at the commencement of the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 570 n.5 (1992). *See also Johnson v. Bd. of Regents*, 263 F.3d 1234, 1267 (11th Cir. 2001) ("A party's standing to sue is generally measured at the time of the complaint . . . "). "No principle is more

fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

Article III standing requires that each claim "clearly" establish standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 519 (1975)). To do so, Plaintiff must allege sufficient facts to demonstrate a "[1] concrete, particularized, and actual or imminent [harm]; [2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149, 130 S. Ct. 2743, 2752 (2010).

A. Plaintiffs lack standing against Gwinnett Defendants because they have not alleged an injury in fact.

To constitute injury in fact for purposes of standing, a plaintiff must establish that the threatened injury is "certainly impending." *Whitmore v. Arkansas,* 495 U.S. 149 (1990) *citing Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979). A plaintiff cannot rely on "a highly attenuated chain of possibilities" to satisfy the requirement that future injury is "certainly impending." *Clapper v. Amnesty International USA,* 568 U.S. 398, 407 (2013). While the Supreme Court has acknowledged that this standard of imminence may be "concededly a somewhat elastic concept, it cannot be stretched beyond

its purposes, which is to ensure that the alleged injury is not too speculative for Article III purposes." *Lujan,* 504 U.S. at 565, n. 2. Plaintiffs cannot meet these standards and their complaint fails for lack of standing.

Plaintiffs' Complaint does not allege any concrete injury. Instead, they claim they will have to, at some point in the future, divert resources if Gwinnett Defendants are not enjoined from utilizing a similar ballot design as they used in previous elections. *See* [Doc. 1, ¶¶ 20, 22, and 24]: "DPG *will* have to divert resources…"; "DSCC *will* have to divert resources…"; "DCCC *will* have to divert resources…" (emphasis added). But the diversion Plaintiffs allege is only that they will communicate different messages to voters, not that they will be doing something different than their missions of electing Democratic officials. *Id.*

An injury must constitute more than a "setback to the organization's abstract social interests." *Havens Realty v. Coleman*, 455 U.S. 363, 379 (1982). Standing is not established when the alleged harm that befalls an organization is to act consistently with its existing mission. This includes plaintiffs that engage in advocacy efforts. *Int'l Acad. of Oral Med. & Toxicology v. Food & Drug Admin.*, 195 F. Supp. 3d 243, 256 (D. D.C. 2016). Essentially, all Plaintiffs claim here is that they will have to spend money to further their organizational mission in a slightly different way than initially

anticipated. But to have standing, organizational plaintiffs must show that Gwinnett Defendants' allegedly "illegal acts *impaired* the organization's ability to engage in its *own projects* by forcing the organization to *divert resources in response*." *Arcia v. Sec'y of Florida*, 772 F.3d 1335, 1341-1342 (11th Cir. 2014) (emphasis added). The organizational plaintiffs will continue their work to elect Democrats—while they claim to be diverting resources, they are simply making different decisions about spending money in furtherance of their purpose, not diverting funds to a wholly new mission. As the Eleventh Circuit pointed out, a true diversion is from the organization's "own projects," *id*., and merely alleging that the organization will continue to spend the same funds for the same purposes cannot be a diversion of resources for purposes of standing.

Plaintiffs have also not yet diverted any resources in response to a potential future event they are not sure will actually occur, which further demonstrates they have failed to establish injury-in-fact. In *Clapper*, the Supreme Court found that the plaintiffs lacked standing despite (1) having a good-faith, non-paranoid belief that they would be surveilled by the challenged government program; and (2) making financial decisions based on those fears. 495 U.S. at 415-16. After *Clapper*, federal courts may not allow plaintiffs to demonstrate standing by "manufactur[ing] standing merely by

inflicting harm on themselves [by expending resources] based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 416.[3]

As discussed below, Plaintiffs' allegations of a possible future injury with respect to the 2020 elections do not and cannot show any harm traceable to Gwinnett Defendants. Plaintiffs are ultimately engaged in the same, flawed exercise as the plaintiffs in *Clapper*: Plaintiffs allege little more than an unsupported *anticipation* that the absentee ballot will be "substantially similar" to older versions of the absentee ballot they characterize as difficult to read. [Doc. 1 at ¶ 50]. But Gwinnett Defendants have yet to determine the ballot design for the 2020 absentee ballots. Accordingly, any allegation of future harm to Plaintiffs is entirely speculative and improperly predicated only upon Plaintiffs' unsubstantiated fears.

Indeed, viewed in this light, Plaintiffs' speculative claims are precisely the kind that the Supreme Court seeks to avoid adjudicating. "[W]e have repeatedly reiterated that threatened injury must be *certainly impending* to

[3] Many of the Eleventh Circuit's decisions on organizational standing came before *Clapper*, but each identified a traceable harm back to the actions of the named defendant. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353-55 (11th Cir. 2009) (new photo ID law); *Arcia v. Fla. Sec. of State*, 772 F.3d 1335, 1340 (11th Cir. 2014) (new voter list maintenance program); *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1157-58 (11th Cir. 2008) (new voter verification program). Here, Plaintiffs focus on a fear of future design decisions, much more like the plaintiffs in *Clapper*.

constitute injury in fact, and that allegations of possible future injury are not sufficient." *Clapper,* 568 U.S. at 409 (emphasis added). "In sum, [Plaintiffs'] speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to," a ballot design that has yet to be designed. *Id.* at 414.

B. Plaintiffs have not sufficiently alleged traceability or redressability.

Even if they exist, the harm Plaintiffs allege that they claim will cause them to divert resources only occurs if voters return "an absentee ballot without properly completing the signature requirement." [Doc. 1 at ¶ 75]. That type of injury is not traceable to any action by Gwinnett Defendants because it depends on the acts of third parties—voters who make errors in returning their ballots. *See Lewis v. Governor of Ala.*, No. 17-11009, 2019 U.S. App. LEXIS 36857, at *34 (11th Cir. Dec. 13, 2019) (rejecting claims based on lack of redressability and traceability). Even if this Court orders a new ballot-envelope design, voters may still make errors—meaning that Plaintiffs cannot "obtain relief that directly redresses the injury suffered," *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1290 (11th Cir. 2010), and lack standing a result.

III. Plaintiffs have failed to state a claim upon which relief may be granted.

"A local government may be held liable under 42 U.S.C.S. § 1983 only for actions for which it is actually responsible, acts which the local government has officially sanctioned or ordered." *Turquitt v. Jefferson County,* 137 F. 3d 1285, 1287 (11th Cir. 1998). Gwinnett Defendants, the members of the Gwinnett County Board of Registration and Elections, have been sued in this case in their official capacities. In undertaking an analysis of § 1983 liability for local government officials, courts must determine "which governmental actors speak with final authority." *Id.* Put differently, "[t]he challenged action must have been taken pursuant to a policy adopted by the official… *responsible under state law for making policy in that area of the [local government's] business." Id.* at 1287–1288 (emphasis added).

In *Turquitt,* an Alabama plaintiff sought to hold a county liable for her husband's death at the county jail. But under Alabama law, the court noted, "the sheriff has control over the inmates of the jail, the employees of the jail, and the jail itself." *Id.* at 1289. While the court recognized that counties certainly possess duties with respect to the county jails, "none of these duties relates to the daily operation of the jails or to the supervision of inmates." *Id.* Instead, such responsibilities fell to the sheriff. "Where a duty is specifically

placed upon the sheriff, that duty is 'statutorily reserved' for the sheriff, and the county has no liability for the sheriff's failure to perform it." *Id.* at 1290. This situation is analogous to the case at bar.

Although Plaintiffs' Complaint targets Gwinnett Defendants in their official capacities, as distinct from the county itself, it nevertheless attempts to put a duty on Gwinnett Defendants that is committed by law to a different authority. Because the complaint involves duties that are "statutorily reserved" for the State election officials, Gwinnett Defendants have no liability for the alleged failures complained of by Plaintiffs.

A. Plaintiffs' claims regarding a lack of uniformity in absentee ballots are not within the scope of authority of Gwinnett Defendants.

Although the Plaintiffs to do not specifically claim that Gwinnett Defendants are responsible for the varying absentee ballot designs throughout the state, Plaintiffs incorporate this allegation into Count IV against Gwinnett Defendants, so it is briefly addressed here.

Plaintiffs allege that Gwinnett County's absentee ballot notice procedures are "ineffective" [Doc. 1 at ¶ 74], but they do not allege that Gwinnett Defendants have violated Georgia law through their notice procedures. Plaintiffs actually concede that "the law does not define 'prompt' notification, nor does it specify the method" of notification. [Doc. 1 at ¶ 40]. As

a result, the Plaintiffs simply take issue with the fact that "counties inconsistently interpret the promptness of the notice required and employ varying methods of contacting voters." *Id.* But this inconsistency is not the result of any duty that Gwinnett Defendants allegedly have to the Plaintiffs. Accordingly, Gwinnett Defendants cannot be liable to Plaintiffs for the acts it cannot control—such as the decisions of the Georgia legislature and the State Election Board to provide leeway to counties to determine what constitutes "prompt" notification under the statute. *Turquitt*, 137 F.3d at 1292.

B. Gwinnett County's absentee ballot design is the product of the requirements of the State Election Board, the Secretary of State, and the Georgia legislature.

As Plaintiffs point out, Gwinnett Defendants are required "[t]o make and issue such rules, regulations and instructions, *consistent with law,* including the rules and regulations promulgated by the State Election Board, as he or she may deem necessary for the guidance of poll officers, custodians, and electors in primaries and elections." [Doc. 1 at ¶ 28] citing O.C.G.A. § 21-2-70(7) (emphasis added). Plaintiffs also note that the Gwinnett Board is required to "conduct all elections... and to perform such other duties *as may be prescribed by law." Id.*, citing O.C.G.A.. § 21-2-70(13) (emphasis added). In other words, Gwinnett Defendants are limited in their actions with respect to designing the mail-in absentee ballots by what state law requires.

Much of the mail-in absentee ballot design and content requirements are governed by O.C.G.A § 21-2-384, *et seq*. This code section also defines the authority of county level officials in departing from certain aspects of that design. For example, the code provides that "in addition to the mailing envelope addressed to the elector… [the Gwinnett Board] shall provide two envelopes for each official absentee ballot, *of such size and shape as shall be determined by the Secretary of State,* in order to permit the placing of one within the other and both within the mailing envelope." O.C.G.A. § 21-2-384(b) (emphasis added). But unlike the "shall" language of (b), the section on what language must be included on the envelopes only requires that the language be "in substantially the following form." O.C.G.A. § 21-2-384(c).

The portions of the statute that require action by the Secretary of State remove any discretion on the part of Gwinnett Defendants for several aspects of ballot design and content. Indeed, this statutory provision states that Gwinnett Defendants *shall* create a ballot that is a certain size to be determined by the Secretary of State, and includes certain content to be determined either by the statute itself or by other complimentary provisions elsewhere in the code:

> On the back of the larger of the two envelopes to be enclosed within the mailing envelope *shall be printed* the form of oath of the elector and the oath for persons assisting electors, *as provided for* in Code

> Section 21-2-409, and the penalties *provided for* in Code Sections 21-2-568, 21-2-573, 21-2-579, and 21-2-599 for violations of oaths; and on the face of such envelope *shall be printed* the name and address of the board of registrars or absentee ballot clerk.

Id. (emphasis added). Thus, Gwinnett Defendants' discretion about the size, design, and content of the absentee ballot is limited. But Gwinnett Defendants are confronted with an additional challenge that none of Georgia's other 158 counties face: specific dual-language requirements from the federal government.

As part of implementing regulations to the Voting Rights Act, the Bureau of the Census Director published a notice in the Federal Register requiring Gwinnett County, as of December 5, 2016, to "provide the minority language assistance prescribed in Section 203 of the [Voting Rights] Act." 81 Fed. Reg. 233, 87533. Section 203 requires affected jurisdictions to provide certain voting information, including ballots, "in the language of the applicable language minority group as well as in the English language." 52 U.S.C. § 10303(f)(4). In the case of Gwinnett County, that requirement results in the necessity for Gwinnett Defendants to provide voting materials, including ballots, in both English and Spanish.

These overlapping federal and state requirements illustrate exactly how Gwinnett Defendants find themselves between the proverbial rock and a

hard place. On the one hand, absentee-ballot envelope sizes and content are largely dictated by state law and the decisions of the Secretary of State. For the vast majority of counties, the Secretary can reasonably determine the appropriate size because the content is reasonably foreseeable. But because of the unique requirements of federal law mandating both English and Spanish on election-related material, Gwinnett Defendants are forced to include twice as much information on the same ballot as each of the 158 other counties using only English-language instructions. The result is the absentee ballot design that forms the basis of Plaintiffs' claims against Gwinnett Defendants.

But Gwinnett Defendants are not the proper party to which Plaintiffs may direct their complaint. As the Eleventh Circuit stated in *Turquitt,* where the duty is "statutorily committed" not to the county, but to another authority, "the county has no liability for the [authority's] failure to perform it." *Turquitt,* 137 F. 3d at 1290.

IV. This Court lacks jurisdiction because Plaintiffs' claim against Gwinnett Defendants is not ripe.

Plaintiffs' Complaint seeks two kinds of relief against Gwinnett Defendants: (1) a declaration that the absentee ballot envelope design violates the U.S. Constitution, and (2) an injunction preventing Gwinnett Defendants from "creating, preparing, and distributing absentee ballot

envelopes with a confusing, illegible design." [Doc. 1, p. 38]. But because Plaintiffs can only speculate about what the newly designed envelope will look like for 2020 elections, these claims are not yet ripe for review by this Court:

> The ripeness doctrine prevents the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. . . . To determine whether a claim is ripe [a court] must evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1315 (11th Cir. 2000). In order to review these two prongs, the Supreme Court requires consideration of three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S. Ct. 1665, 1670 (1998); *see also Pittman v. Cole*, 267 F.3d 1269, 1278 (11th Cir. 2001) (applying same factors).

Each of these factors favors a finding that Plaintiffs' sole claim against Gwinnett Defendants is unripe. A delayed review would not cause hardship to Plaintiffs because their claims are limited to the 2020 elections. [Doc. 1, p.

38]. There is still sufficient time before the 2020 elections to adequately incorporate all the required information in a newly formatted ballot in compliance with state and federal law, especially given the fact that the rollout of a new voting system is underway. Any contention that the absentee ballot will be in the same format as prior elections is unsubstantiated and purely speculative, and thus does not resolve the ripeness issue fatal to Plaintiffs' claim.

The second and third factors also favor a finding that Plaintiffs' claim is unripe. Gwinnett County has not yet developed its 2020 absentee ballot form, but will do so in early 2020. This Court's involvement in that process would prevent counties and the state election officials from engaging in a collaborative process on ballot design inherently entrusted to them. In contrast, a review by this Court of the absentee ballot envelope for 2020 after it is actually developed would be far more beneficial, because Plaintiffs may conclude that there is no further need for litigation and any required relief could be specifically targeted. This is especially true because Plaintiffs' claim currently "require[s] 'speculation about contingent future events'"—the actual design and promulgation of the absentee ballot form. *Pittman*, 267 F.3d at 1278 (*quoting Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995)).

Plaintiffs' claim is not yet ripe and this Court should dismiss their sole claim. *Id*. at 1282.

CONCLUSION

Regarding Gwinnett Defendants, Plaintiffs ask this Court to make decisions about the font size and design of an envelope sent to voters—exactly the kinds of decisions that are beyond the scope of federal-court jurisdiction. But even if this case was properly before this Court, Plaintiffs have not sufficiently pleaded standing, have not stated a claim against Gwinnett Defendants, and bring claims that are not yet ripe. This Court lacks jurisdiction to hear the claims against Gwinnett Defendants and it should dismiss Plaintiffs' claims.

Respectfully submitted this 23rd day of December, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing GWINNETT DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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