

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

THE NEW GEORGIA PROJECT,)
BLACK VOTERS MATTER FUND,)
and RISE, INC.,)

Plaintiffs,)

v.)

BRAD RAFFENSPERGER, in his official)
capacity as the Georgia Secretary of State;)
REBECCA SULLIVAN, in her official)
capacity as the Vice Chair of the Georgia)
State Election Board; DAVID WORLEY,)
in his official capacity as a member of the)
Georgia State Election Board;)
MATTHEW MASHBURN, in his official)
capacity as a member of the Georgia State)
Election Board; and ANH LE, in her)
official capacity as a member of the)
Georgia State Election Board,)
Defendants.)

CIVIL ACTION FILE NO.
1:21-CV-01229-JPB

**BRIEF IN SUPPORT OF DEFENDANT, SOLICITOR GENERAL
GAMMAGE’S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P.
12(b)(1)**

COMES NOW Defendant Keith Gammage (“Defendant Gammage”), by and through undersigned counsel and in his official capacities, and files this Brief in support of his Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) and show this Honorable Court as follows:

INTRODUCTION

Plaintiffs allege that SB 202, signed into law on March 25, 2021, creates unconstitutional barriers that will make it harder for Georgians to vote, particularly the State's minority, young, poor, and disabled citizens. [Doc. 39, ¶ 4]. Plaintiffs allege that SB 202 will unconstitutionally infringe on the right to vote by placing an undue burden on the right to vote (count I), intentionally discriminating on the basis of race (count II), violating the rights to freedom of political association and expression (count III), violating the rights to freedom of speech and expression (count IV), and creating an immaterial voting requirement (count V). [Doc. 39, ¶¶ 155-197]. Plaintiffs bring Counts I, II, and III of the Complaint against all Defendants, and Count IV against Defendants Gammage and Gregory W. Edwards. *Id.* Plaintiffs bring Count V against all Defendants except for Defendants Gammage and Edwards. *Id.* Though Defendant Gammage is named in Counts I-III along with the other Defendants, the only allegations against him specifically concern the hypothetical enforcement of SB 202's provision prohibiting individuals from giving food or drink to those waiting in line to vote, which Plaintiffs allege serves no legitimate purpose other than to maximize the burdens of voting in person. [Doc. 39, ¶¶ 36, 161].

Even when viewing this pleading in the light most favorable to Plaintiffs, and

assuming that all factual allegations are true, Defendant Gammage should be dismissed because Plaintiffs have failed to establish that a ripe case and controversy exists against Defendant Gammage.

ALLEGATIONS OF FACT CONTAINED IN PLAINTIFFS' COMPLAINT

In the Complaint, Plaintiffs describe the events of the 2020 general election and January, 2021 U.S. Senate runoffs, including the record turnout and multiple recounts and audits. [DOC. 39, ¶¶ 1, 2]. Plaintiffs allege that the General Assembly intentionally passed SB 202 to undermine Georgians' ability to vote, particularly the State's minority, young, poor, and disabled citizens. [DOC. 39, ¶ 4]. One provision of SB 202 that Plaintiffs allege will undermine Georgians' right to vote is the provision that prohibits any non-poll worker from giving food or water to voters waiting in line at the polls. [DOC. 39, ¶ 4]. The Complaint does not, however, allege that Defendant Gammage has made any public statement or private commitment regarding whether he will exercise his discretion to prosecute any alleged violations of that provision, nor does it allege that the Plaintiffs have a credible fear that he will do so.

**STANDARD FOR MOTION TO DISMISS FOR LACK OF STANDING
PURSUANT TO FED. R. CIV. P. 12(b)(1)**

In order to bring suit in federal court, a plaintiff must show that a case or

controversy exists. U.S. Const. art. III, § 2. If no case or controversy exists, the plaintiff does not have standing, and the defendant may move to dismiss the complaint for lack of subject matter jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). “The Supreme Court has held that standing contains three elements: (1) an actual or imminent injury-in-fact; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by the court.” *Id.* at 560-1. The Supreme Court has repeatedly held that “threatened injury must be certainly impending to constitute injury in fact,” and that “[a]llegations of possible future injury” are not sufficient. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

ARGUMENT AND CITATION TO AUTHORITY

As noted above, in order for Plaintiffs to have standing, they must show that their injury-in-fact is at least imminent. While the Plaintiffs do not have to subject themselves to prosecution to challenge the constitutionality of a criminal statute, they do have to show that the fear of such a prosecution is more than speculative. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1252 (11th Cir. 2012). “This court has held that a risk of prosecution is sufficient if the plaintiff alleges (1) that an actual threat of prosecution was made, (2) that prosecution is likely, or (3) that a credible threat of prosecution exists based on the circumstances.” *Id.* “Although

imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending.” *Clapper*, 568 U.S. at 409 (internal quotations omitted).

The 11th Circuit has previously found that a plaintiff demonstrated a credible threat of prosecution where the plaintiff provided an affidavit averring that the plaintiff’s president called the government official to inquire about the enforcement of a provision, the government official explained that the provision would be enforced and detailed the penalties for breaching the provision, and that the organization changed its behavior for fear of prosecution. *Am. Charities for Reasonable Fundraising Regul., Inc. v. Pinellas Cty.*, 221 F.3d 1211, 1214 (11th Cir. 2000). In contrast, the Supreme Court dismissed a complaint for lack of standing where the plaintiffs “did not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible.” *Younger v. Harris*, 401 U.S. 37, 42 (1971).

Here, Plaintiffs have made no showing that Defendant Gammage has threatened to prosecute anyone for violating the SB 202 provision prohibiting

individuals from delivering food or water to voters waiting in line.¹ Defendant Gammage has made no such public statement, nor have Plaintiffs alleged that they contacted him regarding the issue. Throughout his tenure as Solicitor General, Defendant Gammage has diligently and effectively prosecuted violations of the laws of the State of Georgia and Fulton County. While Defendant Gammage is committed to fulfilling his oath of office, as Solicitor General he must determine how best to use the Office of the Solicitor General's finite resources and best protect the health and safety of the citizens of Fulton County. Further, "in our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Prosecutors are given discretion over which violations to prosecute in part because of those limited resources, and in part to reflect the wishes of the communities that they serve. While there may be solicitors in other counties who have threatened to prosecute violations of the food and water provision of SB 202, at this juncture, whether Defendant Gammage will

¹ There have been no elections in Fulton County since Governor Kemp signed SB 202 into law; consequently, no one has been actually arrested or prosecuted for distributing food or water to voters waiting in line in violation of SB 202.

dedicate any of those resources to prosecuting such violations is merely speculative. Thus, whether Defendant Gammage should be enjoined from enforcing the provisions of SB 202 is not yet ripe, and Defendant Gammage should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed in its entirety and Defendant's Motion to Dismiss GRANTED.

Respectfully submitted, this 17th day of June, 2021.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this the 17th day of June, 2021, the undersigned counsel presented this document in Times New Roman, 14 point type in accordance with L.R. 5.1(C) and filed a copy with the Clerk of Court using the CM/ECF system which will provide email notification to all counsel of record. I further certify that I served a copy of the foregoing **BRIEF IN SUPPORT OF DEFENDANT KEITH**

GAMMAGE'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P.

12(b)(1) with the Clerk of Court using the CM/ECF system, which will provide e-mail notification to the following attorneys of record:

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