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

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity of the Secretary of State for the State of Georgia, *et al.*, Defendants. REPUBLICAN NATIONAL COMMITTEE, et al. Intervenor-Defendants	)	Civil Action Case No. 1:21-cv-1259-JPB

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO COUNTY DEFENDANTS' MOTION TO DISMISS

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Plaintiffs file this memorandum in response to the motion to dismiss (the "Motion," ECF No. 52) filed on July 12, 2021 by the Chairmen and Members of the Fulton County Registration and Elections Board, the Gwinnet County Board of Registration and Elections, and the Cobb County Board of Elections and Registrations (together, "County Defendants" or "Defendants").

PRELIMINARY STATEMENT

After voters of color turned out in record numbers in the last election cycle, the State of Georgia reacted in extreme fashion—by immediately trying to prevent such voters from voting in the future. Specifically, the Georgia General Assembly passed SB 202, an omnibus voter suppression bill packed with unlawful and unconstitutional restrictions intended to suppress the vote of Black voters and other voters of color in order to maintain the tenuous hold of the Republican Party over Georgia politics. Through their First Amended Complaint ("FAC"), Plaintiffs challenge eleven unlawful and unconstitutional provisions of SB 202 pursuant to the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, Section 2 of the Voting Rights Act, and the Civil Rights Act.

County Defendants are tasked with enforcing and implementing the challenged provisions of SB 202. As detailed further in Plaintiff's FAC the County Defendants are not only generally responsible for administering elections in their

respective counties, but they are also specifically tasked by SB 202 with carrying out many of the provisions challenged by Plaintiffs. (*See* FAC. ¶¶ 74–79.)

While County Defendants now challenge Plaintiffs' standing to bring claims against them to enjoin their enforcement of the challenged provisions of SB 202 and for a declaratory judgment that those provisions are illegal and unconstitutional, these arguments misinterpret or ignore binding case law and the well-pled allegations in the FAC.

First, County Defendants argue that Plaintiffs have not alleged an injury-in-fact based on the "diversion of resources" theory. This argument fails on its face because County Defendants fail to contest the existence of Plaintiff's direct organizational injuries and associational injuries, either of which is sufficient standing alone to sustain Plaintiffs' standing. And even were this not the case, County Defendants' challenge to Plaintiffs' "diversion of resources" injuries asks the Court to ignore directly on-point Eleventh Circuit case law and to instead create a novel and illogical test. The Court should not accept this invitation to disregard binding law.

Second, County Defendants argue that Plaintiffs fail to meet the "traceability" prong of standing because County Defendants did not pass SB 202. But the question of who passed the law is irrelevant to traceability—instead,

Plaintiffs' injuries are traceable to officials who enforce a challenged provision. As the FAC alleges, County Defendants are responsible for enforcing certain of the challenged provisions of SB 202.

Finally, County Defendants argue that they cannot redress Plaintiffs' injuries because Plaintiffs did not name as defendants the members of every county election board in Georgia. However, standing does not require defendants to be able to redress the entirety of a plaintiffs' injuries—instead, as the Eleventh Circuit has repeatedly held, all that is required is that defendants are able to redress a portion of the injuries. As an injunction against County Defendants' enforcement of SB 202 would indisputably prevent injury to Plaintiffs' members residing in Cobb, Fulton, and Gwinnett counties and to Plaintiffs themselves based on their activities in those counties, the redressability prong of standing is satisfied here.

Ultimately, many different officials are responsible for implementing and enforcing SB 202. Because each of the defendants named in this suit, including County Defendants, is included in that group of officials, Plaintiffs' inclusion of County Defendants is permissible and the Court should deny County Defendants' motion to dismiss.

LEGAL STANDARD

For purposes of a Rule 12(b)(6) motion, the complaint is adequately pled if it includes sufficient factual matter, which the Court must take as true and "draw all reasonable inferences in the plaintiff's favor," *PBT Real Estate, LLC v. Town of Palm Beach*, 988 F.3d 1274, 1286 (11th Cir. 2021), to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). These same standards apply to a facial motion under Rule 12(b)(1). *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232–33 (11th Cir. 2008); *see, e.g.*, *Rose v. Raffensperger*, No. 1:20-CV-02921-SDG, 2021 WL 39578, at *6–7 (N.D. Ga. Jan. 5, 2021)).[1]

ARGUMENT

I. PLAINTIFFS HAVE STANDING

Article III standing requires (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Where injunctive and declaratory relief are sought, only one plaintiff need

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1. While County Defendants set forth the standard for a motion to dismiss pursuant to Rule 12(b)(6), they do not argue that the FAC should be dismissed for failure to state a claim and have therefore waived any such argument. (Motion 4).

demonstrate standing. *Wilding v. DNC Services Corp.*, 941 F.3d 1116, 1124 (11th Cir. 2019), *cert. denied,* 140 S. Ct. 2828 (2020).

A. Plaintiffs Have Suffered an Injury-in-Fact.

An organization may establish an injury-in-fact sufficient for standing based on either injuries to itself (i.e., organizational standing) or to its members (i.e., associational standing). *See, e.g.*, *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341–42 (11th Cir. 2014). To establish injury-in-fact at the pleading stage, a plaintiff need only "generally allege a redressable injury." *Miccosukee Tribe of Indians of Fla. v. Southern Everglades Restoration Alliance*, 304 F.3d 1076, 1081 (11th Cir. 2002).[2]

1. Plaintiffs Allege Injuries-in-Fact Sufficient to Establish Organizational Standing.

Organizational plaintiffs can establish standing by showing a defendant's conduct caused or threaten to cause "concrete and demonstrable injury" to their

2. Plaintiffs George State Conference of the NAACP (GA NAACP); Georgia Coalition for the People's Agenda (GCPA), League of Women Voters of Georgia (LEAGUE), COMMON CAUSE, Galeo Latino Community Development Fund (GALEO LCF), and Urban League of Greater Atlanta (ULGA) allege organizational standing due to the injuries caused by the challenged provisions of SB 202 to their respective organizations. GA NAACP, LEAGUE, and COMMON CAUSE allege both organizational and associational standing due to the injuries caused by SB 202 to the organizations and their members. Plaintiff Lower Muscogee Creek Tribe ("TRIBE") alleges associational standing due to the injuries caused to its members by SB 202.

activities by, for example, leading to the diversion of resources from their other activities. *Arcia*, 772 F. 3d at 1342.

The FAC describes in detail how organizational plaintiffs will have to alter their activities and divert resources due to SB 202: GA NAACP (FAC ¶¶ 13-27); GCPA (FAC ¶¶ 28-40); LEAGUE (FAC ¶¶ 41-46); GALEO LCDF (FAC ¶¶ 47-52); COMMON CAUSE (FAC ¶¶ 53-58); and ULGA (FAC ¶¶ 61-70). These allegations establish injury-in-fact under binding Eleventh Circuit precedent. *CommonCause/Ga. v. Billups*, 554 F.3d 1340, 1350–51 (11th Cir. 2009) (diversion of resources from other activities to educate voters about voter ID law and help them obtain IDs); *Fla. State Conj. of the NAACP v. Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (diversion of resources established where added cost is slight and not estimated; only minimal showing of injury is required); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1267 (N.D. Ga. 2019) ("diversion of resources from general voting initiatives or other missions to programs designed to address the impact of the specific conduct" is sufficient); *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1258 (N.D. Ga. 2018) (finding organizational standing pursuant to similar allegations).

Ignoring this precedent, County Defendants argue that the diversion of resources must be to the organization's work *outside* its core mission, citing

Common Cause Indiana v. Lawson, 937 F.3d 944 (7th Cir. 2019). But actually. *Lawson* flatly rejected this novel proposition. *See Lawson*, 937 F.3d at 954–55 (noting it is "a hard time imagining . . . why it is that an organization would undertake any additional work if that work had nothing to do with its mission"). Nor does *Lawson* stand for some new standard of demonstrating "a [real] disruption" in the organizations' operations. (Mot. 4). The court in *Lawson* was merely emphasizing that standing cannot be based on resources expended to do what the organization was already doing. *Lawson*, 937 F.3d at 955. Here, as in *Lawson*, the FAC is replete with allegations that SB 202 will cause them to change their activities and use resources they would not otherwise expend.[3]

Additionally, Plaintiff organizations that participate in activities now prohibited by SB 202, including GA NAACP, GCPA, LEAGUE, COMMON CAUSE and ULGA, also suffer direct injury due to the law's chilling effect on their expressive and associational activities because of the threat of criminal penalties.

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[3] County Defendants also rely on the non-binding decision in *Ga. Ass'n of Latino Elected Officials, Inc. v. Gwinnett Cty. Bd. Of Reg. & Elections*, 499 F. Supp. 3d 1231 (N.D. Ga. 2020) ("*GALEO*"), for this argument. Even if *GALEO* could be construed as so holding that the diversion of resources must be outside of the organization's core interests (as opposed to the equally wrong ruling that plaintiffs had not adequately pled standing under settled theories), it would be in direct conflict with the aforementioned binding precedent. *GALEO* is currently on appeal to the Eleventh Circuit. Docket No. 20-14540 (11th Cir.).

Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992); *see also Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017) (en banc); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (finding threat of enforcement can cause an injury in the form of "self-censorship; a harm that can be realized even without an actual prosecution"). Here, the FAC alleges SB 202 includes criminal penalties and fines for non-compliance, threatening Plaintiffs with direct injury for handling completed absentee ballot applications, sending more than one absentee application to voters, and line-relief activities, all of which these plaintiffs allege they plan to do. FAC ¶¶133-134, 166-167, 179. *See Susan B. Anthony List v. Drieihaus,* 537 U.S. 149, 161 (2014) (Plaintiffs do not have to wait to be arrested to challenge statute prohibiting activities they intend to undertake).

In this context, organizational plaintiffs' injury—either by way of diversion of resources or direct—need not be immediate, but only "reasonably anticipated." *Billups*, *supra* at 1350. Where a new law mandates changes to voting procedures prior to the next scheduled election and plaintiffs allege that they intend to or will have to divert resources to address those changes, the alleged injuries are not speculative. *Id.* at 1350-51. As in *Browning*, the injuries caused by SB 202 are not uncertain—SB 202 is in effect—and its requirements and prohibitions do not depend upon speculation as to contingency upon contingency that underlay the decision in

Clapper v. Amnesty International USA, 568 U.S. 398, 410 (2013), and the cases following it upon which Defendants rely. This is so as to all of the challenged provisions of SB 202, including those dealing with increased opportunity to the making of voter challenges and the State Board of Elections takeover of "dysfunctional" county boards insofar as they are part of Plaintiffs' intentional discrimination claims, FAC ¶¶163-165, because "[a]n official action . . . taken for the purpose of discriminating . . . on account of . . . race has no legitimacy at all." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975).

Here, the FAC adequately alleges injuries sufficient to sustain organizational standing based on both (i) the "diversion of resources" theory, discussed in more detail below, and (ii) direct injury to the organizational Plaintiffs. However, County Defendants challenge only Plaintiffs' allegations of organizational standing based on the diversion of resources theory and do not challenge Plaintiffs' standing based on their direct organizational injuries. (Mot. 8–9). County Defendants' Motion also fails because its challenge to Plaintiffs' injuries arising from the diversion of their resources is based on incorrect interpretations of the law and ignores large swaths of the allegations in the FAC.

2. Plaintiffs Also Adequately Plead Associational Standing.

A plaintiff has associational standing when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adv. Com'n*, 432 U.S. 333, 343 (1977). "[O]rganizational plaintiffs need not establish that all of their members are in danger of suffering an injury." *Arcia*, 772 F.3d at 1342. "Rather, the rule in this Circuit is that organizational plaintiffs need only establish that 'at least one member faces a realistic danger' of suffering an injury." *Id.*

The allegations in the FAC are more than sufficient to survive a motion to dismiss regarding associational injuries. *See, e.g.*, *Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists, Inc.*, 393 F. Supp. 2d 1362, 1372–75 (M.D. Ga. 2005) (finding allegations regarding associational standing sufficient on their face and denying motion to dismiss). Moreover, County Defendants do not advance any allegation contesting Plaintiffs' associational standing. Accordingly, the motion to dismiss should be denied.

B. Plaintiffs' Injuries Are Traceable to Defendants.

"To satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendants, and not the result of the independent action of some third party not before the court.'" *Jacobson v. Fla. Sec. of State*, 974 F.3d 1236, 1253 (11th Cir. 2020) (quoting *Lujan*, 504 U.S. at 560–61). The FAC sufficiently alleges traceability as to each Defendant with respect to each challenged provision of SB 202.

For example, County Defendants do not—and could not—seriously deny that they are responsible for enforcing contested provisions of SB 202. As the FAC sets forth in detail, County Defendants' responsibilities include implementing those illegal and unconstitutional provisions while overseeing the conduct of the primary and general elections, voter registration, and absentee voting. (FAC ¶¶ 74–79.) Moreover, SB 202 specifically tasks county election officials with numerous responsibilities, including enforcing the new identification requirements for voting by absentee ballot, issuing absentee ballots during the compressed distribution periods, and holding hearings on voter registration challenges. SB 202 §§ 15, 16, 25.

County Defendants instead contend that (i) they are not responsible for passing SB 202 and (ii) Plaintiffs could have named more Georgia counties as

defendants. (Mot. 10–12.) While both of these points are undeniably true, neither is relevant to the question of standing. Because County Defendants are responsible for enforcing the challenged provisions of SB 202, Plaintiffs' injuries arising from those provisions are traceable to County Defendants. *See, e.g.*, *Jacobson*, 974 F.3d at 1253 (plaintiffs' injuries are "traceable only to" the officials who would actually enforce the challenged law). And while standing requires a plaintiff's injuries to be traceable to the defendants, those defendants do not have to be solely responsible for the plaintiff's injuries—instead, 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 [defendant] caused *none* of [plaintiff's] damages") (emphasis in original; *see also Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (plaintiffs have standing if defendants are "at least in part" responsible for plaintiffs' alleged injuries).

County Defendants' motion to dismiss based on the traceability element of standing must therefore be denied.

II. PLAINTIFFS' INJURIES WILL BE REDRESSED BY THE REQUESTED INJUNCTION AGAINST COUNTY DEFENDANTS.

In order to establish Article III standing, a plaintiff "need not demonstrate anything 'more than . . . a substantial likelihood' of redressability.'" *Wilding*, 941

F.3d at 1126–27 (quoting *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 79 (1978)). As County Defendants are responsible for implementing and enforcing the challenged provisions of SB 202 in counties where Plaintiffs operate and where Plaintiffs' members reside, Plaintiffs easily satisfy that standard here. (*See, e.g.*, FAC ¶¶ 15, 29, 30, 47–51, 55, 63–64 (alleging details regarding Plaintiffs' memberships and the locations of their work)); *see also Browning*, 522 F.3d at 1159 n.9 (finding that an injunction would redress injury from diversion of resources by "freeing up the organizations"). For example, Plaintiffs GALEO Latino Community Development Fund, Inc. is headquartered, and focuses its activities, in Gwinnett County. (FAC ¶ 48.)

While County Defendants argue that the redressability prong of standing is not satisfied here because an injunction against them will not also serve to enjoin other Georgia counties, Article III standing does not require that defendants be able to fully redress a plaintiff's injury. Instead, as both the Supreme Court and Eleventh Circuit have held, "the ability to effectuate a partial remedy satisfies the redressability requirement" of standing. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (internal quotation marks omitted); *see also Moody v. Holman*, 887 F.3d 1281, 1287 (11th Cir. 2018) ("Article III also does not demand that the redress sought by a plaintiff be complete."); *I.L. v. Alabama*, 739 F.3d 1273, 1282

(11th Cir. 2014) ("We therefore conclude that removing the assessment ratios would likely redress (at least in part) the plaintiffs' injury, and that is enough for standing purposes."); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310 (11th Cir. 2001) (finding the fact that some, but not all, government officials responsible for enforcement of the statute at issue could be enjoined sufficient to confer standing, as a "partial remedy would be sufficient for redressability"). An injunction against County Defendants would indisputably bar the enforcement of the contested portions of SB 202 in Fulton, Gwinnett, and Cobb counties, and thereby prevent organizational injuries to Plaintiffs arising from their work in those counties as well as injury to Plaintiffs' members that reside in those counties.

County Defendants' additional assertions that the Amended Complaint should be dismissed because their inclusion is "arbitrary" and gives rise to a risk of inconsistent application are irrelevant to the question of Plaintiffs' Article III standing.[4] *See, e.g.*, *Billups*, 554 F.3d at 1349 (listing the three elements of Article III standing).

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4. Even if Plaintiffs were obligated to demonstrate that there was no risk of inconsistent application in order to establish standing—which they are not—there is no such risk here because Plaintiffs are also suing the Secretary of State of Georgia and members of the Georgia State Election Board and seeking a declaration that the challenged provisions of SB 202 are illegal and unconstitutional. *See, e.g.*, *Made in the USA Found.*, 242 F.3d at 1309–10

As Plaintiffs' injuries will be fairly redressed by an injunction against County Defendants, the motion to dismiss fails.

CONCLUSION

For the foregoing reasons, County Defendants' motion to dismiss should be denied in its entirety.

Respectfully submitted,

Dated: July 26, 2021

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("[W]e may assume it is substantially likely that . . . officials would abide by an [order of] the District Court, even though they would not be directly bound by such a determination.").

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS has been prepared in Times New Roman 14, a font and type selection approved by the Court in L.R. 5.1(C), and that I provided notice and a copy of the foregoing using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

Respectfully submitted this 26th day of July, 2021.

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