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

VOTER PARTICIPATION CENTER, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.*,

Defendants,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

Civil Action No.: 1:21-CV-1390-JPB

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING STANDING

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INTRODUCTION

As the Court correctly recognized in its July 19 order, Plaintiffs failed to demonstrate at trial "who enforces the Prefilling Provision since it is punishable by a misdemeanor." [Doc. 252 at 4] ("Order"). That same failure permeates Plaintiffs' supplemental brief. [Doc. 253] ("Pls.' Br."). Indeed, Plaintiffs fail to identify anything in the trial record showing that State Defendants play any role in Plaintiffs' potentially facing misdemeanor charges for violating the Prefilling Prohibition. That is not surprising, as State Defendants have no such role. Instead, misdemeanor charges for violating the Prefilling Prohibition are brought by either a district attorney or a county solicitor general. Because Plaintiffs opted not to name any such officials as defendants, Eleventh Circuit precedent confirms that Plaintiffs would still face the significant threat of injury even if the Court were to enjoin the State Election Board ("SEB") and the Secretary of State ("SOS") from enforcing the Prefilling Prohibition.

Rejecting this binding authority, Plaintiffs propose an incorrect test, under which a party has standing to enjoin enforcement of a statute provided the party names at least one official who has some role in *investigating* violations of the statute. Of course, that is not the law, and for good reason. Such a standard would strip Article III standing of all importance.

As this Court has correctly recognized, the law in this Circuit is that a plaintiff fails to establish standing when a court order would only speculatively redress their alleged harm because not all required entities are joined as defendants. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253 (11th Cir. 2020). That is fatal to Plaintiffs' standing, as the trial record provides no basis for the Court to conclude that it could issue any order enjoining all officials whose actions would cause Plaintiffs' alleged injuries.

ARGUMENT

I. The Court's Order Correctly Captured the Eleventh Circuit's Requirements for Traceability and Redressability, and the Court Should Reject Plaintiffs' Mischaracterization of that Authority.

As the Order correctly explained, the trial record lacks evidence demonstrating two key requirements for Article III standing—traceability and redressability. Order at 3–4. And, as the Court further noted, such deficiencies are fatal to standing. *Id.*; *accord Jacobson*, 974 F.3d at 1245.

1. On these points, the Order faithfully follows binding Eleventh Circuit precedent. As to traceability, the Eleventh Circuit explains that this "causation requirement" requires that the injury be "fairly traceable to the challenged action *of the defendant*, and not the result of the independent action of some third party not before the court." *Jacobson*, 974 F.3d at 1253 (emphasis added and quotation marks omitted). As this Court recently confirmed in a similar case brought against the SEB, a plaintiff cannot satisfy this requirement

merely by "rely[ing] on general election authority" when third parties are tasked by state law with taking actions that allegedly harm plaintiffs. Order at 8–9, *Int'l All. of Theater Stage Emps., Loc. 927 v. Fervier*, No. 1:23-cv-04929-JPB (N.D. Ga. June 13, 2024), Doc. 97 ("*IATSE* Order") (citing *Jacobson*, 974 F.3d at 1253–54).

The same is true of redressability. It must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" and that "other state actors, who aren't parties to the litigation" would not "remain free and clear of any judgment and thus free to engage in the conduct that the plaintiffs say injures them[.]" *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201, 1205 (11th Cir. 2021) (cleaned up). Thus, when all named defendants together lack complete enforcement authority, no injunctive relief (preliminary or permanent) is available. *See Lewis v. Governor of Ala.*, 944 F.3d 1287, 1300–02 (11th Cir. 2019) (en banc). That is because, if non-parties may continue to implement the challenged provisions despite an injunction, plaintiffs have failed to establish standing as they can still "be harmed in the same manner whether [defendants] are enjoined or not." *City of South Miami v. Governor of Fla.*, 65 F.4th 631, 645 (11th Cir. 2023).

That is particularly true when defendants are state officials. In that circumstance, the Eleventh Circuit requires a record demonstrating "that the official has the authority to enforce the particular provision ... such that an

injunction prohibiting enforcement would be effectual." *Support Working Animals*, 8 F.4th at 1201. And, as this Court recently noted, non-party government officials who are not bound by a court order "remain lawfully *required* to [fulfill their statutory tasks] as prescribed by Georgia law 'unless and until they are made parties to a judicial proceeding that determines otherwise.'" *IATSE* Order at 14 (emphasis added) (citing *Jacobson*, 974 F.3d at 1254).

For example, the Eleventh Circuit held that plaintiffs in *Support Working Animals* failed to establish standing where nonparties held enforcement power but the Attorney General, the sole remaining defendant, lacked express statutory enforcement authority. 8 F.4th at 1203. In that case, an order declaring the challenged law unconstitutional would not redress the alleged harms because it "would bind only [the Attorney General], and not other parties not before [the] Court." *Id.* at 1205. Thus, redressability was "'highly speculative' at best and non-existent at worst." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). Rather, the court held it lacked jurisdiction and identified the plaintiffs' "real problem" as the challenged law "itself—its existence—and the economic consequences that its passage has visited or will visit on their businesses." *Id.* at 1203.

2. In their supplemental brief, Plaintiffs attempt to distort this binding precedent. For one, Plaintiffs mistakenly claim that standing only "requires …

that a state defendant have '*some* connection with [the] enforcement of the provision at issue.'" Pls.' Br. at 3 (emphasis added by Plaintiffs) (quoting *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998)).[1] But Plaintiffs significantly misread *Socialist Workers Party*. In the portion of the opinion Plaintiffs cite, the Eleventh Circuit held only that the plaintiffs' alleged injury was not traceable to county election supervisor defendants who lacked any statutory enforcement authority. 145 F.3d at 1248. That obviously has no bearing here, where local prosecutors have significant enforcement authority for the Prefilling Prohibition. But Plaintiffs also ignore the more relevant portion of *Socialist Workers Party*, where the Eleventh Circuit explained why the plaintiffs in that case had standing to sue the Florida Secretary of State:

> There can also be no doubt that the required nexus between the challenged conduct and the Secretary of State exists; the threatened injury, removal of minor party status with the state of Florida, stems directly from the challenged conduct, the Secretary of State's attempted enforcement of the bonding requirement.

145 F.3d at 1247. Indeed, the dispute in that case arose when the Florida Secretary of State threatened plaintiffs with enforcement of the challenged

[1] The "'some connection'" standard relates to who is "the proper defendant under *Ex parte Young*," not "Article III standing." *Jacobson*, 974 F.3d at 1256 (first quotation quoting *Ex parte Young,* 209 U.S. 123, 157 (1908)). In contrast, Article III "requires that the plaintiff's injury be 'fairly traceable' to the defendant's actions and redressable by relief against *that* defendant." *Id.* (citing *Lewis*, 944 F.3d at 1298, 1301). Plaintiffs therefore "erred by treating" this standard "as if it addressed—let alone resolved—the standing issues in this suit." *Id.*

provision, which required political parties to file a bond. *Id.* at 1242. In the face of such continued enforcement threats, the Eleventh Circuit easily concluded that the plaintiffs had standing to sue the Florida Secretary of State. *Id.* at 1247. But the record here includes nothing close to such a connection between State Defendants and any enforcement action against Plaintiffs. And this Court, in another case, has implicitly rejected Plaintiffs' position in ruling that a plaintiff lacks standing when the "statute puts the duty" on a nonparty and plaintiffs make no allegation that the defendants "control[] the [nonparties]." *IATSE* Order at 10 (citing *Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741, 2020 WL 7488181, at *2–3 (11th Cir. Dec. 21, 2020)).

Plaintiffs fare no better with the other cases on which they rely. Pls.' Br. at 3, 11–12. For instance, Plaintiffs cite the Tenth Circuit's decision in *303 Creative*, which was later reversed by the Supreme Court, for the proposition that "limited enforcement authority" is sufficient for traceability. *Id.* at 3 (cleaned up). But there, the plaintiff established traceability and redressability by suing *all* state entities necessary to enforce the Colorado anti-discrimination law, which Plaintiffs indisputably failed to do here. *Compare 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1168–69 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023). The same is true of the other cases Plaintiffs cite. *See, e.g., Dream Defs. v. Governor of Fla.*, 57 F.4th 879, 889 (11th Cir. 2023) (citing *Support Working Animals*, 8 F.4th at 1201) (holding that plaintiffs established

traceability and redressability because state defendants had *exclusive* statutory enforcement authority); *Coal. for Good Governance v. Kemp*, 558 F. Supp. 3d 1370, 1382 (N.D. Ga. 2021) (court cited defendants' independent enforcement authority as source of traceability); *League of Women Voters of Fla., Inc. v. Lee*, 566 F. Supp. 3d 1238, 1255 (N.D. Fla. 2021) (same).

Plaintiffs are equally misguided when claiming that "even harms that flow indirectly" can establish traceability. Pls.' Br. at 3 (citing *Focus on the Fam. v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003)). Plaintiffs' citation to *Focus on the Family* takes the Eleventh Circuit's statement out of context. The Eleventh Circuit used the term "indirectly" to explain that the higher standards of "proximate" cause or causation "beyond a reasonable doubt or by clear and convincing evidence" were unnecessary to establish the *causation* required for standing. *Focus on the Fam.*, 344 F.3d at 1273. The Eleventh Circuit did not hold that a plaintiff can establish standing without joining as defendants all parties with enforcement authority. *See id.*

Accordingly, when evaluating the trial record, the Court should reject Plaintiffs' request that the Court incorrectly apply binding precedent.

II. The Trial Record Lacks Evidence of Traceability or Redressability.

When the correct standard is applied, there can be little dispute that Plaintiffs failed to carry their burden of showing that they have standing to

challenge the Prefilling Prohibition.[2] While there is no dispute that Plaintiffs face potential injury if they violate this provision (*e.g.*, including misdemeanor charges), Plaintiffs made no effort to connect the dots between such injury and State Defendants. Instead, the record merely references the Prefilling Prohibition at O.C.G.A. § 21-2-381, and O.C.G.A. § 21-2-598, which simply states that, "[e]xcept as otherwise provided by law, any person who violates any provision of this chapter [which includes § 21-2-381] shall be guilty of a misdemeanor." *See, e.g.*, [Doc. 159 at 19–20]; [Doc. 243 at 2–3]; [Doc. 218 at 7].

But the trial transcripts reveal no mention of how or by whom this provision is enforced. Plaintiffs focused on State Defendants' *investigative* authority under O.C.G.A. § 21-2-31(5). *See, e.g.*, 4/16/24 Trial Tr. 166:17–22 (Germany). But Plaintiffs ignored that, when a matter is presented to the SEB, the SEB merely "determine[s] … whether to send it to the Attorney General's [O]ffice for further adjudication," *id.* at 170:12–18 (Germany); 4/17/24 Trial Tr. 16:9–18 (Watson), or to recommend a case to a local prosecutor "for prosecution," *id.* at 38:1–5 (Watson). And this is critical because Plaintiffs failed to name the Attorney General or any other Georgia prosecutor as a

[2] It is of no moment that State Defendants did not expressly challenge Plaintiffs' standing at trial. Instead, as the Eleventh Circuit confirms, "standing to sue implicates jurisdiction," and even if defendants do not challenge a plaintiff's standing, "a court must satisfy itself that the plaintiff has standing before proceeding to consider the merits of her claim, no matter how weighty or interesting." *Lewis*, 944 F.3d at 1296.

defendant. Plaintiffs' citations to the trial transcript therefore fail to establish State Defendants' *enforcement*, as opposed to investigative, authority. *See* Pls.' Br. at 6–8.[3]

Aside from an SEB referral to the Attorney General, moreover, Georgia law expressly makes violating the Prefilling Prohibition a misdemeanor, O.C.G.A. § 21-2-598,[4] and misdemeanors are prosecuted by county officials—either solicitors general in state court or district attorneys in superior court.

[3] Plaintiffs also cite *New Georgia Project v. Raffensperger*, 484 F. Supp. 3d 1265 (N.D. Ga. 2020), to support their argument that State Defendants have enforcement authority. Pls.' Br. at 8, 11–12. Not only was the injunction in that case stayed by the Eleventh Circuit, but the district court there also found traceability and redressability based on express duties of the SOS and SEB—their "statutory authority to train local election officials and set election standards." *New Ga. Project*, 484 F. Supp. 3d at 1286, *injunction stayed,* 976 F.3d 1278, 1284 (11th Cir. 2020). State Defendants have no such enforcement authority to prosecute misdemeanors, which falls squarely on the shoulders of counties.

[4] In their supplemental brief, Plaintiffs also cite authority (at 9–11) for State Defendants' *civil* enforcement authority. But they mischaracterize that authority as sufficient for standing. As explained in the record, the SEB reviews cases presented by the Investigations Division and can dismiss, issue a letter of instruction, or transfer or "bind over" to the Attorney General to move forward at an administrative hearing before the Office of State Administrative Hearings. O.C.G.A. §§ 21-2-31(5), 21-2-33.1. That Office then provides a recommendation to the Board that can include civil fines. *Id.* § 21-2-33.1. Thus, there are also several non-parties involved in civil enforcement of Georgia's election laws, including the Prefilling Prohibition. But without those entities as parties, State Defendants' powers are insufficient to establish standing. Moreover, even if the Court could enjoin civil enforcement, such an order would still leave Plaintiffs to face criminal enforcement of the Prefilling Prohibition.

id. § 15-10-262. And nothing in the trial record suggests that enjoining State Defendants would do anything to prevent a district attorney or solicitor general from investigating and prosecuting Plaintiffs for misdemeanor violations of the Prefilling Prohibition.

To the contrary, district attorneys and solicitors are authorized to receive complaints from county election officials, investigate the election law violation themselves, and bring charges—all without the involvement of Statewide officials. For example, Fulton County District Attorney Fani Willis has investigated and brought charges for violations of election law without a referral from State Defendants.[5]

As a matter of law, moreover, State Defendants lack statutory authority to prosecute criminal offenses. O.C.G.A. § 21-2-33.1. As noted, State Defendants may only investigate and report violations to the Attorney General for civil or criminal enforcement or to a district attorney "who shall be responsible for further investigation and [criminal] prosecution." *Id.* § 21-2-31(5). In other words, even where State Defendants participate in investigating and referring a violation of the Prefilling Prohibition, they do not choose whether to prosecute, and those who do so are not defendants in this litigation. Thus, there can be "no allegation that the Secretary [or SEB]

[5] *See, e.g.,* Hannah Grabenstein, *Read the full Georgia indictment against Trump and 18 allies*, PBS (Aug. 15, 2023), https://tinyurl.com/3b7p3ztc.

controls the local [district attorney's offices] or has control over the [prosecution] process." *See Ga. Republican Party*, 2020 WL 7488181, at *2. Accordingly, Plaintiffs cannot demonstrate their standing because they would still be injured in "precisely the same way without the defendant's alleged misconduct." *City of South Miami*, 65 F.4th at 645 (quoting *Walters v. Fast AC, LLC*, 60 F.4th 642, 650 (11th Cir. 2023)); *see also id.* ("[A] plaintiff lacks standing to sue over a defendant's action if an independent source would have caused him to suffer the same injury." (quoting *Walters*, 60 F.4th at 650–51)).

Plaintiffs attempt to evade this requirement with a distorted argument that, when multiple "government officials share concurrent [enforcement] authority ... a plaintiff need not sue *all* of those officials to satisfy redressability." Pls.' Br. at 4, 11. However, the authority on which Plaintiffs rely merely stands for the unremarkable proposition that a plaintiff need not join all possible parties, *provided* the plaintiff joins the *necessary* parties to satisfy Article III standing. *See Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1126–27 (11th Cir. 2019) ("partial relief" sufficient for standing against one group of defendants who were themselves able to redress the alleged harm through "full or partial refunds on [plaintiffs'] donations"); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310–11 (11th Cir. 2001) ("[E]ven short of directly ordering the President to terminate our nation's participation in NAFTA, a judicial order instructing subordinate executive officials to cease

their compliance with its provisions would suffice for standing purposes."); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1268, 1272 (N.D. Ga. 2021) (where counties enforced the challenged law, plaintiffs had standing where they sued at least one county that could redress their alleged injuries). Because an injunction against State Defendants would have no effect on the risk of criminal prosecution for violations of the Prefilling Prohibition, the failure to join the Attorney General or any local prosecutors is fatal to Plaintiffs' standing as to that claim.

Similarly, Plaintiffs have no support for their argument that "a plaintiff need not sue every person or entity who plays some role in enforcing the law that the plaintiff is challenging." Pls.' Br. at 4. Though a plaintiff need not prove "that a favorable decision will relieve his *every* injury," *id.* (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in *Larson*)), the Supreme Court nonetheless requires that a court order "likely" gives "substantial and meaningful relief," *Larson*, 456 U.S. at 243 & n.15. And here, Plaintiffs cannot establish such a conclusion merely by suing some of the entities and officials with investigative or referral authority—they must "sue the officials who will *cause* any future injuries[.]" *Jacobson*, 974 F.3d at 1255 (emphasis added). And that necessarily includes the relevant prosecutors—whom Plaintiffs have not sued.

In short, Plaintiffs cannot show either traceability or redressability when parties with complete enforcement authority would not be subject to an injunction and thus could continue investigating and prosecuting any infractions. In that situation, Plaintiffs' alleged harm would be "the result of the independent action of some third party not before the court." *Id.* at 1253. And "other state actors, who aren't parties to the litigation" would "remain free and clear of any judgment and thus free to engage in the conduct that the plaintiffs say injures them[.]" *Support Working Animals*, 8 F.4th at 1205 (citation omitted); *see Lewis*, 944 F.3d at 1301–02 (no standing where state defendant had "no enforcement role" and plaintiffs did not include parties whose action directly caused their harm). That is the quintessential example of a failure of both traceability and redressability.

CONCLUSION

In the Order, this Court correctly examined its Article III jurisdiction and correctly determined that the trial record lacked any evidence of traceability or redressability regarding the Prefilling Prohibition. Plaintiffs therefore failed to establish traceability or redressability, and this Court should reject Plaintiffs' challenge to the Prefilling Prohibition for lack of Article III standing.

August 5, 2024

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CERTIFICATE OF COMPLIANCE

Under L.R. 7.1(D), the undersigned hereby certifies that the foregoing has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(C).

/s/ Gene C. Schaerr
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