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

NEW GEORGIA PROJECT, *et al.*	:	
	:	
Plaintiffs,	:	Civil Action File No.:
vs.	:	1:24-cv-03412- SDG
	:	
BRAD RAFFENSPERGER, in his Official capacity as Secretary of State Of the State of Georgia, *et al.*	:	
	:	
Defendants.	:	

BRIEF IN SUPPORT OF
COBB COUNTY DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

The Cobb County Board of Elections and Registration ("Cobb BOER") and its members are named as defendants in only one of the three lawsuits that make up this consolidated action[1] and are implicated in only in three of the 12 Counts. The only specific reference to Cobb BOER in the entire 142 pages of the Consolidated

[1] Cobb BOER was originally named as a class defendant in the action brought by Secure Families Initiative ("SFI") (1:24-cv-04659-SDG), but in the Consolidated First Amended Complaint, SFI dropped Cobb BOER and named the Gwinnett County Board of Elections as the class defendant. Meanwhile, Georgia NAACP and Georgia Coalition for the People's Agenda ("GCPA") summarily added Cobb BOER along with 16 other counties defendants as to their claims, none of which were named as defendants in their original complaint. See, *Ga. NAACP, et al. v. Raffensperger*, 1:24-cv-04287, Doc. 1.

First Amended Complaint ("Consolidated Complaint"), aside from its identification as a defendant, is an allegation that Cobb BOER denied a series of voter challenges, keeping all of the challenged voters on its voter rolls. [Doc. 155, ¶ 238].

Despite this reality, Plaintiffs have decided pursue declaratory and injunctive relief against Cobb BOER to stop what it alleges to be the "repeated, unlawful removal of eligible voters" from Georgia's voter rolls. Plaintiffs primarily challenge two sections of Georgia Senate Bill 189 ("S.B. 189"), one that deals with the standards for finding probable cause for voter challenges brought pursuant to O.C.G.A. §21-2-230, and another section that deals with requirements for election mail that is sent to unhoused voters. [Doc. 155, ¶ 2]. However, nowhere in the Consolidated Complaint are there any allegations that Cobb BOER removed any voters under the provisions of S.B. 189, nor any allegations that it has or will interpret the provisions of S.B. 189 in a manner that harms plaintiffs or the members of their organizations. Instead, all of the claims alleged against Cobb BOER are based on speculation and attenuated theories about how S.B. 189 may be applied at some point in the future.

Of the 12 counts set forth in the Consolidated Complaint, Cobb BOER is named only in Counts I, II, and IV. [See, Claims Chart, Doc. 155-1]. All three of those counts assert violations of the National Voter Registration Act of 1993

("NVRA"). However, Plaintiffs lack standing to make those claims because they did not provide proper notice of the alleged violations. *Ga. State Conf. of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1335, ("Section 11 notice is mandatory and…dismissal is proper if no proper notice is given") citing to *Broyles v. Texas*, 618 F. Supp. 2d 661, 692 (S.D. Tex. 2009).

Even if Plaintiffs had provided proper notice, they lack standing to pursue their claims against Cobb BOER, because they have not met the requirements of prudential standing, with their own pleadings acknowledging that Cobb BOER has not engaged in the alleged violative conduct.

Accordingly, Cobb BOER moves pursuant to Fed. R. Civ. P. 12(b)(1) and (6) to dismiss Plaintiffs' Claims against it in Counts I, II, and IV of the Consolidated Complaint, because Plaintiffs lack standing and have failed to state a claim upon which relief may be granted. In support of this motion, Cobb BOER sets forth the argument below and also adopts the arguments set forth in Sections I, II (A), and II(B) of the Argument and Citation of Authority portion of State Defendants' Brief in Support of Motion to Dismiss [Doc. 168].

II. ARGUMENT AND CITATION TO AUTHORITY

A. Standards 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*. "Factual attacks, on the other hand, challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered." *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, (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

B. Plaintiffs did not provide proper notice under the NVRA

Section 11 of the NVRA, 52 U.S.C. § 20510(b), requires a person "aggrieved by a violation of the Act" to provide notice of the violation prior to the filing of a civil action so that the state or agency has "an opportunity to correct any violation prior to the commencement of a private action under the [NVRA]." *Bellitto v. Snipes*, 935 F.3d 1192, 1196 (11th Cir. 2019).

> The plain language of Section 11 of the NVRA makes clear that pre-litigation notice is required. It confers standing on an aggrieved party only "[i]f the violation is not corrected within 90 days after receipt of a notice under paragraph (1)." ***No standing is therefore conferred if no proper notice is given, since the 90-day period never runs***.
>
> *Ga. State Conf. of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1335 (ND. Ga 2012) (emphasis added).

Plaintiffs SFI, Georgia NAACP, and GCPA assert they provided notice to Cobb BOER as one of "seventeen members of the Defendant class of county election boards" on July 10, 2024. [Doc. 155, ¶ 246, Doc. 155-3]. However, the notice and the allegations set forth in the letter are addressed entirely to the Secretary of State and his role in the enforcement of S.B. 189:

> As Secretary of State of Georgia, you are the State's Chief Elections Officer, O.C.G.A. §§ 21-2-50, 21-2-50.2, and, as such, are responsible for ensuring Georgia's compliance with the NVRA. See 52 U.S.C. § 20509. This letter constitutes notice pursuant to 52 U.S.C. § 20510(b) that enforcement of the SB 189 provisions detailed above will place you in violation of 52 U.S.C. § 20507(b)(1). As outlined above, we believe that enforcement of Sections 4 and 5 of S.B. 189 puts the

> State in danger of multiple violations of the NVRA, legal action, and, most importantly, unlawfully disenfranchising eligible voters.
>
> [Doc. 155-3]

Cobb BOER is not addressed directly in the July 10, 2024 Notice Letter and is only referenced in a footnote as one of the 17 counties to which the notice was purportedly emailed.[2] [Doc. 155-3] Nowhere in the letter do the "aggrieved parties" identify any specific actions of Cobb BOER which have or will harm the organizations or their members. Indeed, there is no identification of any unhoused individuals living or voting in Cobb County who have or will not be able to receive election mail. Nor does the notice reference any voter challenges brought pursuant to O.C.G.A. 21-2-230 in which Cobb BOER has sustained probable cause. At most, the notice letter alleges highly speculative and generalized future injuries, without sufficient notice of Cobb BOER's role in the projected violations.

Even if the July 10, 2024 Letter had provided sufficient notice to Cobb BOER of potential NVRA violations, the allegations in the Consolidated Complaint demonstrate that Cobb BOER actually "corrected" those potential violations after the notice was sent: "…in August 2024, an individual brought a series of challenges in Cobb County based on NCOA data and data from a discredited privately funded

[2] Plaintiff did not specify in the notice or the Consolidated Complaint the email address to which the notice was sent.

database (Eagle AI)…***Cobb County Board of Elections and Voter Registration denied the challenges***…" (emphasis added). [Doc. 155, ¶ 238].

In other words, to the extent the July 10, 2024 Notice Letter attempted to put Cobb BOER on notice about possible violations of the NVRA, Plaintiffs' own recitation of the facts make it clear that Cobb County addressed those concerns and denied the voter challenges occurring after the notice was sent. The requirement of "pre-litigation notice was meant to encourage exactly this sort of compliance attempt." *Ga. NAACP v. Kemp*, 841 F. Supp. 2d at 1336. Accordingly, because Plaintiffs' own allegations show that Cobb BOER complied with the NVRA by denying the voter challenges received after the notice, the claims against Cobb BOER must be dismissed for lack of standing, because "no standing is therefore conferred if no proper notice is given." *Id* at 1335.

C. Plaintiffs lack standing to bring the claims in Count I, II, and IV against Cobb BOER

"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).

Injury-in-fact is "the first and foremost of standing's three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548, (2016). To prove an injury-in-fact the Plaintiffs must show "a concrete and particularized injury." *Sierra v. City of Hallandale*

Beach, 996 F.3d 1110 (11th Cir. 2021), citing to *Lujan*, 504 US at 560 n.1. "An injury is particularized when it affect[s] the plaintiff in a personal and individual way. To be concrete, the injury must be real, and not abstract." *Id*., (citing to *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (internal quotes omitted)).

And in a case such as this one, "[w]hen a plaintiff seeks prospective relief to prevent a future injury, it must establish that the threatened injury is certainly impending." *Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277, 1280 (11th Cir. 2020). "[A]llegations of possible future injury are not sufficient." *Clapper*, 568 U.S. at 409. Nor is a "realistic threat," *Summers v. Earth Island Inst*., 555 U.S. 488, 499-500 (2009), an "objectively reasonable likelihood" of harm, *Clapper*, 568 U.S. at 410.

Despite this requirement of a concrete actual or imminent injury, all of the allegations against the County Defendants in the Consolidated Complaint are based on the assumption that those boards of election will read and enforce the provisions of S.B. 189 in a manner that harms unspecified individuals who are theoretically connected to their organizations. To the extent several of the organizational plaintiffs claim of injuries based upon a theory of "diversion of resources," those claims are based on highly speculative narratives forecasting actions they might have

to take or resources they might have to expend at some point in the future if county elections boards adopt their strained reading of S.B. 189.

Specifically addressing the three claims involving Cobb BOER, Counts I, II, and IV all rely on speculation about how Sections 4 and 5 of S.B. 189 will be applied by County Defendants, despite alleging elsewhere in the complaint that Cobb County did not apply the language in that manner, denying the voter challenges brought before it in 2024. The NVRA claim in Count I is based on the assumption that the language of Section 5 of S.B. 189 will "force" the County Defendants to find probable cause when someone alleges that a voter has moved and makes unsupported predictions that County Defendants "…will remove voters from the registration list..." in violation of the NVRA. [Doc. 155, ¶ 254]. However, Plaintiffs' own allegations state that Cobb BOER has not applied the language in that manner. [Doc. 155, ¶ 238].

Similarly, Count II is based on Plaintiffs' unfounded predictions that the language of Section 5 will result in a "non-uniform and discriminatory process for identifying people to potentially remove from the voter rolls" or that "from county to county, there will be inconsistent applications of differing standards for determining whether an address is 'residential' or 'nonresidential'…" [Doc. 155, ¶ 265]. This pure conjecture is particularly inapplicable to Cobb BOER. Plaintiffs do

not need to guess whether Cobb BOER will apply the language of Section 5 in a discriminatory or non-uniform manner, they have observed it and averred in the Consolidated Complaint that Cobb BOER has denied such voter challenges, leaving the challenged voters on its rolls. [Doc. 155, ¶ 238].

This same form of conjecture is repeated in the last claim asserted against Cobb BOER, where in Count IV Plaintiffs predict that homeless voters will be harmed by the language in S.B. 189 that specifies the county registrar's office as the address where persons who are "homeless and without a permanent address" can receive election mail (O.C.G.A. §21-2-217(a)(1.1)). Plaintiffs make this claim without identifying any individuals who have been or will be affected by that language in Cobb County, instead relying on a generalized claims that unhoused voters are being treated differently, without acknowledging that the provision only applies to homeless voters who do not have a permanent address. Instead of acknowledging that distinction, Plaintiffs finish Count IV with a double dose of attenuated hypotheticals, asserting that "the ambiguity" of the phrase "creates the ***possibility*** of arbitrary implementation among counties and the ***risk*** that the mailing address restriction could be applied to any unhoused voter." (emphasis added). [Doc. 155, ¶ 279].

These alleged harms to homeless individuals, like the rest of Plaintiffs claims against the County Defendants, "[rest] on their highly speculative fear." *City of S. Miami v. Governor of Florida*, 65 F.4th 631, 637 (quoting *Clapper*, 568 U.S at 410). In applying Article III standing principles, courts "must look at whether a plaintiff is relying on a far-fetched speculation in assessing how a statute may be applied." *Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1179 n.5 (9th Circuit, 2024). And courts "are not bound to accept an incorrect premise in determining whether a party has standing." *Id*. In the present action, this Court should not adopt the unsupported fears of that Plaintiffs have conjured regarding how the language of S.B. 189 will be applied, whether in regard to voter challenges or the mailing requirements for homeless voters without a permanent address.

III. CONCLUSION

In order to bring the three NVRA claims asserted in Counts I, II, and IV against Cobb BOER, Plaintiffs were required to serve proper notice of the alleged violations. They did not do so. Likewise, Plaintiffs must demonstrate that they have prudential standing to pursue their claims against Cobb BOER. In the instant case, where prospective relief to prevent a future injury, that requires a showing that the injury is "certainly impending." They have not made such a showing in the Consolidated Complaint. Instead, they have merely set forth generalized fears about

possible future applications of S.B. 189, while simultaneously acknowledging that Cobb BOER has not sustained voter challenges in such a manner. For these reasons and for all the reasons set forth in Sections I, II (A), and II (B) of the Argument and Citation of Authority in the State Defendants' Motion to Dismiss [Doc. 168], this Court must dismiss Counts I, II, and IV of the Complaint as to the Cobb County Defendants.

Respectfully submitted this 17th day of January, 2025.

HAYNIE, LITCHFIELD & WHITE, PC

/s/ *Daniel W. White*

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing has been prepared in Times New Roman 14, a font and type selection approved by the Court in L.R. 5.1(C).

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2025 I electronically filed the foregoing BRIEF IN SUPPORT OF COBB COUNTY DEEFENDANTS' MOTION TO DISMISS with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record in this matter.

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