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

KAREN FINN, DR. JILLIAN FORD, HYLAH DALY, JENNE DULCIO, GALEO LATINO COMMUNITY DEVELOPMENT FUND, INC., NEW GEORGIA PROJECT ACTION FUND, LEAGUE OF WOMEN VOTERS OF MARIETTA-COBB, and GEORGIA COALITION FOR THE PEOPLE'S AGENDA, INC.,

Plaintiffs

-v-

COBB COUNTY BOARD OF ELECTIONS AND REGISTRATION and JANINE EVELER, in her official capacity as Director of the Cobb County Board of Elections and Registration,

Defendants.

Case No. 1:22-cv-2300-ELR

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs, who are Cobb County voters and four non-profit organizations working to protect the right to vote in Georgia, bring this action to challenge Georgia House Bill 1028 ("HB 1028"), which redrew the election districts for Cobb County's Board of Education (the "Board"). Plaintiffs bring this action against the state actors with the authority to implement and enforce HB 1028: Cobb County's Board of Elections and Registration, and its Director, Janine Eveler ("Defendants").

As alleged in Plaintiffs' amended complaint (the "Complaint" or "Compl."), Georgia state legislators, in enacting HB 1028, improperly used race as a predominant factor in drawing the boundaries of Board electoral districts 2, 3, and 6 (the "Challenged Districts"). Plaintiffs are seeking to enjoin the implementation of the map in time for a new map to be used in the 2024 elections and named as Defendants only those parties necessary to effectuate such relief.

Defendants have moved to dismiss the Complaint solely based on the argument that they are not the proper defendants to this action, erroneously asserting that (i) Plaintiffs have not established the elements of Article III standing, or (ii) Plaintiffs failed to join all necessary parties. Defendants' claim that Plaintiffs were required to name ***any*** other party to this action—the "School Board" or the "State of

Georgia" or the winners of the "primary elections in two of the challenged districts" or the Georgia legislators who passed HB 1028—is wrong.

In Georgia, county election boards, and their directors, implement and enforce the election code. Under this authority, Defendants' acts of implementing and enforcing HB 1028 cause the injuries that Plaintiffs allege in the Complaint. Precedent from previous election law and redistricting litigation uniformly confirms this approach. As a result, Defendants are the proper parties to this action.

LEGAL STANDARD

On a motion to dismiss, the Court must "take the facts from the allegations in the complaint, assuming those allegations to be true." *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1186 (11th Cir. 2004). Under Federal Rule of Civil Procedure 12(b)(1), this standard applies to standing allegations. *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). Rule 12(b)(7) provides for dismissal where a party has not been joined as required "under Rule 19." "The party moving for dismissal pursuant to Rule 12(b)(7) bears the burden of proof." *Gen. Star Indem. Co. v. Triumph Hous. Mgmt., LLC*, No. 1:18-CV-1770-TCB, 2018 WL 8949452, at *1 (N.D. Ga. Nov. 9, 2018) (citing *W. Peninsular Title Co. v. Palm Beach Cnty.*, 41 F.3d 1490, 1492 (11th Cir. 1995)).

ARGUMENT

I. PLAINTIFFS HAVE ARTICLE III STANDING

Plaintiffs' injuries are traceable to and redressable by a judgment against Defendants. 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).

Defendants do not contest that Plaintiffs have suffered an injury-in-fact. Instead, Defendants argue that Plaintiffs "have not plead [sic] any allegation that the [] Defendants played any role in creating, evaluating, accepting, rejecting, or otherwise exercising any control over the district maps or the redistricting process." (Def. Br. at 11.) So, according to Defendants, "Plaintiffs have failed to articulate in their Amended Complaint how their claimed injuries are traceable to and redressable by the [] Defendants." (*Id.* at 12.) Defendants are wrong.

First, with respect to traceability, the Complaint details how binding Georgia law ***requires*** Defendants to implement and enforce the Challenged Districts in Cobb County. (Compl. ¶¶ 147–55.) In particular, O.C.G.A. § 21-2-70 directly delegates to Defendants the powers and duties to administer primaries and elections. For example, directors "select and equip polling places for use in primaries and elections," *id*. § 21-2-70(4), and "determine the sufficiency of nomination petitions,"

id. § 21-2-70(2). Thus, because Defendants implement and enforce HB 1028 under Georgia law, Plaintiffs' injuries are fairly traceable to Defendants.

Notably, Defendants do not contest that they administer election laws in Cobb County. (*See* Def. Br. at 9 (acknowledging that the Cobb County Board of Elections and Registration is the entity "through which the allegedly discriminatory maps will be implemented").) Defendants, however, argue that "Plaintiffs must show that [] Defendants have some type of control over the creation or use of the injurious maps." (*Id.* at 12.) That is not the law.

To begin, the standing analysis does not turn on whether Defendants played a role in the creation of the map. *See, e.g.*, *Rose v. Raffensperger*, 511 F. Supp. 3d 1340, 1356 (N.D. Ga. 2021) (rejecting the defendant's traceability argument that the challenged "districts are designed by the Georgia General Assembly" and not the defendant). Additionally, Plaintiffs need only show that Defendants participate in enforcing a challenged law to meet the traceability prong of Article III standing. *See Black Voters Matter Fund v. Raffensperger*, 478 F. Supp. 3d 1278, 1306 (N.D. Ga. 2020) (holding that the plaintiffs' injuries were traceable to the state official to whom "Georgia's election code delegates authority . . . to oversee the elections"). The Complaint has done just that.

Second, Plaintiffs have established redressability. As shown above, Defendants bear the legal duty of implementing and enforcing HB 1028. The crux of Plaintiffs' action is to stop the implementation and enforcement of this racial gerrymander. (Compl. ¶¶ 11, 22, 27, 34, 39, 183.) Thus, an injunction against Defendants preventing the enforcement of HB 1028 would redress Plaintiffs' injuries. That is all Plaintiffs must show. *See Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1126–27 (11th Cir. 2019) (explaining that "a plaintiff need not demonstrate anything 'more than . . . a substantial likelihood' of redressability" (quoting *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 80 (1978))).

In an apparent attempt to distract from their duties under Georgia's election laws, Defendants fixate on *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020). (Def. Br. at 10–11.) But Defendants misread *Jacobson*. Contrary to Defendants' description, the case turned explicitly on whether the plaintiffs named the party entrusted with administering and enforcing the challenged law. *Jacobson*, 974 F.3d at 1257 (explaining that the county elections supervisors were appropriate defendants because they had "'authority to enforce the complained-of provision,' as the causation element of standing requires"). Defendants have the "authority to enforce" HB 1028. *See* O.C.G.A. § 21-2-70. Indeed, it is the alternative parties

mentioned by Defendants—the Georgia legislature and the Board of Education (Def. Br. at 9)—that lack the "authority" to administer Georgia's election laws. As a result, under a plain reading of *Jacobson*, Plaintiffs' alleged injuries are traceable to and redressable by a judgment against Defendants.[1]

Similarly, *Scott v. Dekalb County Board of Elections*—the one case other than *Jacobson* that Defendants muster for their argument—supports Article III standing here. No. 1:02-CV-1851-ODE, 2005 WL 8155742 (N.D. Ga. Aug. 5, 2005).[2] The court in *Scott* explained that, under Eleventh Circuit precedent, "[i]t is the Board of Elections that carries out the enforcement and implementation of the voting districts"

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[1] Recent precedent within the Eleventh Circuit supports this reading of *Jacobson*. *See, e.g.*, *Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 WL 7488181, at *2 (11th Cir. Dec. 21, 2020) (agreeing with the district court's reasoning that the plaintiffs lacked Article III standing because they did not name "local supervisors" as defendants); *Ga. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1116 (11th Cir. 2022) (holding that voting-rights plaintiffs' injuries were traceable to and redressable by a judgment against the Gwinnett County Board of Registration & Elections); *Trump v. Kemp*, 511 F. Supp. 3d 1325, 1331–33 (N.D. Ga. 2021) (explaining that the plaintiff's election-related claim was only traceable to and redressable by a judgment against county election officials); *Rose*, 511 F. Supp. 3d at 1357 ("The Court does not, therefore, find *Jacobson* or *Lewis[v. Governor of Ala.*, 944 F.3d 1287 (11th Cir. 2019)] persuasive at this stage and reiterates that Plaintiffs have adequately pled traceability and redressability.").

[2] Although Defendants cite *Scott* under their Federal Rule of Civil Procedure 12(b)(7) heading, they further press the Article III argument while discussing the case. (Def. Br. at 16 n.4.) *Scott* also solely dealt with whether the plaintiff had established Article III standing.

and thus voting-rights plaintiffs' injuries are "'fairly traceable' not to the acts of the State Legislators, but to the acts of the Board of Elections, even though the Board of Elections has no discretion in their implementation of the district lines." *Id*. at *13. Even so, the court held that the plaintiff's alleged injury had become "moot," because they related to the plaintiff's candidacy for an already-held election, and the amended complaint failed to "mention [] how [the] Defendant's continued use of the allegedly unconstitutional district lines injures Plaintiff." *Id*. at *14. The court thus could "grant [the] Plaintiff no relief." *Id*.

Unlike the plaintiff in *Scott*, Plaintiffs here are neither incumbent candidates nor seeking relief that could only be granted in an election that has already taken place. To the contrary, Plaintiffs, voters in the Challenged Districts and voting rights organizations, are seeking relief before the 2024 elections. (Compl. ¶¶ 16–41, 183.) Plaintiffs are thus proceeding precisely as instructed by the Eleventh Circuit: naming Defendants that Plaintiffs can obtain "prospective relief" against and "seeking to enjoin the enforcement of the challenged [redistricting plan] and a declaration as to its legality." *Scott v. Taylor*, 405 F.3d 1251, 1256 (11th Cir. 2005). And given that Plaintiffs are "challenging the substance of [HB 1028] as unconstitutional" by asserting that "voters were assigned to districts primarily on

account of their race," Defendants are "suited to defend the law." *Scott*, 2005 WL 8155742, at *16–*17 (emphasis omitted).

Thus, because Plaintiffs' injuries are traceable to and redressable by a judgment against Defendants under the Complaint, Plaintiffs have Article III standing.

II. PLAINTIFFS HAVE JOINED ALL NECESSARY PARTIES

In naming the Cobb County Board of Elections and Registration and Director Eveler, Plaintiffs have joined all necessary parties to maintain this action. "Courts are reluctant to dismiss for failure to join" under Rule 12(b)(7). *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1280 (N.D. Ga. 2019) (quotation marks omitted). Rule 19(a)(1) requires joinder of a non-party only under limited circumstances:

> **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or
>
> **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > **(i)** as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(A)–(B).

Rule 19 "sets out two steps for determining whether a party must be joined as indispensable." *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1039 (11th Cir. 2014). Only the first step is relevant here: "whether the person in question is one who should be joined" under Rule 19(a). *Id*. (citations omitted).

Defendants' arguments with respect to Rule 19(a)(1) conflict with controlling precedent. *First*, no third party has asserted an interest in this action, so Defendants may not assert such an interest on a non-party's behalf. *Second*, Defendants are not at risk of inconsistent obligations because Defendants are not subject to a conflicting court order.[3] Accordingly, this action may proceed without joining further parties.

A. The Court Can Grant Relief in This Action Without the Joinder of Defendants' Proposed Alternative Parties

Defendants first argue that other parties have the "actual interest" in this dispute—the "School Board," the "State of Georgia," and the winners of the "primary elections in two of the challenged districts" held in May 2022. (Def. Br. at 13–16.) This argument is foreclosed by binding precedent.

[3] Defendants concede, as they must, that the Court can accord complete relief among the existing parties. (*See* Def. Br. at 3 (acknowledging that the County Board is "a party against whom the Court might issue an injunction")); *cf.* Fed. R. Civ. P. 19(a)(1)(A). Indeed, courts within the 11th Circuit have issued relief in redistricting cases despite only having the Board of Elections and its Director as defendants. *See, e.g.*, *Crumly v. Cobb Cnty. Bd. of Elections & Voter Registration*, 892 F. Supp. 2d 1333, 1344–45 (N.D. Ga. 2012).

A defendant may only "seek[] refuge in Rule 19(a)(1)(B)" when a non-party claims an interest in the subject of the litigation. *Pers. v. Lyft, Inc.*, 542 F. Supp. 3d 1342, 1354 (N.D. Ga. 2021) (collecting cases); *see also United States v. Janke*, No. 09-14044-CIV, 2009 WL 2525073, at *4 (S.D. Fla. Aug. 17, 2009) ("A prerequisite to the application of Rule 19(a)(1)(B) is that the absent party claim a legally protected interest in the subject matter of the ongoing suit."); *Coca-Cola Sw. Beverages LLC v. Marten Transp., Ltd.*, No. 1:21-CV-4961-TWT, 2022 WL 2954328, at *3 (N.D. Ga. July 26, 2022) ("Unless [the non-party] breaks its silence on the matter, the Court will not presume an interest that [the defendant] alone is attempting to assert on [the non-party's] behalf.").

Here, no other party—neither the Georgia State Legislature, nor the Board of Education, nor the Georgia Attorney General, nor candidates for offices contested in the upcoming general election—has claimed a legally-protected interest in this matter. This silence has persisted despite Defendants' alternative parties being given ample opportunity to assert such an interest. In fact, the Georgia Attorney General's Office has received actual notice of Plaintiffs' filing of the complaint and amended complaint in this action. *See* ECF No. 36; ECF No. 41.[4] As no other party has raised

[4] Plaintiffs' action has also received substantial media coverage. *See, e.g.*, Chart Riggall, *Lawsuit Alleging Racial Bias Challenges Cobb School Board Map's Constitutionality*, MARIETTA DAILY JOURNAL, GA. (June 9, 2022),

any claim of a legally-protected interest yet, this Court may not infer such an interest, and Defendants' suggestion that the State of Georgia, the School Board, or the individual candidates are the proper parties to be joined in this action is foreclosed.

Moreover, Defendants' argument that "Plaintiffs deprive the Court of [] 'concrete adverseness'" (Def. Br. at 15 (citations omitted)), shows a fundamental misunderstanding of civil rights actions. Voting rights actions like this one are often—especially in redistricting cases—brought against so-called "neutral" parties because those are the state entities entrusted with enforcement powers under law. *See, e.g.*, *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282 (11th Cir. 2020) (not questioning the plaintiff's decision to name the local Board of Elections as the sole defendant). To that end, multiple federal Courts of Appeals have recognized the "run-of-the mill" nature of civil rights actions against "neutral" enforcement agencies. *E.g.*, *Consumers Union of U.S., Inc. v. Va. State Bar*, 688 F.2d 218, 222 (4th Cir. 1982); *Hastert v. Ill. State Bd. of Election Comm'rs*, 28 F.3d

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https://www.mdjonline.com/news/education/lawsuit-alleging-racial-bias challenges-cobb-school-board-map-s constitutionality/ article 30191456-e820-11ec-9e65-270b435a7962.html (documenting state Representative Ehrhart's reaction to Plaintiffs' action).

1430, 1444 (7th Cir. 1993) (explaining that "liability [is] usually imposed on a neutral (and nominal) defendant" in "redistricting cases").[5]

Thus, under well-settled precedent, no other parties need to be joined in this action.[6]

B. Defendants Are Not Subject to a Substantial Risk of Incurring Inconsistent Obligations

Defendants also argue that Plaintiffs' action subjects them to "inconsistent obligations." (Def. Br. at 17.) According to Defendants, those inconsistent obligations emanate from either abiding by an order from this Court or abiding by the "duty to run elections using the maps adopted by the State Legislature and signed

[5] *See also Venuti v. Riordan*, 702 F.2d 6, 8 (1st Cir. 1983) ("Indeed, civil rights action costs (including attorney's fees) are often assessed against defendants who enforce the laws instead of those who enact them. The legislature is rarely sued."); *In re Kan. Cong. Dists. Reapportionment Cases*, 745 F.2d 610, 612 (10th Cir. 1984) (similar).

[6] If Defendants feel so strongly that other parties should be joined as defendants, they are free to try to join them. *See* Fed. R. Civ. P. 20. That said, Plaintiffs seek to move efficiently towards resolution ahead of the 2024 elections and naming unnecessary parties further delays swift resolution of this action. *Cf. Scott*, 405 F.3d at 1252 (dismissing a voting-rights claim against Georgia state legislators because "the state legislators are entitled to absolute legislative immunity"); *Trump*, 511 F. Supp. 3d at 1332–34 (holding that the plaintiff lacked standing to assert its election-related claims against Georgia's Governor and Secretary of State).

into law by the Governor." (*Id.*) That argument is also foreclosed by controlling precedent.

Federal courts narrowly interpret the concept of "inconsistent obligations" from Rule 19(a)(1)(B)(ii). Specifically, "[i]nconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident." *Winn-Dixie Stores, Inc., LLC*, 746 F.3d at 1040 (quotation marks omitted); *see also* Steven S. Gensler & Lumen N. Mulligan, Federal Rules of Civil Procedure, Rules and Commentary Highlights § 19 (2022 ed.) ("To be an inconsistent obligation, a party must be unable to comply with one court's order without breaching the other court's order.").

Defendants fail to meet that standard. *First*, as explained above, Defendants may not "seek[] refuge in Rule 19(a)(1)(B)" without the non-party claiming an interest in the litigation. *Pers.*, 542 F. Supp. 3d at 1354. And *second*, Defendants have not stated or demonstrated that they are currently subject to "another court's order" concerning the Challenged Districts; nor have Defendants cited any pending litigation that risks such an order. Because Defendants need only abide by orders from one court, any hypothetical conjecture that Defendants might be subject to some inconsistent order is insufficient under Rule 19(a)(1)(B)(ii). *Cf. BFI Waste Sys. of N. Am., Inc. v. Broward Cnty., Fla.*, 209 F.R.D. 509, 517 (S.D. Fla. 2002)

(stating that the defendant's "hypothetical scenario" failed to meet Rule 19(a)'s requirement that defendants face a "'**substantial risk**' of multiple, inconsistent obligations" (emphasis added)).

Under Defendants' theory, an executive agency could never be a named defendant without the legislature being named as well. Such agencies are always subject to a "duty" to carry out laws "adopted by the [] Legislature and signed into law by the" executive. So Defendants' argument, if taken to its logical conclusion, would entirely foreclose the established practice of suing executive agencies.

Thus, as a matter of law, Defendants are not at risk of inconsistent obligations.

CONCLUSION

For the foregoing reasons, Plaintiffs have standing and have named all necessary parties to maintain this action. Defendants' motion therefore should be denied.

Dated this 23rd day of
September 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with L.R. 5.1B and 7.1 and that this brief is published in 14-point Times New Roman font.

Respectfully submitted,

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I hereby certify that I have this 23rd day of September, 2022, filed the within and foregoing PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS upon all parties of record to this matter by CM/ECF system, which will serve via e-mail notice of such filing to any of the following counsel registered as CM/ECF users:

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