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

IN RE GEORGIA SENATE BILL 202	Master Case No.: 1:21-MI-55555-JPB
GEORGIA STATE CONF. OF THE NAACP, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No.: 1:21-CV-01259-JPB
SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, *et al.*, *Plaintiffs*, v. BRIAN KEMP, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants*.	Civil Action No.: 1:21-CV-01284-JPB

STATE DEFENDANTS' SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION BASED ON IMMATERIAL VOTING REQUIREMENTS

INTRODUCTION

Plaintiffs' Reply brief [Doc. 595] offers new arguments and new evidence that were not contained in their original motion, preventing State Defendants from responding without a sur-reply. Specifically, Plaintiffs' reply (1) attaches two affidavits containing new allegations related to standing, one of which contradicts the witness's deposition testimony; (2) seeks a new category of relief against State Defendants regarding alterations to the absentee-ballot envelope; (3) raises new arguments on standing related to the State Election Board's power to suspend county election officials; and (4) raises new arguments related to the foreseeability of the impact of the birthdate requirement.

This Court should disregard the new arguments and evidence, which go beyond merely responding to the arguments made by State Defendants. But even if this Court considers the new information, none of it demonstrates that Plaintiffs are entitled to a preliminary injunction.

ARGUMENT AND CITATION OF AUTHORITY

I. The new affidavits regarding the Georgia Advocacy Office offer no basis to determine that Plaintiffs have associational standing.

In their original motion, Plaintiffs' only argument related to associational standing was that "some of Plaintiffs' members" would face

possible rejection of their absentee ballots because of the birthdate requirement. [Doc. 548-1, p. 17]. But, as State Defendants pointed out, Plaintiffs offered no evidence of any member who could possibly be impacted. [Doc. 582, p. 15]. Apparently recognizing that shortcoming, Plaintiffs now offer two declarations with their reply, alleging that a "constituent" of the Georgia Advocacy Office (GAO) was somehow injured. [Doc. 595, p. 11; Doc. 595-15; Doc. 595-16]. Nothing about these declarations or new arguments changes Plaintiffs' lack of associational standing.

First, Ms. Thrower's new declaration [Doc. 595-16], contradicts her sworn deposition testimony about her voting experience in the 2022 primary election. In her new declaration, dated July 13, 2023, Ms. Thrower states that her absentee ballot in the 2022 general primary was initially rejected by the Union County registrar's office. [Doc. 595-16, ¶¶ 13, 15]. While Ms. Thrower benefited from the cure processes in Georgia's absentee-ballot statutes because she was contacted by the county, offered an opportunity to cure, and did so successfully, [Doc. 595-16, ¶¶ 13–14, 16], she previously told a different story. In her deposition, which was taken a few months before her declaration, she testified:

> Q. Have you had any issues or problems absentee voting in elections since that experience that you had in 2018?

> A. No. I did have to -- I thought that I was able to sign up for automatic absentee ballots because of disability so that I could independently vote using accommodations at home, but I did have to re-request later.
>
> * * *
>
> Q. So in the 2022 primary general election, did you vote in that election?
>
> A. Yes, I think so.
>
> Q. And, again, same questions. Would it be accurate to state that you voted absentee in that election?
>
> A. Yes.
>
> Q. And, again, did you have any issues with voting absentee in that election?
>
> A. No.
>
> Q. Again, to the best of your knowledge, did your vote in the 2022 primary general election count?
>
> A. As far as I know.

Deposition of Terri Thrower, attached as Ex. A, at 34:11–18, 46:5–17. This Court should not rely on a declaration that contradicts the sworn testimony of the witness in determining whether Plaintiff GAO has standing.

Second, even if the declarations were valid and otherwise cognizable, they could only establish associational standing in the *Sixth District AME* case, not the *Ga. NAACP* case in which the preliminary injunction is sought here. That is because the GAO is a plaintiff in the first case but not the other. This matters because, while the SB 202 cases are consolidated for purposes of discovery, [Doc. 1, p. 8], they are not consolidated for other purposes. Further, any relief must be specific to each case because each Plaintiff group seeks its own attorney fees. *See Ga. NAACP* Amended Compl. [Doc. 35, p. 85]; *Sixth District AME* First Amended Compl. [Doc. 83, pp. 136–137].

Third, Plaintiff GAO did not assert associational standing as a basis for its injuries in its own First Amended Complaint. *See Sixth District AME* First Amended Compl. [Doc. 83, ¶¶ 70–78] (alleging only diversion-of-resources harms and making no allegations regarding members). Allowing GAO to now rely on associational standing after State Defendants took its organizational deposition would be prejudicial to State Defendants.

In short, even if this Court permitted GAO to rely on a basis for standing beyond what they allege in their Complaint, without evidence of a specific member who might be injured, Plaintiffs have not established associational standing, as required by *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1249 (11th Cir. 2020). And they have no cognizable evidence of that here.

II. Plaintiffs' new arguments about altering the absentee-ballot envelope do not provide a basis for traceability and redressability.

In their original motion, Plaintiffs sought to enjoin "Defendants from rejecting absentee ballots based on any error or omission relating to SB 202's requirement of birthdates on ballot return envelopes and ORDER the Secretary of State to count such ballots and refuse certification of election results until all such ballots have been counted." [Doc. 548-1, p. 7], *accord* Proposed Order [Doc. 548-20, p. 2]. Plaintiffs made no argument at all that State Defendants should be required to alter the absentee-ballot *envelope* as part of any injunctive relief—only that *processing* of absentee ballots be altered. *Id*. Indeed, while Plaintiffs mentioned in a footnote that they would want to have the absentee ballot forms altered, [Doc. 548-1, p. 26 n.4], they said that "counting absentee ballots regardless of birthdate information on the return envelope is an adequate alternative." *Id*.

Having now recognized the lack of traceability and redressability because State Defendants do not process absentee ballots, Plaintiffs apparently have now withdrawn their earlier assertion that absentee ballot envelopes would not have to be altered and now apparently seek an injunction requiring the alteration of those forms. [Doc. 595, p. 12]. But even if this Court allows Plaintiffs to shift their position on the relief they are requesting, it does

not solve Plaintiffs' traceability and redressability problems. As the Eleventh Circuit explained in *Jacobson*, there is no "writ of erasure"—injunctions may only enjoin the actions of *officials* who are parties to the action. 974 F.3d at 1255. Thus, even if the Secretary were ordered to alter the forms related to absentee ballots, nonparty county election officials would still be obligated to follow the statute as it is, not as Plaintiffs wish it would be. And that itself destroys traceability and redressability.

III. Plaintiffs' arguments about the suspension power of the SEB does not show adequate traceability and redressability.

Further sensing their weakness on traceability and redressability, Plaintiffs resort to a curious new argument to attack SB 202—that the SEB has the power *under SB 202* to "take over a county office." [Doc. 595, pp. 12-13]. Just as Plaintiffs had to modify their testimony on potential injuries and had to modify their requested relief, the *Ga. NAACP* Plaintiffs are now relying on the suspension provisions they challenge for traceability and redressability. *See Ga. NAACP* [Doc. 53 ¶¶ 162–163, 179(8), 194, 209].

This power, so goes Plaintiffs' argument, distinguishes State Defendants from the state officials in *Jacobson*. But the statutory process Plaintiffs cite is not direct—it requires a series of problems over multiple elections with specific factual findings after notice and a hearing rather than a direct power to

suspend. *Compare* O.C.G.A. § 21-2-33.2 *with Jacobson*, 974 F.3d at 1253. The counties are "independent officials," and Plaintiffs cannot establish traceability and redressability through the suspension provisions. *Jacobson*, 974 F.3d at 1253.

IV. Plaintiffs' claims about foreseeability are not relevant to a materiality claim and misrepresent testimony.

Plaintiffs also now rely on the testimony of Lynn Bailey for the idea that it was somehow foreseeable that voters would have their ballots rejected because of the birthdate requirement. [Doc. 595, p. 17]. But none of this evidence or argument affects Plaintiffs' claims.

First, foreseeability is irrelevant to a claim under the Civil Rights Act because it is not a statutory element. *See* 52 U.S.C. § 10101(a)(2)(B); *see also Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting from the denial of the application for stay) (listing the five specific elements of 52 U.S.C. § 10101(a)(2)(B) and not including any foreseeability element).

Second, Ms. Bailey's testimony does not support this claim. When the entire context of Ms. Bailey's testimony is included, the discussion on which Plaintiffs rely related to suggested changes to the absentee ballot *application*, not the absentee ballot *envelope*. *See* Deposition of L. Bailey, attached as Ex. B, 186:10–190:25. And in that testimony Ms. Bailey was discussing the prior

signature-matching system and envelope while the legislature was considering changing it, not the redesigned system implemented by SB 202. This testimony thus offers no support for Plaintiffs' claims here and only reinforces the significant revisions to the absentee-ballot system after the 2018 and 2020 elections. Plaintiffs apparently can cite no complaints or errors after the adoption of SB 202.

V. The additional letters submitted by Plaintiffs demonstrate that counties process absentee ballots.

Plaintiffs also attach more than 200 letters and an analysis of those letters from their counsel as part of their reply. But Plaintiffs did not even request these letters until May 25, 2023. [Doc. 595-1, ¶ 8]. Plaintiffs aver that they did not receive these letters until after State Defendants filed their response brief. [Doc. 595-1, ¶ 9].

But even if this Court considers the letters, they are apparently a subset of absentee-ballot rejections in a single county and not all 159 counties, they also underscore the reality that Georgia law commits the processing and verification of absentee ballots solely to county officials, not State Defendants. O.C.G.A. § 21-2-386(a)(1)(B). The letters also offer instructions on how voters

can cure the missing information even after the election,[1] including opportunities to email the proper information to the registrar, emphasizing the opportunities for voters to have their votes counted under Georgia law. *See, e.g.*, [Docs. 595-10, 595-11, 595-12]. Thus, these additional letters provide no support to Plaintiffs' claims in their motion.

CONCLUSION

Plaintiffs' new evidence and new arguments in their reply do not change the reality—they have failed to establish any of the requirements for a preliminary injunction. This Court should review the absentee voter verification provisions in light of Georgia's entire no-excuse absentee balloting process, which provides abundant opportunities for voters to vote by absentee ballot for any reason and cure any issues that arise during that process—even for a period after the election. This Court should deny Plaintiffs' motion and allow Georgia's absentee voter verification provisions to remain in effect.

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[1] Plaintiffs misstate the cure period in their Reply, [Doc. 595, p. 21 n.8], saying it is only three days long. But the cure period under Georgia law includes the period up to three days *after* the election and begins when the voter receives the notice. O.C.G.A. § 21-2-386 (a)(1)(C). Thus, if the voter receives the notice to cure in the weeks before the election, they still have until three days after the election to cure the issue. *See, e.g.*, [Doc. 595-11] (Nov. 30, 2022 letter notifying voter they have until December 9, 2022 to cure ballot from December 6 runoff); [Doc. 595-12] (May 12, 2022 letter notifying voter they have until May 27, 2022 to cure ballot from May 24 primary).

Respectfully submitted this 28th day of July, 2023.

Christopher M. Carr
Attorney General
Georgia Bar No. 112505
Bryan K. Webb
Deputy Attorney General
Georgia Bar No. 743580
Russell D. Willard
Senior Assistant Attorney General
Georgia Bar No. 760280
Elizabeth Vaughan
Assistant Attorney General
Georgia Bar No. 762715
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Gene C. Schaerr*
Special Assistant Attorney General
Erik Jaffe*
H. Christopher Bartolomucci*
Donald M. Falk*
Brian J. Field*
Cristina Martinez Squiers*
Edward H. Trent*
Nicholas P. Miller*
Joshua J. Prince*
Annika Boone Barkdull*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com
**Admitted pro hac vice*

/s/Bryan P. Tyson
Bryan P. Tyson
Special Assistant Attorney General
Georgia Bar No. 515411
btyson@taylorenglish.com
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@taylorenglish.com
Diane Festin LaRoss
Georgia Bar No. 430830
dlaross@taylorenglish.com
Donald P. Boyle, Jr.
Georgia Bar No. 073519
dboyle@taylorenglish.com
Deborah A. Ausburn
Georgia Bar No. 028610
dausburn@taylorenglish.com
Daniel H. Weigel
Georgia Bar No. 956419
dweigel@taylorenglish.com
Tobias C. Tatum, Sr.
Georgia Bar No. 307104
ttatum@taylorenglish.com
Taylor English Duma LLP
1600 Parkwood Circle
Suite 200
Atlanta, Georgia 30339
(678) 336-7249

Counsel for State Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing brief was prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/Bryan P. Tyson
Bryan P. Tyson