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

BLACK VOTERS MATTER FUND, et al., Plaintiffs, vs. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia, et al., Defendants.	Civil Action No.: 20-cv-1489-AT

PLAINTIFFS' BRIEF IN OPPOSITION
TO DEKALB DEFENDANTS' MOTION TO DISMISS

Defendants DeKalb County Board of Registration & Elections (the "Board")[1] and Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, Baoky N. Vu, and Erica Hamilton, in their official capacities (the "Individual Defendants") (together, "DeKalb") have filed a motion to dismiss the Amended Complaint. Doc. 104. Specifically, DeKalb argues that: (1) the Board is

[1] References to "County Boards" in this brief refers to a county's analogous Board of Registration & Elections.

purportedly protected by Eleventh Amendment immunity when it performs the function at issue in this case; (2) the Individual Defendants are purportedly protected by legislative immunity; and (3) Plaintiffs allegedly lack standing. These arguments are meritless.[2]

ARGUMENT

Below, Plaintiffs establish that (1) the Board is not entitled to Eleventh Amendment immunity because it has failed to show, at this early stage of the case, that it acts as an "arm of the state" when implementing the postage requirement; (2) the Individual Defendants have failed to establish their affirmative defense of legislative immunity largely because they fail to specify which act by which defendant is entitled to immunity; and (3) Plaintiffs have standing because the postage requirement is harming both Plaintiffs now.

I. PLAINTIFFS' CLAIMS AGAINST THE BOARD ARE NOT BARRED BY ELEVENTH AMENDMENT IMMUNITY

The Board has failed to carry its burden in demonstrating its entitlement to Eleventh Amendment immunity at this early stage of litigation.

[2] Because DeKalb's motion to dismiss the amended complaint incorporates the Board's prior motion to dismiss the complaint, Doc. 104 at 3 (incorporating Doc. 80), Plaintiffs will cite to both briefs here when referring to DeKalb's arguments.

The Eleventh Circuit considers "four factors to determine whether an entity is an 'arm of the State' in carrying out a particular function: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003). "Under the traditional Eleventh Amendment paradigm, states are extended immunity, counties and similar municipal corporations are not, and entities that share characteristics of both require a case-by-case analysis." *U.S. ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 601 (11th Cir. 2014).

Importantly, the inquiry does not examine whether the sued entity "wear[s] a 'state hat'" at all times. *Manders*, 338 F.3d at 1319. Instead, a court "must focus on the nature of the particular function at issue" in the suit. *Id*. Thus the question is whether an entity acts for the state "in a particular area, or on a particular issue." *Stanley v. Israel*, 843 F.3d 920, 924 (11th Cir. 2016).

As with any affirmative defense, the defendant entity invoking Eleventh Amendment immunity "bears the burden of demonstrating that it qualifies as an arm of the state." *Miller v. Adv. Behavioral Health Sys.*, 677 Fed. Appx. 556, 559 (11th Cir. Jan. 26, 2017) (citations tracing to decisions by the Second, Third, Sixth,

Seventh, and Ninth Circuits all establishing that the burden is on the government to establish Eleventh Amendment immunity).

A. First Factor: State Law "Defines" the Board as a County Entity

The first factor looks at how "state law defines" the Board. Here, state law (O.C.G.A. § 21-2-40) defines the Board as a "county" entity, which militates against "arm of the state" status. *See Abusaid v. Hillsborough Cnty. Bd. of Cnty. Com'rs*, 405 F.3d 1298, 1305 (11th Cir. 2005) (sheriffs not "arm of the state" under first factor because state constitution labelled them "county officers"); *Stanley*, 843 F.3d at 926 ("state law defines sheriffs as county officers[,]" which is "indicative of county status").

The Board argues that the General Assembly "created" the Board, gave it "powers and responsibilities" over elections, and has dictated the number of members on the Board and how they are selected. Doc. 80 at 5-6. For support, the Board relies exclusively on dictum from *Casey v. Clayton Cty.* No. 04-CV-00871, 2007 WL 788943, at *8 (N.D. Ga. Mar. 14, 2007), which observed that the "Board of Elections was created by the Georgia General Assembly" and that "for purposes of conducting elections in general, there can be little doubt that Eleventh Amendment immunity would attach." *Id.* The Board also appears to rely on

Casey's observation that the "state fixes the duties of the Board." *Id.* The Board's arguments fail.

1. Casey's dictum is inapplicable because the case did not concern an election function

As a preliminary matter, the Board's reliance on *Casey*'s dictum is misplaced for three independent reasons.

First, *Casey*'s dictum is inapplicable because it says nothing about the postage requirement (and neither does this section of DeKalb's brief), and so cannot be used to support the kind of specific argument the Eleventh Circuit required in *Manders*. Thus, for instance, the Eleventh Circuit has refused to apply prior Eleventh Circuit "arm of the state" decisions even when the prior decision concerned the same entity, precisely because the prior decision "did not address the function at issue in this case." *Stanley*, 843 F.3d at 925-26. This Court should similarly disregard *Casey*.

Second, *Casey's* discussion of various election responsibilities was dictum, since the function at issue in the case involved employment, not election functions. *Casey*'s discussion was only meant to illustrate generally that it was relatively unclear whether employment decisions by the County Board were state or county functions. *Casey*, 2007 WL 788943, at *8. After taking this detour, *Casey* immediately pivoted back to the function at hand. *See id.* at *9 ("But, it is not the

Board's management of elections which is at issue here."). Thus, *Casey*'s reasoning with respect to election functions generally did not need to match the rigor required when deciding Eleventh Amendment immunity with respect to a particular election function.

Third, if *Casey* involved a specific election function, then its wide-ranging analysis about "conducting elections in general" would be at odds with *Manders*. There, the Eleventh Circuit specifically rejected using a generalized, flyover analysis of a swath of functions when only a specific function is at issue. *See Manders*, 338 F.3d at 1319 ("We need not, and do not, decide today whether Georgia sheriffs wear a 'state hat' for Eleventh Amendment purposes for all of the many specific duties assigned directly by the State."). Most importantly, *Casey* said nothing about the postage requirement.

2. The Board's creation by state law carries little, if any, weight

As noted above, the Board's primary argument under the first factor is that the Board was created by state law and that state law assigns responsibilities to the Board. Doc. 80 at 5-6. But these features alone are not sufficient to point the first factor in the Board's favor, especially since state law defines the Board as a "county" entity. O.C.G.A. § 21-2-40.

In addition, while the Board is "created" by the General Assembly, it is created and empowered exclusively with respect to a single county, DeKalb County. O.C.G.A. § 21-2-40(b). Such board may perform duties only within a particular county. *See, e.g.*, *Lightfoot v. Henry Cnty. Sch. Dist.*, 771 F.3d 764, 769-70 (11th Cir. 2014) (observing that "Georgia's Constitution often groups school districts together with counties and municipalities… distinct from the State").

The Board lists various election functions assigned to the Board by state law, e.g., "the preparation for and conduct of elections," etc., Doc. 80 at 6, but this also fails to significantly help the Board. The Eleventh Circuit has made clear (after *Casey* was decided) that the mere fact that a county entity was created by state law, or that the county entity's duties were fixed by state law, is insufficient to establish "arm of the state" status. *See Lightfoot*, 771 F.3d at 771 (whether an entity's "powers and duties are derived from state law" "is not sufficient" to establish arm of the state status for purposes of the first factor); *see also McAdams v. Jefferson Cnty. 911 Emerg. Commc'ns Dist. Inc., THE*, 931 F.3d 1132, 1135 (11th Cir. 2019) (county entity was not an "arm of the state" under the first factor even if state law "authorized" that entity to perform the function at issue, because the entity was still "operated by local authorities.").

Instead, even if state law assigns certain functions to county entities, the inquiry is whether those functions are *state* functions. The Board fails to point to any statute suggesting that these functions are state functions, such as a delegation statute that allows the Secretary to delegate its duties to the Board. *See, e.g.*, *Lesinski*, 739 F.3d at 602 (Florida water management district was an "arm of the state" where state law "vest[ed]" in a state agency certain powers, who in turn had "discretion to accomplish these ends through delegation of appropriate powers to the . . . districts" (citing FL ST § 373.016(5)); *Manders*, 338 F.3d at 1319 (first factor weighed in favor of arm of the state status because "the State uses the county jail to incarcerate" people indicted by, or convicted under, state law). Nor does the Board point to a supervision statute that makes the Secretary the supervisor of the Board. *See, e.g., Ross v. Jefferson Cnty. Dept. of Health*, 701 F.3d 655, 660 (11th Cir. 2012) (first factor in government's favor because the functions assigned to county boards of health were subject to "the supervision and control of the State Board of Health"). (The Board's training and certification argument is addressed *infra* Part I.B.)

The Board also fails to point to any Georgia state court case characterizing the Board as a state agency or an extension of the state. *See McAdams*, 931 F.3d at 1135 ("most important factor" is "how the entity has been treated by the state

courts." (citation omitted)).[3] Nor does DeKalb point to the Georgia Constitution, which is unsurprising since the Georgia Constitution is silent on this issue. *See, e.g.*, *Manders*, 338 F.3d at 1309-12 (extensive discussion of Georgia Constitution's treatment of sheriffs).

DeKalb's assertion that the "General Assembly—not the County—[] sets forth the number of members . . . , member requirements, guidelines on how members are appointed or elected, and terms of service," Doc. 80 at 6, also has minimal if any relevancy. The more important question is *which entity decides who* the members of the Board are. *See, e.g.*, *Stanley*, 843 F.3d at 926-27 (first factor weighed in plaintiffs' favor where county chooses the sheriff); *McAdams*, 931 F.3d at 1135 (first factor can look at whether entity is "operated by local authorities").

Here, it is the county or county-based entities that control who is put on the Board and who will carry out the Board's obligations. Specifically, the local act authorizes the "county executive committee of the political party" who garnered

[3] Plaintiffs could not find a Georgia decision on point, and it is not Plaintiffs' burden to do so. But this factor still tilts in Plaintiffs' favor because there are Georgia Supreme Court elections decisions where a County Board was sued over absentee ballot procedures and there was no mention of the Secretary of State or any characterization of the board as a state agency. *Cf., e.g.*, *Spalding Cnty. Bd. of Elec. v. McCord*, 287 Ga. 835 (2010) (involving absentee voting); *McIntosh Cnty. Bd. of Elec. v. Deverger*, 282 Ga. 566 (2007) (similar).

the first- and second-most votes in the last election to appoint four members, who in turn appoint the fifth.[4] Code of DeKalb County Georgia (hereinafter "DeKalb Code") § 171.[5] If an appointment is not made in time, then the "governing authority of said county" picks the member. DeKalb Code § 174. The Board, in turn, hires the elections supervisor (Defendant Hamilton). DeKalb Code § 184.

In sum, the Board appears to rely solely on the fact that it is created by state law and has functions assigned by state law. This alone does not tilt the first factor in the Board's favor. State law "defines" the Board as a county entity, state law assigns functions to the Board but nowhere characterizes the Board's responsibilities as a delegation of state functions, and the Board is selected by county-based entities, if not the county itself. Thus, the first factor does not help the Board demonstrate that it is an "arm of the state" for purposes of the postage requirement.

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[4] The local act entrusts the initial selection to private entities, i.e., the county political parties, not to a governmental entity. *Cf., e.g.*, *Delay v. Sutton*, 304 Ga. 338 (2018) (DeKalb County Board of Ethics appointment system unconstitutional because local law allowed private entities to appoint some of its members). But the fact that these private entities are county-based tilts the first factor further in Plaintiffs' favor.

[5] *See* https://library.municode.com/ga/dekalb_county/codes/code_of_ordinances.

B. Second Factor: The State Does Not Have Total Control Over the Board With Respect to the Postage Requirement

The second factor—the degree of control the State maintains of the Board with respect to the postage requirement—is admittedly a closer question. The evidence so far has pointed to both the Board and the Secretary as the parties responsible for imposing and implementing the postage requirement. On the one hand, the Secretary alleges that "[c]ounty elections officials are responsible for the absentee balloting process, and their decision to not pay for voters' postage cannot be imputed to the Secretary." Doc. 87 at 14; *see also* Doc. 97 at 9-10. On the other hand, DeKalb argues that "the State maintains a high degree of control over [the Board]," Doc. 80 at 6, and in a prior brief appeared to suggest that state law *requires* the Board to impose a postage requirement, Doc. 50 at 4 (noting "Dekalb VRE's procedures for prepaid postage required under O.C.G.A. §§ 21-2-233(b) and 21-2-234(c)).

Both Defendants appear to agree, however, that either the county or the state can *lift* the postage requirement. *See* Doc. 50 at 4-5; Doc. 51 at 33-35; Doc. 87 at 14. These same brief excerpts also agree that the county plays at least a significant role in *implementing* the postage requirement currently. These features demonstrate, at this early stage of the case, that the county has at least some control over the postage requirement process for purposes of the second factor.

The Board relies solely on statutes in arguing that the State has substantial control over the postage requirement. Specifically, the Board argues that: (1) the Board exercises the powers granted by State law; (2) the State trains and certifies certain Board members and may discipline them; (3) the Board's actions are limited by State law; and (4) any rule promulgated by a county "executive committee" regarding primary conduct cannot conflict with the Board's rules and regulations. Doc. 80 at 6-7. DeKalb cites no cases in support of any of these arguments. As explained below, these arguments fail largely because no state statute says who is responsible for any postage requirement.

Points (1) and (3) argue that the State has control simply because the Board's creation and duties are provided and circumscribed under state law. But that has limited relevance where, as here, the Board points to no law saying that the Secretary or the State Election Board has authority to limit the Board's discretion *with respect to the postage requirement*. *See Stanley*, 843 F.3d at 928 (while state statute codified the defendant's responsibilities generally, it did not expressly restrict the defendant's ability to carry out the function at issue in the case); *McAdams*, 931 F.3d at 1135 (the defendant "has pointed to no authority indicating that the [state entity] or any other state agency has control over" the function at issue in that case); *Lightfoot*, 771 F.3d at 773-74 (state lacked control over the

school district's functions even where "Georgia has enacted many laws pertaining to the operation of school districts").

Point (4) argues that any rule promulgated by a county "executive committee" regarding primary conduct cannot conflict with the Board's rules and regulations. Doc. 80 at 7. This unelaborated argument appears to suggest that because the Board is allegedly a state entity, and the county's primary activities cannot conflict with the Board's rules and regulations, thus the State has control. But again, this local act says nothing about the postage requirement, and as established above, the Board is not purely a state entity because it is the county or county-based entities that select the members of the Board.

Finally, the Board's Point (2) about state training and certification has limited relevance, again because no statute specifically says who is or is not in charge of imposing or lifting a postage requirement. Thus, for example, in *Stanley*, even where the governor had the power to *fire* the defendant sheriff (the Board does not contend that the Secretary has such power over the Board),[6] *id.* at 928, the

[6] Instead, the law pointed to by DeKalb only allows the State Election Board to *fine* a Board, not fire any of its members. And the fining authority is limited, as the statute pointed to by DeKalb only allows a fine if the Board fails to send someone to fulfill the training requirement. O.C.G.A. § 21-2-100(e). DeKalb points to no laws allowing the State Election Board to impose a fine if a County Board does or does not impose a postage requirement.

Eleventh Circuit still found that State control was limited for purposes of that case. That is because state law provided "little [state] involvement in the removal of deputies"—the function at issue in that case—with only minimal boundaries on that power. *Id.* Here, state law is completely silent on who has control over the postage requirement and does not set any parameters on postage requirements at all.

To be sure, the Eleventh Circuit did find that, where the function at issue is the hiring of deputies, the "strongest indicia of state control over personnel decisions is found in state law," which required "deputies to meet certain statutory qualifications . . . before they may be hired." *Stanley*, 843 F.3d at 928.[7] But unlike in *Stanley*, where the state laws at least mentioned the function at issue (hiring deputies), here the two statutes DeKalb points to when mentioning the state's training and certification standards say nothing about a postage requirement, or anything close to one. O.C.G.A. § 21-2-100 refers to "training" without mentioning the subjects of such training. O.C.G.A. § 21-2-101 discusses certification with respect to operating the state's direct recording electronic voting equipment, but it doesn't mention any other subjects that the certification covers.

[7] Though even then, the Eleventh Circuit found the second factor to tilt away from "arm of the state" status because ultimately the county chooses who performs this function. *Id.* at 929.

The Board also fails to point to any relevant regulations. There is thus no comparably "strong[] indicia of state control" here. *Stanley*, 843 F.3d at 928.

Furthermore, any suggestion of State control over the postage requirement that can be wrung from the training and certification statutes is greatly limited, because only *one* person is required to go through training and certification (not all five Board members), and it does not even have to be a Board member. *See* O.C.G.A. §§ 21-2-100(a) ("one member of the board or a designee of the board"); 21-2-101(a) ("the designee of [the] board charged with the daily operations of that board").

Lastly, the Eleventh Circuit has repeatedly emphasized that State control is limited for purposes of this second factor when it is the county that largely controls *who* performs the function at issue. *See, e.g.*, *Stanley*, 843 F.3d at 928 ("Of primary importance is the fact that in Florida, the county controls" who performs the functions at issue in that case, i.e., whether it is the sheriff or someone else); *Lightfoot*, 771 F.3d at 771-72 (second factor weighed in plaintiffs' favor where "[c]ounty school board members are locally elected county residents," and thus, "Georgia school districts are largely under local control."); *McAdams*, 931 F.3d at 1135 (second factor weighed in plaintiffs' favor where entity performing the

function at issue are "appointed by counties and municipalities"). As discussed *supra* Part I.A.2., the Board is selected by the county or county-based entities.

Lastly, the Board is located in a county office within the county, not a state office in the capital, further limiting state control. *See Abusaid*, 405 F.3d at 1306-07 (less state control where "sheriff is required to maintain his office at the place of the county seat," "illustrating the essentially local nature of the office").

For these reasons, the Board has failed to meet its burden in demonstrating a substantial degree of State control over the postage requirement. Even if this factor is a "closer question," it ultimately tilts in Plaintiffs' favor at this early stage of the case. *See, e.g.*, *Stanley*, 843 F.3d at 925 (at summary judgment stage, second factor presents a "closer call" but "ultimately weighs toward county status"); *Abusaid*, 405 F.3d at 1306 (at motion to dismiss stage, the "degree of state control over the sheriff[] is arguably mixed, but still weighs against arm of the state status").[8]

[8] Although both the state and the counties appear responsible for the postage requirement based on the evidence so far, Plaintiffs have only sought a preliminary injunction against the Secretary out of respect for federalism and the current timetable as described in a prior brief, Doc. 98 at 14-15, incorporated by reference. Plaintiffs do not waive the right to seek a different form of injunctive relief in a later stage of this case when the facts are more developed.

C. Third Factor: the Board Derives Its Funds from the County

The third factor tilts in Plaintiffs' favor because the Board all but concedes that it derives its funds from the county, not the state. Doc. 80 at 7 (citing O.C.G.A. § 21-2-71 ("governing authority of each county . . . shall appropriate . . . the funds it shall deem necessary for the conduct of primaries and elections in such county"). The Board similarly concedes that the county pays the salaries of county elections officials. *Id.* (citing DeKalb Code §§ 181-187 ("governing authority of the county" required to "expend public funds" when paying county elections officials)). Furthermore, it is the county that must pay for training and certification. *See* O.C.G.A. §§ 21-2-100(d); 21-2-101(a).

Application of the third factor here is thus straightforward. But the Eleventh Circuit has found the third factor to be in the plaintiffs' favor even where county funding was more attenuated than it is here. In *McAdams*, the third factor tilted in plaintiffs' favor because the defendant's revenues were not "monies or property of the state," even though state law required initial distribution from a state fund. *See McAdams*, 931 F.3d at 1135-1136. Here, the Board does not allege that any significant part of its funding comes from the state. Nor does the Board suggest that the state has placed limits on how much money the Board can raise from the county. *See Lightfoot*, 771 F.3d at 775-77 (third factor in plaintiffs' favor even

where state funds constituted "sixty-five percent of the School District's budget," because the state did not prevent school districts from raising more revenues); *id.* at 774 (school districts "exercise considerable autonomy over local fundraising"). The fact that salaries are paid by the county further establish this factor in favor of Plaintiffs even if state law were to fix a certain salary, which is not the case here. *Stanley*, 843 F.3d at 930 (third factor in plaintiffs' favor where county paid the salary even if salary amount was fixed by state law).

The Board's sole argument appears to be that the county's "budgetary authority" is limited because state law essentially forces the county to provide a sufficient budget that will allow the Board to perform those functions. Doc. 80 at 7 (citing *Casey*, 2007 WL 788943, at *8). This overbroad proposition would essentially provide the Board immunity for all election functions assigned to it by state law—and indeed, any duty assigned to any local entity by state law—because many responsibilities assigned by state law impact the county budget in some way. Nowhere does DeKalb suggest that the state has any kind of direct control over the county's budgetary process, and they do not cite any case suggesting that a state law's mere assignment of responsibilities to counties is tantamount to controlling a county's budget.

In any event, the Eleventh Circuit has rejected the Board's suggestion that budgetary authority is significantly relevant to the third factor, even in cases where the state's control over the county budget far exceeds the control here. In *Abusaid*, the county drafted the initial budget for the sheriff but did not "have final control over the sheriff's budget" because the county's budgetary decisions could be appealed directly to a state agency, who in turn had the *final* authority to change the budget at will. 405 F.3d at 1311. Yet even then, the third factor weighed in plaintiffs' favor because it "leaves unaltered the fundamental fact that the sheriffs' funds are derived entirely from their respective counties." *Id.* The Eleventh Circuit emphasized that "our inquiry on this third prong of our arm of the state test asks what is the source of a sheriff's funds, not (as the second prong asks) what degree of control the state retains over the budgeting process." *Id.* Similarly here, budgetary authority does not dictate the third factor. *See also Stanley*, 843 F.3d at 929 ("The fact that a sheriff's budget is funded entirely by the county . . . is a strong indicator of county control that is not outweighed by the fact that the state maintains some control over the budget review process.").

But "even if state control over the budgeting process were the proper inquiry, this third factor would still weigh against arm of the state status," *Abusaid*, 405 F.3d at 1312, because the state law requires that the budget must still be

submitted to the county. *See* O.C.G.A. § 21-2-70(12); *Abusaid*, 405 F.3d at 1312 (state control was limited because, among other reasons, the initial budget must still be submitted to the county for approval and the sheriff was accountable to the county). Here, any initial budget is submitted to the county, and the Board is primarily accountable to the county because as noted above, it is the county or county-based entities that select the Board's members.

D. Fourth Factor: the County is Responsible for Judgments Against the Entity

The final factor also weighs in favor of Plaintiffs. As the party with the burden of establishing immunity, the Board fails to point to any statute suggesting that the state is responsible for judgments against the Board and all but concedes that the state is not. Doc. 80 at 8. Indeed, the Board has specifically asserted that it would have to spend money if this Court no longer allowed it to have voters cover the government's costs on postage. *See* Doc. 50. The fourth factor thus tilts in Plaintiffs' favor. *See McAdams*, 931 F.3d at 1136 (observing "it does not appear that Alabama would be financially responsible for a judgment against Jefferson County").

The Board's only argument is that the fourth factor is not dispositive. Doc. 80 at 8 (citing *Pellitteri v. Prine*, 776 F.3d 777, 783 (11th Cir. 2015) (citing *Ross v. Jefferson Cnty. Dept. of Health*, 701 F.3d 655, 660 (11th Cir. 2012)). Without

discussing these cases, the Board seems to argue that even if the fourth factor tilted in favor of Plaintiffs, it is outweighed by the other three factors. However, as established above, the first three factors lean in favor of Plaintiffs.

For the above reasons, the Board is not entitled to Eleventh Amendment immunity when it comes to the postage requirement, at least not at this early stage of the case. Its motion to dismiss on Eleventh Immunity grounds should thus be denied. *See, e.g.*, *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1321 (N.D. Ga. 2018) (denying Eleventh Amendment immunity "at this juncture for purposes of considering Plaintiffs' motions for preliminary injunction"); *Tuveson v. Fla. Gov. Council on Indian Affairs, Inc.*, 734 F.2d 730, 732-34 (11th Cir. 1984) (after jury trial, where the "exact status" of the sued entity "under Florida law is uncertain," examining various facts of how the entity operated in practice, with some facts pointing towards, and some against, "arm of the state" status); *Casey v. Clayton Cty.* No. 04-CV-00871, 2007 WL 788943, at *9 (N.D. Ga. Mar. 14, 2007) (denying Eleventh Amendment immunity at summary judgment stage to allow facts related to immunity to develop at trial).

II. THE INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO LEGISLATIVE IMMUNITY

The Individual Defendants, on the other hand, make the blanket assertion that they are entitled to legislative immunity "when approving budgetary and policy items." Doc. 104 at 3. Again, each Individual Defendant carries the burden of demonstrating that she or he is entitled to legislative immunity as to this case. *See Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009) ("Officials claiming protection 'must show that such immunity is justified for the governmental function at issue.'" (citation omitted)); *Scott v. Taylor*, 405 F.3d 1251, 1258 (11th Cir. 2005) ("Legislative immunity is an affirmative defense"). As explained below, the Individual Defendants have failed to satisfy their burden because it is not clear from DeKalb's argument what actions by which Individual Defendant are entitled to legislative immunity, and Plaintiffs cannot guess which ones they are talking about. Thus, legislative immunity should be denied at this stage, without prejudice to DeKalb asserting the defense later after discovery has completed. *See Crymes v. DeKalb Cnty., Ga.*, 923 F.2d 1482, 1486 (11th Cir. 1991) (allegations in pleading were sufficient to defeat legislative immunity at motion to dismiss stage).

DeKalb's argument rests solely on an alleged blanket rule that anything considered "budgetary" or "policymaking" is automatically protected by legislative immunity. Doc. 104 at 3. But the Eleventh Circuit has expressly rejected these

kinds of *per se* rules. *See Bryant*, 575 F.3d at 1305 ("We decline to adopt" a "*per se* rule that would provide . . . immunity any time he drafts a proposal that is later submitted to a legislative body."). "Instead, [courts] examine the facts of each case to determine whether the official *in the instant case* was engaging in legislative activity." *Id.* (internal alterations omitted, emphasis added).

Furthermore, the Individual Defendants do not identify "the facts of [this] case" or which allegations or evidence implicate legislative immunity, which dooms their argument at this early stage. *See, e.g.*, *Parker v. Laurel Cnty. Det. Ctr.*, No. 6:05-113-DCR, 2005 U.S. Dist. LEXIS 50006, at *9-10 (E.D. Ky. Aug. 9, 2005) (denying legislative immunity on motion to dismiss posture, where defendants failed to specify what acts by whom was protected).[9]

Specifically, the Individual Defendants do not identify which specific action by which Individual Defendant is entitled to legislative immunity, whether such act is "budgetary" or "policymaking" and why, and how that matters to the immunity analysis. *See, e.g.*, *Bryant*, 575 F.3d at 1304 (conducting fact-specific analysis,

[9] "Because Parker has not specifically pled exactly the actions taken by each individual Defendant that violated a specified constitutional right, it is impossible for the Court to determine at this time whether legislative immunity is applicable. Also, because the Defendants have not set out the capacity in which they seek legislative immunity, the Court cannot grant the broad scope of legislative immunity that is being sought." *Id.*

noting "we are careful to limit our decision to this narrow issue and decide 'only what is necessary to the disposition of the immediate case'" (citation omitted)). Nor do they identify which Individual Defendant plays what role in any "budgetary" or "policymaking" process generally. For instance, they do not say whether any Individual Defendant "prepares committee reports," "participates in committee investigations and proceedings," "votes, debates," or "reacts to public opinion," or whether any of those actions are relevant to the postage requirement. *Ellis v. Coffee Cnty. Bd. of Registrars*, 981 F.2d 1185, 1191 (11th Cir. 1993) (internal alterations and citations omitted). They say nothing with respect to the Board's relationship with the DeKalb County Commissioners, a legislative body who are the ones who receives and approves their budget proposals. They do not distinguish between the Board members and Defendant Hamilton, who have different roles and responsibilities. Most importantly, they say nothing about the postage requirement or any of their roles with respect to that function. The need for detail is especially great in light of DeKalb's contradictory arguments made elsewhere, that DeKalb have limited "budgetary authority" for purposes of

postage, Doc. 80 at 7, and that the state is the one in control of the postage requirement, *id.* at 6.[10]

Plaintiffs cannot respond adequately when the Individual Defendants do not identify which actions by whom are entitled to immunity, but Plaintiffs make some initial observations. With respect to the Individual Defendants' "budgetary" argument, Plaintiffs' claims do not challenge any budget-making process or any failure to approve a budget that Plaintiffs prefer. Plaintiffs challenge the Individual Defendants' implementation of a postage requirement. The budget may be DeKalb's excuse, but it is not the specific action being challenged, and whether

[10] This Court should also reject any potential argument by DeKalb that the Amended Complaint lacks the specificity the Individual Defendants need to establish legislative immunity. That is because "Plaintiffs are not required to negate an affirmative defense in their complaint." *La Grasta v. First Union Secs., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal alterations omitted). The proper thing to do in that scenario is to deny the motion to dismiss and let discovery play out. *See, e.g.*, *Brison v. Tester*, No. 94-2256, 1994 U.S. Dist. LEXIS 18193, at *85-86 (E.D. Pa. 1994) (denying legislative immunity on motion to dismiss posture where "there are, at present, no allegations as to the procedures used by the Board of Commissioners to enact the funding in question. . . . Because there are insufficient facts contained in the amended complaint to ascertain whether the acts complained of were procedurally as well as substantively legislative, . . . the court will not grant the individual Commissioners' motion to dismiss at this time."). Moreover, there is no heightened pleading standard, *e.g.,* Fed. R. Civ. P. 9(b), DeKalb has not filed any motion for a more definite statement, Fed. R. Civ. P. 12(e), and DeKalb has not alleged a failure to state a claim under Fed. R. Civ. P. 12(b)(6) on grounds other than federalism. Doc. 80 at 14.

budgetary needs can sometimes justify charging voters money is a separate question on the merits. Thus, this case is unlike *Bryant*, upon which the Individual Defendants rely. In *Bryant*, the plaintiff directly challenged a defendant's "crafting [of] the 2004 budget," because it was allegedly an "artifice for what was in fact a retaliatory personnel decision." *Bryant*, 575 F.3d at 1281. The Eleventh Circuit found that irrelevant, because at the end of the day, the plaintiff was directly challenging the formation of the budget, which was legislative in nature. *Id.* at 1306.

The reverse is true here. The Amended Complaint does not challenge any Individual Defendant's budgetary decision as a cover for challenging an unconstitutional act. Nor do Plaintiffs allege that it was any Individual Defendant's budgetary decision that *caused* the postage requirement in the first place. Instead, Plaintiffs are directly challenging the Individual Defendants' implementation of the unconstitutional act itself.

As far as "policymaking," the Individual Defendants' unelaborated argument fails to demonstrate that the postage requirement is purely a result of their own "policymaking." Indeed, in a prior brief, it was unequivocally asserted that DeKalb's imposition of a postage requirement is required by state law. Doc. 50 at 4 (referencing "DeKalb VRE's procedures for prepaid postage required under

O.C.G.A. §§ 21-2-233(b) and 21-2-234(c)."); Doc. 50-1 at ¶ 23. They also argue the state has a "high degree of control" over this process. Doc. 80 at 6. Under their own theory then, the postage requirement is more akin to a "mere administrative application of existing policies," here the state's policies, rather than the creation of new policy. *Crymes*, 923 F.2d at 1485; *see also Curling v. Kemp*, 761 Fed.Appx. 927, 934 (11th Cir. Feb. 7, 2019) (no legislative immunity in voting case where plaintiffs challenged defendants' "implementation and execution of a state law and policy"). Even putting aside DeKalb's contradictory arguments, the evidence so far generally points to both the state and the county in terms of responsibility, *see supra* Part I.B., so discovery should play out to sharpen just who is responsible for what before assessing legislative immunity. DeKalb's conclusory argument fails to satisfy their burden of demonstrating an entitlement to legislative immunity against this evidentiary backdrop and their own arguments made elsewhere.

For these reasons, legislative immunity should be denied at this stage.

III. PLAINTIFFS HAVE STANDING[11]

DeKalb argues that Plaintiffs Black Voters Matter Fund ("BVM") and Megan Gordon allegedly lack standing because there is no injury-in-fact or

[11] DeKalb's arguments incorporate the standing and federalism arguments made by the Secretary. Doc. 80 at 9 n.3; at 14 (citing to Doc. 67-1). Plaintiffs also

traceability to DeKalb. DeKalb's motion appears to be a "facial" attack. "Facial attacks" require 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 purposes of the motion.'" *McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007) (citations omitted).

A. Plaintiffs Have Suffered an Injury-in-Fact

First, DeKalb argues that that the allegation about BVM's injury (Doc. 88 at ¶ 13) is a "conclusory allegation" that "fails to specify how such activities are different from BVMF's regular activities," citing *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). But *Iqbal* faulted the plaintiffs for providing a "formulaic recitation of the elements" and a conclusory allegation that the defendant's actions satisfied those elements. *Id.* Here, Plaintiffs specifically allege that BVM must divert resources from one thing, "efforts to facilitate voting by mail," such as helping voters understand how to vote by mail—and towards another thing, "making sure that voters know about the postage requirement and how to obtain it especially for

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incorporate their responses to the Secretary's standing and federalism arguments, Doc. 84 at 21-34; Doc. 91, including the standing arguments made in the reply brief filed in connection with the now-denied emergency motion for a preliminary injunction, Doc. 98 at 1-11.

those with less resources." *See also* Doc. 84 at 26-27. If Plaintiffs had merely alleged that "Defendants' actions cause BVM to divert its resources," that might be the kind of conclusory pleading rejected by *Iqbal*. Here, Plaintiffs explains *how* BVM would divert its resources.[12]

DeKalb fails to point to a single case that has demanded more detail. Indeed, in *Arcia v. Florida Secretary of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014), on which DeKalb relies, the Eleventh Circuit found organizational standing based solely on "affidavits showing [the organizations] have missions that include voter registration and education . . . , and that they had diverted resources to address the Secretary's programs," and followed up with potentially disenfranchised voters. Similarly, in *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009), the Eleventh Circuit found that NAACP had standing simply because the NAACP testified: that it "is involved in voter registration, mobilization, and education"; that it "uses [its] resources to maximize the ability to mobilize voters and educate

[12] To be sure, "efforts to facilitate voting by mail" might be read technically to include "making sure that voters know about the postage requirement and how to obtain it." But the pleading plausibly establishes that BVM would divert resources from efforts to facilitate voting by mail *that do not have to do with postage*, towards efforts that do. Should this Court dismiss BVM's claims on this basis, Plaintiffs respectfully request leave to amend to make this clearer by, for instance, incorporating BVM's later testimony which fleshes this out. *See, e.g.*, Doc. 75 at 113:24-115:10; Doc. 77.

voters and register voters"; and that the challenged statute would require the NAACP to "divert volunteers and resources from 'getting [voters] to the polls.'" *Id.* at 1350. And this was after a trial. BVM's allegations match this level of specificity, and that is sufficient at this early stage of litigation.

Second, DeKalb conclusorily argues that any alleged harm is not "actual or imminent." But the pleading alleges that BVM is diverting resources now, which is particularly plausible with the June elections coming around the corner. The allegations are all in present tense. DeKalb's argument largely echoes the Secretary's ripeness arguments, which relies on *Georgia Shift v. Gwinnett Cty.*, No. 1:19-cv-01135-AT, 2020 WL 864938 at *2 (N.D. Ga. Feb. 12, 2020). Doc. 67-1 at 17-21. Plaintiffs thus incorporate their response by reference, which also distinguishes *Georgia Shift*. Doc. 84 at 29-34.

In addition, DeKalb cites a trio of Supreme Court cases: *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992); *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990); and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407 (2013). Doc. 80 at 11-12. But DeKalb's mere citations do not explain how Plaintiffs' allegations resemble the ones found wanting in those cases. In any event, each of those cases is distinguishable because BVM has pled that they are being injured *right now* because the postage requirement is being imposed *right now*.

In *Lujan*, a member of the organizational plaintiff said that she may go to Sri Lanka "I don't know when," "not next year," but sometime "[i]n the future." *Lujan*, 504 U.S. at 564. But here, BVM is in Georgia right now, the postage requirement is in effect right now in Georgia, and so BVM is being injured right now.

In *Whitmore*, the third party asserting standing relied on a chain of if-then statements to reach injury. *Whitmore*, 495 U.S. at 158. But here, BVM does not allege that it will suffer injury "if" the government imposes a postage requirement; there are no "ifs" because the postage requirement has already been imposed.

The plaintiffs in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407 (2013) asserted that they have standing because their present injuries are in response to a "fear" of governmental harm in the indefinite future. *Id.* at 407-10. Here, BVM is not relying on "fear," whether "highly speculative" or "objectively reasonable," that a "highly attenuated chain of possibilities" will result in the government imposing a postage requirement in the indefinite future. *Id.* at 410. Instead, we are at the end of the chain. According to the pleadings, the postage requirement exists now and is causing BVM injury now.

Third, DeKalb argues that BVM lacks standing as to DeKalb because BVM is "particularly active in the rural Black Belt of Georgia." Doc. 80 at 11-12. But

just because BVM is active in the Black Belt does not mean BVM's diversion of resources is not impacted by DeKalb's implementation of a postage requirement, or that BVM operates *only* in the Black Belt. Because this is a facial attack on standing, this Court should "'merely [] 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.'" *McElmurray*, 501 F.3d at 1251 (citation omitted). Here, Plaintiffs allege that BVM focuses on "communities of color" and that BVM "focuses on removing" "barriers to voting that other communities do not [face]." Doc. 88 at ¶ 13. Because DeKalb is enacting a postage requirement and "communities of color" obviously exist in DeKalb, BVM's allegations suffice to establish standing at this stage. These allegations are not inconsistent with the possibility, for instance, that BVM is an integrated part of a statewide network whose activities shape BVM's allocation of resources, or that BVM's voter education efforts are sometimes tailored to reach statewide, which is more expensive than local advertising, given that the postage requirement is widespread.

Lastly, DeKalb argues that Defendant Gordon lacks standing essentially because the postage requirement has not made it impossible for her to vote. Doc. 80 at 11. But it is well established that neither *Anderson-Burdick* nor the Twenty-Fourth Amendment require a showing of impossibility. *See Frank v. Walker*, 819

F.3d 384, 386-87 (7th Cir. 2016) (*Anderson-Burdick* claim viable when voter cannot vote "with reasonable effort"); *Harman v. Forssenius*, 380 U.S. 528, 538, 541 (1965) (unconstitutional not just to deny, but also to "abridge" the right to vote for failure to pay a poll tax).

Though DeKalb does not explicitly rely on *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193 (11th Cir. 2020) to argue that BVM's standing is allegedly lacking (other than associational standing, which BVM does not claim), *Jacobson* does not prohibit a finding that Plaintiffs have standing for the reasons set forth in a prior brief, Doc. 98 at 1-11, which Plaintiffs incorporate by reference.

B. Plaintiffs Have Established Traceability

Finally, DeKalb argues that Plaintiffs' alleged injuries are supposedly not traceable to DeKalb's conduct. But for the reasons set forth *supra* Part III.A. and Part I.B., the allegations establish that Plaintiffs' injuries are current and are traceable at least in part to DeKalb. DeKalb argues, without any elaboration, that Plaintiffs' injuries are "self-inflicted." Doc. 80 at 13 (citing *Clapper*, 568 U.S. at 416). But *Clapper*'s characterization of the plaintiffs' alleged harms as "self-inflicted" was a summary encapsulation of its holding that present injuries resulting from speculative fears do not establish standing. And for the reasons set forth *supra* Part III.A., Plaintiffs are not like the plaintiffs in *Clapper*.

DeKalb then argues that the U.S. Postal Service is the real party imposing the postage requirement. The Secretary made the same argument, Doc. 51 at 16, 19; Doc. 67-1 at 13, and Plaintiffs incorporate their response by reference, Doc. 57 at 10-11; Doc. 84 at 14-15. At the risk of wearing out a tired analogy, DeKalb's argument is like the government requiring vehicle deeds to vote, then blaming car dealerships for not giving out free cars.

CONCLUSION

For the above reasons, DeKalb's motion to dismiss the amended complaint should be denied. The tension within DeKalb's own arguments about who is responsible for the postage requirement only illustrates why discovery is needed. Should this Court grant any part of DeKalb's motion to dismiss, Plaintiffs respectfully request leave to file a second amended complaint.

Respectfully submitted this 26th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to N.D. Ga. Local Civil Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with N.D. Ga. Local Civil Rule 5.1(C) in Times New Roman 14-point typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on the aforementioned date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

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