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

THE NEW GEORGIA PROJECT, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and Chair of the Georgia State Election Board, *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:20-cv-01986-ELR

COUNTY DEFENDANTS'[1] CONSOLIDATED MOTION TO DISMISS

County Defendants jointly move to dismiss Plaintiffs' First Amended Complaint for Injunctive and Declaratory Relief [Doc. 33] in its entirety pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Further, Bibb, Chatham, Athens-Clarke, Albany-Dougherty, Muscogee, and Richmond County Defendants move to dismiss the Complaint against them pursuant to Fed. R. Civ. P. 12(b)(3). In support of this motion, County Defendants rely on their Brief in

[1] County Defendants include a list of all party Defendants as an appendix to the attached brief.

Support of County Defendants' Consolidated Motion to Dismiss, which is filed with this motion.

Respectfully submitted this 26th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing COUNTY DEFENDANTS' CONSOLIDATED MOTION TO DISMISS has been 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

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

THE NEW GEORGIA PROJECT, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and Chair of the Georgia State Election Board, *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:20-cv-01986-ELR

BRIEF IN SUPPORT OF COUNTY DEFENDANTS'[1]
CONSOLIDATED MOTION TO DISMISS

INTRODUCTION

This Court should dismiss Plaintiffs' First Amended Complaint for Injunctive and Declaratory Relief [Doc. 33] because they have failed to allege standing adequately. The claims made by Reagan Jennings, Candace Woodall, and Beverly Pyne (the "Individual Plaintiffs") fail to establish standing because their purported "injury" is no more than a fear that certain events may unfold at some ill-defined point in the future. Moreover, even if

[1] County Defendants include a list of all party Defendants as an appendix to this filing.

Plaintiffs could rely on mere fears alone to establish injury in fact, they can neither trace the "injury" to nor seek redress from the County Defendants. Similarly, the New Georgia Project has not and cannot allege that any organizational injury it may have suffered is fairly traceable to or redressable by the County Defendants.

In addition, even if Plaintiffs could establish standing, they still fail to state a claim for age discrimination over absentee-ballot applications as a matter of law. Further, this Court should decline to consider Plaintiffs' claims under the political-question doctrine and as a shotgun pleading. This Court also lacks jurisdiction over some County Defendants because of a lack of venue. Therefore, the Court should dismiss Plaintiffs' First Amended Complaint and instead direct them to the Georgia General Assembly for the policy changes they seek.

PROCEDURAL BACKGROUND

Plaintiffs filed their First Amended Complaint on June 3, 2020 [Doc. 33] ("Amended Complaint"). The Amended Complaint contains seven counts against all Defendants alleging that five Georgia election practices infringe on Plaintiffs' constitutional rights in various ways. Plaintiffs seek attorneys' fees and costs, preliminary and permanent injunctive relief, and declaratory judgments from this court that the following Georgia statutes violate the

United States Constitution: (1) O.C.G.A. § 21-2-381(b)(4), which Plaintiffs claim creates a "lack of standards governing the process for notifying voters regarding incomplete absentee ballot applications," [Doc. 33, p .10]; (2) O.C.G.A. § 21-2-381(a)(1)(G), which Plaintiffs claim is an unconstitutional "age restriction on those who are allowed to submit an application to vote by mail for an entire election cycle," *id.*; (3) O.C.G.A. § 21-2-386(a)(1)(F), which provides for the "rejection of absentee ballots" received after 7:00 p.m. on Election Day, *id.*; and (4) O.C.G.A. § 21-2-385(a), which generally prohibits third-party assistance in mailing or delivering completed absentee ballots, subject to certain defined exceptions. *Id.* The Plaintiffs also claim that the State of Georgia's failure to provide pre-paid postage for the return mailing of absentee ballots is an unconstitutional poll tax. *Id.*

ARGUMENT AND CITATION OF AUTHORITY

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if it has not alleged a sufficient basis for subject-matter jurisdiction. *Stalley v. Orlando Reg'l Healthcare Sys.*, 524 F.3d 1229, 1232 (11th Cir. 2008). This Court must address threshold issues of jurisdiction and standing before considering dismissal on the merits. *Georgia Shift v. Gwinnett Cty.*, No. 1:19-cv-01135-AT, 2020 U.S. Dist. LEXIS 31407, at *7 (N.D. Ga. Feb. 12, 2020).

Further, to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint must show "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, 677 (2009). While this Court must assume the veracity of well-pleaded factual allegations, it need not accept legal conclusions when they are "couched as [] factual allegation[s]." *Id.* at 678-79. Together with the complaint, this Court may consider any matters appropriate for judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

I. This case should be dismissed because Plaintiffs lack standing.

Federal courts may decide only active "cases" and "controversies." U.S. CONST. art. III, § 2. "One element of the case-or-controversy requirement is that plaintiffs must establish they have standing to sue." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 408 (2013), citing *Raines v. Byrd,* 521 U.S. 811, 818 (1997) (internal quotations omitted). Importantly, for our purposes, "[t]he law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.*

To establish standing, a litigant must prove three elements: "(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." *Jacobson v. Fla Sec'y*, 957 F.3d 1193, 1201 (11th Cir. 2020), *citing Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *United States v. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019). As the parties attempting to invoke federal jurisdiction, Plaintiffs bear the burden of establishing standing at the start of the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 570 n.5 (1992); *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1267-68 (11th Cir. 2001). And "when plaintiffs seek prospective relief to prevent future injuries, they must prove that their threatened injuries are 'certainly impending.'" *Id.,* citing *Clapper,* 568 U.S. at 401.

A. The Individual Plaintiffs do not adequately allege an injury in fact.

At the pleading stage, the allegations must "contain sufficient detail for the Court to determine that plaintiffs 'have made factual averments sufficient, if true, to demonstrate injury in fact.'" *Georgia Shift*, 2020 U.S. Dist. LEXIS 31407 at *8-9 quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). In cases involving injunctive relief, "the injury-in-fact requirement insists that a plaintiff allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Strickland v. Alexander,* 772 F.3d 876, 883 (11th Cir. 2014).

Importantly, "the Supreme Court rejected a standing test that would replace the requirement of 'imminent' harm with the requirement of 'a realistic threat' that... the challenged activity would cause [the plaintiff] harm 'in the reasonably near future.'" *Georgia Shift*, 2020 U.S. Dist. LEXIS 31407, at *9. *See also Clapper,* 568 U.S. at 410 ("[T]he Second Circuit's 'objectively reasonable likelihood' standard is inconsistent with our requirement that 'threatened injury must be certainly impending to constitute injury in fact.'"). Further, the "complainant must allege an injury to himself that is distinct and palpable, 'as distinguished from merely abstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Georgia Shift*, 2020 U.S. Dist. LEXIS 31407, at *9, citing *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990). In order to meet the particularity requirement of an injury, a plaintiff must be more than just a "concerned bystander" who is interested in a problem—the plaintiff must show that the injury is distinct to that plaintiff. *Gardner v. Mutz*, No. 19-10461, 2020 U.S. App. LEXIS 19329, at *22-23 (11th Cir. June 22, 2020) (no injury when only generalized interest in preserving history). The rationale behind these requirements is simple: to "ensure[] that courts do not entertain suits based on speculative or hypothetical harms." *Georgia Shift*, 2020 U.S. Dist. LEXIS 31407, at *10, citing *Whitmore*, 495 U.S. at 155.

Reagan Jennings, Candace Woodall, and Beverly Pyne are the only Individual Plaintiffs. [Doc. 33, ¶¶ 20-22]. Ms. Jennings' alleged injury is based on only her general fear of COVID-19 and her apparent mistaken belief that she must mail an absentee ballot with stamps,[2] along with speculation about potential difficulties of buying stamps, and her fear that her absentee ballot may not arrive in time to be counted. [Doc. 33, ¶ 20]. Ms. Woodall similarly tries to allege that she has an injury for standing purposes just because she must take MARTA to purchase stamps, is currently unemployed, would have trouble affording stamps, and it would be challenging for her to walk to her polling place and vote in person, claiming she would benefit if a third party could collect and return her ballot for her. [Doc. 33, ¶ 21]. Lastly, Ms. Pyne claims an "injury" only because she temporarily lives out of the state and "worries" that her absentee ballot may not arrive in time, does not want to apply for an absentee ballot for each election, and "does not think it is fair" that she has to pay for stamps. [Doc. 33, ¶ 22].

[2] This belief is incorrect about the June 9 primary, because the State Election Board adopted an emergency rule allowing for the use of absentee-ballot drop boxes. Ga. Comp. R. & Regs. r. 183-1-14-0.6-.14. The State Election Board has not opined on whether it intends to extend this emergency rule for the November election, but this may create another option for Plaintiffs.

Each of the Individual Plaintiffs thus identifies only hypothetical and conjectural future "injuries"—rooted in nothing more than their unfounded beliefs or fears about selective election practices. For example, none of the Individual Plaintiffs allege they do not currently have stamps or cannot purchase stamps at some point in the next five months; they only allege that it *might* be challenging to do so in the future.[3] Ms. Jennings also ignores other methods allowed by current rules by which she can even deliver her absentee ballot, including the option to drop them (unadorned) into a box with no postage [Doc. 33, ¶ 20]. *See* Ga. Comp. R. & Regs. r. 183-1-14-0.6-.14. As for Ms. Pyne, she claims that her "worries" alone establish that her ballot will go undelivered or unreceived by Election Day and that she does not *think* it is "fair" that she has to buy stamps if she chooses to mail in her ballot. [Doc. 33, ¶ 22]. *See Nat'l Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (injuries "shared by a large class of citizens" are "insufficient").

[3] The Individual Plaintiffs ignore the USPS policy to deliver election mail that contains insufficient postage. See Mark Niesse, *Mailed ballots in Georgia will be counted, even without a stamp*, Atlanta Journal-Constitution (April 14, 2020) available at https://www.ajc.com/news/state--regional-govt--politics/mailed-ballots-georgia-will-counted-even-without-stamp/4P04UcxpZuJ1jZVXgDbixO/

Thus, the Individual Plaintiffs' rest their allegations of "injuries" on generalized fear and speculation that these injuries *could* occur in the future because they *may* not be able to vote how they *prefer* or *feel* most comfortable—if they even decide to cast their ballot. But plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper,* 568 U.S. at 416. To hold otherwise would "transform the[] standing burden from one requiring a showing of actual or imminent . . . [harm] to one requiring a showing that their subjective fear of such [harm] is not fanciful, irrational, or clearly unreasonable." *Id.* And the Individual Plaintiffs (and voters in general) cannot cite merely to preference in voting method to show injury. "Although the right to vote is fundamental, '[i]t does not follow, however, that the right to vote in any manner . . . [is] absolute." *Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registrations & Elections,* 2020 U.S. Dist. LEXIS 36702 *14–15 (March 3, 2020) quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

For these reasons, the Individual Plaintiffs have not alleged there is a "substantial likelihood" they will suffer injury in the future or any cognizable injury. *Strickland,* 772 F.3d at 883. Instead, they have only alleged a possible future harm that is purely hypothetical and based on their own subjective

fears. *Whitmore,* 495 U.S. at 155. Therefore, the Individual Plaintiffs' claims must be dismissed for lack of standing due to their failure to allege an injury in fact.

B. Neither The New Georgia Project nor the Individual Plaintiffs have adequately alleged traceability and redressability because they have not sued all 159 counties.

As the Eleventh Circuit recently explained, "[t]o satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Jacobson*, 957 F.3d at 1207 quoting, *Lujan*, 504 U.S. at 560. Further, "it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Lewis v. Governor of Ala.,* 944 F.3d 1287, 1301 (11th Cir. 2019) (internal quotations omitted).

Plaintiffs affirmatively plead—correctly—that county officials bear the responsibility of processing absentee ballots. [Doc. 33, ¶ 26]. But Plaintiffs have named members of only 17 county boards of election in this case, along with the Secretary of State and members of the State Election Board, even

though the New Georgia Project purports to work in all 159 counties.[4] [Doc. 33, ¶ 17] (alleging that the New Georgia Project has registered voters "in all 159 of Georgia's counties"). Thus, even if Plaintiffs obtain all the relief they seek, this Court's order cannot enjoin "absent nonparties." *Jacobson*, 957 F.3d at 1208. Because the New Georgia Project seeks targeted relief from cherry-picked parties while leaving out other necessary parties, it fails to establish redressability for its claimed "injuries" from alleged diversions of resources will cease. [Doc. 33, ¶¶ 17-19].

Plaintiffs' failure to sue the parties that can redress the alleged harm could also lead to "arbitrary and disparate treatment to voters in its different counties," *Bush v. Gore*, 531 U.S. 98, 107, 121 S. Ct. 525, 531 (2000), with 17 counties bound by an order from this Court and the remaining 142 counties following existing law.[5] *See also Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1381 (S.D. Fla. 2004) (error not to join other county election officials). In

[4] While the Secretary is designated as the "chief election officer of the state", it does not follow that every alleged injury or prayer for relief in the election context is therefore traceable to the Secretary. *Jacobson*, 957 F.3d at 1208; *Lewis*, 944 F.3d at 1300.

[5] While the Eleventh Circuit issued a decision pre-dating *Jacobson*, *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011), it only decided that case under a proper-party analysis and did not consider standing, making it a "drive-by jurisdictional ruling" that has no precedential effect. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91, 118 S. Ct. 1003, 1011 (1998).

other words, granting Plaintiffs the relief they seek would lead to different rules for absentee voting in different parts of the state, based solely on Plaintiffs' choice over which counties to sue in this particular case. Thus, Plaintiffs undermine their own claims of imminent "injury," "redress," or "equal protection" by leaving out the other counties which would necessarily prolong any uniform implementation or enforcement of any order issued by this Court.

Some District Courts have succumbed to the temptation to correct the deficient pleadings of plaintiffs that fail to join all necessary parties, but the Eleventh Circuit decision in *Jacobson* suggests this Court should refrain from embarking on such a course of action. A declaratory judgment or injunction against the 17 counties listed as defendants here does not apply to counties "who are not parties to this action." *Jacobson,* 957 F.3d at 1208. And even if this Court tried to apply its ruling to counties not now before it, the 142 non-party counties are not "obliged . . . in any binding sense . . . to honor an incidental legal determination [this] suit produce[s]." *Lewis*, 944 F.3d at 1301 (internal quotation marks omitted). The separation of powers and the inherent, limited authority under Article III prevent the judiciary from binding non-parties to its orders.

"Redressability requires that the court be able to afford relief *through the exercise of its power,* not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power." *Id.* at 1305, quoting *Franklin v. Massachusetts,* 505 U.S. 788, 825 (Scalia, J. concurring in part and concurring in the judgment). "Any persuasive effect a judicial order might have upon the [non-party counties] . . . cannot suffice to establish redressability." *Jacobson,* 957 F.3d at 1208. Moreover, "[i]f a plaintiff sues the wrong defendant, an order enjoining the correct official who has not been joined as a defendant cannot suddenly make the plaintiff's injury redressable." *Id.* at 1209.

The "failure to join the [county officials] is an independent reason that [plaintiffs] lack standing," *id.* at 1207, and accordingly, this Court should dismiss Plaintiffs' Amended Complaint because they have not adequately alleged facts sufficient to support standing.

II. Plaintiffs fail to state a claim on the age restriction for absentee-ballot applications.

Plaintiffs challenge O.C.G.A. § 21-2-381(a)(1)(G) and Ga. Comp. R. & Regs. 183-1-14-.01(1), which allow voters over 65 to submit a single absentee-ballot application for the entire election cycle, as unconstitutional burdens on the right to vote and as violating the Twenty-Sixth Amendment. Plaintiffs'

counsel has pursued similar claims in other states as well, but those claims failed because of binding precedent.

As to Plaintiffs' right-to-vote claim on the age restriction, in *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807, 89 S. Ct. 1404, 1408 (1969), the U.S. Supreme Court determined that denying jailed inmates access to absentee ballots did not restrict their right to vote, but rather only their asserted right to an absentee ballot. As a result, the Court applied rational-basis review to the refusal to provide absentee ballots and upheld the state's approach. *Id*. at 808-11.

Although Plaintiffs allege there is some "burden" associated with sending in multiple absentee forms, they do not allege this minimal "burden" actually prevents them from voting. [Doc. 33, ¶ 48]. Age is not a suspect class, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83, 120 S. Ct. 631 (2000), and *McDonald* is still good law. As a result, the Court must apply rational-basis review, and Plaintiffs cannot state a claim unless they can show that "no grounds can be conceived of to justify them." *McDonald*, 394 U.S. at 809. But as the Fifth Circuit found recently in a similar challenge, "[the state] has a proper interest in helping older citizens to vote, and its decision to permit them to do so by mail is a rational way to satisfy that 'laudable state policy.'" *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 U.S. App. LEXIS 17564,

at *27 (5th Cir. June 4, 2020) quoting *McDonald*, 394 U.S. at 811. Thus, even taking Plaintiffs' allegations as true, Plaintiffs have failed to state a claim under a fundamental-right-to-vote theory.

Likewise, the same logic from *McDonald* bars Plaintiffs' Twenty-Sixth-Amendment claims. Claims under the Twenty-Sixth Amendment are rare and focus on a *denial* or *abridgement* of the right to vote "on account of age." Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1170 (2012) (noting that the Amendment has only been applied in one Supreme-Court case). Plaintiffs have not alleged that younger individuals' right to vote is denied or abridged—only that it is allegedly "restricted" by having to request an absentee ballot for each election instead of a single request covering all elections. [Doc. 33, ¶¶ 7, 145].

But there is no basis to conclude that anything besides rational-basis review applies to claims under the Twenty-Sixth Amendment. *Tex. Democratic Party*, 2020 U.S. App. LEXIS 17564, at *31. Again, the issue is not the *right* to vote, because younger voters are free to vote by absentee ballot, but instead a claimed right to a particular *method* of requesting an absentee ballot. As with Plaintiffs' right-to-vote challenge, Plaintiffs fail to state a claim for relief on this particular voting practice under the Twenty-Sixth Amendment, and their claim should be dismissed.

III. This Court lacks jurisdiction under the political-question doctrine.

"[F]ederal courts will not intervene to . . . supervise the administrative details of a local election. *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). The judicial system is not a conduit to force election officials to adopt the method of administering elections preferred by a particular group. *GALEO v. Gwinnett Cty. Bd. of Registrations and Elections*, Case No. 1:20-cv-1587-WMR, 2020 U.S. Dist. LEXIS 86998, at *3 (N.D. Ga. May 8, 2020).

While courts can "say what the law is," there are some questions that are "in their nature[,] political" that are beyond the scope of Article III. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 177 (1803). The political-question doctrine is thus rooted in the separation of powers and a court must dismiss a case for lack of jurisdiction that requires it to decide any one of the six indicia of a political question.[6] *McMahon v. Presidential Airways*, Inc., 502

[6] The six characteristics of a political question are "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious

F.3d 1331, 1357-58 (11th Cir. 2007) quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691 (1962).

Plaintiffs' Amended Complaint asks the Court to dictate the administrative details of an election, including by requiring appropriations from the state (or possibly county) budgets, setting the number of days the state must accept an absentee ballot with a postmark, and requiring changes to systems to allow all voters to submit a single absentee-ballot application for each election cycle. [Doc. 33, pp. 79-80]. The sweeping relief and focus of this litigation thus implicate at least two of the six indicia of a nonjusticiable political question.

First, the Elections Clause commits the administration of elections to coordinate departments—Congress and state legislatures—not courts. *Baker*, 369 U.S. at 217; U.S. CONST. Art. I, §4, cl. 1. "Plaintiffs ask this Court to assume the roles of state and federal legislatures, urging us to exercise the discretion that has been explicitly reserved to those political bodies." *Agre v. Wolf*, 284 F. Supp. 3d 591, 596 (E.D. Pa. 2018) (three-judge court).

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pronouncements by various departments on one question." *McMahon*, 502 F.3d at 1357-58.

The Elections Clause and the history of its adoption shows that "the Framers did not envision such a primary role for the courts." *Agre*, 284 F. Supp. 3d at 599. The "manner" of conducting elections includes "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366, 52 S. Ct. 397, 399 (1932). These are reserved expressly to the state legislatures—not the courts. Instead, courts should focus on enforcement of the First and Fourteenth Amendments because they are "generally unobtrusive to States in promulgating election regulations." *Agre*, 284 F. Supp. 3d at 599.

Plaintiffs' Amended Complaint presents nonjusticiable political questions because it ultimately requires this Court to replace significant policy decisions made by Georgia legislators in Georgia's Election Code with this Court's own judgment about the proper administration of elections, in violation of the "textually demonstrable constitutional commitment of the issue" to state legislatures and to Congress. *Baker*, 369 U.S. at 217; *Agre*, 284 F. Supp. 3d at 620.

Second, there are no "judicially discoverable and manageable standards" that this Court can apply to Plaintiffs' claims. *McMahon*, 502 F.3d at 1357-58. Nevertheless, Plaintiffs want this Court to serve as an election administrator to oversee and manage tasks delegated by the General Assembly to state and local election officials. Here, this Court must conduct an "inquiry [which] necessarily proceeds to . . . whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker*, 369 U.S. at 198. As there is no right by which to "judicially mold" an alleged protection, there is no standard for this Court to follow.

Much like cases alleging partisan gerrymandering, where courts were called upon to decide the definition of "fairness" and then "how much is too much," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500-01 (2019), Plaintiffs ask this Court to take on the task of election administration by deciding many questions related to the administration of elections. *See also Jacobson*, 957 F.3d at 1218 (Pryor, William, J., concurring) (applying *Rucho* to ballot-order challenge when "[t]here are no discernable and manageable standards 'to answer the determinative question'"). The judiciary is ill-equipped to handle these questions that involve the "complex, subtle, and professional decisions" required to conduct elections. *Gilligan v. Morgan*, 413 U.S. 1, 10,

93 S. Ct. 2440, 2446 (1973) (applied to military training). Ultimately, Plaintiffs' Amended Complaint "poses basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2489; *Jacobson*, 957 F.3d at 1215-16; see also *Ctr. for Biological Diversity v. Trump*, 2020 U.S. Dist. LEXIS 58160, *47, (D. D.C. April 2, 2020) (no judicially manageable standards available for second guessing military policy).

"[N]o justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts v. EPA*, 549 U.S. 497, 516, 127 S. Ct. 1438, 1452 (2007). As another judge on this Court did in a case asking that Court to "micromanage the State's election process," this Court should dismiss Plaintiffs' Amended Complaint as a nonjusticiable political question. *Coal. for Good Governance v. Raffensperger*, No. 1:20-cv-1677-TCB, 2020 U.S. Dist. LEXIS 86996, at *9 (N.D. Ga. May 14, 2020).

IV. Plaintiffs' Amended Complaint is a forbidden shotgun pleading.

Plaintiffs Amended Complaint also fails as a quintessential shotgun pleading expressly forbidden by courts in the Eleventh Circuit. *Beckwith v. Bellsouth Telecomms., Inc.*, 146 Fed. Appx. 368, 371 (11th Cir. 2005) (the defining characteristic of a shotgun complaint is that it fails "to identify claims with sufficient clarity to enable the defendant to frame a responsive pleading."); *see also Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg*

Corp., 305 F.3d 1293, 1295 (11th Cir. 2002) ("[t]he typical shotgun complaint contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions"); *Wagner v. First Horizon Pharm. Corp*., 464 F.3d 1273, 1279 (11th Cir. 2006) ("Shotgun pleadings are those that incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense"). Plaintiffs' five-count, 145-paragraph Complaint undoubtedly falls within this Circuit's definition of a shotgun pleading.

As to Plaintiffs Jennings, Woodall, and Pyne, there is no allegation in the complaint of any ties to any County Defendant other than Fulton and Gwinnett. [Doc. 33, ¶ 15]. Plaintiff The New Georgia Project is a non-profit organization with its principal place of business in Fulton County. *Id*. at ¶¶ 15, 17. The New Georgia Project alleges it advocates in every county in the state but alleges no specific activities that occurred in particular counties except that its registration and education activities take place in Fulton County. *Id*.

It is virtually impossible to determine which specific allegations Plaintiffs intend to assert against most of the County Defendants. By grouping all defendants, including connecting the Secretary of State and the

State Board of Election members to local boards of election when those entities are appointed by entirely different methods, Plaintiffs attempt to hold all County Defendants guilty by association when the Court assumes, for the purposes of this motion, that the allegations against some actors are true. For obvious reasons, this is troubling and dangerous, and plaintiffs are forbidden from making such allegations without specifying which facts and which claims apply to each particular defendant. For example, Plaintiffs allege generally that counties have "the opportunity to interpret 'promptly' in distinct ways," [Doc. 33, ¶ 165], regarding the absentee-ballot-application notification process, but do not allege that any particular County Defendants fail to provide sufficient notice to voters.

After listing 80 members of some Boards of Elections at the county level in the jurisdiction and venue section of the Amended Complaint, [Doc. 33, ¶ 26], almost all of the County Defendants are not specifically listed again, with only a handful of counties even mentioned. By contrast, there are seven paragraphs referencing Wisconsin. [Doc. 33, ¶¶ 9, 53, 94, 95, 96, 125, 159]. This Amended Complaint constitutes an improper shotgun pleading. *Doe v. Pierce Cty.*, No. 5:19-cv-0005, 2019 U.S. Dist. LEXIS 73436, at *10 (S.D. Ga. May 1, 2019) (holding that the plaintiffs' complaint was a shotgun

pleading where "in the body of each count, Plaintiff fails to describe to what extent or how that count is being alleged against certain Defendants").

V. This Court lacks jurisdiction over certain County Defendants because of improper venue.

Pursuant to Rule 12(b)(3), the Bibb, Chatham, Athens-Clarke, Albany-Dougherty, Muscogee, and Richmond County Defendants further request this Court dismiss this action as venue is improper in the Northern District of Georgia as to them. Plaintiffs, all residents of the Northern District of Georgia, have cast an incredibly wide net in an attempt to lump the actions of all Defendants with one another. Because of the shotgun nature of Plaintiffs' Amended Complaint, it is not possible to identify the specific claims against the County Defendants that are not within the Northern District of Georgia. As a result, the Amended Complaint does not properly allege a basis for this Court to exercise venue over the County Defendants that are outside of the district. *Gonsalves - Carvalhal v. Aurora Bank, FSB*, No. 1:14-CV-00151-SCJ-LTW, 2015 U.S. Dist. LEXIS 181889, at *17 (N.D. Ga. Feb. 9, 2015).

CONCLUSION

The Individual Plaintiffs have not adequately alleged an injury-in-fact, or a future injury that is "certainly impending." Without this necessary precondition, they have failed to adequately plead standing and this Court

must dismiss their claims. Moreover, neither the Individual Plaintiffs nor The New Georgia Project have established enough remaining elements of Article III standing: traceability and redressability. It was the decision of the Plaintiffs, who have already amended their complaint once, to include only 17 of Georgia's 159 counties—even though the laws they complained about were statewide in their application. This is ultimately fatal to their Amended Complaint even if they can establish injury in fact. And considering the Eleventh Circuit's recent decision in *Jacobson,* this Court may not cure the defects of Plaintiffs' Amended Complaint *sua sponte.* Thus, the Plaintiffs Amended Complaint should be dismissed for lack of standing.

But even if this Court finds the Plaintiffs have standing to bring their claims, the Amended Complaint must still be dismissed because the Plaintiffs have failed to state a claim upon which relief may be granted, and because their claims represent quintessential political questions outside the purview of this Court to consider and are presented as a shotgun pleading.

[signature blocks on following pages]

Respectfully submitted this 26th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing BRIEF IN SUPPORT OF COUNTY DEFENDANTS' CONSOLIDATED MOTION TO DISMISS has been 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

APPENDIX

"County Defendants" are Benny G. Hand, Pamela Middleton, Dontravious M. Simmons, Annabelle T. Stubbs, and Frederick Williams, in their official capacities as Members of the Albany-Dougherty County Joint Board of Registration and Elections (collectively, the "Albany-Dougherty Defendants"); Jesse Evans, Willa Fambrough, Charles Knapper, and Ann Till, in their official capacities as Members of the Athens-Clarke County Board of Elections and Voter Registration (collectively, the "Athens-Clarke Defendants"); Wanda Andrews, Colin McRae, William L. Norse, Jon Pannell, and Randolph Slay, in their official capacities as Members of the Chatham County Board of Registrars (collectively, the "Chatham Defendants"); Diane Givens, Dorothy Foster Hall, Darlene Johnson, Patricia Pullar, and Carol Wesley, in their official capacities as Members of the Clayton County Board of Elections and Registrations (collectively, the "Clayton Defendants"); Fred Aiken, Neera Bahl, Jessica M. Brooks, Phil Daniell, and Darryl O. Wilson, in their official capacities as Members of the Cobb County Board of Elections and Registration (collectively, the "Cobb Defendants"); Margaret Jenkins, Linda Parker, Uhland Roberts, Diane Scrimpshire, and Eleanor White, in their official capacities as Members of the Columbus-Muscogee County Board of Elections (collectively, the "Columbus-Muscogee Defendants); Anthony

Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, and Baoky N. Vu, in their official capacities as Members of the DeKalb County Board of Registration and Elections (collectively, the "DeKalb Defendants"); David C. Fedak, Myesha Good, Talula Martin,[7] Robert Proctor, and Daniel Zimmermann, in their official capacities as Members of the Douglas County Board of Elections and Registration (collectively, the "Douglas Defendants"); Darryl Hicks, Addison Lester, and Aaron Wright, in their official capacities as Members of the Fayette County Board of Elections and Voter Registration (collectively, the "Fayette Defendants"); Matthew Blender, Barbara Luth, Randy Ingram, Joel Natt, and Carla Radzikinas, in their official capacities as Members of the Forsyth County Board of Registrations and Elections (collectively, the "Forsyth Defendants"); Mary Carole Cooney, Aaron Johnson, Vernetta Nuriddin, Kathleen Ruth, and Mark Wingate, in their official

[7] Plaintiffs and the Douglas County Defendants have filed a Consent Motion to Substitute Official Capacity Defendant in which they ask to substitute Talula Martin as a defendant in her official capacity with Maurice Hurry in his official capacity on the basis that Mr. Hurry has replaced Ms. Martin on the Douglas County Board of Elections and Registration. [See Doc. 79.] As of the date of filing this Motion to Dismiss, the Court has not yet entered an order substituting Mr. Hurry for Ms. Martin as an official capacity defendant. Therefore, Ms. Martin continues to be listed as a responding party at this time, but it is the Douglas County Defendants' intention that this Motion to Dismiss be filed on behalf of both Ms. Martin and Mr. Hurry to the extent Mr. Hurry is later substituted for Ms. Martin.

capacities as Members of the Fulton County Board of Registration and Elections (collectively, the "Fulton Defendants"); Beauty Baldwin, Stephen Day, John Mangano, Alice O'Lenick, and Ben Satterfield, in their official capacities as Members of the Gwinnett County Board of Registrations and Elections (collectively, the "Gwinnett Defendants"); Dan Richardson, Donna Morris-McBride, Andy Callaway, Arch Brown, and Mildred Schmelz, in their official capacities as Members of the Henry County Board of Elections and Registration (collectively, the "Henry Defendants"); Henry Ficklin, Mike Kaplan, Cassandra Powell, Herbert Spangler, and Rinda Wilson, in their official capacities as Members of the Macon-Bibb County Board of Elections (collectively, the "Macon-Bibb Defendants"); Phil Johnson, Kelly Robinson, and Dustin Thompson, in their official capacities as Members of the Newton County Board of Elections and Registration (collectively, the "Newton Defendants"); Sherry T. Barnes, Marcia Brown, Terence Dicks, Bob Finnegan, and Tim McFalls, in their official capacities as Members of the Richmond County Board of Elections (collectively, the "Richmond Defendants"); and Gerald Barger, Karen James, and Aldren Sadler, Sr., in their official capacities as Members of the Rockdale County Board of Elections and Voter Registration (collectively, the "Rockdale Defendants").