

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA**

_____ :

MOTION TO DISMISS PLAINTIFF’S AMENDED COMPLAINT

Come now, Defendants Cobb County Board of Elections and Registration (“Elections Board”) and Janine Eveler, in her official capacity as Cobb County Elections Director, (collectively “Election Defendants”), and move the Court to dismiss Plaintiffs’ Amended Complaint [Doc. 37] pursuant to Fed. R. Civ. P. 12(b)(1) or, alternatively, to join all necessary parties pursuant to Fed. R. Civ. P. 19, showing the Court as follows:

1. Plaintiffs lack standing to bring their claims against Election Defendants, because the injuries they allege are not fairly traceable to the conduct of the Cobb County Board of Elections and Registration nor Janine Eveler.

, 568 U.S. 398, 409, 133 S. Ct. 1138 (2013).

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

KAREN FINN, et al.	:	
	:	
Plaintiffs,	:	Civil Action File No.:
vs.	:	22-cv-2300-ELR
	:	
COBB COUNTY BOARD OF	:	
ELECTIONS AND REGISTRATION,	:	
et al.	:	
	:	
Defendants.	:	
	:	
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BRIEF IN SUPPORT OF MOTION TO DISMISS
PLAINTIFFS’ AMENDED COMPLAINT

I. INTRODUCTION

Plaintiffs’ Amended Complaint for Declaratory Judgement and Injunctive Relief [Doc. 37] (“Amended Complaint”) contains the very same defects found in their original Complaint [Doc. 1]. Plaintiffs continue to challenge the constitutionality of

369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), Plaintiffs double down on pursuing the “shoot the messenger” tactic in this litigation. While the Amended Complaint identifies numerous government officials and individual actors whose actions are responsible for the creation of the e etDBs 0. Bs 0. Bs il -0p8.299 Td(C)Tj0(

The only significant difference in the original Complaint and the Amended Complaint is that Plaintiffs have inserted nine paragraphs expounding upon the general duties of the Board of Elections as election superintendent and alleging that their injuries will “flow directly” from the actions of the Election Defendants in holding the elections they are required by law to administer. [Doc. 37, ¶¶ 147-155]

However, Plaintiffs are not entitled to sue the Election Defendants simply because they need a party against whom the Court might issue an injunction. They also must plead and demonstrate the other elements of prudential standing, including some form of injurious conduct that is fairly traceable to the Election Defendants. Lewis v. Governor of Ala , 944 F.3d 1287, 1296 (11th Cir. 2019) (“To establish standing, in addition to demonstrating an injury-in-fact, Plaintiffs must also show a ‘causal connection between [their] injury and the challenged action of the defendant—i.e., the injury must be fairly...trace[able] to the defendant's conduct’...”

Additionally, the failure of Plaintiffs to join the parties whose actions resulted in the ostensibly gerrymandered maps puts the Election Defendants in the unjust position of potentially being held liable under 42 U.S.C. §1983 for actions over which they have no discretion. Nowhere in the Amended Complaint do Plaintiffs identify any authority the Election Defendants would have to reject or even evaluate

district maps

role in conducting elections [Doc. 37, ¶¶ 147-155], hastily inserted by Plaintiffs to try and salvage standing,² and in the Prayers for Relief, where Plaintiffs ask the Court enjoin the Election Defendants from holding elections using the challenged district maps [Doc. 37 ¶ 183(b)].

Plaintiffs' Amended Complaint also acknowledges for the first time that primary elections have already been held in the challenged districts [Doc. 37, ¶ 154]. This highly relevant fact is not mentioned in the original Complaint nor anywhere else in the Amended Complaint, but this admission should have also been accompanied by a recognition that the winning candidates should be joined as interested parties to this action.

Even after construing these facts from the Amended Complaint in the light most favorable to Plaintiffs, no amount of leeway can overcome the jurisdictional obstacle of Plaintiffs failure to demonstrate prudential standing. Accordingly, this Court does not have jurisdiction over the claims asserted against the Election

² Given the complete dearth of factual allegations involving the Election Defendants in the Plaintiffs' original Complaint, it seems evident that they were only included in this action for purposes of redressability, not because any of Plaintiffs' alleged injuries are fairly traceable to their actions. In an attempt to manufacture standing without adding the actual parties responsible for its alleged injuries, Plaintiffs added these few paragraphs to their Amended Complaint setting out the general duty of Election Defendants to administer elections, asserting that this administrative duty is the conduct from which their injuries flow. [Doc. 37, ¶ 155].

Defendants, and the Election Defendants therefore request that the Court dismiss all claims against them pursuant to Fed. R. Civ. P. 12(b)(1). If the Court declines to dismiss the Amended Complaint, at a minimum, it is obligated to join all indispensable parties under Fed. R. Civ. P. 19.

III. ARGUMENT AND CITATION TO AUTHORITY

A. Standard for Motion to Dismiss

"[A] motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)[(a)-4n n6.2 ()b8.3 (e)3.2 ()b1 (nsa)1s4.4 (e)123.2 ()u8.3 (p)8.4 (o)8.4.4

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the burden to clearly and specifically set forth facts sufficient to satisfy Art. III standing requirements." Id. "If the plaintiff fails to meet its burden, this court lacks the power to create jurisdiction by embellishing a deficient allegation of injury." .

Further, "when plaintiffs seek prospective relief to prevent future injuries, they must prove that their threatened injuries are "certainly impending." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013).

To establish standing Plaintiffs must show an injury-in-fact, and also a "causal connection between [their] injury and the challenged action of the defendant—i.e., the injury must be fairly...trace[able] to the defendant's conduct..." Lewis v. Governor of Ala., 944 F.3d 1287, 1296 (11th Cir. 2019) (internal quotes removed). The crux of Plaintiffs' lawsuit is that the "[School] Board and state legislators' use of race as the predominant factor in drawing the Challenged Districts, without narrowly tailoring that use to comply with a compelling governmental interest, violates the Equal Protection Clause..." [Doc. 37, ¶ 11]. Yet nowhere in the Amended Complaint do Plaintiffs bother to explain how their supposed injuries are fairly traceable to the Election Defendants. At best they accuse the Election Defendants of being the conduit through which the allegedly discriminatory maps will be implemented, but they do not explain how that ministerial obligation makes Election Defendants liable for the allegations of

improper racial gerrymandering

burden to plead and prove...causation..." Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla , 641 F.3d 1259, 1266 (11th Cir. 2011).

To be sure, Plaintiffs have attempted to remedy their complete failure to plead facts related to causation in their original Complaint by asserting in the Amended Complaint that their injuries directly flow from the Elections Defendants' duty to "interpret and enforce" the redistricting HB 1028. However, there is no authority cited by Plaintiffs showing that the Elections Defendants have any authority to "interpret" the Redistricting Plan, nor any discretion over whether to enforce as currently adopted. In order to demonstrate causality Plaintiffs must show that Election Defendants have some type of control over the creation or use of the injurious maps. "The causation element3.5 (i)e6 (r)12.2 (c)12.14 (e)3.5[(I)3.In eI senrrrore

C. Plaintiffs have failed to join indispensable parties

Federal Rule of Civil Procedure 12(b)(7) provides for dismissal when a plaintiff fails "to join a party under Rule 19." Rule 19 provides a "two-part test for determining whether an action should proceed in a nonparty's absence." City of Marietta v. CSX Transportation, Inc., 196 F.3d 1300, 1305 (11th Cir. 1999). "The first question is whether complete relief can be afforded in the present procedural posture, or whether a nonparty's absence will impede either the nonparty's protection of an interest at stake or subject [existing] parties to a risk of inconsistent obligations." Id. (citing Fed. R. Civ. P. 19(a)(1)-(2)). If the Court determines that the non-party's absence will impede its rights, "and the nonparty cannot be joined," the court proceeds to the second step in the analysis and considers whether in "equity and good conscience the action should proceed among the parties before it, or should be dismissed." Id. (Fed. R. Civ. P. 19(b)). This analysis should not be formalistic, but rather based on "flexible practicality." Id. (citing Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)).

the action, disposing of the action without the absent party may ‘as a practical matter impair or impede the person's ability to protect the interest; or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.’” Santiago v. Honeywell Int'l, Inc., 768 F. App'x 1000, 1004 (11th Cir. 2019), Fed. R. Civ. P. 19(a)(1)

The vast majority of the allegations in the Amended Complaint focus on the history surrounding the creation of the district maps created by the School Board and adopted by the State of Georgia, or upon the potential discriminatory impacts of the challenged maps. Neither the Elections Board nor Ms. Eveler have any authority regarding the drawin hainininins B a

1028]. There is no guarantee, therefore, of vigorous advocacy, which is one of the purposes of requiring Article III standing.” Scott v. Dekalb Cty. Bd. of Elections, No. 1:02-CV-1851-ODE, 2005 U.S. Dist. LEXIS 47650, at *16 (N.D. Ga. Aug. 5, 2005).⁴ The Election Defendants are not true adverse parties in the sense that they have an interest in defending the maps adopted under the Redistricting Plan, nor do they even have access to any facts that would shed any light on the allegations set forth in the Amended Complaint. Instead they are in the “unenviable position of defending actions of which [they have] absolutely no connection and only second hand knowledge.” Id.

Further, as demonstrated by the Declaration of Janine Eveler, there are candidates who have already won primary elections in two of the challenged districts, Ward 2 and Ward 6: Stephen M. George was declared the winner of the Republican Primary for Board of Education District 2, Becky Sayler was declared the winner of the Democratic Primary for Board of Education District 2

District 6. See, Declaration of Janine Eveler [Doc. 30-2, ¶¶ 5-9]. These candidates, now running for election in the General Election in the new districts this November have a clear interest in whether those districts are to be upheld.

Finally, and most importantly for Electiimpor28.3 e 53030

Board, the State of Georgia (or its election officials) should be joined to defend their interests in the maps. Likewise, the candidates who have already been elected in the recent primary elections that used the new maps should be permitted to weigh-in on this challenge.

Accordingly, and for all the reasons set forth above, Election Defendants request that the Court enter an order dismissing all claims against them in Plaintiffs' Amended Complaint

CERTIFICATE OF COMPLAINT WITH LOCAL RULE 7.1

The undersigned hereby certifies that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1 of the Northern District of Georgia, using a font type of Times New Roman and a point size of 14.

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2022, I electronically filed the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

/s/ _____
DANIEL W. WHITE
Georgia Bar Nn5s.145mTm[(D)Tur