* * v IN THE UNITED* STATES* DISTR*

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COBB COUNTY BOARD OF ELECTIONS AND REGISTRATION, et al.,

Defendants.

O R D E R

There are several matters pending before the Court. The Court sets out its reasoning and conclusions below.

I. Factual Background[1]

This case stems from the 2022 redrawing of the seven (7) districts from which members of

; Hylah Daly; Jenne Dulcio; Galeo Latino Community Development Fund, Inc.;

[1] For purposes of the present motions only, the Court accepts the facts alleged in the Amended Complaint as true and construes them in the light most favorable to Plaintiffs as the non-movants. See Perez v. Wells Fargo N.A., 774 F.3d 1329, 1335 (11th Cir. 2014) (applying this standard to a motion for judgment on the pleadings); Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003) (applying this standard to a motion to dismiss).

New Georgia Project Action Fund; League of Women Voters of Marietta-Cobb; and Georgia Coalition for the People's Agenda, Inc. allege that the 2022 Board voting district map (the "Map") violates their rights pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it is the product of illegal racial gerrymandering. See id. Specifically, Plaintiffs contend that the Map was drawn with race as a predominating factor, both to preserve a narrow 4-3 majority of white members on the Board and to "create a firewall against

laws and regulations, including the Map at issue.[2] See Am. Compl. ¶¶ 42–43, 147–48, 150–

several years to impose policies that disproportionately and negatively impact students of color and their families." Id. ¶ 10.

B. Enaction of the Map

After the Board voted 4-3 (along racial lines) on December 9, 2021, to submit the Map to the General Assembly, it was passed as part of House Bill 1028 ("HB 1028"). Id. ¶¶ 44–47. Subsequently, on March 2, 2022, Georgia Governor Brian Kemp signed HB 1028 into law, thereby redistricting voting districts for the Board elections the next ten (10) years. Id. ¶ 44. The authority to enforce HB 1028, including during the 2024 primary and general elections, passed to Election Defendants pursuant to Georgia law. Id. ¶¶ 147–51. Plaintiffs allege that "[b]y enforcing HB 1028, [Election Defendants] are subjecting Cobb [County] residents to a racially redistricted [M]ap" and "Plaintiffs' injuries flow directly from [this] conduct." Id. ¶ 158.

C. The Challenged Districts

According to Plaintiffs, the Map was drawn using race as the predominant factor for the purpose of suppressing the "growing political power of [Cobb] County's Black and Latinx population" following the "rapid diversification" of the county's population. Id. ¶ 1. "Using race as a predominant factor in redistricting may be justified in certain circumstances, such as ensuring compliance with Section 2 of the Voting Rights Act of 1965 ('VRA')[,]" but Plaintiffs claim that "neither the

Board nor any of the state legislators conducted a functional analysis of each challenged District to support the [Map's] use of race" as legitimate and not pretextual. Id. ¶¶ 7–9. Instead, Plaintiffs claim the Map was designed to pack Black and Latinx voters into three (3) of the seven (7) voting districts for the District's Board seats (the "Challenged Districts"), thereby preserving the white majority voting population in the Board's four (4) other districts. Id. ¶¶ 4, 45–46.

Plaintiffs include the below figure in the Amended Complaint to illustrate Cobb County's "Black and Latinx voting age population figures by voting district" based on 2020 census data. See id. ¶ 157. The deeper hue a voting district is shaded in the below figure, the greater the percentage of that district's voting age population is Black and Latinx. Id.

See id. As shown in the figure above, "the majority of Cobb County's Black and Latinx communities live in the southern half of the [c]ounty, while most of the [c]ounty's white population lives in the north." Id. Pursuant to the voting district map for Board seats in Cobb County that was used from 2012 to 2022, "the districts currently represented by Black Board members[] skewed southeastward," while "the white members' districts . . . skewed northwestward[.]" Id. ¶ 158. Plaintiffs include the below figures in the Amended Complaint to illustrate how the current Map differs from that used between 2012 and 2022. See id.

lines superimposed in blue demonstrate how the Challenged Districts were rotated clockwise so Black and Latinx residents could be packed into" the Challenged Districts (Districts 2, 3, and 6). Id.

See id.

II. Procedural History

Plaintiffs initiated this action against Election Defendants on June 9, 2022, bringing a single claim pursuant to 42 U.S.C. § 1983 for purported violations of the Fourteenth Amendment's Equal Protection Clause based on racial gerrymandering. See Compl. ¶¶ 169–73 [Doc. 1]. As relief, Plaintiffs request that this

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elections in the Challenged Districts as enacted in HB 1028 and any adjoining districts necessary to remedy the constitutional violations, (c) set a deadline for s

Pursuant to an extension of time granted by the Court, the Parties submitted their Joint Preliminary Report and Discovery Plan on October 11, 2022. [See Docs. 40, 42, 48]. The Court issued a Scheduling Order on October 13, 2022, and assigned this case to an eight (8)-month discovery track. [Doc. 49]. On December 19, 2022, Plaintiffs filed a "Motion to Commence Discovery and Revise Scheduling Order," by which they requested an order pronouncing that discovery had opened and re-setting the eight (8)-month discovery period to run from the date of any such order. [See Doc. 51]. The Court granted Plaintiffs' motion by an Order dated January 5, 2023, and issued an Amended Scheduling Order that same day. [See Docs. 56, 57].

On December 19, 2022, the District filed a "Motion to Intervene" and asked

intervene as a Defendant and Ordered it to answer or otherwise

"When a defendant challenges a plaintiff[']s standing by bringing a Rule 12(b)(1) motion, the plaintiff bears the burden to establish that jurisdiction exists." McCabe v. Daimler Ag, Civil Action No. 1:12-CV-02494-MHC, 2015 WL 11199196, at *2 (N.D. Ga. Aug. 19, 2015).

A defendant may challenge a district court's subject matter jurisdiction through two (2) different types of attacks: facial attacks and factual attacks. See Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc., 524 F.3d 1229, 1232 (11th Cir. 2008). A facial attack on the complaint requires the court "merely to look and see if the plaintiff sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [the] complaint are taken as true for the purposes of the motion." See id. at 1233 (internal quotation omitted). "When defending against a facial attack, the plaintiff has 'safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised,' and 'the court must consider the allegations in the plaintiff's complaint as true.'" See id. (quoting McElmurray v. Consol. Gov't of Augusta–Richmond Cnty., 501 F.3d 1244, 1250 (11th Cir. 2007)).

"By contrast, a factual attack on a complaint challenges the existence of subject matter jurisdiction using material extrinsic from the pleadings, such as affidavits or testimony." See id. (internal citation omitted). When assessing a factual attack, the trial court

> may proceed as it never could under 12(b)(6) or FED. R. CIV. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's

against [Election] Defendants preventing the enforcement of HB 1028 would redress Plaintiffs' injuries." [Doc. 44 at 4–5] (internal citations omitted).

To establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332, 1337 (11th Cir. 2021) (citing Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560–61 (1992)). The Parties do not dispute that Plaintiffs satisfy the first element by alleging an injury-in-fact. [See generally Docs. 43-1 at 8–12; 44; 47]. However, as noted, they dispute both traceability and redressability. [See Docs. 43-1 at 12; 44 at 4–5]. Traceability requires that "the injury must have been caused by [the d]efendant's actions." Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278, 1298 (N.D. Ga. 2020), aff'd sub nom. Black Voters Matter Fund v. Sec. of State for Ga., 11 F.4th 1227 (11th Cir. 2021). Redressability requires that the "[p]laintiffs' injury, or threat of injury, must likely be redressed by" an order from this Court. Id. "The question of whether the [p]laintiffs ultimately will prevail on the merits of their asserted claims is not the question before the Court in assessing standing." Id. (internal citations omitted).

In the Amended Complaint, Plaintiffs allege that Election Defendants participate in enforcing the challenged Map pursuant to their statutory duties. See Am. Compl. ¶¶ 42–43. In particular, Plaintiffs allege that Election Defendants are

responsible for overseeing Cobb County elections as well as implementing election

example, in

Doc. 43-1 at 12]. In response, Plaintiffs maintain that the "crux of [their] action is to stop the implementation and enforcement of" the Map, and thus, "an injunction against Defendants preventing the enforcement of HB 1028 would redress Plaintiffs' injuries." [Doc. 44 at 5] (citing Am. Compl. ¶¶ 11, 22, 27, 34, 39, 183). The Court agrees with Plaintiffs. As the Eleventh Circuit has explained, "[t]o have Article III standing, a plaintiff need not demonstrate anything 'more

the plaintiffs' injury. See Rose, 511 F. Supp. 3d at 1357 (citing Jacobson, 974 F.3d at 1241–42 (noting county officials independent of the secretary were responsible for placing candidates on the ballot in the prescribed order)). Indeed, Jacobson supports that the redressability prong of the standing analysis exists as to Election Defendants because Plaintiffs have sued the entities responsible for "enforcing" the Map at issue. See 974 F.3d at 1241–42. Whether Election Defendants "played any role in creating, evaluating, accepting, rejecting, or otherwise exercising any control over the [Map] or the redistricting process" is of no consequence to that analysis, despite Election Defendants' unsupported argument to the contrary. [Doc. 43-1 at 11]. Indeed, Election Defendants do not contest that they have a "legal obligation to conduct elections using the maps adopted by the State." [Id. at 12].

Other recent caselaw from this district belies Election Defendants' arguments that Plaintiffs' alleged injuries are not traceable to them and that those injuries cannot be redressed by the entry of an order against them. For example, in Rose, another judge of this district rejected an argument by the Georgia Secretary of State that the plaintiffs' alleged injury was not traceable to him in his official capacity or redressable by an order against him. See 511 F. Supp. 3d at 1356. In that ongoing case, the four (4) African American plaintiffs challenge "the state-wide, at-large method of electing members of the [Georgia Public Service] Commission" on the basis that it "inhibits black voters' ability to elect their preferred candidates and

dilutes black voting strength in violation of Section 2 of the Voting Rights Act." Id. at 1344. Accepting the plaintiffs' well-pleaded allegations as true for purposes of addressing the Georgia Secretary of State's motion to dismiss for lack of standing, the district court explained that

> [s]ince the Secretary is the person responsible for administering [the state-wide] elections [at issue], O.C.G.A. § 21-2-50(b), [p]laintiffs' injuries are traceable to him and injunctive relief directed against him concerning the administration of elections for the Commission consistent with Section 2 would redress the harm [p]laintiffs have allegedly suffered. At the pleading stage, this is enough.

Id. at 1356. In this case, it is undisputed that Election Defendants administer the county-level elections at issue, rather than the Secretary of State, who administers state-wide elections such as the one at issue in Rose. See id.; see also Am. Compl. ¶¶ 147–55; [Doc. 43-1 at 3]. Thus, the reasoning of Rose supports a finding that Plaintiffs in this action possess standing to sue Election Defendants. See 511 F. Supp. 3d at 1356.

Even distinguishable authority from this district illustrates why Plaintiffs have standing to sue Election Defendants in the matter at bar. Specifically, another judgates

lost her reelection. See id. The plaintiff in that case brought an equal protection claim based on the purported racial gerrymandering of county commission voting precincts. Id. at *2. In that case, the plaintiff alleged the defendant county board of elections was the entity charged by state law with conducting the elections for which the redrawn election map would be used. Id. at *3–5. The district court ultimately found that the plaintiff in Scott lacked standing on redressability grounds because the heart of her claimed injury was *retroactive*—that she lost her status as an incumbent county commissioner due to the redrawing of the voting districts—and noted that the plaintiff had no intention to run for that position in the foreseeable future. Id. at *4 ("Surely the [b]oard of [e]lection's enforcement of [the redrawn] voting districts caused [p]laintiff harm in the November 2002 election by preventing [p]laintiff from running as the incumbent in District 3. However, to the extent

judgment or a directed verdict at trial." Rose, 511 F. Supp. 3d at 1357 (citing Lujan, 504 U.S. at 561).

B. Failure to Join Indispensable Parties

1. Legal standard

Rule 12(b)(7) permits a party to move to dismiss a complaint for failure to join indispensable parties as required by Rule 19. See FED. R. CIV. P. 12(b)(7). As the Eleventh Circuit has instructed, a district court should engage in a two (2)-part analysis to determine whether a party is indispensable:

> First, the court must ascertain under the standards of Rule 19(a) whether the person in question is one who should be joined if feasible. If the person should be joined but-2.sony s

2. Discussion

[a] person aggrieved by the application of a legal rule

Fair Fight Action, Inc. v. Raffensperger, 413 F. Supp. 3d 1251, 1277 (N.D. Ga. 2019). The only case Election Defendants cite as to why the State or State Board of

inconsistent adjudications or results. Inconsistent obligations occur when a party is unable to comply with one court's order without breaching order concerning the same incident." Id. (emphasis added) (quoting Delgado v. Plaza Las Ams., Inc., 139 F.3d 1, 3 (1st Cir. 1998) (per curiam)). Here, Election Defendants' argument does not concern a potential conflict between court orders; rather, it focuses on a potential conflict between an order this Court may eventually issue and Election Defendants' "duty to run elections using the maps adopted by the State Legislature and signed into law by the Governor." [Doc. 43-1 at 17]. And the Court has already addressed the reasons why Election Defendants are "suited to defend the [claim]" in this case challenging the Map. See Scott, 2005 WL 8155742, at *5.

The protestation by Election Defendants that they lack the authority to institute part of the relief Plaintiffs seek—the adoption of a constitutionally compliant redistricting plan that remedies the alleged racial gerrymandering of the Challenged Districts, even on an interim basis—does not impact the instant analysis. See Am. Compl. ¶ 183(c), (d); [see also Doc. 47 at 3]. If, at the appropriate procedural juncture, the Court determines such relief to be warranted, the Georgia General Assembly will be given "an adequate opportunity" to adopt a new redistricting map that comports with

In short, nothing suggests that the alternative defendants enumerated by the Election Defendants are "one[s] who should be joined if feasible[.]" See Focus on the Fam., 344 F.3d at 1279–80; see also FED. R. CIV. P. 19(a). As such, the Court need not proceed to the second step of the Rule 19 analysis. Accordingly, the Court denies the Election Defendants' motion to dismiss based on failure to join necessary parties.

IV.

The Court next turns to the District's motion for judgment on the pleadings. By that motion, the District repeats or recasts Election Defendants' arguments about the other entities they think Plaintiffs should have sued, including the State of Georgia, the Georgia General Assembly, or various individual legislators.[4] [See Doc. 83 at 1–2, 11–24]. Because the Court already addressed these arguments, it declines to further discuss them here. See supra part III(B)(2). The only new argument the District makes is that it is not subject to liability pursuant to § 1983 and Monell v. Department of Social Services. [See Doc. 83 at 11–15] (citing 436 U.S. 658 (1978)). In response, Plaintiffs contend that "the District's reliance on Monell is completely off base" and that the Court should instead "apply the well-established framework from [Shaw v. Reno, 509 U.S. 630 (1993),] and its progeny"

[4] The District also makes passing mention of Governor Kemp, but does not appear to contend that Plaintiffs should have sued him for signing HB 1028 into law. [See Doc. 83 at 20].

in its analysis of the District's motion. [Doc. 93 at 16 n.3, 20 n.4].[5] After setting forth the relevant legal standard for a motion for judgment on the pleadings, the Court addresses the Parties' arguments.

A. Legal Standard

The legal standard for assessing a motion for judgment on the pleadings is the same as the standard for a motion to dismiss under Rule 12(b)(6). See Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998); Roma Outdoor Creations, Inc. v. City of Cumming, 558 F. Supp. 2d 1283, 1284 (N.D. Ga. 2008). Thus, in evaluating a motion for judgment on the pleadings, a court analyzes whether the complaint "contain[s] sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also Horsley v. Feldt, 304 F.3d 1125, 1131 n.2 (11th Cir. 2002) (explaining that "motions for judgment on the pleadings are facial challenges to the legal sufficiency of [a plaintiff's] complaint that 'present a purely legal question'" (first alteration adopted) (quoting Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997))). Put differently, when deciding a motion for judgment on the pleadings, a court looks

the reasonable inference that the defendant is liable for the misconduct alleged." See Iqbal, 556 U.S. at 678.

"Judgment on the pleadings is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." Hawthorne, 140 F.3d at 1370 (citing FED. R. CIV. P. 12(c)). "In determining whether a party is entitled to judgment on

fairly subject a municipality to [§ 1983] liability on the theory that the relevant practice is so widespread as to have the force of law." Bd. of Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

Whether a policy or custom is sufficiently "official" to subject a defendant municipality to § 1983 liability is "dependent on an analysis of state law" because a court looks to state law to determine "

1283, 1289 (11th Cir. 2004)); Brown, 520 U.S. at 403 ("[I]n Monell and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury."); Canton v. Harris, 489 U.S. 378, 389 (1989) (same). In other words, to adequately state a claim against the District pursuant to § 1983, Plaintiffs99 ( )62.00r5-2.999 (s)4.

map" and that "[t]his process

Georgia and Cobb County." Am. Compl. ¶ 51. Plaintiffs do not allege that the Board or its Chairman have previously violated their Fourteenth Amendment Equal Protection rights by recommending a racially gerrymandered redistricting proposal to the General Assembly for final approval. See generally Am. Compl.; see also O.C.G.A. § 28-1-14.1 (setting forth the process for county boards of education to submit a proposed "plan to revise . . . or create [voting] districts" to the Georgia General Assembly).

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motion in all other respects. The Court **GRANTS** the District's "Motion for Judgment on the Pleadings." [Doc. 83]. Pursuant to the Court's most recent Amended Scheduling Order dated January 5, 2023, discovery in this case will close after September 5, 2023. [See Doc. 57].

SO ORDERED, this 18th day of July, 2023.

Eleanor L. Ross
United States District Judge
Northern District of Georgia