

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

NEW GEORGIA PROJECT, <i>et. al.</i> ,	:	
	:	
Plaintiffs,	:	Civil Action No.
	:	1:24-cv-03412-SDG
vs.	:	
	:	
BRAD RAFFENSPERGER, in his	:	
official capacity as Secretary of State	:	
of the State of Georgia, <i>et. al.</i> ,	:	
	:	
Defendants.	:	
	:	

BRIEF IN SUPPORT OF DEFENDANTS’
WHITFIELD COUNTY BOARD OF ELECTIONS AND REGISTRATION,
STEPHEN KELEHEAR, ROB COWAN, AND CAROL BYERS’
MOTION TO DISMISS

INTRODUCTION

The Whitfield County Board of Elections and Registration and Stephen Kelehear, Rob Cowan, and Carol Byers, in their official capacities as members of the Whitfield County Board of Elections and Registration (hereinafter collectively referred to as “Whitfield BOE,”) respectfully move this Court to dismiss them from Plaintiffs’ Consolidated First Amended Complaint [Doc. 155] (hereinafter “Complaint”) pursuant to *Fed. R. Civ. P. 12(b)(1)* and *(6)*. Plaintiffs lack standing to sue Whitfield BOE and have failed to state any claims upon which relief can be granted against Whitfield BOE.

The Complaint is a consolidation and expansion of three (3) previously filed complaints, none of which named Whitfield BOE. Only the Plaintiffs Georgia State Conference of the NAACP (“NAACP”) and Georgia Coalition for The People’s Agenda, Inc. (“GCPA”) (collectively hereinafter the “Plaintiffs”) added Whitfield BOE, along with sixteen (16) other county election boards (“the seventeen county defendants,”) to its Complaint and have sued them in Counts I, II, and IV for violations of the National Voter Registration Act of 1993 (“NVRA.”) [Doc. 155.]

This Court should dismiss Plaintiffs’ Complaint [Doc. 155] as against Whitfield BOE based upon *Fed. R. Civ. P. 12(b)(1)* because it fails to allege any challenged action or raise any bad conduct of Whitfield BOE and, therefore, fails to allege an injury-in-fact with respect to any action or inaction of Whitfield BOE. Even if this Court were to find that the Complaint does allege an injury-in-fact, it very clearly does not allege any action traceable to Whitfield BOE with respect to any such possible injury-in-fact that the Court may find and, thus, must be dismissed for that reason as well.

This Court should also dismiss Plaintiffs’ Complaint [Doc. 155] as against Whitfield BOE based upon *Fed. R. Civ. P. 12(b)(6)* because it does not contain sufficient factual allegations to establish plausibly that Whitfield BOE has acted -- or will act -- unlawfully and, therefore, fails to state a claim upon which relief can be granted against Whitfield BOE.

STATEMENT OF FACTS

Whitfield BOE is specifically referenced only three (3) times in the Complaint, which encompasses one hundred and forty-two (142) pages. Those scant references, other than the case heading itself, are the identification of defendants (Doc. 155 ¶104,) and two footnotes regarding a letter sent to Whitfield County Board of Elections (Doc. 155 fns. 4, 41.) None of these references includes any allegations of specific conduct of Whitfield BOE.

ARGUMENT AND CITATION TO AUTHORITY

I. Plaintiffs lack standing because they have failed to allege any injury-in-fact nor have they alleged any injury fairly traceable to any conduct of Whitfield BOE.

Outside of the case caption, the naming of the parties, and a footnoted reference to an emailed letter sent by Plaintiffs, the Amended Complaint does not even refer to Whitfield BOE. [Doc. 155, ¶104, ¶ 245 fn. 41]. It is simply one of the “seventeen county defendants.” Thus, the decision by Plaintiffs to name these particular seventeen (17) county defendants – among the one hundred fifty-nine (159) counties in Georgia – is arbitrary and unconnected to the application, or alleged lack thereof, of the NVRA by Whitfield BOE. Such a tenuous link cannot satisfy Plaintiffs’ threshold burden to establish standing to sue Whitfield BOE. Both the State Defendants’ Motion to Dismiss [Doc. 168] and the Cobb County

Defendants' Motion to Dismiss [Doc. 176] fully brief the applicable law regarding standing. Whitfield BOE will not repeat here those arguments but simply adopts them by reference herein. As the Complaint fails to articulate a "concrete and particularized" injury with respect to Whitfield BOE, it must be dismissed from the Complaint.

II. Plaintiffs also lack standing because they have failed to satisfy the traceability requirement between any injury and the actions of Whitfield BOE.

Article III of the Constitution limits the subject-matter jurisdiction of federal courts to "Cases" and "Controversies." "To have a case or controversy, a litigant must establish that he has standing." The "irreducible constitutional minimum" of standing consists of (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.

Ga. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. Of Registration & Elections ("GALEO"), 36 F.4th 1100, 1113 (11th Cir. 2022) (internal citations omitted.) To satisfy the traceability requirement, any complaint must allege "a fairly traceable connection between the plaintiff's injury and the complained of conduct of the defendant." GALEO, 36 F.4th at 1116, quoting *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005), quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003 (11th Cir. 2004.)

The claims of Plaintiffs against Whitfield BOE are alleged in Counts I, II, and IV of the Complaint. [Doc. 155, ¶¶249-260, 261-269, 276-279.] Each of the Plaintiffs alleges a "diversion of resources injury." [Doc. 155, ¶43, ¶53, ¶64.] Each

of these Plaintiffs alleges its injury is due to Senate Bill 189 itself due to *changes in the statute*. [Doc. 155, ¶43, ¶53, ¶64 .] None of the Plaintiffs even alleges its purported injury is traceable to any challenged action or conduct of Whitfield BOE.

Paragraph 104 of the Complaint alleges Whitfield BOE is created by state law to conduct elections and oversee voter registration in Whitfield County and that the individual members of the Board are being sued in their official capacity [Doc. 155, ¶104.] Footnotes 4 and 41 allege the Whitfield County Board of Elections and Registration was one of seventeen (17) Boards of Elections in Georgia that were sent the notice dated July 10, 2024, attached as Exhibit 2 to the Complaint. [Doc. 155, ¶32, n.4, ¶246, n.41.] Otherwise, the Complaint does not make any allegation specifically regarding any conduct of Whitfield BOE.

Standing is not “dispensed in gross.” *Murthy v. Missouri*, 603 U.S. 43, 61 (2024.) A plaintiff must demonstrate standing for each claim “against each defendant.” *Id.* at 61. This requires a “threshold showing” that “a particular defendant” engaged in challenged conduct. *Id.* Defendants may not be treated “as a monolith.” *Id.* at 69. Rather, the Court “must confirm *each* Government defendant continues to engage in the challenged conduct.” *Id.* (italics supplied by the Court).

Because the Complaint does not allege Whitfield BOE continues to engage in challenged conduct, standing to sue it may not be based upon speculation and conjecture that it will engage in challenged conduct in the future. *Id.* at 69-70.

III. Plaintiffs lack standing with respect to Count I because they failed to provide notice of the alleged violation to the Whitfield County Board of Elections as required by the NVRA.

If plaintiffs do not provide pre-suit notice of alleged NVRA violations, they fail to establish standing. *See 52 U.S.C. § 20510; Georgia State Conference of N.A.A.C.P. v. Kemp*, 841 F. Supp. 2d 1320, 1335 (N.D. Ga. 2012.) Compliance with the written notice requirement is mandatory and dismissal is proper when such notice is not provided. *Id.* (internal citations omitted).

Count I alleges that Section 5 violates the NVRA 8(d) removal process. [Doc. 155, ¶¶ 249 – 260]. However, the July 10 Notice Letter sent via email -- the only Notice Letter Whitfield BOE received -- does not allege this particular violation. [Doc. 155-3.] For this reason alone, this Court must dismiss Whitfield BOE from Count I.

The initial paragraph of the July 10 Notice Letter states that “enforcement of Sections 4 and 5 of S.B. 189, *as detailed below*, violates . . . the exclusive basis for removing registered voters for purported change of address, [NVRA Section 8(d)].” [Doc. 155-3, emphasis added]. Yet the portion of the July 10 Notice Letter regarding Section 5 does not mention Section 8(d) of the NVRA at all, let alone allege a violation. It alleges only that enforcement of Section 5 will violate NVRA Section 8(b,) which requires that all voter registration programs be uniform and non-discriminatory [Doc. 155-3, Section II(a).]

In contrast, the July 10 Notice Letter explicitly states that “Section 4 [of SB

189] also violates Section 8(d) of the NVRA” [Doc. 155-3, Section II(b).] Because the July 10 Notice Letter did not state that Section 5 violated NVRA Section 8(d), Plaintiffs have failed to establish standing to sue Whitfield BOE in Count I.

Plaintiffs did serve an Amended Notice Letter on January 9, 2025. But, the Amended Notice Letter will not cure the defect because it was sent nearly a month *after* Plaintiffs filed the Complaint.

Therefore, this Court must dismiss Whitfield BOE from this action. Plaintiffs have failed to allege any concrete or particularized injury due to any action of Whitfield BOE and they lack standing as to Count I because their July 10 Notice Letter was insufficient as a matter of law.

IV. Plaintiffs’ Amended Complaint Does Not State a Claim upon which Relief Can be Granted Against Whitfield BOE.

“[W]hile a plaintiff may both lack standing and fail to state a claim, it is also true that a plaintiff can meet the requirement for constitutional standing but nonetheless fail to state a claim.” *Carpenters Pension Fund of Illinois v. MiMedx Group, Inc.*, 73 F.4th 1220, 1240 (11th Cir. 2024.)

[T]o survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’” Establishing plausibility requires “more than a sheer possibility that a defendant has acted unlawfully.”

GALEO, 36 F.4th at 1116 (internal citations omitted.)

Here, the Complaint [Doc. 155] contains wholly insufficient factual matter that Whitfield BOE has acted or will act unlawfully. It therefore fails to state a claim upon which relief can be granted as against Whitfield BOE. The fleeting possibility that Whitfield BOE *may someday* act unlawfully cannot establish plausibility necessary to state a claim upon which relief can be granted against Whitfield BOE.

Conclusion

For all of the reasons set forth herein and additionally adopting by reference any other argument made by any of the “seventeen county defendants,” Whitfield BOE respectfully requests that this Court dismiss Whitfield BOE from Plaintiffs’ Complaint [Doc. 155.]

Respectfully submitted this 21st day of March, 2025.

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Certificate of Compliance

Pursuant to L.R. 7.1(D), I certify that the foregoing has been prepared in Times New Roman 14, a font and type selection approved by the Court in L.R. 5.1(C).

/s/Robert H. Smalley, III

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Certificate of Service

I hereby certify that on March 21, 2025, I electronically filed the foregoing *Defendants' Whitfield County Board of Elections and Registration, Stephen Kelehear, Rob Cowan, and Carol Byers Brief in Support of Motion to Dismiss Plaintiffs' Complaint* with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record in this matter.

/s/Robert H. Smalley, III_____

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