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

COALITION FOR GOOD GOVERNANCE, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State; *et al.*, *Defendants*.	CIVIL ACTION FILE NO. 1:20-CV-01677-TCB

DEFENDANTS' MOTION TO DISMISS

Defendants Brad Raffensperger, in his official capacity as Secretary of State; and Rebecca N. Sullivan, David J. Worley, Anh Le, and Matthew Mashburn, in their official capacities as members of the State Election Board, move to dismiss Plaintiffs' claims in their entirety pursuant to Fed. R. Civ. P. 12(b)(1) and (6). In support of this motion, Defendants rely on their Brief in Support of Motion to Dismiss, which is filed with this motion.

This 11th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

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

Plaintiffs are advocates for hand-marked paper ballots. In their effort to find a new problem for which their preferred policy is the only solution, Plaintiffs' Complaint does not contain allegations that support Article III jurisdiction. *First*, Plaintiffs lack standing because they do not adequately allege any injury and almost all of the decisions they challenge are made by county officials, not the Secretary of State or State Election Board—and even their proposed measures cannot eliminate their claimed injury. *Second,* the Eleventh Amendment bars their claims because they seek to invade the special sovereignty interests of the State of Georgia. *Third*, their Complaint

seeks answers to nonjusticiable political questions. *Fourth*, their claims regarding future elections are not ripe. *Fifth*, even if they can overcome their jurisdictional problems, they have failed to state a claim upon which relief can be granted. For all these reasons, this Court lacks jurisdiction and should dismiss Plaintiffs' Complaint.

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 prior to 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 demonstrate "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 is not required to accept legal conclusions when they are "couched as [] factual allegation[s]." *Id.* at 678-79.

In addition to 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. Plaintiffs lack standing to bring this action.

Article III of the Constitution limits the subject-matter jurisdiction of federal courts. U.S. CONST. art. III § 2. A party invoking federal jurisdiction bears the burden of establishing standing at the commencement 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 (11th Cir. 2001). Standing requires proof 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." *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 U.S. App. LEXIS 13714, at *13 (11th Cir. Apr. 29, 2020) citing *Lujan,* 504 U.S. at 560-561. And, "when plaintiffs seek prospective relief to prevent future injuries, they must prove that their threatened injuries are 'certainly impending.'" *Id.* at *13, citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

A. No plaintiff has alleged a sufficient injury.

This Court must first determine whether the Plaintiffs have adequately pleaded an injury. Neither the organizational plaintiffs nor the individuals

have met this initial burden. 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, *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. 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.'" *Id.,* citing *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990). The rationale behind these requirements is deceptively simple: To "ensure[] that courts do not entertain suits based on speculative or hypothetical harms." *Lujan,* 504 U.S. at 564, n.2. But that is the entirety of what Plaintiffs in this action have alleged.

1. The individual plaintiffs have not alleged any cognizable injury.

The five individual Plaintiffs fall into two categories in alleging injuries. Plaintiffs Martin and Nakamura would prefer to vote in person but have not applied for absentee ballots. (Doc. 1, ¶¶ 139, 143). Plaintiffs Dufort, Wasson, and Throop would prefer to vote in person and have applied for absentee ballots.[1] (Doc. 1, ¶¶ 140, 145, 147). Plaintiffs Wasson and Throop further allege that they plan to serve as poll watchers but are apprehensive about their health if they choose to do so. (Doc. 1, ¶¶ 146, 148).

The individual Plaintiffs generally allege that they will be harmed "if required to vote in person without the Pandemic Voting Safety Measures" because of potential exposure to the virus. (Doc. 1, ¶ 149). Alternatively they allege "if required to vote absentee by mail" without their "Pandemic Voting Safety Measures" in place, there is a substantial likelihood their absentee ballot applications and ballots will not be processed in a timely manner. *Id.*

Put simply, Plaintiffs' pleadings contain only "hypothetical," "abstract," and "conjectural" harms. As the Plaintiffs concede, they have no idea what "the course of the pandemic in Georgia and nationwide" may be because "so

[1] While beyond the scope of the Complaint, two of the plaintiffs filed declarations indicating they have now received their absentee ballots. (Doc. 20, pp. 158, 169).

little is known about the coronavirus..." (Doc. 1, ¶ 40). But "allegations of *possible* future injury are not sufficient." *Clapper,* 568 U.S. at 409 (emphasis added). By only alleging that any theoretical injuries stem from not knowing how the pandemic will evolve in the weeks to come, and stating their injury in terms of their own feelings of apprehension about particular methods of voting—none of which they are required to use—Plaintiffs acknowledge their injury is entirely speculative. *Id.*

Plaintiffs also claim to be injured because they may not be able to vote in the *manner* in which they feel most comfortable, if and when they decide to cast their ballot. But voters are not injured merely because they cannot vote using their preferred method: "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).

Finally, Plaintiffs claim a "great" interest in the DeKalb sheriff's race and a sales tax referendum for the City of Atlanta, fearing harm if some ballots are wrongfully cancelled because, if that were to be the case, the election results would not be accurate. (Doc. 1, ¶ 150). Not only is this exactly the kind of "highly attenuated chain of possibilities" that "does not satisfy the

requirement that threatened injury must be certainly impending," *Clapper,* 568 U.S. at 410, it is also a generalized grievance that does not satisfy the injury-in-fact requirement of standing: "Voters have no judicially enforceable interest in the *outcome* of an election." *Jacobson,* 2020 U.S. App. LEXIS 13714 *16. "Instead, they have an interest in *their* ability to vote and *their* vote being given the same weight as any other." *Id.* (emphasis added).

The individual Plaintiffs have not adequately alleged any injury-in-fact and their claims should be dismissed.

2. The Coalition for Good Governance has not alleged what it must divert resources from.

The remaining Plaintiff is the Coalition for Good Governance, which claims organizational standing to bring this action. "An organization may demonstrate a concrete, imminent injury either through a 'diversion-of-resources' theory or through an 'associational-standing' theory." *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1336 (N.D. Ga. 2018) citing *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341–42 (11th Cir. 2014). "[A]n organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Crittenden*, 347 F. Supp. 3d at 1336 citing *Arcia*, 772 F.3d at 1341. It is not sufficient to merely allege

resource "diversion," but the organization also to state what those resources are being diverted away *from*. *Jacobson*, 2020 U.S. App. LEXIS at *26.

Here the organizational Plaintiff only alleges it will continue its general mission. (Doc. 1, ¶¶ 133-134). The entirety of the diversion of *financial* resources alleged is the costs of this lawsuit, which is not sufficient for Article III standing. *Florida State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008); *see also Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). The entirety of the alleged diversion of *time* resources is the time of single individual, Ms. Marks, from other projects in North Carolina. (Doc. 1, ¶ 135). Ms. Marks is still advancing the organization's purpose of advocacy, just in a different state. *Id.*

Finally, to the extent the organizational Plaintiff is claiming associational standing on behalf of Georgia members, that argument fails for the same reasons that the individual Plaintiffs cannot establish standing. The same attenuated fears are not an injury for purposes of Article III. *Clapper,* 568 U.S. at 409.

None of the Plaintiffs have alleged any actual injury for purposes of standing and this case should be dismissed on that basis alone.

B. Any injury by Plaintiffs is not traceable to Defendants or redressable by them.

Even if Plaintiffs had alleged an injury, it would only be traceable to the county election superintendents and redressable only by those officials. Specifically, almost all of the "Pandemic Voting Safety Measures" alleged by Plaintiffs are actions local officials are responsible for, not Defendants.

Under Georgia law, county election officials[2] are responsible for (1) the processing of absentee ballots, O.C.G.A. §§ 21-2-381, -384; (2) handling all aspects of early voting, O.C.G.A. § 21-2-385; (3) selecting the voting equipment for each precinct, including any portable polling facilities, O.C.G.A. §§ 21-2-263 *et seq*., 21-2-332; (4) preparing and deploying voting machines, including setting up and utilizing them on election day, O.C.G.A. §§ 21-2-328; (5) training pollworkers on how to use voting equipment and election-day voting procedures, O.C.G.A. § 21-2-99; (6) credentialing poll watchers, O.C.G.A. § 21-2-408; (7) the layout, management, and control of the polling places, O.C.G.A. § 21-2-413; (8) in-person voting operations, including

[2] The "superintendent" is either a county Board of Elections or the probate judge. O.C.G.A. § 21-2-2(35)(A). The Secretary of State is never referred to as a superintendent in the Election Code, even though he is designated the "chief election officer" for purposes of the Help America Vote Act. O.C.G.A. § 21-2-50.2(a). Election officials that work at the polls are referred to as "poll officers" O.C.G.A. § 21-2-2(26).

receiving and examining voter certificates and photo identification, checking in voters at each polling place, and maintaining the official list of voters, O.C.G.A. §§ 21-2-417, -451 to -454; (9) tabulation of absentee ballots, along with the computation and canvassing of returns, O.C.G.A. §§ 21-2-386, -492; (10) assembling a vote review panel for questioned ballots, O.C.G.A. §§ 21-2-386, -483; (11) preparing return sheets and posting initial counts after the closing of the polls, O.C.G.A. §§ 21-2-455, -457; and (12) certification of election results, O.C.G.A. §§ 21-2-493, -497. While the Secretary of State's Elections Division provides support and resources to county election officials, the conduct of the election is the legal responsibility of each superintendent.

Local election superintendents are not appointed by the Secretary of State but are created by office or local act. O.C.G.A. §§ 21-2-2(35)(A), 21-2-40. None of the 15 enumerated duties of the Secretary of State give him any control over county election superintendents. O.C.G.A. § 21-2-50. As Plaintiffs admit, the only method by which any state official can exercise control over a county election superintendent is by initiating "formal action" against that superintendent, (Doc. 1, ¶ 38), either through a hearing before the Board or by filing a judicial action against the superintendent. O.C.G.A. §§ 21-2-31(5), 21-2-32(a)–(b).

Despite the clear statutory duties of county election superintendents and the scope of the relief sought, Plaintiffs have only sued the Secretary of State and State Election Board. In so doing, they failed to sue any of the "independent officials . . . who are not subject to the Secretary's control," *Jacobson*, 2020 U.S. App. LEXIS 13714 at *30. The mere fact that the Secretary is designated the "chief election officer of the state" does not make every particular injury or relief in the election context traceable to the Secretary. *Id*. at *31; *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1300 (11th Cir. 2019) (en banc). Like the alleged injuries in *Jacobson*, the Secretary has not caused the injury here and relief against the Secretary "will not redress that injury—either 'directly or indirectly.'" *Jacobson*, 2020 U.S. App. LEXIS 13714 at *32. And this Court cannot bind the superintendents through the Secretary: "If a plaintiff sues the wrong defendant, an order enjoining the correct official who has not been joined as a defendant cannot suddenly make the plaintiffs' injury redressable." *Id*. at *36-37. Even if an injury exists, Plaintiffs have sued the wrong defendants for the relief they seek. Further, even if every one of the Pandemic Voting Safety Measures are implemented by the proper entities, it will still not eliminate the transmission of the virus—which is the only alleged injury. Nor

will it eliminate the fears of all voters. Plaintiffs do not have standing and this case should be dismissed on that basis alone.

II. Plaintiffs' Complaint is barred by the Eleventh Amendment.

Plaintiffs' Complaint alleges that it is a constitutional violation to hold Georgia's primary election without Plaintiffs' preferred "safety measures." (Doc. 1, ¶¶ 153-154, 159-160). While the Eleventh Amendment generally prohibits suits "brought by a citizen against his own State," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 89 (1984), *Ex parte Young*, 209 U.S. 123 (1908), provides an exception that allows Plaintiffs to sue state officers for prospective injunctive relief. *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 288 (1997); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999).

Plaintiffs say they seek only prospective injunctive and declaratory relief. (Doc. 1, p. 1). But what Plaintiffs claim about their relief is not enough—this Court must evaluate the "essential nature and effect of the proceeding." *Cassady v. Hall*, 892 F.3d 1150, 1153 (11th Cir. 2018). And unlike other cases involving elections and voting, where plaintiffs sought to enjoin a particular practice or practices, this case seeks to have this Court dictate the *exact manner* in which elections are conducted, down to the layout

of precincts and the attire of pollworkers. This proposed relief is repugnant to the limitations of the U.S. Constitution.

A. Georgia's special sovereignty interests are implicated by Plaintiffs' requested relief.

Ex Parte Young does not apply—and thus a suit is barred by the Eleventh Amendment—when a plaintiffs' requested relief against state officials "implicates special sovereignty interests" of the state. *Coeur d' Alene Tribe*, 521 U.S. at 281. In order to implicate the special sovereignty interests of the state, the type of relief sought must implicate the "sovereignty interests and funds *so significantly*" that the *Ex Parte Young* exception does not apply. *Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (emphasis added). Without question, they are implicated here.

Most courts applying *Coeur d' Alene Tribe* have done so in the context of real property. *See, e.g., Hollywood Mobile Estates Ltd. v. Cypress*, 415 F. App'x 207, 211 (11th Cir. 2011). In determining if special sovereignty interests are implicated in other contexts, courts have looked to whether (1) the injunctive relief would involve an area that "derives from [the state's] general sovereign powers," *MCI Telecomm. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 514 (3d Cir. 2001); (2) the suit seeks to interfere "with the allocation of state funds" as opposed to "incidental expenditures" involved in complying

with an injunction, *Barton v. Summers*, 293 F.3d 944, 949, 951 (6th Cir. 2002); or (3) the suit sought to "rewrite [the state's] property tax code with respect to its application against [] personal property," *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1194 (10th Cir. 1998). In this case, all three of these criteria are instructive and warrant the imposition of Eleventh Amendment immunity.

To determine the sovereignty interests of states to conduct elections, this Court need only look to the Constitution. The Elections Clause, Art. I, §4, cl. 1, specifies that the "Times, Places and Manner of holding elections . . . shall be prescribed in each State by the Legislature[3] thereof." This provision was based on the "plain proposition" identified by the Framers that "*every government ought to contain in itself the means of its own preservation*." THE FEDERALIST, No. 59 (A. Hamilton) (emphasis in original). Leaving the manner of regulating state elections in the hands of the states made sense because allowing the federal government to regulate elections for states

[3] As discussed further below, the Georgia General Assembly has assigned the responsibility for administering elections to local election officials, which results in the standing problems with this case. That is in no way inconsistent with the fact that the *manner* of holding elections is the *State's* sovereignty interest for purposes of the Eleventh Amendment because it is the state legislature that chose the manner of conducting elections.

would be "an unwarrantable transposition of power, and [] a premeditated engine for the destruction of the State governments." *Id*.

The Supreme Court has likewise repeatedly recognized the sovereign interests of states conducting their own elections: "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006) quoting *Eu v. San Francisco County Democratic Central Comm*., 489 U.S. 214, 231, 109 S. Ct. 1013 (1989). In denying a challenge to a state election practice, Justice Scalia relied in part on "the Constitution's express commitment of the task [of running elections] to the States." *Crawford v. Marion Cty. Election Bd*., 553 U.S. 181, 208, 128 S. Ct. 1610, 1626-27 (2008) (Scalia, J., concurring); see also *Gregory v. Ashcroft*, 501 U.S. 452, 461, 468, 111 S. Ct. 2395 (1991).[4] Similarly, this Court should do so here.

[4] Congress has passed laws under its powers altering state regulations of federal elections under the Elections Clause but not using this power to "destroy state governments." *ACORN v. Edgar*, 56 F.3d 791, 796 (7th Cir. 1995) (discussing role of states and Congress). And federal courts have intervened to address *specific* state election practices under the First and Fourteenth Amendments. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 806, 103 S. Ct. 1564, 1579 (1983) (invalidating March filing deadline for candidates for President); *Norman v. Reed*, 502 U.S. 279, 288, 112 S. Ct. 698, 705 (1992) (evaluating ballot-access statute).

B. Plaintiffs seek to invade the entirety of the State's sovereignty interests in administering elections.

Plaintiffs' Complaint invades the sovereignty interests of the State of Georgia by seeking an order "directing the precise way in which Georgia should conduct voting"—exactly the type of order the Eleventh Circuit warned could be barred by the Eleventh Amendment. *Curling v. Worley*, 761 Fed. Appx. 927, 934 (11th Cir. 2019). Plaintiffs are doing far more than merely asking a federal court to "closely scrutinize state laws whose very design infringes on the rights of voters" because, instead, they are seeking to have this Court "supervise the administrative details of a local election." *Curry*, 802 F.2d at 1314.

Plaintiffs' proposed overhaul of Georgia's election procedures would be a judicial declaration that would "diminish, even extinguish," *Coeur d' Alene Tribe*, 521 U.S. at 281, the State's and nonparty counties' power to control:

1. The date of the primary election (Doc. 1, ¶ 45);
2. The technology used and design for all in-person ballots, including the thickness of cardboard used (Doc. 1, ¶¶ 66, 68, 81);
3. The entirety of the conduct of early voting, from adding vote centers to the appointment of absentee-ballot clerks to the timing of early voting itself (Doc. 1, ¶¶ 90-93);

4. The use of other methods of in-person voting, including requiring curbside voting and "pop-up" polling places (Doc. 1, ¶¶ 94-95);
5. The timing and location of scanning in-person ballots (Doc. 1, ¶ 96);
6. The method of checking in voters who vote in person (Doc. 1, ¶ 97);
7. The method by which voters swear their identity and present required identification for purposes of voting (Doc. 1, ¶¶ 98-99];
8. The attire of pollworkers, support staff, and voters at every in-person voting location (Doc. 1, ¶¶ 100-101);
9. The design of check-in stations and what markings should be placed on the floor of individual polling locations (Doc. 1, ¶¶ 102-103); and
10. The control and processing of all absentee ballot applications and absentee ballots, down to the design of review panels and requirement to report absentee and early voting. (Doc. 1, ¶¶ 109).

Without question, Plaintiffs' proposed relief directly attacks the state's general sovereign powers to regulate elections, as discussed above. *Bell Atl.-Pa.*, 271 F.3d at 514. Plaintiffs' proposed relief would also interfere with state funds by *specifically* requiring state payment for the relief sought, as noted in (Doc. 1, ¶¶ 100-102). *Barton*, 293 F.3d at 949, 951.

Plaintiffs ask this Court to rewrite Georgia's Election Code. *ANR Pipeline Co.*, 150 F.3d at 1194. Except for redistricting, candidate

qualification, election contests, and campaign finance, Plaintiffs touch the entirety of Title 21. If Plaintiffs' proposed rewrite of Georgia's Election Code does not implicate the special sovereignty interests of the State in a way violative of the Eleventh Amendment, it is difficult to fathom a situation where *Coeur d' Alene Tribe* would apply to *any* election case.

III. Plaintiffs' Complaint is barred by the political-question doctrine.

While courts have authority to "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 rooted in the separation of powers. *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691 (1962). Any one of six factors can render a case nonjusticiable under this doctrine:

> [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 pronouncements by various departments on one question.

McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1357-58 (11th Cir. 2007) quoting *Baker*, 369 U.S. at 217. Cases that require the court to decide a political question must be dismissed for lack of jurisdiction. *Id*. at 1358.

Plaintiffs' Complaint admits that it "is extremely difficult to project the course of the pandemic in Georgia and nationwide because so little is known about the coronavirus or about how any easing of current restrictions may prolong the pandemic's spread or accelerate its reemergence." (Doc. 1, ¶ 40). The scope of the requested relief implicates at least three 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).

The Elections Clause and the history of its adoption demonstrates 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 "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 to the state legislatures. Courts should focus on enforcement of the First and Fourteenth Amendments, which are "generally unobtrusive to States in promulgating election regulations." *Agre*, 284 F. Supp. 3d at 599.

As discussed above, Plaintiffs' Complaint seeks a court order directing the exact "manner" of the conduct of elections—that is specifically committed to other parts of government. Plaintiffs' Complaint requires this Court to replace Georgia's Election Code with this Court's own judgment about the proper administration of elections (or more specifically implement Plaintiffs' preferred election measures), 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, Plaintiffs acknowledge that executive-branch officials at all levels "have undertaken measures to slow the spread of the coronavirus." (Doc. 1, ¶¶ 6, 25). But Plaintiffs believe the measures taken so far are insufficient to "protect the health" of the individuals involved in the upcoming election. (Doc. 1, ¶¶ 10-11, 33-36, 53). As a result, Plaintiffs' Complaint calls upon the Court to make "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

Plaintiffs' Complaint requires this Court to determine that the officials charged by statute with making decisions in a declared health emergency have not sufficiently exercised those powers for the benefit and protection of Georgia voters. That determination is required before this Court can reach the merits of Plaintiffs' claims. (Doc. 1, ¶¶ 152-153, 158-159); *McMahon*, 502 F.3d at 1357-58. Thus, in order to decide Plaintiffs' claims, this Court must "reconsider what are essentially policy choices," *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010), made by the Governor and Secretary of State under their authority to direct the upcoming election, when the election should be held, and what measures are necessary to properly respond to the declared public health emergency. This Court is not being asked to decide the constitutionality of a statute, *Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S. Ct. 1421, 1427 (2012), but is instead asked to second-guess the policy determinations of executive-branch officials in response to COVID-19. Because Plaintiffs' Complaint requires the Court to reconsider the policy decisions of officials from other branches before it can address Plaintiffs' claims, it presents nonjusticiable political questions that are not within the jurisdiction of this Court to decide.

Third, even if this Court did not have to determine the proper policy for a response to the current pandemic, there are still no "judicially discoverable

and manageable standards" that this Court can apply to Plaintiffs' claims. *McMahon*, 502 F.3d at 1357-58. Plaintiffs' claims require determinations about constantly changing projections from the Institute for Health Metrics and Evaluations (IMHE),[5] the vectors by which the coronavirus can spread,[6] whether the Governor's decisions about "relax[ing] social distancing requirements" is correct, and whether Georgia has sufficient "containment strategies" in place. (Doc. 1, ¶¶ 3, 7, 31, 49-55). All of these questions are properly addressed by state and local officials and not the courts.

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 define "safety" in the context of an election and then answer

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[5] Even Plaintiffs acknowledge that the projections are updated "every several day" and have "large uncertainty intervals," (Doc. 1, ¶¶ 49, 52), yet they repeatedly cite only to this model. (Doc. 1, ¶¶ 50-55). The Governor, on the other hand, is empowered in a public health emergency to make real-time decisions based on available data. O.C.G.A. § 38-3-51. The Secretary of State likewise is charged with deciding whether or not to use his powers to delay elections. O.C.G.A. § 21-2-50.1.

[6] For example, Plaintiffs allege that the coronavirus means that BMDs "pose an unacceptable and irremediable risk to the health of voters and pollworkers." (Doc. 1, ¶ 68). But the CDC guidance attached as Ex. C to Plaintiffs' Complaint advises "Transmission of SARS-CoV-2 to persons from surfaces contaminated with the virus has not been documented." (Doc. 1, p. 116). This is yet another area where Plaintiffs ask this Court to decide policy.

"how much is not enough"? *Id.*; (Doc. 1, ¶ 152). *See also Jacobson*, 2020 U.S. App. LEXIS 13714, at *58 (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 because of the lack of manageable standards. *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S. Ct. 2440, 2446 (1973) (military training). Ultimately, Plaintiffs' Complaint "poses basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2489; *Jacobson*, 2020 U.S. App. LEXIS 13714, at *53; *see also Ctr. for Biological Diversity v. Trump*, 2020 U.S. Dist. LEXIS 58160, *47, (D. D.C. April 2, 2020).

"[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). Because Plaintiffs only invite this Court to decide nonjusticiable political questions, this Court should dismiss Plaintiffs' Complaint.

IV. Plaintiffs' claims are not ripe.

Plaintiffs' claims that seek changes for the August and November 2020 elections are not ripe. Ripeness examines whether a claim is "sufficiently mature, and the issues sufficiently defined and concrete, to permit effective

decisionmaking by the court." *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995).

Any involvement by the court at this point, however, would violate the very premise upon which ripeness is based:

> [The] basic rationale [of the doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Ala. Power Co. v. U.S. Doe, 307 F.3d 1300, 1310 (11th Cir. 2002) *quoting Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). This rationale also aligns with the principle that "federal 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, slip op. (Doc. 33), p. 2 (N.D. Ga. May 8, 2020).

While Plaintiffs only allege that their proposed policy solutions are necessary "during the pandemic" (Doc. 1, ¶¶ 43), they also admit that they—like everyone else—do not know what the course of the pandemic will be,

(Doc. 1, ¶¶ 40, 42).[7] Plaintiffs only allege a fear of future infringement and future differential treatment as a result of events Plaintiffs *presume* will happen. (Doc. 1 at ¶¶ 153,160-164). Thus, all of Plaintiffs' claims for future elections are speculative and contingent upon possible future events, making them unfit for review at this point. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998); *Alabama Power Co.*, 307 F.3d at 1310.

V. Plaintiffs fail to state a claim upon which relief can be granted.

Even if Plaintiffs can overcome the jurisdictional problems outlined above, they have not stated a claim for relief, as explained in Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, which is incorporated by reference.

CONCLUSION

Plaintiffs' Complaint fails at the first hurdle it must pass—this Court's limited jurisdiction. This Court should dismiss Plaintiffs' Complaint and end this attempt to engage the Court in a policy exercise.

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[7] Despite this lack of knowledge, Plaintiffs also allege that moving the August 11 runoff is unnecessary. (Doc. 1, ¶ 64). But that is not a correct statement of law, as the United States makes clear. *Iqbal,* 556 U.S. at 678-79; (Doc. 24).

This 11th day of May, 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 DEFENDANTS' 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
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