

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

BLACK VOTERS MATTER FUND,
et al.,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his
official capacity as Secretary of State
of Georgia, et al.,

Defendants.

CIVIL ACTION FILE NO.
1:20-CV-01489-AT

**THE DEKALB DEFENDANTS' REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS AMENDED COMPLAINT**

The DeKalb Defendants¹ respectfully submit this reply in support of their Motion to Dismiss the Amended Complaint (Doc. 104) as follows:

I. Defendants are Protected from Suit by Eleventh Amendment Immunity.

Plaintiffs cannot distinguish *Casey v. Clayton County, GA*, which supports Eleventh Amendment immunity for the DeKalb Defendants in this action. *Id.*, 2007 WL 788943 (N.D. Ga. 2007). As the DeKalb Defendants showed in their opening brief, this Court's order in *Casey* states that a county board of registration

¹ Plaintiffs seek certification of a defendant class of all 159 county boards of registrars or absentee ballot clerks. (DOC 88), ¶¶ 53-61. No class has been certified, and thus this reply is not being filed on behalf of a putative class.

and elections, when conducting elections activity (as is alleged of the DeKalb Defendants here), acts as an arm of the state for purposes of Eleventh Amendment immunity. 2007 WL 788943, * 8. In their attempt to unsuccessfully distinguish *Casey*, Plaintiffs wrongfully exaggerate the BRE's autonomy while conducting elections and over-emphasize the source of funds and responsibility-for-judgment factors of the *Manders* analysis. *See Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

The first two prongs of the *Manders*' Eleventh Amendment analysis require the Court to review: (1) how State law defines the entity, and (2) what degree of control the State maintains over the entity. *Id.*, 338 F.3d at 1309. While Plaintiffs concede that the State creates the boards of elections, Plaintiffs characterize the governmental function at issue as "the postage requirement," rather than the conduct of elections, in an unsuccessful attempt to diminish the State's control over the DeKalb BRE and distinguish *Casey*. *See* Plaintiffs' Brief in Opposition to DeKalb Defendants' Motion to Dismiss (Doc. 107) ("Plaintiffs' Brief"), pp. 5-6, 11. To the extent Plaintiffs argue that the DeKalb Defendants have made a decision with respect to providing prepaid postage for absentee ballot mailings, such a decision falls squarely within the DeKalb Defendants' conduct of elections function. Plaintiffs' attempt to differentiate a postage requirement from the act of conducting elections contradicts their own allegations that "mail-in votes [are]

expected to skyrocket this year...[and] may become the new normal” for voting. *See* Amended Complaint (Doc. 88), ¶ 3. As set forth in the DeKalb Defendants’ Motion to Dismiss (Doc. 104), this Court has stated that with respect to the conduct of elections, a county board of registration is acting as an arm of the state.

Plaintiffs nevertheless maintain that DeKalb Defendants’ responsibility to conduct elections means that the State has no control over these processes. However, this position fails to consider the overarching power of the State. In fact, the State Election Board was created to “promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections.” O.C.G.A. §§ 21-2-30, 21-2-31. The BRE, on the other hand, was created to carry out the State election laws. O.C.G.A. § 21-2-70. As set forth in detail in the DeKalb Defendants’ Motion to Dismiss (Doc. 104), the ultimate control over the conduct of elections lies with the State General Assembly, Election Board, and Secretary of State. O.C.G.A. § 21-2-1 *et seq.* This ultimate control is further evidenced by the Secretary of State’s unilateral decision to mail absentee ballot request forms and absentee ballots to voters in Georgia for the upcoming primary, a task normally performed by the County. *See* Secretary of State Brad Raffensperger’s Brief in Support of His Motion to Dismiss, (Doc. 67-1), p. 2; Declaration of Erica Hamilton filed in support of Defendant DeKalb BRE’s

Response to Plaintiffs' Motion for Preliminary Injunction, (Doc. 50-1), ¶¶ 15-19. Moreover, Plaintiffs' own allegation that the Secretary of State can issue guidance to the counties to direct them to provide postage for absentee ballot mailings indicates that even Plaintiffs recognize the State's control over Defendants.

Plaintiffs' focus on the third and fourth prongs of the *Manders* analysis, the source-of-funds and responsibility-for-judgment elements, is contrary to the Court's unequivocal statement in *Casey* that the board of elections acts as an arm of the state while conducting elections, although the county has budgetary authority. *Id.*, 2007 WL 788943, *8. Moreover, this Court has casted doubt on whether the County actually has budgetary control in light of State law protections for the elections process. *Id.* Consequently, case law strongly supports the application of Eleventh Amendment immunity to the DeKalb Defendants in this case. To the extent that DeKalb Defendants are comparable to another entity, they are more akin to entities such as the sheriff's department in *Manders v. Lee*, 338 F.3d at 1308, or a county board of tax assessors in *Ballard v. Chattooga Co. Bd. of Tax Assessors*, 615 Fed. Appx. 621, 628 (11th Cir. 2015), which were both held to have Eleventh Amendment immunity, rather than a school board, which was the subject of the analysis in *Lightfoot v. Henry Cty. Sch. Dist.*, 771 F.3d 764, 770-72 (11th Cir. 2014).

II. To the Extent that Plaintiffs' Claim is Based on an Alleged Policy to Not Provide Prepaid Postage on Absentee Ballot Mailings, That Claim is Barred by Legislative Immunity.

Plaintiffs contend that the Individual Defendants² are not entitled to legislative immunity, because the Individual Defendants have not identified the specific conduct that is subject to the immunity. *See* Plaintiffs' Brief (Doc. 107), at p. 22. As set forth above, although Plaintiffs attempt to frame their claims as arising out of a "postage requirement," the DeKalb Defendants do not impose any such requirement on absentee ballot mailings.³ However, to the extent Plaintiffs' claims arise out of an alleged policy or decision not to request budgetary funds for or provide prepaid postage for such mailings, the Individual Defendants are entitled to legislative immunity and the claims against them must be dismissed. *See* *Bryant v. Jones*, 575 F.3d 1281 (11th Cir. 2009) (holding that an executive assistant to the CEO was entitled to legislative immunity against any claims arising from his preparation and drafting of a budget proposal); *Ellis v. Coffee Co. Bd. of Registrars*, 981 F.2d 1185, 1190-91 (11th Cir. 1993) (holding that the "Coffee

² Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, Baoky N. Vu, and Erica Hamilton.

³ Plaintiffs refer to "DeKalb's imposition of a postage requirement" and cite to state statutes which require the provision of prepaid postage for certain elections mailings. *See* Plaintiffs' Brief (Doc. 107), p. 26-27. The cited statutes do not reflect the DeKalb Defendants' imposition of a postage requirement, but instead are the General Assembly's requirements to provide prepaid postage with certain elections mailings not in question here.

County Commissioners clearly were performing their legislative function when they investigated the voting eligibility of the listed electors on the county precinct list in order to provide the Board of Registrars with the names of those persons no longer qualified to vote in Coffee County”).

III. Plaintiffs Lack Standing to Bring this Action.⁴

Plaintiffs have failed to demonstrate that they have alleged a sufficient injury-in-fact to establish standing. First, Plaintiffs fail to demonstrate how their Amended Complaint contains sufficient allegations to establish a diversion of resources injury on behalf of Plaintiff Black Voters Matter Fund. In the Amended Complaint, Plaintiffs simply allege that “Black Voters Matter must direct scarce resources away from voter education and away from other efforts to facilitate voting by mail, towards making sure that voters know about the postage requirement and how to obtain it especially for those with less resources.” Amended Complaint (Doc. 80), ¶ 13. However, this allegation does not detail how “making sure that voters know about the postage requirement and how to obtain it especially for those with less resources” is different from “voter education” and “efforts to facilitate voting by mail.” As such, Plaintiff Black Voters Matter Fund

⁴ The DeKalb Defendants incorporate by reference as if fully stated herein the arguments contained in Sections III.A, III.B, IV, and V of Secretary of State Brad Raffensperger’s Reply in Support of His Motion to Dismiss (Doc. 87) and Section I.A. of the Response of Secretary of State Brad Raffensperger in Opposition to Plaintiffs’ Second Motion for Preliminary Injunction (Doc. 97).

fails to sufficiently allege an injury-in fact. *See Jacobson v. Florida Secretary of State*, 957 F.3d 1193, 1206 (11th Cir. 2020) (finding that plaintiff organizations failed to establish with sufficient specificity what activities resources were diverted from, and thus failed to establish injury-in-fact). Similarly, Plaintiff Megan Gordon, who admits that she has stamps, but simply does not want to use them, has failed to establish an injury cognizable by law.

IV. CONCLUSION

The Amended Complaint against the DeKalb Defendants should be dismissed with prejudice, because as demonstrated in the DeKalb BRE's Motion to Dismiss the Amended Complaint, this Court lacks subject matter jurisdiction over Plaintiffs' claim and Plaintiffs have failed to plausibly state a claim against the DeKalb Defendants upon which relief may be granted.

Respectfully submitted this 1st day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system (which document was prepared in Times New Roman font, 14-point type, one of the font and point selections approved by the Court in N.D. Ga. L.R. 5.1(C)), which will automatically send e-mail notification of such filing to counsel of record.

This 1st day of June, 2020.

/s/ IRENE B. VANDER ELS
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