No. 20-14540

United States Court of Appeals

for the

Eleventh Circuit

GEORGIA ASSOCIATION OF LATINO ELECTED OFFICIALS, INC., as an organization, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, INC., as an organization, ASIAN AMERICANS ADVANCING JUSTICE - ATLANTA, INC., as an organization, NEW GEORGIA PROJECT, as an organization, COMMON CAUSE, as an organization, ALBERT MENDEZ, LIMARY RUIZ TORRES,

Plaintiffs/Appellants,

– v. –

GWINNETT COUNTY BOARD OF REGISTRATION AND ELECTIONS, JOHN MANGANO, STEPHEN DAY, BEN SATTERFIELD, BEAUTY BALDWIN, ALICE O'LENICK, in their official capacity as members of the Gwinnett County Board of Registrations and Elections, BRAD RAFFENSPERGER, in his official capacity as the Secretary of State of Georgia,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CASE NO: 1:20-cv-01587-WMR
(Hon. William M. Ray)

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, 26.1-2, and 26.1-3, counsel for the plaintiffs-appellants (hereinafter referred to as "Plaintiffs" unless otherwise specified) certifies that the following persons and entities have or may have an interest in the outcome of this case:

Asian Americans Advancing Justice-Atlanta

Baldwin, Beauty

Common Cause

Day, Stephen

Georgia Association of Latino Elected Officials, Inc.

Georgia Coalition for the People's Agenda, Inc.

Gwinnett County Board of Registration and Elections

Houk, Julie Marie

Jacoutot, Bryan Francis

LaRoss, Diane Festin

Lawyers' Committee for Civil Rights Under Law

Mangano, John

Mendez, Albert

New Georgia Project

O'Lenick, Alice

Paradise, Loree Anne

Powers, John Michael

Raffensperger, Brad

Ray II, William M.

Rosenberg, Ezra David

Satterfield, Ben

Sells, Bryan

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Torres, Limary Ruiz

Tyson, Bryan P.

Young, Elizabeth T.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs request oral argument on this appeal. This appeal raises several jurisdictional issues relating to individual voter standing, organizational and associational standing and mootness, in addition to complex legal arguments relating to the merits. This matter raises novel questions about the proper application of Section 203 and Section 4(e) of the Voting Rights Act that have not been addressed by this Court in any previous case.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the district court entered on October 5, 2020. Plaintiffs filed a notice of appeal in the district court 60 days later on December 4, 2020, after the district court granted Plaintiffs' unopposed motion for a 30-day extension of time to appeal. [II:61.] This Court therefore has jurisdiction under 28 U.S.C. § 1291.

The district court had subject-matter jurisdiction because this case presents a federal question. 28 U.S.C. § 1331.

STATEMENT OF THE ISSUES

(1) Whether the Individual and Organizational Plaintiffs lack standing to bring their claims;

(2) Whether the Plaintiffs' claims are moot;

(3) Whether the Plaintiffs' Second Amended Complaint fails to state a claim for relief under Section 203 and Section 4(e) of the Voting Rights Act; and

(4) Whether the district court erred in declining to rule upon Plaintiffs' Motion for Leave to File a Supplemental Complaint.

STATEMENT OF THE CASE

Limary Ruiz Torres and Albert Mendez are United States citizens, registered voters, residents of Gwinnett County, Georgia, and unable to read the English language. They were raised in Puerto Rico and educated there in Spanish-speaking schools before moving to Georgia as adults. Because Gwinnett County is covered

by Section 203 of the Voting Rights Act, 52 U.S.C. § 10503, they have a right to receive voting materials in Spanish. By virtue of their education in Puerto Rico, Section 4(e) of the Voting Rights Act, 52 U.S.C. § 10303(e), protects them against the denial of their right to vote because of their lack of proficiency in the English language.

In this action, Ms. Ruiz Torres and Mr. Mendez (the "Individual Plaintiffs")—together with several civic-engagement groups (the "Organizational Plaintiffs")—challenge certain English-only aspects of Georgia's election process. These include:

- Georgia's online absentee ballot application portal;
- Georgia's online voter precinct cards;
- notices, press releases, and other critical election information published only on the Secretary of State's website; and
- voting materials furnished to nursing homes in Gwinnett County.

Plaintiffs allege that these and other identified practices violate Section 203 and Section 4(e) of the Voting Rights Act. The defendants are Gwinnett County election officials and the Georgia Secretary of State (hereinafter, "Defendants").

The district court dismissed the case after concluding, first, that the Plaintiffs do not have standing to bring this action; second, that Plaintiffs' claims are moot; and third, that Plaintiffs failed to state a claim upon which relief could be granted. The Plaintiffs now appeal.

I. Procedural History

Plaintiffs filed this action in April 2020, after Georgia's Secretary of State mailed English-only absentee ballot applications to all of the state's registered voters in an effort to mitigate the COVID-related health risks of in-person voting in Georgia's primary election. [I:1 at 2 ¶2.][1] They filed a First Amended Complaint shortly thereafter to add more plaintiffs. [I:13 at 11-12 ¶¶18-19.] Plaintiffs then sought preliminary relief, which the district court denied.

A month later, Plaintiffs filed a Second Amended Complaint with Defendants' consent. [II:36.] That complaint added allegations of facts that had occurred since the filing of the original complaint and expanded the list of challenged English-only practices. The Secretary of State and Gwinnett County officials then moved to dismiss the Second Amended Complaint. After a full round of briefing, the district court held oral argument on Defendants' motions on August 18, 2020.

Before the district court ruled on Defendants' motions to dismiss, Plaintiffs filed a motion for leave to file a supplemental complaint alleging facts that had arisen after oral argument, including the unveiling of a new English-only online

[1] Throughout this brief, citations to the Appendix will be in the form "Volume:Tab at Page (¶ Paragraph, where applicable)" unless otherwise noted.

absentee ballot application portal on August 28 and Gwinnett County officials' decision, on September 1, not to mail bilingual absentee ballot applications to eligible voters in advance of the 2020 general election. [II:53-1 at 2-3.] Defendants opposed Plaintiffs' motion.

On October 5, the district court granted Defendants' motions to dismiss and entered judgment in Defendants' favor. [II:58 at 26; II:59 at 1.] The district court did not enter any ruling on Plaintiffs' motion to supplement, and its order contains no discussion of the motion.

The district court subsequently granted an extension of time to appeal, and Plaintiffs filed their notice of appeal before the extended deadline.

II. The Parties

Ms. Ruiz Torres was born and raised in Puerto Rico. Mr. Mendez was born in New York City and raised in Puerto Rico. Both of them attended school in Puerto Rico. They cannot read the English-only absentee ballot application that the Secretary of State mailed to them and all other Georgia voters before the 2020 primary. Neither of them is able to read the English-only precinct card available through the Secretary of State's website or the English-only notices and other information posted there. [II:36 at 12-14 ¶¶20-21.]

In addition to these Individual Plaintiffs, there are five Organizational Plaintiffs. The first of these is the Georgia Association of Latino Elected Officials

("GALEO"). GALEO was founded in 2003 and is one of the oldest and largest organizations promoting and protecting the civil rights of Georgia's Latine community. GALEO has approximately 165 members across Georgia, including in Gwinnett County. GALEO's headquarters are located in Norcross, which is in Gwinnett County, and a substantial amount of GALEO's civic engagement, voter registration, and get-out-the-vote work takes place in Gwinnett County. This work includes organizing voter education, civic engagement, voter empowerment, and get-out-the-vote events and conducting voter registration drives. During the 2020 election cycle, GALEO sent bilingual mailers to Latine voters in Gwinnett County with information about changes to the election process. [II:36 at 6-8 ¶15.]

The Georgia Coalition for the People's Agenda ("GCPA") is another one of the Organizational Plaintiffs. The GCPA is a coalition of more than 30 organizations which, collectively, have more than 5,000 individual members. The GCPA encourages voter registration and participation, particularly among Black voters, other voters of color, language minority voters, students, and other underrepresented communities. The organization commits time and resources to civic engagement, voter registration drives, voter education, get-out-the-vote efforts, minority language assistance, and other initiatives that seek to encourage voter registration and participation. The GCPA devoted substantial resources in 2020 to encouraging voters to cast their ballots by mail. [II:36 at 8-9 ¶16.]

Another one of the Organizational Plaintiffs is Asian-Americans Advancing Justice-Atlanta ("Advancing Justice-Atlanta"). Advancing Justice-Atlanta was founded in 2010 to protect and promote the civil rights of Asian Americans and Pacific Islanders and other immigrant, refugee, and language minority communities in Georgia, including in Gwinnett County, through policy advocacy, legal services, impact litigation, and civic engagement. Advancing Justice-Atlanta engages in voter registration, voter education, and get-out-the-vote efforts, and seeks to increase voter participation among newly naturalized citizens, people of color, immigrants, non-English speakers, and individuals in other underserved communities, including by disseminating Spanish-language "know your rights" informational materials. [II:36 at 9-10 ¶17.]

The fourth Organizational Plaintiff is the New Georgia Project, Inc. ("NGP"). NGP's mission is to build power among people of color, language minority citizens, young people aged 18 to 29 years old, and unmarried women—through civic and voter engagement. NGP organizes voter registration, civic engagement and get-out-the-vote events in Gwinnett County, including "souls to the polls" campaigns. Organizing around absentee voting is also an important part of NGP's work. [II:36 at 10-11 ¶18.]

The fifth and final Organizational Plaintiff is Common Cause. Since its founding in 1970, Common Cause has been dedicated to the promotion and

protection of the democratic process. In Georgia, Common Cause works in the areas of election protection, voter education, registration, advocacy, outreach, getting out the vote, and grassroots mobilization around voting rights. Common Cause has worked alongside partners to help recruit volunteers to assist Spanish-speaking voters and to provide Spanish-language election materials. [II:36 at 11-12 ¶19.]

All of the Organizational Plaintiffs allege that Defendants' decision to provide critical election materials in English only caused them to divert resources from other activities to mitigate the impact of the English-only policy. [II:36 at 6-13 ¶¶15-19.] GALEO, for instance, dedicated staff members that otherwise would have focused on other areas to the task of assisting Spanish-speaking voters in Gwinnett County with their absentee ballot applications. [*Id.* at 8 ¶15.]

Defendants include the Gwinnett County Board of Registrations and Elections and the five individual members of that board, each of whom is sued in his or her official capacity. [II:36 at 14-15 ¶¶22-23.] Together, these election officials are primarily responsible for the conduct of elections in Gwinnett County. Most importantly, these officials are responsible under Georgia law for providing absentee ballot applications, voter precinct cards, and other election-related information to voters in Gwinnett County. *See* O.C.G.A. §§ 21-2-70, -226, -381.

The Georgia Secretary of State is also a defendant. The Secretary is Georgia's chief election official and serves as chair of the State Election Board. O.C.G.A. §§ 21-2-30(d), -50. The Secretary's responsibilities as chair include ensuring the legality of all primaries and elections and promulgating rules conducive to the fair, legal, and orderly conduct of primaries and elections. O.C.G.A. § 21-2-31. The Secretary has undertaken many of the responsibilities assigned by Georgia law to county election officials, including the provision of absentee ballot applications, voter registration, voter precinct cards, maintenance of the online voter registration portal and online absentee ballot application portal, and other election-related information. [II:36 at 16-18, 20-23.]

III. The Challenged Practices

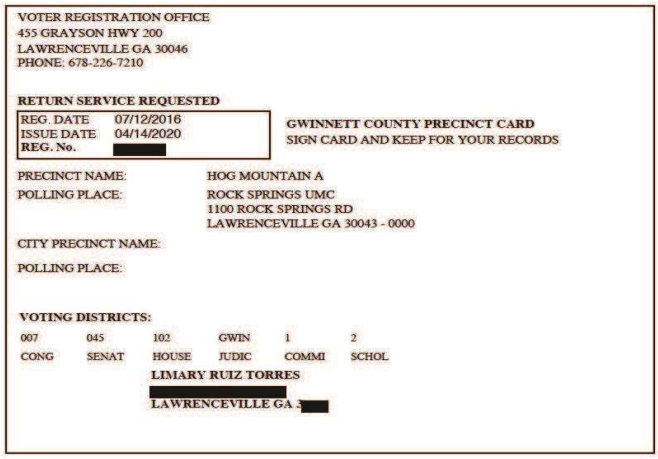
The Second Amended Complaint challenges several discrete election practices.

First, Plaintiffs challenge the Secretary of State's mailing of English-only absentee ballot applications to voters in Gwinnett County. [II:36 at 16-20 ¶¶26-47.] Although responsibility for mailing absentee ballot applications to voters lies with county election officials, *see* O.C.G.A. § 21-2-381, following the outbreak of the coronavirus pandemic, the Secretary used federal funds to mail absentee ballot applications to all of the roughly 6.9 million active registered voters, including

those in Gwinnett County, in advance of Georgia's 2020 primary election. He sent another round of 323,000 English-only applications a few weeks later.

Second, Plaintiffs challenge English-only notices, press releases, and other critical election information published only on the Secretary of State's website. [II:36 at 20-21 ¶¶50-54.] The Secretary's entire website is in English only. The Secretary issues press releases that provide substantive election-related information and notices to the public. The website also contains other important election-related information on pages such as "Register to Vote," "Key Election Dates and Information," "Advance Voting Info," "FAQs," "2019 List Maintenance," "Online Complaints," and "Information for Voter Registrations Pending Due to Citizenship." Gwinnett County does not post translations of these web pages on its own website.

Third, Plaintiffs challenge the English-only precinct cards that are available through the Secretary of State's website. [II:36 at 22 ¶¶56-58.] Voter precinct cards contain critical information such as the voter's precinct and polling place both for county and municipal elections; voting districts for congressional, state legislative, and local elections; information about how voters may submit a notice of change of address to election officials; and notice that the "card may not be used as evidence to prove United States Citizenship or as identification to vote." An example precinct card is shown below.



VOTER REGISTRATION OFFICE
455 GRAYSON HWY 200
LAWRENCEVILLE GA 30046
PHONE: 678-226-7210

RETURN SERVICE REQUESTED

REG. DATE 07/12/2016
ISSUE DATE 04/14/2020
REG. No. [redacted]

GWINNETT COUNTY PRECINCT CARD
SIGN CARD AND KEEP FOR YOUR RECORDS

PRECINCT NAME: HOG MOUNTAIN A
POLLING PLACE: ROCK SPRINGS UMC
1100 ROCK SPRINGS RD
LAWRENCEVILLE GA 30043 - 0000

CITY PRECINCT NAME:
POLLING PLACE:

VOTING DISTRICTS:

007	045	102	GWIN	1	2
CONG	SENAT	HOUSE	JUDIC	COMMI	SCHOL

LIMARY RUIZ TORRES
[redacted]
LAWRENCEVILLE GA [redacted]

[I:17-3 at 7.] After a person registers to vote, county election officials are responsible for providing the voter with a precinct card. *See* O.C.G.A. § 21-2-226(e). Voters can also access their precinct card online through the Secretary of State's website. That website, and the precinct card available on it, is in English only. Gwinnett County does not offer a similar service on its website.

Fourth, Plaintiffs challenge the English-only materials provided to nursing homes in Gwinnett County. [II:36 at 22-23 ¶¶59-60.] The Secretary of State, as a matter of practice, provides election-related instructions and supplies to nursing homes throughout the State, including those in Gwinnett County. All of those materials are provided in English only.

Fifth, and finally, Plaintiffs' Second Amended Complaint challenges certain information posted on the website of the Gwinnett County Board of Registration and Elections. To access a Spanish-language computer-translated version of the website, voters have to find a small box marked "English >" at the bottom right-hand corner of the Board's webpage, which is otherwise available in English only. If the voter clicks that "English>" button, a panel appears indicating that the website is also available in Spanish and other languages. A Spanish-speaking voter would thus need to click the "English>" button in order to access a Spanish translation. The quality of the computer-generated Spanish translation, moreover, is poor; it is riddled with errors that could prevent Spanish-speaking voters from being able to navigate the election process. [II:36 at 23-24 ¶¶61-65.]

Plaintiffs' proposed First Supplemental Complaint also challenges the Secretary of State's online absentee ballot application portal, which debuted on August 28, 2020.[2] The portal allowed all Georgia voters, including those in Gwinnett County, to request an absentee ballot for the November general election. The portal was subsequently used in the January 5, 2021, runoff election. The portal provides a printable confirmation of the voter's absentee ballot application,

[2] The proposed Supplemental Complaint also adds allegations about the impact of these challenged practices on the Plaintiffs, including on the Organizational Plaintiffs' diversion of resources. [II:53-1 at 3-8 ¶6-11.]

which functions as a receipt for voters who use the portal. The portal and the confirmation are available in English only. Gwinnett County does not offer a similar portal, and, in fact, Gwinnett County's website directs voters to use the Secretary of State's English-only portal. Meanwhile, on, September 1, 2020, Gwinnett County officials voted against mailing bilingual absentee ballot applications to all active registered voters in the county. [II:53-1 at 10-11 ¶22.] As a result, Spanish-speaking voters in Gwinnett County lack equal access to the absentee ballot application process. [*Id.* at 12-13 ¶29.]

IV. The District Court's Ruling

On October 5, 2020, the district court issued an order granting Defendants' motions to dismiss, concluding that Plaintiffs lack standing to bring their claims; that their claims are moot; and that their Second Amended Complaint failed to state a claim for which relief could be granted. [II:58 at 26.] The court did not rule on Plaintiffs' motion for leave to file a supplemental complaint.

With respect to standing, the district court held that the Individual Plaintiffs lack standing because the risk that they might be mailed English-only absentee ballot applications in the future "is too speculative to warrant Article III standing." [II:58 at 13.] The court also found that the Secretary of State's English-only website and new online absentee ballot application portal do not injure the Individual Plaintiffs because the Secretary is under no obligation to provide

information to Gwinnett County voters in Spanish. [*Id.* at 13-14] The court observed that Gwinnett County's website "has a few imperfections that can be corrected" but found that those imperfections do not "effectively prevent[]" the Individual Plaintiffs from receiving the information they need to vote and therefore cause no injury. [*Id.*]

The district court held that the Organizational Plaintiffs lack standing because they "have not established that Defendants engaged in any illegal activity forcing them to divert resources." [*Id.* at 15.] The diversion-of-resources theory of standing failed, according to the court, because the challenged English-only practices are lawful. [*Id.*] The court also found that the Organizational Plaintiffs did not sufficiently allege that they diverted their resources in order to address the challenged English-only practices because the new activities—which the court characterized broadly as voter education—"are precisely of the same nature" as the activities that the Organizational Plaintiffs engaged in before the pandemic. [*Id.* at 15-16.] The court also concluded that GALEO lacks associational standing on the basis that none of its members suffered any injury for the reasons that the court had already outlined. [*Id.* at 16.]

The district court further concluded that Plaintiffs "are unable to establish traceability and redressability." [*Id.* at 17.] With respect to traceability, the court ruled that "[t]he harm here is not traceable to any action taken by Gwinnett

County, since Secretary Raffensperger's office distributed the English-only applications . . . ." [*Id.*] The court also concluded that, although the Secretary had undertaken county functions in this case, any allegation that he might do so again in the future was "speculative" and "not directly traceable to the Secretary of State because 'the Secretary simply does not conduct the elections at the county level.'" [*Id.* at 17-18.] Finally, "any potential harm cannot be redressed by an order of this Court" because "Secretary Raffensperger was under no legal obligation to provide the materials plaintiffs request." [*Id.* at 18.]

Turning to mootness, the district court concluded that Plaintiffs' claims are moot because the Secretary was unlikely to mail English-only absentee ballot applications to Georgia voters again. [*Id.* at 19.] In addition, the court stated that a new lawsuit could be brought if the Secretary decides to mail English-only absentee ballots in the future. [*Id.* at 19-20.] The court did not address any of the other English-only practices that Plaintiffs challenge, many of which—like the online absentee ballot application portal—remain in current use.

Finally, the district court turned to the merits of Plaintiffs' claims and held that the Second Amended Complaint fails to allege a violation of federal law. [*Id.* at 20-26.] First, the court found that Plaintiffs failed to state a claim under Section 203 of the Voting Rights Act because Gwinnett County, which is covered by the statute, did not provide the English-only materials at issue and had no duty under

the law to correct or supplement the materials provided by the Secretary of State. [*Id*. at 23.] The Secretary, moreover, was under no obligation to provide election materials in Spanish—even when the Secretary undertook duties assigned by state law to county officials—because the State of Georgia as a whole is not covered by Section 203. [*Id*.]

Second, the district court found that Plaintiffs failed to state a claim under Section 4(e) of the Voting Rights Act because they "alleged no facts supporting the conclusion that [Defendants] are conditioning the right to vote on the voter's ability to use the English language." [*Id.* at 24.] With respect to Gwinnett County, the court found that "the Plaintiffs have been unable to establish that Gwinnett County is otherwise preventing its voters from voting in person on Spanish ballots in any future elections." [*Id*.] With respect to the Secretary of State, the court found that sending English-only absentee ballot applications and publishing a website in English only did not amount to "conditioning the right to vote" on being able to read or understand English. [*Id*. at 25.] The court did not address the impact of the Secretary's English-only online absentee ballot application portal on Plaintiffs' Section 4(e) claim.

V. Standards of Review

This Court reviews a district court's disposition of a Rule 12(b)(1) or Rule 12(b)(6) motion to dismiss *de novo*, applying the same standards as the district court. *See Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003) (Rule 12(b)(6) motion); *Branch v. Franklin*, 285 Fed. App'x 573, 575 (11th Cir. 2008) (same); *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465 (11th Cir. 1998) (Rule 12(b)(1) motion).

The complaint is viewed in the light most favorable to the plaintiff, and all of the plaintiff's well-pleaded facts are accepted as true. *See*, *e.g.*, *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1128 (11th Cir. 2019); *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321-22 (11th Cir. 2012); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007).

SUMMARY OF THE ARGUMENT

Because Gwinnett County has more than 10,000 limited English proficient ("LEP") Spanish-speaking citizens of voting age, it is covered for the Spanish language under Section 203 of the Voting Rights Act. *See* 52 U.S.C. § 10503(b)(2)(A)(ii). Congress enacted Section 203 of the Voting Rights Act in 1975 and reauthorized it in 2006 "to ensure protection of the voting rights of language minority citizens"—voters who are limited in their English proficiency. S. Rep. No. 94-295 at 24 (1975); H.R. Rep. No. 109-478 at 9-10 (2006) (citations

omitted). Section 203 provides that "[w]henever any State or political subdivision subject to" coverage under Section 203 "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language." 52 U.S.C. § 10503(c).

Defendants in this case are routinely providing English-only election materials to Gwinnett County voters, notwithstanding Section 203's requirements. Those materials include the Georgia Secretary of State's official online voter registration application portal and online absentee ballot application portal, absentee ballot applications, online voter precinct cards available through the Georgia My Voter Page, notices, press releases, other election materials available on the Secretary of State's website, and materials furnished at nursing homes.

Defendants contend they do not have to provide bilingual versions of a broad swath of election materials provided to Gwinnett voters notwithstanding Gwinnett County's status as a jurisdiction covered under Section 203. The district court agreed, concluding that providing English-only election materials to voters in a Section 203-covered jurisdiction does not violate the statute when the officials providing those materials are employed by the State of Georgia, a non-covered jurisdiction. Both the State and the County cannot be right according to the

statute's plain language and this Court's ruling in *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988). Defendants have obligations under the VRA and are failing to meet those requirements, and the district court erred in concluding otherwise.

Section 203 is not the only section of the VRA implicated by Defendants' practice of providing English-only election materials to Gwinnett County voters. Defendants have created a two-tier voting system in Gwinnett County where English-speaking voters have opportunities to vote by mail not provided to LEP Spanish-speaking voters educated in Puerto Rico in violation of Section 4(e) of the Voting Rights Act. Plaintiffs Limary Ruiz Torres and Albert Mendez, Spanish-speaking Gwinnett County voters educated in Puerto Rico schools, cannot understand the English-only election materials relating to the vote by mail process furnished to them and other voters. Plaintiffs allege that Defendants are effectively conditioning access to the mail voting process on Plaintiff Ruiz Torres' and Plaintiff Mendez's ability to understand English in violation of Section 4(e). The district court was required to accept those allegations as true but failed to do so.

The district court further erred in concluding that none of the Individual or Organizational Plaintiffs have standing to bring this case. To the contrary, Plaintiffs clearly have standing pursuant to the well-established and longstanding precedents of this Court. The Individual Plaintiffs are currently harmed by Defendants' ongoing provision of English-only materials, and the likelihood of

repetition of this harm in future elections is apparent. The Organizational Plaintiffs also have standing under binding Eleventh Circuit precedent due to the drain on their resources that they have suffered—and, in GALEO's case, because they have members who would have standing to sue in their own right. The Organizational Plaintiffs filed declarations with the district court detailing the specific ways in which they have been diverting resources to help LEP Spanish-speaking voters in Gwinnett County who would not require assistance if Defendants provided certain election materials in Spanish.[3] The organizations' injuries meet the legal threshold set forth by this Court in *Arcia* and other cases and far exceeds what is necessary at this early stage of the litigation. Moreover, the harm is plainly traceable to and redressable by Defendants, who have produced English-only materials, are statutorily required to provide election materials, and have worked together to produce bilingual election materials to Gwinnett County voters in the past.

Finally, the district court erred by failing to rule upon Plaintiffs' September 11, 2020 motion for leave to file their First Supplemental Complaint. Critical facts, such as the Georgia Secretary of State's August 28, 2020 unveiling of a new English-only absentee ballot application portal and Gwinnett County officials' September 1, 2020 decision to reject a proposal to provide bilingual absentee ballot

[3] *See*, *e.g.*, II:17-3 (Gonzalez decl.); II:17-4 (Butler decl.); II:17-5 (Cho decl.); II:17-6 (Ufot decl.); II:17-11 (Alvarez decl.); II:17-12 (Battles decl.).

applications to active voters for the November election, were unknown to Plaintiffs at the time of the filing of the Second Amended Complaint or even oral argument on Defendants' Motions to Dismiss (August 18, 2020). The federal rules freely permit supplementation of initial pleadings under these circumstances.

For these reasons, this Court should reverse the district court's order granting Defendants' motion to dismiss and grant Plaintiffs leave to file their First Supplemental Complaint.

ARGUMENT

I. Plaintiffs Have Standing To Bring Their Claims

The district court held that none of the Individual or Organizational Plaintiffs have Article III standing to bring this case on injury in fact, traceability, redressability, and mootness grounds.[4] [II:58 at 12-20.] Each of these elements are addressed in turn.

A. The Individual Plaintiffs Have Established Injury In Fact

The district court concluded that the Individual Plaintiffs are not suffering an injury in fact sufficient to give rise to standing. [II:58 at 12-14.] In doing so, it

[4] As long as at least one plaintiff has established standing, the case cannot be dismissed on standing grounds and the Court need not consider whether the other plaintiffs also have standing. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n. 9 (1977); *Greater Birmingham Ministries v. Sec'y of State for Alabama*, 966 F.3d 1202, 1220 (11th Cir. 2020); *Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1274 n. 10 (11th Cir. 1999).

failed to apply this Court's precedents for standing in voting cases and it did not give full weight to several well-pled allegations concerning the Individual Plaintiffs' injuries. The alleged harm here easily satisfies the low injury in fact threshold established by this Court for individual voter plaintiffs.

"The Supreme Court has rejected the argument that an injury must be 'significant'; a small injury, an 'identifiable trifle,' is sufficient to confer standing." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)). Moreover, "where an alleged injury is to a statutory right, standing exists 'even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.'" *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (quoting *Warth v. Seldin*, 422 U.S. 490, 514 (1975)). Applying these principles, this Court has routinely held that voters subjected to a voting requirement have suffered an injury sufficient to challenge that restriction. *See id.* at 1351-52; *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014); *Billups*, 554 F.3d at 1351-52.

The Individual Plaintiffs' alleged injuries under Section 203 are concrete and remain ongoing. The Second Amended Complaint alleges that Defendants currently "have a policy and practice of frequently providing English-only election materials," and that the Plaintiffs "cannot read the English-only voter precinct card

accessible via the Georgia My Voter Page, the English-only election notices and information posted on the Georgia Secretary of State's website, and other English-only election materials furnished [] by Defendants." [II:36 at 3-4 ¶6, 12-14 ¶¶20-21.] These allegations must be accepted as true.

The injury of being provided English-only election materials is sufficient to allege standing, regardless of whether the practice results in a loss of the right to vote. A voter need not be at risk of imminent disenfranchisement to have standing in cases like this one. *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (voters "wrongly identified as non-citizens" in 2012 have standing "[e]ven though they were ultimately not prevented from voting"); *Cox*, 408 F.3d at 1352 (plaintiff has standing even though she is already registered to vote because "[a] plaintiff need not have the franchise wholly denied to suffer injury"); *Billups*, 554 F.3d at 1351 (two voters have standing despite "[t]he slightness of their burden" and "would still have standing" even if they "possessed an acceptable form of photo identification").

Here, the district court applied a different standard. [*See* II:58 at 12.] Citing *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014), the district court concluded that Plaintiffs failed to demonstrate "'a real and immediate—as opposed to a merely hypothetical or conjectural—threat of *future* injury.'" *Id*. at 883 (quoting *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994)

(citation omitted) (emphasis in original)). The district court ruled that (1) the threat of being mailed English-only absentee ballot applications is "too speculative" and, in any event, "Gwinnett County has made a bilingual absentee ballot application available on its website . . . although it has a few imperfections that can be corrected"; and (2) the Georgia Secretary of State's English-only website and online absentee ballot application portal "does not sufficiently injure plaintiffs for Article III standing." [II:58 at 13-14.]

This conclusion contravenes *Arcia*, *Cox*, and *Billups*. According to those cases, the fact that Defendants are currently making English-only election materials available to Ms. Ruiz Torres and Mr. Mendez—such as the voter precinct card on the Georgia My Voter page and the notices and information posted on the Georgia Secretary of State's website—compels the conclusion that the Individual Plaintiffs are suffering an injury in fact sufficient to bring suit. [II:36 at 12-14 ¶¶20-21.] The district court concluded the mailing of absentee ballot applications is "speculative," [II:58 at 13,] but the Supplemental Complaint alleges that the new online absentee ballot application portal is intended to supplant mailed paper applications. [II:53-1 at 9 ¶14.] Moreover, the computer-generated Spanish translation of the Gwinnett County elections website is woefully inadequate—and does not link to bilingual translations of voter precinct cards or other materials on the Secretary of State's website. [II:36 at 23-24 ¶¶61-65.]

Ultimately, Ms. Ruiz Torres and Mr. Mendez cannot read their English-only voter precinct cards available on the Georgia My Voter Page, the online absentee ballot application portal, or other election notices and materials furnished to them by Defendants. They therefore have standing according to this Court's precedents.

B. The Organizational Plaintiffs Have Suffered An Injury In Fact

Contrary to the conclusion reached by the district court, each of the Organizational Plaintiffs has suffered an injury in fact due to the drain on their resources resulting from Defendants' conduct. This Court has found that an organization suffers a drain on its resources when a defendant's actions impair and divert resources away from the organization's own projects. *Arcia*, 772 F. 3d at 1341 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("[C]oncrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests.")); *see also Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1249-50 (11th Cir. 2020) (holding that "resource diversion is a concrete injury" and citing *Browning* three times).

According to Eleventh Circuit precedent, organizations can establish an injury in fact in voting cases by showing that they will have to divert personnel and time to educating potential voters on compliance with the laws or assisting impacted voters. *See*, *e.g.*, *Billups*, 554 F.3d at 1350-51 (NAACP has standing to

challenge voter ID statute "[b]ecause it will divert resources from its regular activities to educate voters about the requirement of a photo identification and assist voters in obtaining free identification cards"); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (holding "an organization suffers an injury in fact when a statute compels it to divert more resources to accomplishing its goals… the fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury") (citing *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007)).

Here, the district court held that the Organizational Plaintiffs did not suffer an injury in fact because they (1) did not "sufficiently allege[] what they would have to 'divert resources away from in order to spend additional resources'"; (2) have not "established that Defendants engaged in any illegal activity forcing them to divert resources"; and (3) could not establish associational standing because GALEO's Spanish-speaking members in Gwinnett County who received English-only materials "have suffered no injury in fact." [II:58 at 14-17.] The Organizational Plaintiffs, however, satisfy all of the requirements for organizational standing—and, in GALEO's case, associational standing.

1. The Plaintiffs Have Identified The Activities From Which They Were Forced To Divert Resources

The Second Amended Complaint includes detailed allegations describing how each of the Organizational Plaintiffs was forced to divert their resources from other organizational activities as a result of Defendants' conduct. Plaintiffs supplemented those allegations with supporting declarations submitted in conjunction with Plaintiffs' preliminary injunction papers.

For example, the Second Amended Complaint alleges that "GALEO has diverted, and will continue to divert, time and resources that would ordinarily be directed to GALEO's other organizational goals and priorities," which include "civic engagement, voter registration and get out the vote work." [II:36 at 7-8 ¶15.] In his declaration, GALEO Executive Director Jerry Gonzalez describes how the organization is diverting resources from other get-out-the-vote and voter education activities to reach out to and educate LEP Gwinnett voters on how to vote by mail precisely because Defendants fail to provide materials on voting by mail in Spanish. [*See*, *e.g.*, 1:17-3 at 6 ¶¶27-28 (Gonzalez decl.).] GALEO staff helps LEP Gwinnett voters who cannot read Defendants' English-only materials and therefore require additional assistance to vote. [I:30-4 at 3 ¶¶5-6 (2d Alvarez decl.).]

The other Plaintiffs are similarly situated. Advancing Justice-Atlanta helps Gwinnett County's LEP Spanish-speaking voters by calling and texting them and

producing educational videos and written FAQs in Spanish. [II:36 at 9-10 ¶17; I:17-5 at 3-5 ¶¶5-8 (Cho decl.).] The allegations regarding the other organizations, such as Common Cause's "election protection efforts to engage additional Spanish-speaking volunteers to assist LEP Gwinnett County voters impacted by Defendants' decision to provide voters with English-only election materials," [II:36 at 11-12 ¶19], are similarly concrete and specific. [*See also* I:17-6 at 3-4 ¶¶4-6, 6-7 ¶¶12-14 (Ufot decl.); I:17-4 at 3-4 ¶¶4-7, 7 ¶16 (Butler decl.).]

In each instance, the Organizational Plaintiffs have alleged that their other programmatic work and initiatives to assist voters, such as their voter registration, voter education, get-out-the-vote, and election protection efforts, are negatively impacted. *See*, *e.g.*, II:36 at 6-12 ¶¶15-19; I:17-3 at 3 ¶9, 8 ¶¶32-33 (Gonzalez decl.) (assisting Gwinnett County voters provided with English-only materials "will divert [] invaluable resources away from GALEO's other voter education and mobilization activities" such as educating voters, conducting voter registration drives, and conducting other get out the vote efforts); I:17-12 at 4-6 ¶¶7-11, 15 (Battles decl.) (Common Cause is "diverting resources from other initiatives in Georgia" such as voter registration and getting out the vote to assist "Gwinnett County's LEP Spanish speaking voters"); I:17-4 at 3 ¶4, 7 ¶16 (Butler decl.) (GCPA diverting resources from projects such as conducting voter registration drives, promoting voter education, organizing "Souls to the Polls" events, voter ID

assistance, and other projects).

These allegations, which must be accepted as true, *see Silberman*, 927 F.3d at 1128, are more than sufficient to satisfy the standard set forth in this Court's precedents—particularly at the motion to dismiss stage of the litigation.[5] *See Jacobson*, 974 F.3d at 1250 (noting that precedent requires identifying "what activities the [organization] would divert resources away *from* in order to spend additional resources on combating the [restriction]" and noting it is sufficient if resources would otherwise be spent on "registration drives" or "getting voters to the polls") (citing *Browning*, 522 F.3d at 1166; *Billups*, 554 F.3d at 1350)). A drain on resources can occur even when an organization diverts resources to achieve a typical goal in a different or amplified manner. *Browning*, 522 F.3d at 1166 (finding organizational standing when a plaintiff anticipated that it would "expend many more hours than it otherwise would have" on specific election-related activity).

[5] The organizations' evidence of resource diversion in *Jacobson* was exceptionally weak; Democratic-aligned organizations alleged only that they had to spend unidentified "additional resources" because Republican candidates are listed first on ballots, without identifying any impact on the plaintiffs' organizational activities. *See id.* at 1250.

2. The Voting Rights Act Merits Analysis Has No Bearing on the Standing Analysis

The district court concluded that Plaintiffs lack standing in this case because they "have not established that Defendants engaged in any illegal activity forcing them to divert resources." [II:58 at 14-15.] This Court has stated, however, that it is error to "conflate[] standing with the merits of the case." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005). This is because the standing analysis involves "a question of fact unrelated to an action's propriety as a matter of law." *Id*. To hold otherwise would mean that plaintiffs would never have standing to bring a case in which they did not ultimately prevail on the merits, an anomalous result at odds with this Court's precedents. *See*, *e.g.*, *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1280-81 (11th Cir. 2001) (observing that "[standing] is a threshold determination that is conceptually distinct from whether the plaintiff is entitled to prevail on the merits" and rejecting UGA defendant's assertion that a plaintiff lacked standing because it "conflates the merits of the case . . . with standing"); *see also Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003) ("If a jurisdictional challenge does implicate the merits of the underlying claim then: '[T]he proper course of action for the district court … is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case'") (alteration in original). In *Browning*, for example, this Court held the plaintiffs had standing at the same time it held the

challenged law was valid. *See* 522 F.3d at 1159 n.9; *see also Billups*, 554 F.3d at 1351-52 (finding that requirement to produce photo identification to vote was an injury sufficient to confer standing although the plaintiffs did not prevail on the merits).

3. GALEO's Members Have Suffered An Injury In Fact Sufficient For Purposes of Establishing Associational Standing

The district court erred in holding GALEO does not have associational standing because its individual members could not have suffered an injury in fact. [*See* II:58 at 16-17.] The Supreme Court has "recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Here, GALEO has associational standing because its members include Spanish-speaking Gwinnett County voters who have been provided English-only election materials by Defendants and have standing to sue in their own right. *See*, *e.g.*, *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1219-20 (11th Cir. 2020) (holding that organization's members include "minority voters in Alabama" who "would otherwise have standing to sue" in case involving Alabama voter identification requirement); *Ne. Fla. Chapter of Assoc. Gen.*

Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993) (holding that the injury in fact is "the denial of equal treatment resulting from the imposition of the barrier"); *see also* Section I(A), *supra*.

C. The Organizational Plaintiffs' Injuries Are Traceable to Defendants' Conduct

In this Court, "[t]o satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendants, and not the result of the independent action of some third party not before the court.'" *Jacobson*, 957 F.3d at 1207 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). This Court has held that "even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003); *see also Arcia*, 772 F.3d at 1342 n.2 (finding traceability test has been satisfied).

Causation and traceability are satisfied with respect to the Secretary of State. State officials have provided various English-only election materials to Gwinnett voters, including "two rounds of English-only absentee ballot applications … English-only press releases and all other election-related information published on the Secretary of State's website, English-only voter precinct cards accessible to individuals logging on to the Georgia My Voter Page, and English-only election-related notices, instructions, and supplies to nursing homes, among other items."

[*See*, *e.g.*, II:36 at 3-4 ¶6.]

Plaintiffs' injuries are also traceable to Gwinnett County. County officials are responsible for producing and providing some of the election materials at issue such as the county's own website, which Plaintiffs allege is inadequately translated. [*See*, *e.g.*, II:36 at 23-24 ¶¶61-65.] Also, under Georgia law, Gwinnett County is responsible for providing absentee ballot applications, voter precinct cards, and other election-related information to Gwinnett voters. *See, e.g.*, O.C.G.A. § 21-2-226(e)-(f) (registrars issue voter precinct cards to voters upon registration and when "changes in districts or precinct [occur] as a result of reapportionment or court order"), § 21-2-381 (registrars issue absentee ballot applications). [I:26-1 at 3-4 ¶¶7-8 (Harvey decl.)].

The district court, however, concluded that Plaintiffs have not established traceability even though they have sued the State and Gwinnett County parties responsible for providing the election materials at issue in this case. [II:58 at 17-18.] It relies on *Jacobson* to supports its conclusion, but that case is inapposite. There, the plaintiffs failed to sue any county election officials, whereas here there is no third party not before the court who is responsible for Plaintiffs' alleged injuries. *See* 974 F.3d at 1258 (holding that "the voters and organizations should have sued the Supervisors of Elections"). In *Jacobson,* the only named defendant—the Secretary of State—did "not enforce the challenged law" at issue

and would not "cause any future injuries." *Id.* at 1241, 1255; *see also Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296-99 (11th Cir. 2019) (en banc) (dismissing the Alabama Attorney General because he never enforced the state law at issue). Plaintiffs here, however, have sued both the State and the County.

D. Defendants Are Capable of Redressing Plaintiffs' Injuries

Finally, the district court held that "any potential harm cannot be redressed by an order of this Court" because there "was [] no legal obligation to provide the materials Plaintiffs request." [II:58 at 18.] This analysis again impermissibly conflates the standing analysis with the merits analysis. *See* Section II(B)(2), *supra*. This Court's redressability analysis requires an assessment of whether, as a factual matter, Defendants are capable of furnishing the requested relief and remedying Plaintiffs' alleged injury. *See Browning*, 522 F.3d at 1159 n.9 (holding "[a]n injunction against the enforcement of [the challenged statute] would also redress this injury by doing away with the matching requirement, thereby freeing up the organizations to get on with their business"); *Jacobson*, 974 F.3d at 1255 (plaintiffs must sue "the officials who will cause [] future injuries"). Here, Defendants are, under Georgia law, responsible for providing the election materials at issue and are capable of producing bilingual election materials (as they have done in the past), thereby redressing Plaintiffs' alleged injuries. [*See* II:36 at 7-14 ¶¶15-19, 27-28 ¶78, 30 ¶86.]

E. The District Court Erred in Concluding That Plaintiffs' Claims Are Moot

The district court held that Plaintiffs' claims are moot and that the capable-of-repetition-yet-evading-review exception does not apply.[6] [II:58 at 18-20.] The district court relied on the Secretary of State's representation that he would not mail absentee ballot applications again. [*Id*. at 19.] However, Plaintiffs' Second Amended Complaint does not solely concern absentee ballot applications but also "English-only press releases and all other election-related information published on the Secretary of State's website, English-only voter precinct cards accessible to individuals logging on to the Georgia My Voter Page, and English-only election-related notices, instructions, and supplies to nursing homes." [II:36 ¶6.] Moreover, Plaintiffs' First Supplemental Complaint alleges that the Secretary of State made absentee ballot applications available again in the November 2020 election via the English-only online absentee ballot application portal, which was linked to on Gwinnett County's website and was intended to supplant the mailed paper applications. [II:53-1 at 9 ¶14.] These allegations doom a mootness argument in this case.

[6] Neither Defendant argued in support of the particular mootness holding reached by the district court. Gwinnett County did not pursue a mootness argument and the State argued the case was moot only with respect to the two Individual Plaintiffs. [II:38-1; II:39-1 at 7.] Plaintiffs therefore did not have an opportunity to brief these particular mootness issues in the district court.

The district court further held that "the challenged action is not too short in duration that it will evade meaningful judicial review," reasoning that it was able to rule on Plaintiffs' preliminary injunction prior to the June 2020 primary (which was delayed by more than two months due to the COVID-19 pandemic). [II:58 at 19-20.] The district court measured incorrectly, however; the proper standard is whether there is time for a trial on the merits and a full round of appeals. *See Bourgeois v. Peters*, 387 F.3d 1303, 1309 (11th Cir. 2004) ("[W]e conclude that one year is an insufficient amount of time for a district court, circuit court of appeals, and Supreme Court to adjudicate the typical case.").

As this Court has observed, "[i]n election cases … there is often 'not sufficient time between the filing of the complaint and the election to obtain judicial resolution of the controversy before the election.'" *Arcia*, 772 F.3d at 1343 (quoting *Teper v. Miller*, 82 F.3d 989, 992 n.1 (11th Cir. 1996). The *Arcia* Court confirmed that three months was a "duration too short to be fully litigated." *Id.* at 1343. That is dispositive here because the Plaintiffs filed this case on April 14, 2020, less than two months before the June 9, 2020 primary election. The capable-of-repetition-yet-evading-review exception therefore applies here.

II. Plaintiffs Have Stated A Valid Claim Under Section 203

The district court held that the Plaintiffs failed to state a claim under Section 203 of the Voting Rights Act. [I:58 at 21-23.] The district court held that Section

203 does not apply when the State of Georgia, which is not a covered jurisdiction, provides election materials to voters in a covered jurisdiction like Gwinnett County. [*Id.*] That conclusion is contrary to the plain language of that statute, its legislative intent, and controlling precedent of this Court and the Supreme Court. Under Defendants' theory, a covered jurisdiction can escape the requirements of Section 203 by allowing another government entity to assume its responsibility to distribute voting materials. Congress could not possibly have intended voters to be deprived of the statute's benefits under such circumstances. Such an absurd result would create a giant donut hole in Section 203, the entire purpose of which is to put LEP language minority voters on an equal footing with English-speaking voters.

A. The Plain Language of Section 203 Supports Applying the Statute to the State in this Case

When interpreting a statute, "[a] court's inquiry, [] 'begins with the statutory text, and ends there if the text is unambiguous.'" *Packard v. Comm'r of Internal Revenue*, 746 F.3d 1219, 1222 (11th Cir. 2014) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)). In particular:

> We assume that Congress used the words in a statute as they are commonly and ordinarily understood, and we read the statute to give full effect to each of its provisions. *United States v. McLymont*, 45 F.3d 400, 401 (11th Cir. 1995) (per curiam). We do not look at one word or term in isolation, but instead we look to the entire statutory context.

Harrison, 593 F.3d at 1212-1213 (quoting *United States v. DBB, Inc.*, 180 F.3d

1277, 1281 (11th Cir. 1999)).

The district court failed to closely analyze the text of Section 203 and, in particular, to consider whether the State can be "subject to" the requirements of the law as defined in 52 U.S.C. § 10503(c). The statute's plain language supports the conclusion that Section 203 applies when a non-covered State provides election materials to voters in a covered county. Section 203 provides "no covered State or political subdivision shall provide materials only in the English language," 52 U.S.C. § 10503(b)(1), and that "[w]henever **any State or political subdivision subject to** the prohibition of (b) of this section provides any… materials or information relating to the electoral process, including ballots, it shall provide them" in the applicable minority language, *id.* § 10503(c) (emphasis added).

Here, § 10503(c) applies because, according to the Merriam-Webster Dictionary, a jurisdiction is "subject to" the prohibition of subsection (b) if it is simply "affected by or possibly affected by" the provision.[7] The State is subject to, or affected by, Section 203(b)'s prohibition when it provides election materials relating to the electoral process to voters in a covered jurisdiction such as Gwinnett County.

The meaning of Section 203 is so plain that this Court has already assumed

[7] *Subject To*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/subject%20to.

that the statute applies in these particular circumstances. In *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), this Court stated that Section 203 applies when officials from a non-covered state provide election materials to voters in a covered county. *Id*. at 1490. Some background is necessary: in the 1980s, Florida was not covered statewide for Spanish under Section 203 but certain counties in the state were covered, as is the case with Georgia and Gwinnett County today.[8] As the *Delgado* Court explained:

> The controlling provision of the Voting Rights Act **requires a state** which distributes "materials or information relating to the electoral process" **to certain bilingual political subdivisions to provide them "in the language of the applicable language minority group** as well as in the English language."

Id. at 1490 (citations omitted) (emphasis added). According to *Delgado*, the non-covered State—whether it was Florida in the 1980s or Georgia today—must provide bilingual election materials to voters in a "bilingual political subdivision" such as Gwinnett County. *See id*. The district court, ignoring this language, instead concluded that *Delgado* (and two other cases) militate against finding

[8] *Compare* "Voting Rights Act Amendments of 1992, Determinations Under Section 203," Fed. Reg., Vol. 67, No. 144, https://www.govinfo.gov/content/pkg/FR-2002-07-26/pdf/02-19033.pdf; *with* "Voting Rights Act Amendment of 2006, Determinations Under Section 203," Fed. Reg., Vol. 76, No. 198, Oct. 13, 2011.

Section 203 liability.[9]

B. Even if Section 203 is Ambiguous, Applicable Canons of Statutory Construction Require Applying Section 203 to the State

The Eleventh Circuit has stated that "defining the plain meaning of a statutory word is only our starting point for statutory construction. We must also consider its placement and purpose in the statutory scheme." *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1213 (11th Cir. 2010) (citing *United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir. 1994). Courts must "giv[e] effect to the full statute." *Harrison*, 593 F.3d at 1213. A proper analysis must extend "beyond the plain language of a statute at extrinsic materials to determine the congressional intent if: (1) the statute's language is ambiguous; (2) applying it according to its plain meaning would lead to an absurd result; or (3) there is clear evidence of contrary legislative intent." *Id*. at 1212-13 (quoting *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999)).

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[9] The holdings in *Delgado* and the other cases referred to by the district court are irrelevant because the "election materials" at issue were petitions produced by private citizens, not the government. *See Delgado*, 861 F.2d at 1491-93 (plaintiffs challenged citizen initiative petitions and wanted "the sponsors [to] circulate both English and Spanish copies of the petition" but "Congress has never shown any intent… to expand coverage of the Act to materials distributed by private citizens"); *Padilla v. Lever*, 463 F.3d 1046, 1051 (9th Cir. 2006) ("petitions privately initiated, drafted, and circulated by the proponents [are not] 'provided' by the County"); *Montero v. Meyer*, 861 F.2d 603, 605 (1988) (citizen petitions). Those cases reinforce the principle that Section 203 applies to governmental actors and not to private citizens.

Plaintiffs' interpretation of Section 203 prevails even if this Court decides that the statute is ambiguous with respect to whether materials provided by officials from a non-covered jurisdiction to a covered county are covered, according to at least three familiar canons of statutory interpretation.[10]

First, the canon of consistent usage instructs that "a material variation in terms suggests a variation in meaning." *In re Failla*, 838 F.3d 1170, 1176-77 (11th Cir. 2016) (quoting Antonin Scalia & Bryan Garner, *Reading Law* 170 (2012)); *see also Russello v. United States*, 464 U.S. 16, 23 (1983). With respect to Section 203, if Congress intended to impose subsection (c)'s obligations only on those states that qualify for statewide coverage, it would have simply reproduced the "covered State or political subdivision" language that it used in subsection (b). *See* 52 U.S.C. § 10503(b) (identifying the coverage formula). Instead, Congress chose to use the broader "subject to" language. This supports the conclusion that when the State provides election materials to voters in a covered jurisdiction, it becomes "subject to" the statute's requirements and therefore must provide those materials in English and Spanish. *See O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 86 (1994) (finding that when the FDIC takes over a bank as receiver, it "steps into the

[10] Plaintiffs address the third canon of statutory interpretation, which involves the principle that remedial legislation should be construed broadly to effectuate its purposes, in Section II(C), *infra*.

shoes" of the bank and inherits the rights and the liabilities of the institution).

Second, this Court's precedent precludes construing a statute in a way that leads to an absurd result. *See Harrison*, 593 F.3d at 1213 (citing *DBB, Inc.*, 180 F.3d at 1281); *United States v. Velez*, 586 F.3d 875, 879 (11th Cir. 2009) ("We do not believe Congress intended such an absurd result, which nullifies the provision and divorces it from its statutory context, thereby violating basic canons of statutory construction."); *see also Driscoll v. Adams*, 181 F.3d 1285, 1288 (11th Cir. 1999). Here, it is contrary to Congress's express intent for voters in Gwinnett County to be denied Section 203's protections when the State, a non-covered jurisdiction, assumes the county's duties, such as by producing election materials for which the county is responsible under O.C.G.A. § 21-2-226 or § 21-2-381. A judicially-created exception for State officials risks swallowing Section 203 whole at a time when the State is taking on more election-related responsibilities, for example by creating the online voter registration and absentee ballot application portals. Such a ruling would also create an environment where (1) covered counties could freely shift their election administration responsibilities to non-covered entities such as the Secretary of State to evade their Section 203 obligations and (2) municipalities in Gwinnett County and the Gwinnett County School District, which are currently complying with Section 203, could stop doing so.

Indeed, the Supreme Court disclaimed any such "canon of donut holes" in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1746-47 (2020). In *Bostock*, the Court held that while gay and transgender status are "distinct concepts" from sex and are not specifically referenced in Title VII, the statute nonetheless bars discrimination based upon those statuses because "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex." *Id*. at 1747. As Justice Gorsuch observed:

> Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.

Id. at 1747. So, too, here. Section 203's silence regarding a non-covered state's provision of election materials to voters in a covered county does not create a tacit exception.

The Supreme Court reached the same conclusion in *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999). *Lopez* raised the question of whether a law passed by a non-covered state legislature (California) required preclearance because a county covered under Section 5 of the Voting Rights Act (Monterey County) would be implementing it. A judge in the U.S. District Court for the Northern District of California dismissed the lawsuit for reasons similar to those of the district court in this case, reasoning "that § 5, by its own terms, creates a preclearance obligation only for covered jurisdictions" and that "[n]oncovered

entities, like the State, bear no responsibility to preclear voting changes that they 'enact or seek to administer.'" 525 U.S. at 276. Relying heavily on the Attorney General's interpretation of Section 5, the Supreme Court reversed the district court, concluding that Section 5's preclearance requirement applied to the California state law "notwithstanding the fact that the State is not itself a covered jurisdiction." *Id.* at 281-82. While *Lopez* involves a different section of the Voting Rights Act, its reasoning compels the conclusion that when a non-covered state's actions impact voters in a covered county, the VRA's proscriptions continue to apply. *See Florida v. United States*, 885 F. Supp. 2d 299, 312 (D.D.C. 2012) (Section 5 applies to state acts "to the extent that that law affects voting in jurisdictions properly designated for coverage," even if the state is not covered); *Quiver v. Nelson*, 387 F. Supp. 2d 1027, 1033 (D.S.D. 2005) (same).

C. Past Supreme Court Decisions and Section 203's Legislative History Confirm the Statute Must Be Construed Broadly and the Attorney General's Interpretation is Entitled to Deference

The district court did not address precedent broadly construing provisions of the Voting Rights Act or deferring to the Attorney General's statutory construction indicating that Section 203 applies in these circumstances. [*See* II:58 at 21-23.] This Court has observed that, in enacting Section 203's bilingual election material requirement, "[t]he Committee on the Judiciary emphasized that minority language groups were being obstructed from exercising the franchise since they were unable

to understand the ballot and other materials provided at the polls." *Delgado*, 861 F.2d at 1492 (citing 1975 U.S. Code Cong. & Admin. News, 774, 800-804). Congress's clear intent, both in enacting Section 203 in 1975 and reauthorizing the statute in 2006, was to expand and broaden the Voting Rights Act's protections for language minority citizens:

> By expanding the temporary provisions to include Section[] 203 under its 14th amendment enforcement power, Congress sought to remedy the voting inequities resulting from the disparate treatment experienced by language minority citizens in educational opportunities. In doing so… the [] Subcommittee acted to broaden its special coverage to new geographic areas in order to ensure protection of the voting rights of language minority citizens.

H.R. Rep. No. 109-478 at 9-10 (2006) (citations omitted); *see also* S. Rep. No. 94-295 at 24 (1975) (same). The 1975 Senate Report further states that "[b]y covering these new geographic areas, we simply apply the Act's special remedies to jurisdictions where language minorities reside in greatest concentrations and where there is evidence of low voting participation." *Id*. at 32. There is no support in the congressional record for the notion that Section 203's scope should be limited by which governmental entity furnishes materials within a covered jurisdiction.

This Court should construe Section 203's provisions broadly under "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *See*, *e.g.*, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 565-

66 (1969) (the Voting Rights Act "gives a broad interpretation to the right to vote"); *Padilla v. Lever*, 463 F.3d 1046, 1057 (9th Cir. 2006) ("As a remedial statute, the Voting Rights Act is to be construed broadly…").

The U.S. Attorney General has long interpreted Section 203 to apply under these circumstances. *See* 28 C.F.R. § 55.9 ("Where a political subdivision (e.g., a county) is determined to be subject to … section 203(c), all political units that hold elections within that political subdivision (e.g., cities, school districts) are subject to the same requirements"); 28 C.F.R. § 55.19 (covered jurisdictions are "required to publish in the language of the applicable language minority group *materials distributed to or provided for the use of the electorate generally*" (emphasis added)); 28 C.F.R. §§ 55.2(b); 55.10, & 55.15. The Attorney General's "interpretation of the Voting Rights Act is entitled to considerable deference." *See City of Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987) (citing *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 131 (1978)).

D. Gwinnett County Is Plainly Subject to Section 203 in this Case

Two aspects of the district court's holding that Section 203 does not apply to Gwinnett County merit the attention of this Court.

First, the district court ignores that the Second Amended Complaint alleges that some of Gwinnett County's own election materials fail to comply with Section 203. Instead, the district court concluded that "[e]veryone agrees" that "Gwinnett

County … provides the covered materials in accordance with 203 as part of their election administration" and that the Secretary is the only governmental entity producing election materials that are not bilingual and subject to scrutiny under Section 203. [*Contra* II:58 at 18-19.] That is not so. Plaintiffs allege that the Gwinnett County elections website appears only in English and is not reasonably accessible to LEP Spanish-speaking voters because the Spanish version can only be accessed by clicking a small box marked "English." [II:36 at 23-24 ¶¶61-65.] The quality of the computer-generated Spanish translation of the website is poor and riddled with errors that could prevent Spanish-speaking voters from navigating the voting process. [*Id*. at 24 ¶64; II:17-15 at 3-5 ¶¶7-11 (Vargas decl.).] Plaintiffs also allege that jurisdictions covered under Section 203 "are required to offer translations of all election-related materials including … the locality's website," and can be held liable under the statute when they fail to do so. [*Id*. ¶70.] The district court's rationale for dismissing Plaintiffs' Section 203 claim does not apply to Gwinnett County's website.

Second, the district court did not adequately consider whether Section 203 applies to Gwinnett County when a non-covered jurisdiction steps into the county's shoes and provides election materials that the county is required to provide under state law. There is no dispute that Gwinnett County is a covered entity under Section 203(b) and is therefore "subject to" Section 203's requirements.

Therefore, when Gwinnett County is obligated under state law to provide absentee ballot applications and other election materials to voters, the county must produce bilingual translations when the State steps into the County's shoes and provides those materials to Gwinnett County voters solely in English. Here, Gwinnett officials are responsible for providing absentee ballot applications, voter precinct cards, and other election-related information to Gwinnett voters under Georgia law. *See*, *e.g.*, O.C.G.A. §§ 21-2-381 (absentee ballot applications); 21-2-226(e)-(g) (voter precinct cards). [I:26-1 at 3-4 ¶¶7-8 (Harvey decl.).] The County has worked with the State to furnish bilingual absentee ballots and other election materials to Gwinnett County voters in the past. [I:24-2 at 11 ¶28 (Ledford decl.) (absentee ballots); II:39-1 at 17-18 n. 6 ("last chance" notices)].

III. Plaintiffs Have Stated a Valid Claim Under Section 4(e)

A. The District Court Failed to Apply the Appropriate Test for Determining a Section 4(e) Violation

Section 4(e) of the Voting Rights Act "prohibit[s] the States from conditioning the right to vote of [Puerto Ricans] on ability to read, write, understand, or interpret any matter in the English language." *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1277 (N.D. Fla. 2018) (quoting 52 U.S.C. § 10303(e)(1)). The statute was enacted to "secure the rights under the Fourteenth Amendment of persons educated in American-flag schools in which the predominant classroom language was other than English." 52 U.S.C. § 10303(e)(1). "The purpose of

Section 4(e), according to its main sponsor, Sen. Robert F. Kennedy, was to bring the citizen of Puerto Rican origin into a status of equality with his fellow citizen[s]." *United States v. Berks Cty., Pennsylvania*, 277 F. Supp. 2d 570, 579 (E.D. Pa. 2003) (quoting 111 Cong. Rec. 11160).

Section 4(e)'s reach is broad. *See*, *e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (Section 4(e) "in effect extends the franchise to persons who otherwise would be denied it…"); *Allen*, 393 U.S. at 565-66 (provisions of the Voting Rights Act should be construed broadly). The Seventh Circuit has held that the meaning of "the right to vote" in Section 4(e) goes well beyond "the right to enter a voting booth and cast a ballot" because voters have "the right to be informed as to which mark on the ballot, or lever on the voting machine will effectuate the voter's political choice." *PROPA v. Kusper*, 490 F.2d 575, 579 (7th Cir. 1973). Another court has held that Section 4(e) mandates that "voting instructions … must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired." *Torres v. Sachs*, 381 F. Supp. 309, 312 (S.D.N.Y. 1974); *see also Arroyo v. Tucker*, 372 F. Supp. 764, 767-68 (E.D. Pa. 1974) (holding that "plaintiffs cannot cast an 'informed' or 'effective' vote without demonstrating an ability to comprehend the registration and election forms and the ballot itself").

The district court concluded that a Section 4(e) analysis turns solely on the

question of whether or not election officials are employing an "English-only election process." [II:58 at 25 (quoting *United States v. Berks Cty., Pennsylvania*, 277 F. Supp. 2d 570, 579 (E.D. Pa. 2003).][11] That is not the appropriate test under Section 4(e). First, it is not supported by the text of the statute itself. Section 4(e) does not refer to "English-only" elections; that language is contained in a separate statute, Section 4(f)(1), which is not at issue in this case. *Compare* 52 U.S.C. § 10303(e), *with* 52 U.S.C. § 10303(f).

Second, the district court purports to rely on the *Berks County* case but misreads that court's analysis and ultimately applies an entirely different test. While it is correct that the *Berks County* court described the defendants as having made "use of an English-only election process," 277 F. Supp. 2d at 579, the district court takes that phrase out of context. In fact, Berks County was not conducting entirely English-only elections; instead, it was providing some language assistance, which the court deemed inadequate under § 4(e). *See* 277 F. Supp. 2d at 576 (describing use of some bilingual poll workers and bilingual instructions on operating the voting machines).

The *Berks County* court's Section 4(e) analysis was more contextualized.

[11] The district court found that "an election conducted entirely in English only would likely violate Plaintiffs rights," but found that was not the case here. [II:58 at 25.]

That court rejected the defendants' argument that its allegedly "expansive interpretation of Section 4(e) [] could lead to the eventual result that bilingual ballots and voting materials be provided in every voting precinct in the country with even a single limited-English proficient" Puerto-Rico-educated voter—arguments similar to those raised by Defendants in this case. *See* 250 F. Supp. 2d at 535, 537-38. It also found that courts "broadly interpret[] Section 4(e)." 277 F. Supp. 2d at 579. Ultimately, the court ordered broad relief that extended far beyond ending English-only elections (and far beyond what Plaintiffs seek in this case), including a mandate that "Defendants shall provide in English and Spanish *all* written election-related materials." 250 F. Supp. 2d at 543 (emphasis added). *Berks County* cannot be read as predicating Section 4(e) liability solely on a finding that an election is being run entirely in English.

A district court in Florida recently applied a similar standard in a § 4(e) case. In *Madera v. Detzner*, 325 F. Supp. 3d 1269 (N.D. Fla. 2018), many of the counties provided at least "limited support for Spanish speakers." *Id*. at 1274. Again, after conducting a contextualized analysis, *see id*. at 1280-83, the court ruled that was not enough, *id.* at 1284, because § 4(e)'s "plain language" ensures greater access to the electoral process. *Id*. at 1279. The court granted tailored preliminary relief: requiring officials to make bilingual sample ballots available "to voters who fall within the ambit of Section 4(e)." *Id*. at 1283-84.

B. The District Court Improperly Weighed Facts at the Motion to Dismiss Stage and Failed to Credit the Individual Plaintiffs' Well-Pled Allegations

Plaintiffs' Second Amended Complaint includes detailed allegations supporting a § 4(e) claim. Defendants have provided two rounds of English-only paper absentee ballot applications, an English-only absentee ballot application portal, English-only press releases, English-only voter precinct cards accessible via the Georgia My Voter Page, English-only election-related notices, instructions and other information on the Secretary of State's website, and English-only election-related supplies to nursing homes, among other items, to thousands of LEP Gwinnett County Puerto Rico-educated voters such as Plaintiffs Mendez and Ruiz Torres. [II:36 at 3-4 ¶6; II:53-1 at 2 ¶2.] Doing so conditions Plaintiffs' right to vote on their ability to understand and read English. For example, Plaintiffs Mendez and Ruiz Torres could not read the English-only absentee ballot applications mailed to them for the primary and thought they were junk mail. [*See* II:36 at 12-14 ¶¶20-21, 29-30 ¶¶84-85; I:17-13 at 3-4 ¶¶6, 15 (Ruiz Torres decl.); I:17-14 at 3-4 ¶¶5-6, 14 (Mendez decl.).] In response to the preliminary injunction motion, the Gwinnett Defendants mailed Plaintiffs Ruiz Torres and Mendez bilingual absentee ballot applications for the June 2020 election. [*See* II:36 at 12-14 ¶¶20-21.]

The district court was obligated to accept these well-pled allegations as true.

See, *e.g.*, *Silberman*, 927 F.3d at 1128. Instead, the district court weighed and discredited Plaintiffs' allegations by concluding, for example, that "Gwinnett County provided Plaintiffs [Ruiz Torres and Mendez] with absentee-ballot applications in bilingual form after the Secretary's distribution, and Plaintiffs have been unable to establish that Gwinnett County is otherwise preventing its voters from voting in person on Spanish ballots in any future elections." This conclusion ignores (1) the absence of any evidence that Defendants mailed Ms. Ruiz Torres and Mr. Mendez bilingual applications for subsequent to the June 2020 primary, and (2) the First Supplemental Complaint's allegations that Defendants began using an English-only absentee ballot application portal. [*Compare* II:58 at 24, *with* II:53-1 at 3 ¶3, 8 ¶11.] The district court also implicitly rejected Plaintiffs' allegations regarding the inaccessibility of the Gwinnett County elections office's website, as well as the numerous translation errors contained in it, [II:36 at 23-24 ¶¶61-65], when it credited "Gwinnett County's continuing distribution of voting materials in Spanish through . . . its website," and opined that "any voting materials provided to Gwinnett County voters have been in Spanish." [II:58 at 24-25.]

IV. The District Court Abused its Discretion in Denying Plaintiffs' Motion for Leave to File the First Supplemental Complaint

On September 11, 2020, Plaintiffs filed a Motion for Leave to file a First Supplemental Complaint. The supplemental complaint added allegations that the

Georgia Secretary of State unveiled a new English-only absentee ballot application portal on August 28, 2020, and that Gwinnett County officials rejected a proposal to provide bilingual absentee ballot applications to active voters for the November election on September 1, 2020. [II:53-1 at 2 ¶2.] The district court did not rule on or explicitly address the merits of Plaintiffs' Motion for Leave in its Order granting Defendants' Motions to Dismiss or its Judgment dismissing the case. [*See generally* II:58, II:59.][12]

This constitutes an abuse of discretion. Federal Rule of Civil Procedure 15(d) provides:

> On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense.

Fed. R. Civ. P. 15(d). "A supplemental pleading is an appropriate vehicle by which to 'set forth new facts in order to update the earlier pleading, or change the amount or nature of the relief requested in the original pleading.'" *Lussier v. Dugger*, 904 F.2d 661, 670 (11th Cir. 1990) (citing 4 C. Wright & A. Miller, 4 Federal Practice and Procedure § 1504 at 536-37). "No Eleventh Circuit case law

[12] The district court did hold that "[n]othing in Plaintiffs' Motion to File a Supplemental Complaint alters th[e] conclusion" that Plaintiffs failed to state a claim under Section 203 of the Voting Rights Act. [II:58 at 9, 23.]

provides a standard of review in analyzing the application of Rule 15(d), but looking to decisions from other district courts, it is clear that leave to supplement the complaint should be freely given, absent bad faith, undue delay, undue prejudice to the nonmovant, or dilatory motive on behalf of the movant." *Chao v. Tyson Foods, Inc.*, 2009 WL 10687920, at *6 (N.D. Ala. Jan. 6, 2009).

"Courts apply the same 'freely given' standard that governs Rule 15(a) to Rule 15(d)." *Queen Virgin Remy Ltd. Co. v. Thomason*, 2016 WL 4267801, at *4 (N.D. Ga. Apr. 14, 2016) (citing *Lussier*, 904 F.2d at 670); *see also Harris v. Garner*, 216 F.3d 970, 984 (11th Cir. 2000) (referencing "the liberal allowance of amendments or supplements to the pleading under Rule 15"); *see also In re Engle Cases*, 767 F.3d 1082, 1108 (11th Cir. 2014); *McGrotha v. Fed Ex Ground Package Sys.*, 2007 WL 640457, at *2 (M.D. Ga. Feb. 24, 2007); *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998).

"In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 406-407 (11th Cir. 1989); *Queen Virgin Remy Ltd. Co.*, 2016 WL 4267801, at *4.

A supplemental pleading was the proper vehicle for Plaintiffs to raise their allegations relating to the Secretary of State's new English-only absentee ballot application portal. No factors were present that warranted denying the Plaintiffs leave to file their First Supplemental Complaint. There was no undue delay. All of the facts alleged occurred on or after August 28, 2020; Plaintiffs filed the supplemental complaint on September 11, 2020, only two weeks later. Plaintiffs did not know the Secretary of State would use an English-only absentee ballot application portal at the time they filed their Second Amended Complaint.

The interests of justice and judicial economy would be served by having the new allegations properly before the Court as set forth in Plaintiffs' proposed First Supplemental Complaint. The amendments are narrowly tailored to reflect new facts that transpired since oral argument took place on Defendants' Motions to Dismiss. Moreover, this case is the best forum to efficiently adjudicate Plaintiffs' supplemented claims. Judicial economy would not be served by forcing the Plaintiffs to file a separate action alleging these new facts. Defendants will not suffer any undue prejudice by virtue of the proposed amendment. This litigation is in a nascent stage, discovery has not begun, and the proposed First Supplemental Complaint does not involve the addition of any parties or claims. The district court therefore erred in failing to grant Plaintiffs' motion for leave to file the First Supplemental Complaint.

CONCLUSION

For the foregoing reasons, the district court's judgment in favor of Defendants should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(C), 32(a)(5), and 32(g)(1), I certify that this brief has 12,854 words and was prepared using Times New Roman, 14-point font.

/s/ Bryan L. Sells

CERTIFICATE OF SERVICE

I certify that on February 12, 2021, I filed a copy of the above Brief with the Court's electronic filing system, which will send notice of such filing to counsel of record.

/s/ Bryan L. Sells