

No. 20-14540

In the
United States Court of Appeals
for the Eleventh Circuit

**GEORGIA ASSOCIATION OF
LATINO ELECTED OFFICIALS, INC., *et al.*,**
Plaintiff-Appellant,

v.

**GWINNETT COUNTY BOARD OF
REGISTRATIONS AND ELECTIONS, *et al.*,**
Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia, Atlanta Division.
No. 1:20-cv-01587-WMR — William M. Ray, Judge

BRIEF OF GWINNETT DEFENDANTS-APPELLEES

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3,
counsel for Gwinnett Defendants-Appellees hereby certify that the
Certificate of Interested Persons contained in App. Br. filed on
February 12, 2021 is complete with the following addition:

1. George Awuku: new member of the Gwinnett Board of
Registrations and Elections, replacing Ben Satterfield.

Counsel for Gwinnett Defendants-Appellees also certify that
they are individuals, sued in their official capacities as
representatives of county government entities. Counsel for
Gwinnett Defendants-Appellees further certify that no publicly
traded company or corporation has an interest in the outcome of
the case or appeal.

Respectfully submitted this 15th day of March, 2021.

/s/ Bryan P. Tyson
Bryan P. Tyson

STATEMENT REGARDING ORAL ARGUMENT

Gwinnett Defendants do not believe that oral argument will assist the Court with the resolution of this appeal. The standing issues are not unusual and the questions of the interpretation of Section 203 of the Voting Rights Act can be resolved solely by reliance on the text of the relevant statute.

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RESPONSE TO STATEMENT OF JURISDICTION

Gwinnett Defendants agree with Plaintiffs' Statement of Jurisdiction.

RESPONSE TO STATEMENT OF ISSUES

Gwinnett Defendants agree with Plaintiffs' Statement of the Issues.

RESPONSE TO STATEMENT OF THE CASE

Let's begin where there is agreement: everyone agrees that Gwinnett County is a covered jurisdiction for purposes of Section 203 of the Voting Rights Act. App. Br.,¹ p. 16. As a result, everyone agrees that Gwinnett County—when it provides election materials—must provide them in both English and Spanish. 52 U.S.C. § 10503(b)(2). While the case is framed in terms of Section 203 as to its claims against Gwinnett Defendants,² Plaintiffs³ do not allege that Gwinnett Defendants have failed to provide election materials they created in Spanish—just that, when the Georgia Secretary of State provided English-only materials, there was some duty on Gwinnett Defendants to supplement with bilingual materials for Gwinnett voters.

Plaintiffs' statement of the case correctly explains most of the issues involved in this appeal. In order to avoid duplicating the

¹ Appellants' Brief is referred to throughout as "App. Br." and all page numbers are to the ECF numbering at the top of each page.

² Gwinnett Defendants are Appellees the Gwinnett County Board of Registrations and Elections and its members, Alice O'Lenick, George Awuku, Stephen Day, John Mangano, and Wandy Taylor.

³ All Appellants are referred to collectively as Plaintiffs for ease of reference.

relatively simple record of this case, Gwinnett Defendants note several additional facts for this Court's consideration.

A. Additional factual background.

In the early stages of the response to COVID-19, Secretary of State Brad Raffensperger mailed absentee-ballot applications to all Georgia voters. (Doc. 33, p. 3). He took that action without consulting with Gwinnett Defendants or other local election officials in advance. (Doc. 33, p. 8).

Plaintiffs then complained that the efforts of the Secretary to assist individuals with voting did not go far enough—they filed this case to force either Gwinnett Defendants or the Secretary to send Spanish-language absentee-ballot applications to all Gwinnett County voters and to make updates to the Secretary's website. (Docs. 1, 13, 36). Plaintiffs have correctly explained the procedural history of the case in their brief. App. Br., pp. 13-16.

1. The individual plaintiffs.

Ms. Ruiz Torres and Mr. Mendez both initially alleged that they were unable to read the English-language absentee-ballot applications mailed to them by the Secretary. (Doc. 36, pp. 12-13 ¶¶20-21). As soon as Gwinnett Defendants became aware that the individual plaintiffs wished to receive a Spanish-language

absentee-ballot application, they mailed those applications to them. (Doc. 24-2, p. 11 ¶29). Both Ms. Ruiz Torres and Mr. Mendez were able to complete those applications, as they admitted in the Second Amended Complaint. (Doc. 36, pp. 12-13 ¶¶20-21). Going forward, the only remaining claim on which relief was sought for the individual plaintiffs related to Gwinnett Defendants was that “if [they were] sent an English-only absentee ballot application in the future,” they “will not be able to understand it.” (Doc. 36, pp. 12-13 ¶¶20-21).

2. The organizational plaintiffs.

The five organizational Plaintiffs in this case also claimed they were injured, but, as the district court later found, did not sufficiently describe *from* what activities they would be diverting resources. GALEO made generalized allegations about diversions, but then explained that it would be “reaching out to and educating” Spanish-speaking voters about the electoral process—which were the same activities it alleged it was engaged in before the Secretary sent the absentee-ballot applications. (Doc. 36, pp. 7-8 ¶15). GALEO made no allegations of an injury specifically about the actions of Gwinnett Defendants and almost all of its alleged injuries appeared to be caused by COVID-19 rather than by the Defendants. *Id.* The Georgia Coalition for the People’s

Agenda likewise blamed its diverted resources primarily on COVID-19 and did not specify what it would do differently in light of the Secretary sending absentee-ballot applications or as a result of any decision of Gwinnett Defendants. (Doc. 36, pp. 8-9 ¶16).

Asian Americans Advancing Justice—Atlanta only claimed it was “making videos in multiple languages” and did not claim that this was a diversion from its activities of working to increase voter registration and turnout. (Doc. 36, pp. 9-10 ¶17). The New Georgia Project did not explain from what it was diverting funds or how any decision by Gwinnett Defendants affected its activities. (Doc. 36, pp. 10-11 ¶18). Finally, Common Cause claimed it was diverting resources “from its election protection efforts” but then did not explain what it would be doing differently than its primary work “in the areas of election protection, voter registration, registration advocacy, outreach, get out the vote, and grassroots mobilization around voting rights.” (Doc. 36, p. 11-12 ¶19).

3. The role of county election officials.

County election officials, such as Gwinnett Defendants, have a number of specific responsibilities under Georgia law. Those include issuing paper precinct cards to voters, O.C.G.A. § 21-2-226(e), and issuing absentee ballots to voters who request them, O.C.G.A. § 21-2-381. But Plaintiffs’ repeated claim that county

officials are responsible for mailing “absentee ballot applications,” is not supported by the statutes they cite. App. Br., pp. 19-20.

While the Secretary sent out unsolicited absentee-ballot applications during the COVID-19 pandemic, Plaintiffs agree that Gwinnett Defendants make a Spanish-language application available on their website and do not allege that Gwinnett Defendants have mailed English-only precinct cards (because they mail bilingual precinct cards), only that the *Secretary’s website* automatically generates precinct cards in English only. (Doc. 36, pp. 22-23 ¶¶56, 61).

4. The challenged practices.

Plaintiffs reference six practices they say are challenged by their Second Amended Complaint. App. Br., pp. 20-22. The first four practices and most of the sixth practice relate only to actions or inactions of the Secretary and not the efforts of Gwinnett Defendants. The fifth claim—that there is a lack of clarity in some translations on Gwinnett Defendants’ website—was mentioned in a few paragraphs of Plaintiffs’ operative complaint, but their prayer for relief contained no request that the district court do anything about Gwinnett Defendants’ website—only that changes be made to the *Secretary’s website*. (Doc. 36, pp. 30-32). Finally, Plaintiffs also claim that Gwinnett Defendants’ failure to mail out

unsolicited bilingual absentee-ballot applications for the November election (when the Secretary did not send out additional applications) and a failure to translate the Secretary's website for Gwinnett voters are a potential basis for liability. App. Br., pp. 21, 23.

5. The district court's rulings.

Prior to the district court's order on the motions to dismiss, it earlier denied Plaintiffs' attempted preliminary injunction to require the mailing of bilingual absentee-ballot applications to Gwinnett voters for the June 2020 primary election. (Doc. 33). In that ruling, the district court found that "any voting materials [Gwinnett Defendants] have provided to Gwinnett County voters have been in Spanish pursuant to their obligations as a 'covered political subdivision' under Section 203 of the VRA. It was Secretary Raffensperger, not Gwinnett Defendants, who mailed out the English-only applications at issue in this case." (Doc. 33, p. 10). The district court reserved ruling on issues related to standing in that order. (Doc. 33, p. 7 n.3).

After full briefing on jurisdictional issues, the Court held extensive oral argument on the motions to dismiss. (Docs. 51, 54). Following that argument, and perhaps recognizing shortcomings in their operative complaint, Plaintiffs attempted to supplement

their complaint with additional facts. (Doc. 53). That proposed supplemental complaint added extensive allegations about standing in addition to the new factual allegations Plaintiffs discuss in their brief, but did not add any new claims. (Doc. 53-1).

The district court then dismissed the case in its October 5 order, finding that Plaintiffs lacked standing, that their claims were moot, and that they failed to state a claim upon which relief could be granted.⁴ (Doc. 58).

B. Standard of review.

Questions related to the subject-matter jurisdiction of the Court, including standing, are reviewed *de novo*. *Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006). A Rule 12(b)(6) dismissal is likewise reviewed under a *de novo* standard. *Speaker v. United States HHS CDC & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010).

While generally a ruling on standing at the pleading stage requires the Court to “accept as true all material allegations of the

⁴ While Plaintiffs complain repeatedly that the district court “did not rule on Plaintiffs’ motion for leave to file a supplemental complaint,” *see, e.g.*, App. Br., pp. 24, 31, 35, 65, the district court made clear that it considered the proposed additional facts, including the online portal, and those facts did not change its ultimate conclusion about its jurisdiction. (Doc. 58, pp. 9, 13).

[pleading],” the Court may also consider “facts beyond the four corners’ of the pleading that are relevant to the question of standing.” *Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1228 (11th Cir. 2019) quoting *Cone Corp. v. Fla. Dep’t of Transp.*, 921 F.2d 1190, 1206 n.50 (11th Cir. 1991). And, as discussed in Section I. A. and B. below, there are instances where the Court can properly weigh those facts as part of its standing analysis.

SUMMARY OF ARGUMENT

When the Secretary of State took unilateral action to assist voters in the midst of a pandemic, Plaintiffs decided he did not go far enough and sued in an effort to force Gwinnett Defendants and/or the Secretary to supplement the Secretary’s mailings of English-only absentee-ballot applications. Further, despite the fact that Gwinnett County is the only jurisdiction in Georgia covered by Section 203 of the Voting Rights Act (VRA) (and has been since December 5, 2016, *Voting Rights Act Amendments of 2006, Determinations Under Section 203*, 81 Fed. Reg. 87532, 87533 (December 5, 2016)), Plaintiffs sought to compel changes to the *Secretary’s* activities using Section 203.⁵

⁵ Throughout their brief, Plaintiffs regularly refer to “Defendants” taking various actions. In so doing, they improperly combine Gwinnett Defendants—who clearly have duties under Section 203—with the Secretary, who does not share those same

The district court first considered its jurisdiction and concluded that neither the individual or organizational Plaintiffs had standing and that their claims were moot. The individual plaintiffs' claims were moot once they received Spanish-language absentee-ballot applications and the Secretary made clear he was sending no additional applications. The organizational plaintiffs never adequately alleged a diversion of resources. But even if an injury existed, neither group of plaintiffs identified any action of Gwinnett Defendants that resulted in the injuries they claim—at most they had a problem with the *Secretary's* actions.

But even if standing existed and their claims were not moot, the district court correctly concluded that Plaintiffs failed to state a claim. Section 203 applies only to *covered* jurisdictions. Gwinnett County is a covered jurisdiction under Section 203 but Gwinnett Defendants never distributed any election materials that were only in English. Because a covered jurisdiction had not “provided” the election materials Plaintiffs challenged, there was no violation

burdens. *See, e.g.*, App. Br., p. 29 (“*Defendants* in this case are routinely providing English-only election materials to Gwinnett County voters.” (emphasis added)). As explained below, their apparent purpose in doing so is to prevent a careful analysis of their claims on a defendant-by-defendant basis and an individualized assessment of their standing to pursue these claims.

of Section 203. Plaintiffs’ theory that the Secretary stands in the shoes of Gwinnett Defendants when he sends something is not supported by the statutory text or any cases.

Further, Plaintiffs’ Section 4(e) claims have no relevance to Gwinnett County. Not only is Gwinnett already required to provide bilingual election materials under Section 203, it also clearly runs a bilingual election, making all election materials it provides available in both English and Spanish. Thus, the district court correctly found that Section 4(e) does not impose any additional duties on Gwinnett Defendants that are not already imposed by Section 203.

ARGUMENT

I. Plaintiffs do not have standing.

A. The law governing standing.

Modern standing doctrine derives from Article III of the Constitution, which limits the courts’ jurisdiction to only “Cases” and “Controversies.” U.S. CONST. ART. III, § 2. This constitutional limitation is rooted in founding-era concerns over maintaining a “separation of powers” among the three co-equal branches of the federal government and is an integral part of a system of limited federal authority that, “has afforded the constitutional rights and

liberties of individual citizens and minority groups against oppressive or discriminatory government action.” *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Establishing standing is critical to this Court’s vital but limited responsibilities in the constitutional process: “[i]t is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and permitted the peaceful coexistence of the countermajoritarian implications of judicial review...” *Id.* Or, as this Court explained recently: “Federal courts are not ‘constituted as free-wheeling enforcers of the Constitution and laws.’” *Wood v. Raffensperger*, 981 F.3d 1307, 1313 (11th Cir. 2020) quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc).

To establish standing and invoke the jurisdiction of federal courts, plaintiffs must provide proof of “(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision.” *Jacobson v. Fla. Sec’y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). Because federal court jurisdiction is inherently limited, it is incumbent on the party invoking such jurisdiction to prove standing at each successive phase of litigation according to the manner and degree

of evidence required at that stage. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

B. What Plaintiffs get wrong about the law of standing.

Before turning to the substantive standing inquiry with respect to Plaintiffs' claims, it is necessary to correct some inaccurate or incomplete legal standards referenced in their principal brief.

1. Motions to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) are subject to different standards of review.

Plaintiffs are correct when they invoke the general proposition that courts must take well-pleaded allegations as true at the motion-to-dismiss stage. App. Br., pp. 28, 30, 34, 40. But this general rule is subject to limitations that are applicable to this case. "While we typically confine our standing analysis to the four corners of the complaint, we may look beyond it when we have before us facts in the record." *Corbett*, 930 F.3d at 1235. And "in the context of a Rule 12(b)(1) challenge to standing, we are obliged to consider not only the pleadings, but to examine the record as a whole to determine whether we are empowered to adjudicate the matter at hand." *Elend*, 471 F.3d at 1208. "Because

standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).” *Cone Corp.*, 921 F.2d at 1203, n. 42.

Where, as here, the Court has “been presented with facts beyond the four corners of the pleading that are relevant to the questions of standing, [the court] **may** consider them.” *Corbett*, 930 F.3d at 1228 (emphasis added). That is exactly what Plaintiffs have done by injecting facts from their Preliminary Injunction into this appeal. *See, e.g.*, App. Br., pp. 31, 38 (relying on declarations filed by plaintiff organizations in support of motion for preliminary injunction). This Court is not bound to simply accept them as true.

2. Some consideration of the merits may be required in a standing analysis.

Under a diversion-of-resources theory of organizational standing, this Circuit has noted that such resource diversion must be a result of “a defendant’s *illegal* acts [that] impair the organization’s ability to engage in its own projects...” *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (emphasis added). And while it is true that “standing in no way depends on the merits” of a plaintiff’s claim, “it often turns on the nature and

source of the claim asserted.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Plaintiffs claim that the trial court improperly “conflate[d] standing with the merits of the case.” App. Br., p. 41, citing *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005). While standing analysis certainly differs from a merits analysis, the two are not always as neatly separated as Plaintiffs propose. In this case, as this Court has previously held, “sometimes our standing analysis requires us to take a ‘peek’ at the merits....” *Corbett*, 930 F.3d at 1237 citing *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1382 (11th Cir. 2019). And “while standing in no way depends on the merits... in some circumstances weakness on the merits informs the question of Article III standing.” *Id.* (internal quotations omitted).⁶ As discussed further below, this is precisely the type of analysis in which the district court engaged, and it appropriately exercised its discretion in doing so.

⁶ Courts, of course, “must not confuse weakness on the merits with absence of Article III standing.” *Moody v. Holman*, 887 F.3d 1281, 1285 (11th Cir. 2018) quoting *Ariz. St. Leg. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2663 (2015). But “[i]n some circumstances... those distinct concepts can be difficult to keep separate.” *Club Madonna*, 924 F.3d at 1382, quoting *Moody*, 887 F.3d at 1285.

C. No plaintiff adequately alleged an injury.

1. The individual plaintiffs have stated no injury as a result of actions of Gwinnett Defendants.

The individual plaintiffs argue they have standing under Section 203 of the Voting Rights Act for two reasons. First, they claim that Defendants “have a policy and practice of frequently providing English-only election materials.” App. Br., p. 33. And second, because the individual plaintiffs “cannot read the English-only voter precinct card accessible via *the Georgia My Voter Page*, the English only-election notices and information posted by *the Georgia Secretary of State’s website*, and other English-only election materials furnished [] by Defendants.” App. Br., pp. 33-34 (emphasis added).

What Plaintiffs fail to make clear—possibly intentionally—is that the two sets of Defendants have separate and distinct roles and responsibilities under federal and state law. Even if the individual plaintiffs are suffering some injury—and they are not—they have not alleged that that injury is caused by *Gwinnett Defendants* because their claims for relief are only directed to the *Secretary’s* activities.⁷

⁷ And, as the district court found, “[t]he Secretary of State is not covered under the statutes of the VRA requiring it to provide this

2. The organizational plaintiffs have not sufficiently alleged an injury.

The organizational plaintiffs in this case claim both associational standing by “stepping in the shoes” of individual members and organizational standing by a diversion of resources.

a. *The organizational plaintiffs do not have associational standing.*

Because the individual plaintiffs have not established standing for themselves, the claims by the organizational plaintiffs that they have associational standing also fall short. “An organization can also establish associational standing by proving ‘that its members would otherwise have standing to sue in their own right.’” (Doc. 58, p. 13) citing *Jacobson*, 974 F.3d at 1237. As explained above, no members of any organization could establish standing to sue in their own right because Plaintiffs have not alleged any injury caused by Gwinnett Defendants. Thus, the organizational plaintiffs do not have associational standing.

information to Gwinnett County voters in Spanish. Instead, *Gwinnett County* is under the obligation to do so *when it provides* this information *to its voters*”. (Doc. 58, p. 13) (emphasis added).

- b. *The organizational plaintiffs do not have organizational standing.*

For an organizational plaintiff to have standing itself, it must demonstrate that “a defendant’s illegal acts impair the organization’s ability to engage in its own projects by forcing the organization to divert resources in response.” *Arcia*, 772 F.3d at 1341. And as the Seventh Circuit recently explained, organizations cannot support a claim of standing “based solely on the baseline work they are already doing.” *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). Further, “they cannot convert ordinary program costs into an injury in fact. The question is what *additional* or *new* burdens are created by the law [or practice] the organization is challenging. It must show that the disruption is real and its response is warranted.” *Id.* (cleaned up and emphasis added). Put differently, organizations must show that the challenged law’s effect “goes far beyond ‘business as usual’” through “concrete evidence showing that [the law] is already disrupting their operations and . . . will likely require them to significantly change or expand their activities.” *Id.*

The organizational plaintiffs claim this is not the law in this Circuit and that they can show a diversion of resources through a much more lenient standard of spending money or effort to “achieve a typical goal in a different or amplified manner.” App.

Br., p. 40. For example, “GALEO Executive Director Jerry Gonzalez [states] 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 in Spanish.” App. Br., p. 38. Other organizational plaintiffs claim they have alleged “similarly concrete and specific” harms because, for example, they will “engage additional Spanish-speaking volunteers to assist LEP Gwinnet County voters impacted by... English-only election materials.” *Id.*, p. 39. Likewise, Plaintiffs claim “Common Cause is ‘diverting resources from other initiatives in Georgia such as voter registration and [GOTV efforts] to assist Gwinnett County’s LEP Spanish speaking voters.” *Id.*

It is far from clear that these actions constitute a “diversion” of anything. As the district court noted, “GALEO has already been ‘working to address challenges facing Gwinnett County’s LEP Spanish speaking voters as a result of the COVID-19 pandemic.’” (Doc. 58, p. 15). *See also Coal. for Good Governance v. Raffensperger*, No. 1:20-cv-1677-TCB, 2020 U.S. Dist. LEXIS 86996, at *9 n.2 (N.D. Ga. May 14, 2020) (any injury was caused by COVID-19, not by defendants). “Thus,” the district court

continued, “there is no indication that GALEO would in fact be diverting any resources away from the core activities it already engages in by continuing to educate and inform Latino voters.” *Id.* Finding that GALEO was effectively engaging in activities of “precisely... the same nature as those that GALEO engaged in before the COVID-19 pandemic...” they failed to allege any injury under a resource-diversion theory.⁸ *Id.*

Plaintiffs suggest that this Court’s holding in *Jacobson* is more lenient than the rule expressed by the Seventh Circuit and that they have satisfied what is required by *Jacobson*. App. Br., p. 40. To be sure, the Seventh Circuit has more definitively stated that an organization “cannot convert ordinary program costs into an injury in fact,” but this is really just a restatement of the Court’s holding in *Jacobson*. By requiring a plaintiff to adequately explain where the resources were allegedly diverted *from*, the Court may satisfy itself that the organization is not merely executing its existing mission, but was actually injured in some concrete and cognizable way.

⁸ This same shortcoming applies to the other organizational plaintiffs, who either did not allege from what they were diverting funds or did not explain how any decision of Gwinnett Defendants caused that diversion. (Doc. 36, pp. 7-12 ¶¶ 15-19).

On a larger scale, accepting Plaintiffs’ contention that all that is required for standing is to allege they expended resources on their existing efforts in a slightly different fashion would create an exception that swallows the resource-diversion rule. Under Plaintiffs’ theory, organizations would *always* have standing to challenge any government action because they could simply cite to slightly different expenditures made after enactment of the challenged provision and claim they constitute an injury. For example, Plaintiffs’ theory of diversion would have allowed individual plaintiffs suing in the aftermath of the 2020 election to avoid dismissal on standing merely by incorporating—one can easily imagine a new organization called “Kraken Action, Inc.”—and then claiming to spend some time or effort differently. *See Wood*, 981 F.3d at 1314 (no concrete injury to individual voter); *Bognet v. Sec’y Pa.*, 980 F.3d 336, 356 (3d Cir. 2020) (same); *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 U.S. Dist. LEXIS 231093, at *15 (D. Ariz. Dec. 9, 2020) (same); *Gohmert v. Pence*, No. 6:20-cv-660-JDK, 2021 U.S. Dist. LEXIS 3, at *11 (E.D. Tex. Jan. 1, 2021) (same).⁹

⁹ At least one district court has recognized the tension between the post-election rulings in 2020 that found no standing for individual plaintiffs and the generally more-lax standards for organizational plaintiffs. *See, e.g., Fair Fight Action v.*

Although plaintiffs rely heavily on *Browning* for the proposition that “[a] drain on resources can occur even when an organization diverts resources to a typical goal in a different or amplified manner,” this Court’s more recent holding in *Jacobson* should control and this Court should make clear that a diversion of resources requires some “disruption” and that the effect requires the organization to “significantly change or expand their activities” beyond merely pursuing their existing mission. *Common Cause Ind.*, 937 F.3d at 955.

D. Plaintiffs have not alleged traceability to any action or inaction by Gwinnett Defendants.

Even if Plaintiffs have alleged an injury, any injuries they claim they incurred are not fairly traceable to Gwinnett Defendants. As earlier noted, while “standing in no way depends on the merits’ of a plaintiff’s claim, ‘it often turns on the nature and source of the claim asserted.’” *Club Madonna*, 924 F.3d at 1382.

In *Club Madonna*, this Court considered whether a city ordinance was unconstitutionally vague as applied to a plaintiff, a strip-club located in Miami Beach. *Id.* at 1381. Noting its

Raffensperger, Case No. 1:18-cv-05391-SCJ, Doc. 612, slip op. at 14 (Feb. 16, 2021).

occasional obligation to take a “peek” at the merits in certain standing inquiries, the Court found, “the ‘nature and source’ of the Club’s claim requires us to ask whether the Ordinance’s challenged provisions are ‘at least arguably vague’ as applied to it. *Id.* at 1382. “The answer to that question,” the Court noted, “will allow us to assess whether the Club’s apparent injury... is ‘fairly traceable’ to the Ordinance’s vagueness and, accordingly, whether the Club has standing...” *Id.*

In *Club Madonna*, this Court determined that a plaintiff had not established standing because its alleged constitutional injury was clearly not applicable to the plaintiff based on the circumstances described in the complaint. The Court acknowledged that, “we ‘most loosely’ apply the injury-in-fact requirement when a claim involves First Amendment rights...” *Club Madonna*, 924 F.3d at 1381. But the problem was that, “[e]ven if the Club could show that it had suffered, or will imminently suffer, an injury in fact, it cannot demonstrate that the injury is fairly traceable to the” law at issue. *Id.*

Here, as in *Club Madonna*, the Court must look to the claims made by Plaintiffs to determine whether the actions Plaintiffs allege violate the VRA are “at least arguably” traceable to Gwinnett Defendants. And as the district court found, while

Section 203 of the VRA certainly applies to Gwinnett County, the actions by the Secretary that form the basis of Plaintiffs' complaint are not attributable to Gwinnett Defendants. Like the *Club Madonna* plaintiff, Plaintiffs "cannot clear the low bar of demonstrating that the challenged provisions," are sufficient to create an injury. *Id.* at 1383. The Court concluded, "without an injury that is fairly traceable to the challenged provisions, the Club lacks standing to argue that they are unconstitutionally vague." *Id.*

There is no basis to conclude that the Secretary is going to mail absentee-ballot applications to all Georgia voters again. That means the only remaining possible injury is that English-only portions of the Secretary's website are continuing to injure Plaintiffs. App. Br., p. 23. But this is not an injury resulting from the actions of Gwinnett Defendants. Plaintiffs' analysis requires this Court to find that the district court erred by acknowledging that Section 203 of the VRA covers only the parties it covers, and that such a finding constitutes an improper merits analysis at the Motion to Dismiss stage. Yet, as mentioned above, sometimes a court's standing analysis requires it "to take a 'peek' at the merits of the underlying," claim. *Corbett*, 930 F.3d at 1237. And where, as here, the availability of injury hinges on whether Plaintiffs

challenge any conduct of Gwinnett Defendants, the Court is not required to simply accept as true Plaintiffs’ legal conclusion that the VRA applies to the Secretary—and this is the case whether conducted in a 12(b)(1) jurisdictional analysis or in evaluating a 12(b)(6) motion, because courts “are not bound to accept as true a legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiffs have not alleged that Gwinnett Defendants have engaged in any *illegal* acts. Thus, any alleged injury would not – indeed, could not – be “fairly traceable” to the challenged provisions of the VRA. “And without an injury that is fairly traceable to the challenged provisions, [Plaintiffs] lack[] standing...” *Club Madonna*, 924 F.3d at 1383; see also *Ga. Republican Party, Inc. v. Sec’y of State of Ga.*, No. 20-14741-RR, 2020 U.S. App. LEXIS 39969, at *7 (11th Cir. Dec. 20, 2020) (no traceability when actions taken by local election officials).

E. Gwinnett Defendants cannot redress any injury to Plaintiffs.

“Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power.” *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301, 1305

(11th Cir. 2019) (en banc) quoting *Franklin v. Mass.*, 505 U.S. 788, 825 (1992) (Scalia, J. concurring in part and concurring in the judgment). “Any persuasive effect a judicial order might have upon the [non-party counties] . . . cannot suffice to establish redressability.” *Jacobson*, 974 F.3d at 1254.

Because the only relief sought by Plaintiffs were to make changes in activities and websites that are not controlled by Gwinnett Defendants; Gwinnett Defendants cannot redress any alleged injuries of Plaintiffs. Instead, this Court could only issue what amounts to an Order directing Gwinnett Defendants to “follow the law.” But such supervisory edicts are inconsistent with the limited jurisdiction of federal courts.

II. Plaintiffs’ claims are moot.

As the district court correctly found, a case must be dismissed when the issues presented are “no longer live.” *De La Teja v. United States*, 321 F.3d 1357, 1362 (11th Cir. 2003). The exception for situations that are capable of repetition yet evading review only applies if (1) there is a “reasonable expectation that the same complaining party would be subjected to the same action again,” and (2) “the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration.” *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (internal quotations omitted); see

also *Davis v. FEC*, 554 U.S. 724, 735 (2008). Neither of these situations exist here.

There is no reasonable expectation that Plaintiffs would be subject to the same action again. First, the extraordinary and unprecedented burdens placed on Georgia's election system in 2020 were the result of a global pandemic. It is unlikely that Georgia will face this same situation again. *Accord Spell v. Edwards*, 962 F.3d 175, 180 (5th Cir. 2020) (declining to apply this exception to expired COVID-19 stay-at-home order); *Common Sense Party v. Padilla*, 834 F. App'x 335, 336 (9th Cir. 2021) (election case was moot because relief sought was limited to election in COVID-19 context). Second, there is no reasonable expectation that the Secretary will mail absentee-ballot applications to all voters again. The Secretary has "stated no intention to" send absentee-ballot applications again for the general election, and instead, has "professed the contrary intent," that he does not plan to do so. *Christian Coal. of Ala. v. Cole*, 355 F.3d 1288, 1292 (11th Cir. 2004). The Secretary was only able to send absentee-ballot applications to Georgia voters through the use of one-time federal funds under the CARES Act. (Doc. 58, p. 19). Third, the emergency rule authorizing the online absentee-

ballot application portal has also expired. Ga. Comp. R. & Regs. r. 183-1-14-0.10-.16.

Nor, as the district court noted, is the challenged action too short to evade meaningful review. This is true for the simplest of reasons: Even though Plaintiffs challenged the Secretary's actions in their first complaint two months before the rescheduled June 9, 2020 primaries, the district court reviewed those actions in a timely fashion. And there is no reason to believe that similar actions by the Secretary could not be reviewed in the same fashion on the off chance they occurred again. While this time period is less than the length of a full trial, this Court correctly pointed out in the aftermath of the 2020 election that, if there is "some alternative vehicle through which a particular policy may effectively be subject to' complete review," mootness still applies. *Wood*, 981 F.3d at 1317 quoting *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004).

Finally, Plaintiffs' claim that their allegations about the continuing existence of materials on the Secretary's website in English prevent the application of mootness fails no better because Gwinnett Defendants have no control over the Secretary's website. Ultimately, none of Plaintiffs' claims against Gwinnett

Defendants are still “live.” They are moot and must be dismissed.¹⁰

III. Plaintiffs failed to state a claim against Gwinnett Defendants under Section 203 of the Voting Rights Act.

Even if this Court has jurisdiction, the district court properly dismissed the case because the Secretary’s unilateral mailing of absentee-ballot applications did not trigger any Section 203 obligations on the part of Gwinnett Defendants. The plain language of Section 203 forecloses the relief Plaintiffs seek and the Supplemental Complaint does not correct the lack of any valid claim.

A. The plain language of Section 203 limits bilingual election obligations to instances when Covered Jurisdictions provide voting materials.

The provision of bilingual voting materials under the Voting Rights Act is governed by subsections (b) and (c) of Section 203:

¹⁰ The mere fact that something might happen again is not enough to overcome mootness, so long as “there would be ample opportunity for review at the time.” *Hall v. Sec’y, State of Ala.*, 902 F.3d 1294, 1297 (11th Cir. 2018).

(b) Bilingual voting materials requirement.

(1) Generally. Before August 6, 2032, no ***covered*** State or political subdivision shall provide voting materials only in the English language.

...

(c) Requirement of voting notices, forms, instructions, assistance, or other materials and ballots in minority language. Whenever a State or political subdivision subject to the prohibition of (b) of this section ***provides*** any registration or voting notices, forms, instruction, 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 (emphasis added).

1. **When interpreting the VRA’s bilingual election requirement, courts must presume that Congress said what it meant and meant what it said.**

Plaintiffs claim that the Secretary’s mailing of absentee ballot applications statewide created an obligation on Gwinnett Defendants under Section 203 despite the fact that Gwinnett Defendants did not provide the materials in question. App. Br., pp. 48-59. This conclusion is inconsistent with the plain language of the VRA.

As the Supreme Court has “stated time and again that courts must presume that a legislature says in a statute what it means

and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-242, (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103, (1897); *Oneale v. Thornton*, 10 U.S. 53, 68 (1810). “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Germain*, 503 U.S. at 254 (emphasis added), citing *Rubin v. United States*, 449 U.S. 424, 430 (1981); *Ron Pair Enters.*, 489 U.S. at 241 (“[W]here, as here, the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms’”).

“Where the language Congress chose to express its intent is clear and unambiguous” the clear language of the statute is “as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said.” *U.S. v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998); *Thompson v. Gargula*, 939 F.3d 1279, 1285 (11th Cir. 2019); *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969 (11th Cir. 2016) (en banc); *Nesbitt v. Candler Cty.*, 945 F.3d 1355, 1356 (11th Cir. 2020).

The plain language of the “[b]ilingual election requirement” of Section 203 of the VRA is crystal clear and applies to two groups. Covered States (which Georgia is not) and covered political

subdivisions (which Gwinnett County is) “shall provide voting materials only in the English language.” 52 U.S.C. § 10503(b); (Doc. 58, p. 21). Referring back to any “**covered** State or political subdivision” meeting the requirements of bilingual language requirement in subpart (b), subsection (c) sets forth the instances when bilingual voting materials must be provided:

Whenever a State or political subdivision subject to the prohibition of (b) of this section provides any registration or voting notices, forms, instruction, 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) (emphasis added). The terms of Section 203 apply only to the provision of voting materials by States and political subdivisions “covered” by the VRA’s bilingual requirement. Had Congress intended for the application of Section 203 to turn, as Plaintiffs suggest, on the residence of the intended recipients of voting materials, subsections (b) and (c) would have stated that specifically and they plainly do not.

To support their assertion that Section 203’s bilingual obligations depend entirely on where the recipients reside, Plaintiffs take the phrase “subjected to” in subsection (c) entirely out of context. The use of the phrase “subjected to” incorporates

subsection (b)’s covered-jurisdiction limitation into subsection (c) and does not transform it into a residence-based obligation. Subsection (c) links the provision of voting materials in “the language of the applicable minority group as well as English” to instances when a “covered State or political subdivision provides any registration or voting notices, forms, instruction, assistance, or other materials or information relating to the electoral process, including ballots.” *Id.* Nothing in Section 203 requires that bilingual voting materials be provided based solely on where the recipients reside.

2. Courts applying Section 203 focus on who provides the election materials.

Consistent with this plain reading of the text, courts interpreting Section 203 focus on the entity providing the voting materials, not the intended recipients.¹¹ (Doc. 33, pp. 8-10); accord

¹¹ Plaintiffs rely on *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), in an apparent attempt to elevate an introductory remark in that case to a holding that courts should ignore the plain language of the VRA. App. Br., p. 50-51. But adopting Plaintiffs’ approach would require this Court to reject the express language of the VRA and ignore established law interpreting the exact language of the VRA that is applicable in this case. (Doc. 33, pp. 8-10). The statement from *Delgado* that a state is required to provide materials to voters in covered subdivisions is “a statement that neither constitutes the holding of a case, nor arises from a part of the opinion that is necessary to the holding of the case.”

Padilla v. Lever, 463 F.3d 1046, 1051 (9th Cir. 2006); *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988); *In re County of Monterey Initiative Matter*, 427 F. Supp. 2d 958, 962 (N.D. Ca. 2006); *Dekom v. New York*, No. 12-CV-1318(JS) (ARL), 2013 U.S. Dist. LEXIS 85360, at *59 (E.D.N.Y. June 18, 2013).

While many of these cases relate to citizen petitions, they focus on who provided the petitions in the first place. For example, in *Padilla*, the citizen petitions were circulated in Orange County, a covered jurisdiction under Section 203, and the plaintiffs sued because the petitions were only in one language. The Ninth Circuit found that, because neither Orange County nor the State provided the materials in question, Section 203 did not apply. *Padilla*, 463 F.3d at 1050.

Despite Plaintiffs' attempts to limit holdings like those in *Padilla*, the analysis did not rest on the petitions being circulated to residents of a covered jurisdiction. Orange County even specified the exact format of recall petitions—but that did “not

United States v. Gillis, 938 F.3d 1181, 1198 (11th Cir. 2019) (quoting *Black v. United States*, 373 F.3d 1140, 1144 (11th Cir. 2004)); see also Bryan A. Garner, et al., *The Law of Judicial Precedent* 46 (2016) (“Generally, a *dictum* is a statement in a judicial opinion that is unnecessary to the case’s resolution.”). Plaintiffs have provided no basis to find this holding was incorrect.

mean that the petitions are *provided* by the State or subdivision” within the meaning of the VRA. *Id.* at 1051 (emphasis in original); see also *Montero*, 861 F.2d at 605 (rejecting application of Section 203 solely on the basis that the petitions were circulated within a county “in which printed election materials must be bilingual”). “It is not reasonable to hold that this regulatory process transforms petitions privately initiated, drafted and circulated by the proponents into petitions ‘provided’ by the County for purposes of the Voting Rights Act.” *Padilla*, 463 F.3d at 1051. See also *Dekom*, 2013 U.S. Dist. LEXIS 85360, at *59-60 (Section 203 claims will fail where a covered jurisdiction does not provide the voting materials). Notably, none of the courts interpreting Section 203 held that there was any ambiguity in the plain language of the statute.

The application of this plain language of Section 203 in each of these cases is fatal to Plaintiffs’ attempted re-reading of the VRA. In this case, when the Secretary mailed absentee-ballot applications statewide in March and April of 2020, his actions did not create any obligation on the part of Gwinnett Defendants because they did not provide those applications. Section 203 placed no legal requirement for Gwinnett Defendants to mail bilingual applications to its residents, as the district court

correctly pointed out. (Doc. 58, p. 23). The role of the court “is to apply statutory language, not to rewrite it.” *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2015).

3. There were no “shoes” into which the Secretary stepped.

Seeing the weakness of the fact that Gwinnett Defendants did not provide the election materials, Plaintiffs’ assertion that the State somehow “stepped in the shoes” of Gwinnett County fares no better. App. Br., pp. 58-59. Counties in Georgia do not have any duty to mail absentee-ballot applications to every registered voter in the county and the State did not “become the county” or trigger any obligation on a county by doing so. Georgia’s Election Code only requires that a county superintendent provide absentee-ballot applications to registered voters in the county upon request. O.C.G.A. §§ 21-2-381 (a)(1)(A) and (2)(A). Thus, neither Section 203 nor Georgia law creates any “shoe” into which the Secretary can “step” when he mailed absentee-ballot applications statewide.

4. Plaintiffs’ claims about Gwinnett Defendants’ website have no merit.

Plaintiffs also complain that the district court ignored the allegations in their Second Amended Complaint that the general Gwinnett County website was difficult to navigate. App. Br., p. 58.

Aside from the standing problems with these claims,¹² Plaintiffs never sought any relief related to Gwinnett Defendants’ website because the prayer for relief contained no request that the district court do anything about that website—only that changes be made to the *Secretary’s* website. (Doc. 36, pp. 30-32).

In addition, Plaintiffs’ reference to ¶ 70 of their Second Amended Complaint concerning Section 203 and a “locality’s website” claiming that “[u]nder the plain language of the statute, jurisdictions are strictly liable for any failure to translate written materials,” App. Br., p. 58, should be disregarded because it is a conclusion of law, albeit an incorrect legal conclusion, and not a statement of fact. As the Supreme Court makes clear, courts “are not bound to accept as true a legal conclusion couched as a factual allegation” when considering a motion to dismiss. *Iqbal*, 556 U.S. at 678.

¹²Plaintiffs’ claim that “LEP voters would not navigate an English only website” is purely speculative and is not sufficient for purposes of standing. The Supreme Court has “repeatedly reiterated that ‘threatened injury must be *certainly impending* to constitute injury in fact,’ and that ‘[a]llegations of *possible* future injury’ are not sufficient.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (citations omitted) (emphasis in original).

5. The “absurd result” exception to the plain-language rule of construction does not apply in this case.

Plaintiffs’ last effort is to claim that the plain language of Section 203 will somehow lead to an absurd result. App. Br., pp. 51-54; *Durr v. Shinieski*, 638 F.3d 1342, 1349 (11th Cir. 2011). Under their theory, this Court can disregard the plain meaning of a statute because it could potentially lead to an absurd result. See *In re Fretz*, 244 F.3d 1323 (11th Cir. 2001).

While Plaintiffs paint a scenario whereby a jurisdiction shirks its duties by transferring election-administration responsibilities, App. Br., p. 53, they have not even alleged that something of that magnitude took place here. Few could have ever imagined that the country would be gripped by a deadly global pandemic or that the impact of a potentially deadly airborne virus on in-person voting during a presidential election year would require government officials to take unprecedented measures. Attempting to craft a theory of Section 203 based on these unique (and hopefully singular) circumstances is not a proper application of the absurd-result canon but would work the very absurdity the exception is meant to avoid. Even if the pandemic highlighted what Plaintiffs perceive as an inadequacy in the VRA, the solution lies with Congress and not the courts.

6. Legislative history is inapplicable.

Plaintiffs also ask this court to review the legislative history of Section 203. App. Br., p. 55. Courts, however, should not, cannot, and do not use legislative history to get around the plain meaning of a statute's text: "When the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *Nesbitt*, 945 F.3d at 1361-62 quoting *Harris*, 216 F.3d at 976. There is no basis in the law for this Court to find otherwise, and to do so would run afoul of sound principles of statutory interpretation. "Legislative history creates mischief both coming and going – not only when it is made but also when it is used." Antonin Scalia & Bryan A. Garner, *Reading Law: the interpretation of legal texts*, p. 377 (1st ed. 2012). "[W]ords and text are chosen to embody intentions and thus replace inquiries into subjective mental states. In short, the text *is* the intention of the authors..." Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 Harv. L. Rev. 751, 759 (1987) (emphasis original).

IV. Plaintiffs failed to state a claim against Gwinnett Defendants under Section 4(e) of the Voting Rights Act.

Under Section 4(e) of the VRA, Congress has “secure[d] 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). To further protect these rights, Section 4(e) prohibits “the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.” *Id.*

As was covered exhaustively earlier, no one disputes that Gwinnett County is covered by Section 203 of the Voting Rights Act. App. Br., p. 50. But even in their briefing to this Court, Plaintiffs have failed to identify any further duties imposed by Section 4(e) on Gwinnett Defendants regarding bilingual election materials that is not previously imposed by Section 203.

Section 4(e) ensures that no jurisdiction conditions someone’s right to vote on the ability to understand or only have available materials in the English language. 52 U.S.C. § 10303(e)(1). While Plaintiffs contend this provision should be broadly construed, other courts have declined that invitation. Typically, cases that invoke Section 4(e) involve outright refusals to prohibit individuals from voting. *See United States v. County Bd. of*

Elections, 248 F. Supp. 316, 323 (W.D. N.Y. 1965) (voter prevented from registering to vote because she did not speak or understand English); *United States v. Berks Cty.*, 277 F. Supp. 2d 570, 573 (E. D. Pa. 2003) (granting injunction against English-only election process when poll officials expressed hostility toward LEP voters and affirmatively prevented those voters from participating in the election process). (Doc. 38-1, p. 17). No case identifies an obligation beyond that already imposed on Gwinnett Defendants by Section 203.

Plaintiffs take issue with the test applied by the district court as to whether or not election officials are employing an “English-only election process.” App. Br., pp. 60-61. But they offer no support for anything differing from Gwinnett Defendants’ duties under Section 203. The district court specifically found that any materials provided by Gwinnett Defendants were provided in Spanish. (Doc. 58, p. 24). While Plaintiffs continue to complain about the translations used by Gwinnett County on its multilingual website, they offer nothing to indicate that Gwinnett Defendants have not fully complied with their duties under the law.

V. The district court was not required to consider Plaintiffs' Supplemental Complaint.

Where a supplemental complaint would be futile, the court is not required to consider it, especially when the amendment would be futile. *Geary v. City of Snellville*, 205 Fed. App'x 761, 763 (11th Cir. 2006); *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007). "Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant." *Lee v. Alachua Cty.*, 461 F. App'x 859, 860 (11th Cir. 2012) quoting *Cockrell*, 510 F.3d at 1310.

Plaintiffs' request for leave to file a supplemental complaint arises from what they claim are two critical new facts: the Secretary's English-only absentee-ballot application portal launched in August 2020 under emergency rules and Gwinnett Defendants' decision in September 2020 to not mail "bilingual absentee ballot applications to active voters for the November election." (Doc. 53, p. 2). Neither alters the application of Section 203 to Gwinnett Defendants. Again, Gwinnett Defendants are not providing election materials in either of these instances and a supplemental complaint raising these facts "would still be properly dismissed." *Cockrell*, 510 F.3d at 1310.

Gwinnett Defendants’ obligations under Section 203 apply when they provide voting materials—not when they do not. As the district court explained, “Section 203 applies based on the covered entity that provides the materials, ‘not the possibility that voters within a covered jurisdiction may see or come across materials from outside it.’” (Doc. 58, p. 23). The district court correctly determined that “[n]othing in Plaintiffs’ Motion to File a Supplemental Complaint alters that conclusion here” and this Court should affirm that decision. *Id.*

CONCLUSION

Plaintiffs did not properly invoke the jurisdiction of the Court. But even if the district court had jurisdiction, Gwinnett Defendants did not provide the election materials in question and that ends the analysis. For the reasons set out above, this Court should affirm the judgment of the district court.

Respectfully submitted this 15th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 8,639 words as counted by the word-processing system used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2021, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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