

No. 20-14540

In the
United States Court of Appeals
for the Eleventh Circuit

Georgia Association of Latino Elected Officials, Inc. et al.,
Plaintiffs-Appellants,
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*

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. This case presents jurisdictional questions similar to many cases that this Court has considered recently, it and can be resolved by straightforward application of those precedents. The case presents no unusual legal issues that would require the Court to create new law or reconsider the validity of existing precedents. And even if there were jurisdiction to adjudicate the merits of Appellants' voting rights claims, those issues can be resolved by application of basic principles of statutory interpretation. The facts and legal arguments are adequately presented in the parties' briefs, and the decisional process would not be significantly assisted by oral argument.

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STATEMENT OF JURISDICTION

This case is an appeal from a final judgment of a district court, and this Court therefore has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The case was filed in the district court pursuant to 28 U.S.C. § 1331. However, for the reasons set forth herein, Appellee contends that this case lacks Article III jurisdiction as Appellants have failed to demonstrate standing and because the case is now moot.

STATEMENT OF THE ISSUES

1. Whether Appellants have Article III standing to raise their claims, where Appellants have not alleged a cognizable injury in fact traceable to or redressable by the Secretary of State of Georgia.
2. Whether Appellants' complaints regarding the Secretary of State's prior mailings and website contents related to completed elections are moot because of the completion of those elections.
3. Whether Appellants failed to state a claim against Appellant Secretary of State Brad Raffensperger for violation of Section 203 of the Voting Rights Act (52 U.S.C. § 10503) where the State of Georgia is not a "covered jurisdiction" subject to Section 203's provisions.

4. Whether the district court erred in finding that Appellants failed to state a claim for violation of Section 4(e) of the Voting Rights Act (52 U.S.C. § 10303) against Appellant Secretary of State Brad Raffensperger as his actions did not condition the right to vote on the ability to read and understand English.

5. Whether the district court erred in declining to allow Appellants to supplement their complaint after dispositive motions had been briefed and argued.

INTRODUCTION

During the 2020 election cycle, Georgia Secretary of State Brad Raffensperger (“the Secretary”) faced the challenge of ensuring Georgia voter’s ability to vote safely and securely and protecting the public health of voters and election workers during the COVID-19 pandemic. One way that the Secretary addressed this challenge was to mail absentee ballot application forms to all Georgia registered voters – something that the Secretary has never done before or since. The Secretary was able to fund this initiative solely due to the receipt of federal coronavirus relief funds.

Shortly after the Secretary mailed the application forms, Appellants sued the Secretary and the members of the Gwinnett County Board of Registration and Elections. They alleged that the mailing of the application forms violated Sections 203 and 4(e) of the Voting Rights Act because they were printed only in English. They asked the district court to order Appellees to print and mail a second round of bilingual absentee ballot applications to all Gwinnett County voters.

When their effort at obtaining preliminary injunctive relief was unsuccessful, Appellants amended their complaint to include new claims. They contended that because the Secretary’s website

and various other materials were printed only in English, the Secretary had violated Sections 203 and 4(e) of the Voting Rights Act.¹

The elections have now been concluded, and no allegation has been made that any voter subject to the protections of Section 203 and/or 4(e) had been unable to obtain necessary voting materials printed in Spanish or that they had been effectively denied the right to vote. Appellants have not demonstrated that either the individual plaintiffs or the organizational plaintiffs have suffered any “injury” as a result of receiving an English-language absentee ballot application form in the mail, or by the content on the Secretary’s website or any other publication that may have been issued by the Secretary. The organizational plaintiffs have failed to set forth facts demonstrating that any action of the Secretary caused them to divert resources, or that they have associational standing due to any injury to their members. Nor have Appellants demonstrated that any purported injury that they may have suffered is either traceable to or redressable by the Secretary. And, because the elections are now completed and Georgia’s

¹ 52 U.S.C. § 10503 is typically referred to as “Section 203” of the Voting Rights Act, and 52 U.S.C. § 10303(e) is commonly referred to as “Section 4(e)” of the Voting Rights Act. These terms are hereinafter used interchangeably.

election code has been substantially revised, there is no basis for contending that the Secretary will repeat any of the actions about which Appellants have complained in future elections. Appellants' claims are therefore moot.

Nor have Appellants stated a claim against the Secretary for violation of Section 203 or 4(e) of the Voting Rights Act. Section 203 expressly provides that the State of Georgia is not a "covered jurisdiction" subject to its provisions; Gwinnett County is the state's only political subdivision that has been designated a "covered jurisdiction" required to comply with Section 203's requirements. Section 4(e) also does not apply to the Secretary; it prohibits states from conditioning covered citizens' right to vote on the ability to read, write, understand or interpret the English language. Under Georgia law, local elections officials conduct elections, not the Secretary, and there is no allegation that Gwinnett County elections were conducted in a manner that conditioned any voter's ability to vote on the ability to read, write, understand or interpret English.

The district court therefore properly dismissed Appellants' claims under Fed.R.Civ.P. 12(b)(1) for lack of Article III jurisdiction, both because Appellants lack standing and because any claims they have raised in this action are now moot. The

district court was also correct in dismissing the action pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted, as Appellants have not raised a viable claim against the Secretary under either Section 203 or Section 4(e) of the Voting Rights Act.

STATEMENT OF THE CASE

A. Factual Background

Shortly before Georgia was scheduled to hold its Presidential Preference Primary and Special Election on March 24 2020, the growing spread of COVID-19 began to reach critical mass. The resulting public health state of emergency led to the postponement of both the March 24 election and the statewide general nonpartisan and primary election that had been scheduled for May 19. Doc. 26-1, ¶9. These elections were combined into a single election conducted on June 9, 2021. *Id.* As the situation unfolded, the Secretary began to confront the numerous challenges presented by the question of how to safely conduct elections during a pandemic.

Recognizing that there would be increased interest in absentee voting due to the COVID-19 pandemic, Secretary Raffensperger made arrangements to mail every active Georgia

voter an absentee ballot request form. Doc. 26-1, ¶9. Under normal circumstances, absentee ballot request forms are handled by county elections officials in a variety of ways.² Doc. 26-1 at ¶ 7. Due solely to the unique circumstances presented by COVID-19, the Secretary sought to facilitate and streamline the process of requesting absentee ballots by sending application forms directly to the voters. The mailing of the absentee ballot forms cost approximately \$3.1 million, made possible only by a one-time grant of federal coronavirus relief funds. Doc. 26-1 at ¶9. Georgia voters were not required to use these forms to request an absentee ballot, and Gwinnett County voters continued to have the option of using the Spanish-language absentee ballot application form

² See O.C.G.A. § 21-2-40(b) (“The General Assembly may by local Act create a board of elections and registration . . . and empower the board with the powers and duties of the election superintendent relating to the conduct of primaries and elections and with the powers and duties of the board of registrars relating to the registration of voters and absentee-balloting procedures”); O.C.G.A. § 21-2-70(13) (County supervisor powers and duties include “conduct[ing] all elections . . . and to perform such other duties as may be prescribed by law” and preparation and publishing all notices and advertisements of elections); see also O.C.G.A. § 21-2-381 (addressing rules for absentee ballot applications to county and municipal registrars).

provided by Gwinnett County on their website. Doc. 24-2, ¶¶ 13, 20.

Soon after the Secretary mailed the absentee ballot applications to Georgia voters statewide, several organizations filed suit against the Secretary.³ The organizations sued the Secretary and the Gwinnett County Board of Registration and Elections and its members (hereinafter collectively “the Gwinnett defendants”), alleging that the mailing of the applications violated Sections 203 and 4(e) of the Voting Rights Act. The organizations claimed that the Secretary’s mailing of the absentee ballot applications forms to Georgia voters statewide would cause them to have to divert resources to educate limited-English proficient (“LEP”) Gwinnett County voters about how to vote by absentee ballot. Doc. 1, ¶¶ 13-17. Although each of the organizations acknowledged that they had already begun engaging in providing Spanish-language voting information to voters before the Secretary mailed the application forms (*see* Doc. 1, ¶¶ 13-17), they

³ These organizations are Georgia Association of Latino Elected Officials, Inc. (“GALEO”), Georgia Coalition for the People’s Agenda (“GCPA”), Asian Americans Advancing Justice – Atlanta, Inc. (“AAAJ”), New Georgia Project (“NGP”) and Common Cause (“Common Cause”), and are hereinafter referred to collectively as “the organizations” or “the organizational plaintiffs.”

claimed that the mailing of the form – and not the general increased interest in absentee voting caused by COVID-19 – caused them to divert unspecified resources away from these efforts. *Id.*

Two days after their complaint was filed, the organizational plaintiffs amended their complaint to add two individual plaintiffs, Albert Mendez and Limary Ruiz Torres (hereinafter collectively “the individual plaintiffs”). The individual plaintiffs complained that when they received the mailed applications, they could not read them and thought that they were junk mail. Doc.13, ¶7. After being served with the complaint, Gwinnett County mailed Spanish language absentee ballot application to the individual plaintiffs and other individuals identified in the complaint. Doc. 24-2, ¶ 29. The individual plaintiffs acknowledged that they were successfully able to complete and return those forms to Gwinnett County to receive their absentee ballots. Doc. 36, ¶¶ 20, 21. Any absentee ballots sent to Gwinnett County voters are printed in both English and Spanish. Doc. 24-2 at ¶28.

After their initial request for a temporary restraining order/preliminary injunction was denied (Doc. 33), Appellants amended their complaint to allege that the English-language voter precinct card accessible on the Secretary’s website, as well as

press releases and other various other unidentified English-language communications posted on the Secretary's website or otherwise disseminated by the Secretary were also in violation of Sections 203 and 4(e) of the Voting Rights Act. Doc. 36. No allegation has been made that either the individual plaintiffs or any members of the organizations actually accessed the Secretary's website or viewed any other printed materials he may have disseminated, or that they were hindered in their voting efforts by having seen these materials. *See generally* Doc. 36.

Georgia's primary, special and non-partisan general elections were held on June 9, 2020.⁴ On November 3, 2020, Georgia held its statewide general election, and U.S. Senate runoff elections were held on January 5, 2021. *Id.* No allegation has been made at any time that any act of the Secretary prevented the individual plaintiffs, the organizations' members, or any other Spanish-speaking voters in Gwinnett County from successfully exercising their right to vote in any of these elections.

⁴ *See* 2020 State Elections and Voter Registration Calendar, <https://sos.ga.gov/admin/files/2020%20Revised%20Short%20Calendar.pdf>.

B. Proceedings Below

Plaintiffs sued Defendants on April 15, 2020, alleging that Secretary Raffensperger's mailing of absentee ballot applications to Georgia's voters violated Sections 203 and 4(e) of the Voting Rights Act. Doc. 1. On April 17, 2020, Plaintiffs filed their First Amended Complaint. Doc. 13. On June 8, 2020, Plaintiffs filed their Second Amended Complaint. Doc. 36.

On June 22, 2020, the Secretary and the Gwinnett Defendants filed a motion to dismiss Plaintiffs' Second Amended Complaint with briefs in support. Docs. 38, 39. The district court heard arguments on the motion on August 18, 2020. Doc. 54. On September 11, 2020, while Defendants' Motions to Dismiss remained pending, Plaintiffs filed a Motion for Leave to file Supplemental Complaint. Doc. 53.

On October 5, 2020, the District Court granted Defendants' Motions to Dismiss and entered judgment for Defendants. Docs. 58, 59. Following an extension of time to file a notice of appeal (Doc. 61), Plaintiffs filed their notice of appeal on December 4, 2020. Doc. 62.

C. Standard of Review

District court orders dismissing a case for lack of standing or failure to state a claim are reviewed *de novo*. See *Lewis v.*

Governor of Alabama, 944 F.3d 1287, 1308 (11th Cir. 2019) (standing); *Ambarus v. Bank of America*, 561 Fed. Appx. 859, 860 n.1 (11th Cir. 2014) (motion to dismiss).

SUMMARY OF ARGUMENT

The district court correctly found that it lacked Article III jurisdiction over Appellants' claims, and that Appellants had failed to state a claim upon which relief may be granted. Appellants' claims were therefore properly dismissed pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

First, the court lacks subject matter jurisdiction because Appellants failed to demonstrate Article III standing. Neither the individual plaintiffs nor the organizations articulated concrete and particularized injuries stemming from the mailed absentee ballot form, the contents of the Secretary's website, or any other materials that may have been disseminated by the Secretary. Further, any purported injury that might have been experienced by any of the plaintiffs were not traceable to nor redressable by the Secretary, as the Secretary is not the party responsible for complying with Sections 203 and 4(e) of the Voting Rights Act, nor is he responsible for administering elections in the State of Georgia. Therefore, the court lacks standing over Appellants' claims, and they are properly dismissed.

Second, Appellants' claims are moot. Their complaints sought injunctive relief with regard to actions taken by the Secretary prior to elections that have now been completed. There is no indication that these actions are "capable of repetition yet evading review," and no reason to believe any of the actions plaintiffs complained of will be repeated in future elections. There is therefore no present live controversy sufficient to confer Article III standing upon the court, and the action was properly dismissed on the grounds of mootness.

Finally, Appellants have failed to state a claim upon which relief may be granted. Neither Section 203 nor Section 4(e) of the Voting Rights Act imposes any legal duties upon the Secretary. Both the Voting Rights Act and Georgia law are clear that the duty to administer elections and comply with the Voting Rights Act are squarely placed upon Gwinnett County elections officials.

The plain text of Section 203 is clear – it applies only to "covered jurisdictions," and Georgia is not a "covered jurisdiction" subject to Section 203's provisions. Gwinnett County, the sole political subdivision subject to Section 203, is expressly given the authority to use its own discretion and judgment as to how best to comply with those obligations. None of the Secretary's actions interfered with Gwinnett County officials' ability to discharge

their Section 203 obligations, and these claims were properly dismissed.

Similarly, the Secretary's actions are not subject to Section 4(e), which prohibits elections officials from conducting "English-only elections." Under Georgia law, local election officials conduct elections, not the Secretary. There is no evidence that any website content or printed materials of any kind that have been disseminated by the Secretary interfered with Gwinnett County officials' ability to conduct an election that did not impermissibly condition the right to vote on the ability to read, write, understand or interpret English. Therefore, the district court properly dismissed all claims against the Secretary for violations of the Voting Rights Act.

ARGUMENT

I. The district court properly concluded that it lacked Article III jurisdiction over Appellants' claims.

Under Article III of the Constitution, federal courts have the power to decide "Cases" and Controversies." To establish a case or controversy, a litigant must demonstrate standing: an injury in fact that is fairly traceable to the defendant's actions and likely to be redressed by a favorable decision. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). And this requirement

persists throughout a lawsuit. If a case “no longer presents a live controversy with respect to which the court can give meaningful relief,” the case is moot and must be dismissed. *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009).

Here, the district court correctly found that Appellants failed to establish the elements of standing to pursue their claims against Secretary Raffensperger, and that Appellants’ claims are moot in any event because declaratory or injunctive relief could no longer redress Appellants’ injuries, which are related to elections that were completed several months ago. Doc. 58, pp. 12-18. This Court should affirm the lower court’s dismissal of Appellants’ claims for lack of subject-matter jurisdiction.

A. Appellants failed to establish standing to pursue their claims.

To establish standing, a litigant must prove “(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*, 974 F.3d at 1245 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The district court properly found that Appellants failed to meet this burden, because they failed to prove that they sustained a cognizable injury in fact, that any such

injury was fairly traceable to the Secretary's actions, or that their injuries could be redressed by him.

1. Neither the individual plaintiffs nor the organizations have alleged a cognizable injury in fact.

To allege an injury sufficient to establish Article III standing, a plaintiff must allege an injury that is “concrete, particularized and actual or imminent.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013). It must “affect the plaintiff in a personal and individual way.” *Spokeo, Inc. v. Robins*, 136 S.Ct 1540. 1548 (2016) (quoting *Lujan, supra*, 504 U.S. 555, 560 n.1). Neither the individual plaintiffs nor the organizations have alleged a cognizable injury sufficient to form a basis for Article III standing.

a. The individual plaintiffs have not alleged any concrete, actual or imminent injury, but have raised only hypothetical and conjectural theories of possible future injuries. The individual plaintiffs originally alleged an “injury” based on their receipt in the mail of the absentee ballot application mailed by the Secretary during the week of March 30, 2021. Both plaintiffs alleged that they could not read the application form and thought that it was junk mail. Doc. 13, ¶¶18-19. They did not articulate how receiving

what they thought was junk mail caused them any cognizable harm.

Shortly after the individual plaintiffs raised the issue, Gwinnett County officials sent both individual plaintiffs bilingual absentee ballot applications. Doc. 24-2, ¶29. Both the plaintiffs were able to complete those applications. Doc. 36, ¶¶ 20-21. Therefore, any “injury” resulting from the individual plaintiffs’ receipt of a form that they thought was junk mail has long been remedied.

With the absentee ballot application form issue resolved, the individual plaintiffs then changed course, complaining that they cannot read the contents of the Secretary’s website, including the online version of their voter precinct card as well as general election-related content. Doc. 36, ¶¶21, 22.⁵ They have not alleged that they cannot obtain the same or equivalent information from the Gwinnett Defendants. Nor have they even alleged that they have ever accessed the Secretary’s website and attempted to read it. And most important, they have not alleged that they have been unable to successfully exercise their right to vote in any of the 2020 or 2021 elections, or that they experienced any difficulty or

⁵ Gwinnett County mails bilingual precinct cards to all registered voters pursuant to Section 203 and O.C.G.A. § 21-2-226(e).

impediment when voting in those elections. *See generally* Doc. 36. The district court therefore correctly held that the individual plaintiffs had not alleged a sufficient injury in fact and therefore lacked standing.

The district court correctly recognized that when seeking declaratory or injunctive relief, as Appellants have here, litigants “must allege and ultimately prove ‘a real and immediate – as opposed to a merely hypothetical or conjectural – threat of *future* injury.’” Doc. 58-12 (*citing Strickland v. Alexander*, 772 F.3d 876, 883 (11th Cir. 2014) (emphasis in original)). Allegations that the Secretary *might* send unspecified future election-related mailings to the individual plaintiffs or that they *might* try to access the Secretary’s website and be unable to read it are pure speculation, not the stuff of Article III injury-in-fact. The district court correctly determined that the individual plaintiffs have made no allegation that there was a “substantial likelihood” that they will actually suffer any injury in the future. *See Strickland, supra* and *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1346 (11th Cir. 1999). This remote risk of harm is too speculative to form a foundation for Article III standing. This is even more true now, as the 2020/21 election cycle is now complete, and it is presently uncertain what content or form of any future

communications to voters may be necessary or appropriate during the 2022 election cycle.

b. The district court also correctly held that the organizational plaintiffs failed to establish an injury in fact under a “diversion of resources” theory. To have standing based on “diversion of resources,” organizational plaintiffs must show that the Secretary’s allegedly “illegal acts impaired the organization’s ability to engage in its own projects by forcing the organization to divert resources in response.” *Arcia v. Sec’y of Florida*, 772 F.3d 1335, 1341-1342 (11th Cir. 2014). The Eleventh Circuit recently clarified this standard in *Jacobson v. Florida Secretary of State*, finding plaintiffs lacked standing on facts very similar to those alleged here. 957 F.3d 1193, 1205-06 (11th Cir. 2020). As the court explained:

Although resource diversion is a concrete injury, neither [of the relevant witnesses] explained what activities [the plaintiffs] would divert resources away from in order to spend additional resources on combatting [the alleged wrong] as precedent requires . . . [W]e do not know what activities, if any, might be impaired by the Committee’s decision to allocate ‘additional resources’ to target districts . . . And [the evidence] likewise fails to identify any activities that will be impaired by Priorities USA’s decision to ‘invest more resources’ in Florida. Their testimony fails to establish an injury based on diversion of resources.

Id. (emphasis in original) (citations omitted).

A true diversion of resources breaks from and depletes the organization's "own projects," *Arcia*, 772 F.3d 1341-1342, and merely alleging that the organization will continue to allocate resources for essentially the same functions or purposes cannot be a diversion of resources for the purposes of establishing standing. It is not enough, as Appellants contend, to allege that the Secretary's actions caused the organizations to accomplish their goals in a "different or amplified manner." App.Br. at 28 (*citing Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008)). Rather, as *Jacobson* confirms, to base standing on a diversion of resources, Appellant organizations must explain how the Secretary's acts impaired their ability to engage in their projects and what projects the organizations would divert resources away from in order to counteract an allegedly illegal act. 974 F.3d at 1250.

Appellants' diversion-of-resources allegations do not meet these standards. First, they failed to identify any resources that the organizational plaintiffs were required to divert to address any specific injury caused by the Secretary. Although the organizational plaintiffs have described various efforts to aid Gwinnett County's LEP Spanish-speaking voters during the

2020/2021 elections, they have acknowledged that these types of efforts were already a part of their activities before the Secretary took any of the actions they complain of. Doc. 36, ¶¶ 13-17. They have not explained how the mailing of the absentee ballot request form might have caused them to divert any resources away from their ongoing efforts to provide Spanish-speaking voters with voting information and assistance to address any issues caused by the Secretary's mailing. Nor have they explained how the existence of the contents of the Secretary's website could have required the organizational plaintiffs to diversion any resources to these efforts. None of the organizations has made any attempt to differentiate between what resources they would have directed to educating and assisting Spanish-speaking voters in navigating the challenges of voting during a pandemic and any particular diversion needed to address the Secretary's mailed absentee ballot application forms, his website, or any other materials he may have disseminated.

Moreover, for the most part, the organizational plaintiffs here have made only general allegations that the Secretary's actions somehow caused them to divert resources. They do not explain, for example, *what* resources have been or will be diverted, from where, and to the detriment of which normal projects. Indeed, as

alleged, it is not clear that what Appellants describe as “diversion” is not simply a new purpose or motivation for substantially the same work. Each of the organizations acknowledges that they were already engaged in disseminating Spanish language information to Gwinnett voters prior to and independently of any of the Secretary’s actions. *See* Doc. 36 at ¶15 (“GALEO has been working to address challenges facing Gwinnett County’s LEP Spanish speaking voters as a result of the impact of the COVID-19 pandemic. GALEO sent bilingual mailers to Spanish-speaking Gwinnett county voters with information about the presidential primary. After the March primary was postponed, GALEO sent out another round of bilingual mailers providing Spanish-speaking voters with updated information. Now that the primary has been postponed until June, GALEO expects to send out another round of bilingual mailings...”); ¶16 (“Due to the spread of the COVID-19 virus in Georgia ... the GCPA has been devoting, and will continue to devote, time and resources to public information campaigns and other initiatives to encourage voters to exercise their right to vote by mail.”); ¶17 (“[Advancing Justice-Atlanta] engages in voter registration, voter education, and GOTV efforts...including by disseminating Spanish-language “know your rights” informational materials. During this election cycle,

Advancing Justice-Atlanta is calling and texting Gwinnett County voters to provide them information about voter registration, absentee voting and other voting and election related issues to increase registration and voter turnout.”); ¶18 (NGP’s “Loose the Chains” project “disseminate[s] multilingual information about voting rights and voter protection – including in Spanish...”); ¶19 (“COMMON CAUSE has worked alongside partners to help recruit volunteers to assist LEP Spanish-speaking voters and provide Spanish language election materials.”) These types of general, factually unsupported claims of resources diversion are not a sufficient basis for standing. *Jacobson*, 957 F.3d at 1205-06.

Although the organizations each claim that the Secretary’s actions caused a diversion of resources, they fail articulate how the Secretary’s actions caused such a diversion. They do not explain how they changed their existing outreach to Spanish-speaking voters to address any harm purportedly caused by the Secretary’s mailed absentee ballot form, his website, or any other materials. Although some of their efforts during the 2020/21 election cycle may have differed from what they have done in prior elections, none of the organizations allege that any “deviations” from their normal activities were actually caused by the Secretary

and not by the unique challenges presented by the COVID-19 pandemic.

Thus, as in *Jacobson*, the complaint here is devoid of any meaningful allegations of resource diversion, and makes only unsupported or conclusory statements that such diversion exists.

c. The district court also properly held that GALEO's members had not suffered an injury in fact sufficient for purposes of establishing associational standing.⁶ An association has standing to bring suit on behalf of its members when its members "would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). To establish standing under this theory, an organization must "make specific allegations that at least one identified member ha[s] suffered or [will] suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).

⁶ Only GALEO makes the claim that it has associational standing; none of the other organizations have alleged that their individual members could have suffered an injury in fact as a result of any action of the Secretary. App. Br., p. 30.

GALEO's failure to name even a single member who is covered by Sections 203 or 4(e) and would be injured by any action of the Secretary is fatal to any claim of associational standing. GALEO alleges that it has "approximately 165 members across Georgia, which includes members in Gwinnett County." Doc. 36-6, ¶ 15. However, GALEO has alleged only that some unknown number of its members are "in Gwinnett County" – not that any of these members are either LEP Spanish-speaking voters covered by Section 203 or citizens educated in American-flag schools in which the predominant classroom language was other than English and covered by Section 4(e). Further, even if any of GALEO's members are in fact covered by Section 203 and/or 4(e), GALEO has not alleged that any of its members suffered or will suffer any harm as a result of any action of the Secretary.

Georgia Republican Party v. SEC, 888 F.3d 1198, 1204 (11th Cir. 2018), confirms that GALEO lacks associational standing. In that case, this Court affirmed that associational standing requires an association to "name at least one member who can establish an actual or imminent injury." Rejecting claims that an organization asserting associational standing "need not name names" to establish standing based on prospective harm, this Court admonished that prior precedents had not relaxed the

requirement that an organization name at least one member who can establish an actual or imminent injury. *Id.* Because the plaintiffs had not named even one member that was subject to the provisions of the law the plaintiffs sought to invoke, the Court therefore found that the plaintiffs lacked standing. The circumstances here are exactly the same: GALEO has not named a single member subject to either Section 203 or 4(e) and who can establish an actual or imminent injury. The result is that GALEO lacks associational standing and this Court should therefore dismiss its claims for lack of subject-matter jurisdiction.

2. Any alleged injury to Appellants would not be traceable to or redressable by the Secretary.

Standing also requires establishing that the alleged injury is “‘fairly traceable’ to the defendant’s conduct, as opposed to the action of a third party.” *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1310 (11th Cir. 2019). Even if Appellants had articulated an Article III injury in fact, none have shown that any such injury is traceable to or redressable by the Secretary.

In *Jacobson*, this Court held that, although Florida elections law provided that the Secretary of State was responsible for “general supervision and administration of the election laws,” the traceability and redressability requirements for standing could

not be met where the state's ballot order statute "gives a different, independent official" control over the placement of candidates on the ballot. 974 F.3d at 1254. Because the law placed the relevant legal obligations on county elections supervisors, the Secretary "plainly is not the cause of any injuries from ballot order, and relief against her cannot redress those injuries." *Id.* at 1258.

This Court recently reaffirmed this principle in *Georgia Republican Party v. Sec'y of the State of Ga.*, No. 20-14741-RR, 2020 U.S. App. LEXIS 33969 (11th Cir. Dec. 20, 2020). Following *Jacobson*, this Court found that any injuries stemming from the processing of absentee ballots in Georgia was neither traceable to nor redressable by the Secretary as state law placed the duties to process absentee ballots on county elections officials and not the Secretary of State. Because the law gave the authority to conduct this part of the elections process to local supervisors, not the Secretary, the alleged injuries were not traceable to or redressable by the Secretary. *Id.* at *6-7.

Like the election supervisors in *Jacobson*, the counties, and not the Secretary, administer and conduct elections in Georgia. O.C.G.A. § 21-2-40(b); O.C.G.A. § 21-2-70(13); O.C.G.A. § 21-2-381. *Jacobson* makes clear that an injury is not traceable to a Secretary of State when a duty is assigned to independent officers

not subject to the Secretary’s control — and that a court may not simply presume that injuries are traceable to high-ranking state officers (like the Secretary of State or the Attorney General) by rote. *See* 957 F.3d at 1208 (*citing Lewis*, 944 F.3d at 1301). It is therefore not enough to show standing that the Secretary is Georgia’s “chief election officer,” or “serves as the chairman of the board which promulgates and enforces obligations on the counties’ conduct of elections.” *Contra* Doc. 36 at ¶24. Without some provision of state law making the Secretary accountable or responsible for Gwinnett County’s legal obligations in conducting its elections, any harm the plaintiffs claim to suffer is not traceable to the Secretary.

Here, just as in *Jacobson* and *Georgia Republican Party*, Georgia law squarely places any legal duties under Sections 203 and 4(e) upon Gwinnett County’s elections officials, not the Secretary. Section 203 specifically provides that Gwinnett County is the “covered jurisdiction” required to meet its obligations⁷, and the regulations interpreting Section 203 make doubly clear that Gwinnett County, as the “affected jurisdiction,” is responsible to determine what is required for compliance using its own analysis

⁷ *See Voting Rights Act Amendments of 2006, Determinations Under Section 203*, 81 Fed. Reg. 87532 (December 6, 2016).

and decisionmaking as to what steps are reasonable to achieve the statute's goals. *See generally* 28 C.F.R. §55.2. And, because Georgia law places the responsibility for conducting elections squarely upon county elections officials, the Secretary can neither meet nor breach the duty imposed by Section 4(e) to ensure that covered citizens do not find themselves subject to an "English-only election process." Therefore, because the relevant legal duties and authority are given to "local supervisors, not the Secretary," any injuries stemming from an alleged breach of such duties are neither traceable to nor redressable by the Secretary.

The district court's recognition of the fact that the Secretary was under no legal obligation to provide the materials Appellants request is not, as Appellants contend, an impermissible consideration of the merits of Appellants' claims (*see* Br. at p. 29). Rather, it is a straightforward application of *Jacobson* and later cases affirming that an injury is not traceable to or redressable by a defendant for the breach of a duty that the law imposes on a third party.

The district court was therefore correct in finding that it lacked jurisdiction over this action and dismissing Appellants' claims pursuant to Fed.R.Civ.P. 12(b)(1). This Court should affirm the dismissal of this action for lack of Article III standing.

B. This case is moot.

“A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.” *Aaron Priv. Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1335 (11th Cir. 2019) (quoting *Hunt v. Aimco Props.*, 814 F.3d 1213, 1220 (11th Cir. 2016)). And moot cases require dismissal. *De La Teja v. United States*, 321 F.3d 1357, 1362 (11th Cir. 2003).

This case is moot. The actions of which Appellants complain took place during the time periods leading up to the 2020 primary and general elections and the 2021 U.S. Senate runoffs. Appellants’ primary request for relief sought an order requiring the Secretary to mail bilingual versions of absentee ballot application forms that had been sent to Gwinnett County voters; however, the Secretary has mailed absentee ballot application forms to voters only once, before the June 9, 2020 primary, and nonpartisan general elections, and has not done so in subsequent elections. Appellants’ other requests for relief (which sought a sweeping order requiring the Secretary to provide bilingual translations of all press releases and election-related information regardless of content) were predicated entirely upon website contents and notices that are now out of date and are subject to elimination and/or revision prior to future elections.

Any injuries that Appellants might have suffered with regard to those elections are therefore no longer redressable through declaratory or injunctive relief, as “the requested effective end-date for the preliminary injunction has passed.” *Wood v. Raffensperger*, 981 F.3d 1307, 1317 (11th Cir. 2020) (quoting *Tropicana Prods. Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1581 (11th Cir. 1989)). Any claim for injunctive relief became moot upon the completion of the prior elections.

Nor are any injuries articulated by Appellants “capable of repetition yet evading review.” This exception applies “when the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the complaining party would be subject to the same action again. *National Broadcasting Co. v. Communications Workers of America*, 860 F.2d 1022, 1023 (11th Cir. 1988)(quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). Neither of these elements are present here.

First, the parties were easily capable of fully litigating the challenged actions prior to the 2020/2021 elections. The district court denied Appellants’ motion for a temporary restraining order and preliminary injunction on May 8, 2020. Doc 33-1. Appellants did not make any effort to advance the issue to this Court in order

to obtain a ruling prior to the elections and, in fact, they affirmatively sought to extend their time for raising this appeal until *after* the completion of the 2020/21 election cycle. Doc. 61.

Further, there is no reasonable expectation that the Appellants will be subjected in future election to any of the same actions of which they have complained of in this case. On March 25, 2021, Governor Brian Kemp signed S.B. 202 into law, which amends numerous provisions of Georgia’s election code. Included among those changes are significant revisions to code sections related to the procedures for applying for and casting absentee ballots, and specifically prohibiting the Secretary from sending absentee ballot forms directly to electors – the very action that formed the basis of Appellants’ initial complaint. Doc. 1, ¶¶ 2-9. While the Secretary has not yet had time to determine what changes might be made to website content or printed materials for future elections, the website contents or materials Appellants complained about in their amended complaints are likely to be revised or eliminated before any future election. There is therefore no reasonable expectation that Appellants will be subjected to any of the “same actions” of which they have complained in the future, and the “capable of repetition yet evading review” exception to mootness therefore does not apply. At present, the possibility of a

recurrence of the Secretary's prior actions is "purely theoretical" (*see Wood, supra* at *22) and Appellants' claims are therefore moot.

II. Appellants failed state a plausible claim for relief against the Secretary.

Even if Appellants had standing and this case were not moot, both of their claims against the Secretary still fail on the merits. First, Appellants cannot state a claim for relief against the Secretary under Section 203 because the state of Georgia is not a covered jurisdiction—meaning the Secretary has no responsibilities under that provision. Appellants' arguments to the contrary misread and radically expand the scope of Section 203. Second, Appellants' Section 4(e) claim fails because nothing in the complaint plausibly alleges that any act of the Secretary transforms Gwinnett County's elections into an "English-only" process or otherwise "conditions" their right to vote on the ability to speak English. Instead, Appellants urge this Court to read two district court cases interpreting Section 4(e) to expand the statute from a narrow prohibition on effective disenfranchisement into a sweeping affirmative obligation to translate materials at seemingly every level of the election process. Neither those cases,

nor the words of the statute itself, support such an expansion of Section 4(e)'s obligations.

A. Appellants cannot state a claim against the Secretary under Section 203 because the State of Georgia is not a covered jurisdiction.

1. Under Section 203 of the VRA, “no *covered State* or political subdivision shall provide voting materials only in the English Language.” 52 U.S.C. §10503(b)(1) (emphasis added); *see also* 52 U.S.C. §10503(c) (“Whenever any State or political subdivision subject to the prohibition of section (b) of this section provides any ... materials or information relating to the electoral process ... it shall provide them in the language of the applicable minority group as well as in the English language”) and 28 C.F.R. § 55.2 (“[t]he determination of what is required for compliance with section 4(f) and Section 203 is the responsibility of the affected jurisdiction”). Section 203 analysis thus starts with the question of who *provided* the voting materials at issue in a given case. *See, e.g., Delgado v. Smith*, 861 F.2d 1489, 1496-97 (11th Cir. 1988) (holding initiative petitions were not subject to § 203 because they were “formulated by” private citizens, and state involvement was insufficient to trigger VRA obligations); *Padilla v. Lever*, 463 F.3d 1046, 1051 (9th Cir. 2006) (recall petitions were

not “provided by” the State); *Montero v. Meyer*, 861 F.2d 603, 609-10 (10th Cir. 1988) (initiative petitions). It follows that when the State of Georgia—which everyone agrees is not a covered jurisdiction—provides voting materials, it is not bound by Section 203.

True enough, the Secretary sent English absentee ballot request forms to registered voters statewide (including Gwinnett) last year, Doc. 36 ¶¶ 4, 26, 37, and makes election related materials and press releases available statewide in the English language on the official Secretary of State website, *id.* ¶¶ 6, 50-60; but that is beside the point. Where Gwinnett County voters are concerned, *Gwinnett County* is the covered jurisdiction, and Gwinnett County (under Georgia election law) provided the covered materials in accordance with Section 203 as part of their election administration. *See* O.C.G.A. § 21-2-40(b) (“The General Assembly may by local Act create a board of elections and registration ... and empower the board with the powers and duties of the election superintendent relating to the conduct of primaries and elections and with the powers and duties of the board of registrars relating to the registration of voters and absentee-balloting procedures”); O.C.G.A. § 21-2-70(13) (County supervisor powers and duties include “conduct[ing] all elections ... and to

perform such other duties as may be prescribed by law” and preparation and publishing all notices and advertisements of elections); see also O.C.G.A. § 21-2-381 (addressing rules for absentee ballot applications to county and municipal registrars); *contra* Doc. 36 ¶¶ 48-49. Nothing in the VRA imputes those responsibilities to the Secretary as well. *See generally* 52 U.S.C. §§10303, 10503.

Thus, none of the alleged conduct brings the Secretary within the ambit of Section 203. The fact that the Secretary opted to send out absentee ballot applications statewide—i.e., to assist Georgia voters exercise their rights in a time of crisis—simply does not mean that the Secretary assumed wholesale responsibility for Gwinnett’s obligations. *See* Doc. 36 ¶¶ 4-5, 8, 10. Nor does the assertion that that “[a]ll election materials provided by the Georgia Secretary of State to Gwinnett County voters are English-only,” *id.* ¶¶48, 85. The Secretary provides resources for statewide use and accessibility. He does not (and has no responsibility to) oversee or administer Gwinnett County elections, nor to furnish their election related materials. Instead, the responsibility to provide bilingual materials to Gwinnett LEP voters lies with and is satisfied by the County. The mere fact that Gwinnett LEP voters *might* see or access the Secretary’s website and materials

does not wrest the responsibility to provide bilingual materials from the counties—which actually conduct the elections. The Secretary thus has no obligations under Section 203, and it follows that he cannot violate it on the facts alleged here.

2. Appellants resist that seemingly straightforward conclusion on two basic grounds. First, they argue that the State is nonetheless swept into the statute’s reach under Section 203(c)’s “subject to” language. Br. at 49-51. And second, they assert that various canons of construction somehow require reaching a different result than the plain text. Br. at 51-53 (construction if the statute is ambiguous); 53-55 (asserting that applying the plain meaning would lead to an absurd result); 55-57 (arguing that the statute’s legislative history contradicts its plain language). Both of those arguments plainly lack merit.

a. First, Appellants’ reading of Section 203(c) can’t be squared with the VRA’s text or structure. Appellants recognize, as they must, that Section 203 applies to a “covered State or political subdivision,” and that it is wherever a “state or political subdivision [is] subject to the prohibition of (b) of this section” that it is required to render materials it provides in the appropriate language. Br. at 49. And yet Appellants somehow read subsection (c) to be a separate—indeed, broader—statement of when

jurisdictions may be subject to Section 203's requirements. Br. at 49 (arguing that "a jurisdiction is 'subject to' the prohibition of subsection (b) if it is simply 'affected by or possibly affected by' the provision") (citations omitted). So, as Appellants read the statute, even when a non-covered state offers election materials to the general public across the State of Georgia, those materials *must* be in Spanish on the bare chance that voters in even a single covered jurisdiction *might* see or use them. Br. at 49. That argument rewrites Section 203 to render the textual limitation to "covered jurisdictions" meaningless.

Section 203 could hardly be clearer that its prohibitions apply solely to "covered jurisdictions." Subsection (a) sets out "Congressional findings and declaration of policy"; Subsection (b) lays out a "Bilingual voting materials requirement" defining "Covered States and political subdivisions"; and subsection (c) sets out the "Requirements of voting notices, forms, instructions, assistance, or other materials and ballots" applicable to those jurisdictions "subject to the prohibition of subsection (b)." Which "State[s] or political subdivision[s]" are "subject to the prohibition of subsection (b)"? The ones captured by subsection (b). Thus, a party is "subject to" the prohibition of subsection (b)—and caught

in the sweep of subsection (c)—only if it is captured by the coverage formula of subsection (b).

Reading section (c) as Appellants do—which not a single court appears to have done—invents a completely new statute. Under that view, a state is “subject to” the prohibition of subsection (b) “if it is simply ‘affected or possibly affected by’ the provision.” Br. at 49. That test would be met in every particular whenever a state contains *even one* covered political subdivision. Virtually every state has some statewide official or body with authority over elections, so there is no obvious reason why every single one of them are not “possibly affected by” a covered county’s responsibilities. If it is enough that, as here, a state produces materials which might be seen by voters within that subdivision, then under Appellant’s reasoning, every such state must provide every one of its “registration or voting notices, forms, instructions, assistance, or other materials” in the language of the applicable minority group. *See* 52 USC §10503(b)(3). That is a staggering and unsupported expansion of Section 203’s scope.

Appellants suggest that this Court adopted their reading of the statute in *Delgado v. Smith*, 861 F.2d 1489, 1490 (11th Cir.

1988), but *Delgado* says nothing of the kind.⁸ That case dealt with whether citizen-initiative materials were covered materials, not whether a state was covered whenever it incidentally interacted with voters residing within a covered county. *See id.* The language Appellants quote cite did not purport to say, let alone authoritatively hold, that when a county is the covered jurisdiction, a state (which is not covered as a whole) must render bilingual anything that voters there might incidentally encounter. *Delgado* simply does not stand for the proposition Appellants claim.

b. Second, no canon of construction supports Appellants’ reading of Section 203. Appellants’ scattershot arguments about “canons of construction” tilt at windmills. Br. 51-57. The statute is not ambiguous—and does not turn on construing Section 203 “broadly” or “narrowly”—the plain text speaks clearly against their submissions here. *Contra* Br. at 51-53 and 55-57. Nor do Plaintiffs offer any serious argument that hinging Section 203’s prohibitions on the coverage formula lead to an “absurd” result. *Id.* at 53-55. In Georgia, as in most states, elections are principally

⁸ Plaintiffs elsewhere recognize as much, arguing in footnote 9 that “[t]he holdings in *Delgado* and the other cases referred to by the district court are irrelevant.” App. Br. at 51, n.9.

administered at the county level. If a county, but not a state, is a covered jurisdiction, then it follows that the county, but not the state, is responsible for determining what materials and information should be made available to LEP voters in order to enable them to participate in that election. Where is the absurdity? Further, there is no allegation in this case that Gwinnett's failed to engage in efforts to fulfill its Section 203 obligations, let alone any credible allegation that the State has wholly subsumed Gwinnett's administrations of its own elections. *See id.* ¶¶ 61-65 (acknowledging Gwinnett County BORE provides materials in Spanish, but complaining about the format and translation of Gwinnett's materials). At best, they allege that the Secretary of State also publishes his own English-only version of materials that are translated into Spanish when they are provided by Gwinnett. *See id.* ¶53. Appellants' "donut hole" horror story is a fiction, and is simply not presented by this case.

Finally, Appellants fail to deliver on their promise of favorable interpretations by the United States Attorney General. *See Br.* 55-57. The first regulation they cite merely confirms that all sub-parts of a covered jurisdiction are obligated by section 203. *See Br.* at 57 (citing 28 CFR 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”). By its own terms, that language applies only to “political units that hold elections,” which the Secretary does not, and focuses 203’s requirements downward, toward subordinate jurisdictions, not expands them upward, toward the state as a whole. So too, 28 C.F.R. 55.19 belies Appellants’ reading, stating “[a] jurisdiction *required to provide* minority language materials”—i.e., a covered jurisdiction—“is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally”). To the extent that these regulations shed any light on the questions presented here, they fail to provide any support for Plaintiff’s reading of Section 203.

* * *

In sum, by the VRA’s plain terms, any Section 203 analysis must start with whether a jurisdiction is *covered* — and only proceed to the regulated materials if it is. That is enough to resolve this case. The State of Georgia is not a covered jurisdiction. To the extent § 203 requires any material to be in Spanish, Gwinnett County is the obligated party. Yet none of this means, as Appellants vigorously insist, that the State would

somehow be immunized if it wholly took over Gwinnett’s administration responsibilities. Instead, the reality (even on the face of the Second Amended Complaint) is that their hypothetical is not what happened here. There is no allegation that Gwinnett’s elections officials did not discharge their duties to administer Gwinnett’s elections, nor any allegation of fact that the Secretary has wholly subsumed those processes. This Court should affirm the dismissal of Appellants Section 203 claim.

B. Appellants’ Section 4(e) claim fails because they have not plausibly alleged that the Secretary has transformed Gwinnett County’s elections into an “English-only” process.

1. Section 4(e) of the Voting Rights Act protects American Citizens “educated in American-flag schools in which the predominant classroom language was other than English,” from the denial of the right to vote because of an “inability to read, write, understand, or interpret any matter in the English language.” 52 U.S.C. § 10303. Section 4(e), in short, prohibits conditioning the right to vote on the ability to understand the English language. That prohibited result can be achieved in more ways than simply passing a law placing such a condition—so courts and litigants frequently speak in terms of conducting an “English-only” election process. *See, e.g., Arroyo v. Tucker*, 372 F.

Supp. 764, 767 (E.D. Pa. 1974); *U.S. v. Berks County, Pennsylvania*, 277 F. Supp. 2d 570 (E.D. Pa. Aug. 20, 2003) (“Federal Courts, including this Court, have broadly interpreted Section 4(e) to prohibit *both* the explicit conditioning of the right to vote on the ability to speak English *and* the conduct of English-only elections”) (emphasis added). Here, there is no law placing an express condition requiring a voter to understand English, so Appellants’ claim against the Secretary rises and falls on their ability to show that he has nonetheless “conditioned” their right to vote on the ability to understand English, i.e., that he has effectively transformed Gwinnett County’s elections into an English-only process. They have not alleged anything of the kind.

As discussed above, elections in Georgia are principally administered at the County level. *See* O.C.G.A. § 21-2-40(b); O.C.G.A. § 21-2-70(13); O.C.G.A. § 21-2-381. Indeed, as even Appellants agree, Gwinnett County has the obligation to provide Spanish materials to its LEP voters. The Secretary, therefore, cannot violate § 4(e) merely by sending statewide materials or furnishing a website and making public statements in English—since his materials being in English does not mean that the election is actually or effectively “English-only.” Nowhere in the complaint, for example, did Appellants allege facts showing that

covered voters are unable to participate in elections or meaningfully register their political choice simply because the statewide materials are not also (i.e., in addition to the County's materials) available in Spanish.

2. Lacking that plausible allegation, Appellants urge this Court to read cases interpreting § 4(e) as expanding the statute from a narrow prohibition on effective disenfranchisement into a broad-sweeping obligation to translate materials at seemingly every level of the election process. Br. 61-62. Appellants misread those cases.

a. The cases Appellants cite do not support a more expansive reading of § 4(e). Appellants argue that *Berks*, 277 F. Supp. 2d at 579 and *Madera v. Detzner*, 325 F. Supp. 3d 1269 (N.D. Fla. Sept. 10, 2018) show that Section 4(e) may be violated even where an election process involves some assistance for LEP voters, and they insist these and other cases urge a “broad” understanding of 4(e).

But contrary to Appellants' suggestion, *see* Br. at 61-62, *Berks* expressly found § 4(e) liability because “Defendant's use of an English-only election process violates Section 4(e) by conditioning the right to vote ... on the ability to read, write, and understand English.” 250 F. Supp. at 538; *see also* 277 F. Supp. 2d 570, 579 (“Defendants' use of an English-only election process effectively

conditions the right to vote ... on the ability to read, write, and understand English” and “Defendants’ failure to provide Spanish-language oral and written assistance ... denies this group their right to effectively register a political choice”). Along the same lines, even to the extent to which the Berks Court “was not conducting entirely English-only elections” and “providing some language assistance that was inadequate under 4(e),” Br. at 61 (citing 277 F. Supp. 576)—the bottom-line finding was that the County was effectively running an “English-only election.” 277 F. Supp. at 579. Appellants have not plausibly alleged anything of that sort here (least of all against the State). At best, they allege that the County’s translation of its online materials is insufficient, Doc. 36 ¶¶ 61-65, and assert that the State must also translate its materials simply because they may see or attempt to use them, *id.* ¶¶ 48-60, 79-86. Moreover, when *Berks* referred to interpreting § 4(e) “broadly,” the court explained that it meant courts had read § 4(e) “to prohibit both the explicit conditioning of the right to vote on the ability to speak English and the conduct of English-only elections” 250 F.3d at 535—not as the open-ended translation mandate Plaintiffs envision here.

For this reason, Appellants’ insistence that Courts must read § 4(e) “broadly” does not salvage their claims, because, as closer

examination of these cases shows, the breadth they seek goes well beyond the meaning that the words of the statute will bear.

Even *Detzner* offers no refuge for Appellants. The district court there based its holding on the assertion that the Florida Secretary of State “‘authorizes and permits the Counties to provide English-only’ materials by ‘not requir[ing] the Counties to provide bilingual ballots or Spanish-language election materials, instructions, or assistance.’” 325 F. Supp. 3d at 1278. But Appellants’ claims here are different in kind. Unlike Florida, Georgia has no law (least of all one placing an obligation on the Secretary of State) specifically providing that “[b]allots shall be translated into other languages that are required by law or court order.” *See* Fla. Admin. Code. R. 1S-2.032 (2018). For that reason, Appellants’ allegations here do not trace *Detzner*’s logic that the Secretary has failed to require the counties to provide language assistance—instead asserting the state has an *independent* obligation to translate its own materials, despite the County’s own efforts to that end.

Along these lines, it makes no difference that “the right to vote encompasses the right to an effective vote” or “includes 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,” *Puerto*

Rican Organization for Political Action v. Kusper, 490 F.2d 575, 579-80 (7th Cir. 1973)—because the allegations in this case do not implicate that concern. Instead, the claim against the Secretary here reduces to the mistaken assertion that he too, notwithstanding the County’s language assistance and bilingual materials, must translate all of his public materials on the chance that covered voters in Gwinnett County might see them. There is no authority for the proposition that § 4(e) requires that, or that failing to do so has transformed Gwinnett’s elections into an “English-only” process.

b. Appellants also accuse the district court rejecting well-pleaded allegations and weighing factual evidence, but they fail to substantiate those claims. Instead, they point to a number of their factual allegations, which the district court accepted, and they claim the district court was therefore required to accept the conclusory assertion that “[d]oing so conditions Plaintiffs’ right to vote on their ability to understand English.” Br. at 63-64; *compare* Doc. 58 at 24-26. But it is black letter law that “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions” and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S.

662, 678 (2009). The district court did not weigh any evidence—it concluded Appellants had not actually alleged the facts necessary to state a violation of section 4(e). *See* Doc. 58 at 24-26.

III. The district court did not abuse its discretion in denying leave to amend the complaint a third time while dispositive motions were pending.

Finally, Appellants seek to salvage their case on the ground that the district court denied them a fourth opportunity to state plausible claims under the VRA. But they fail to show any abuse of discretion. The federal rules provide that “[o]n 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.” Fed. R. Civ. P. 15(d). The decision whether to allow a plaintiff to serve a supplemental pleading under Rule 15(d) is “solely in the Court's discretion,” and ought to be based upon such factors 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, [and] futility of the amendment.” *Lucas Assocs. v. Johnson*, 2007 U.S. Dist. LEXIS 105544, *3-4, 2007 WL 9702838 (N.D. Ga. 2007) (citing

Cowart v. Gonzales, No. 7:03-CV-139(HL), 2006 U.S. Dist. LEXIS 61731, 2006 WL 2523033, at *2 (M.D. Ga. Aug. 30, 2006) and *Ala. v. United States Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1309 (N.D. Ala. 2005) (noting that, with few exceptions, “[r]egardless of whether the motions are to amend or supplement, the standard of review is the same”). Appellants’ motion to supplement their complaint added new facts, but essentially doubled down on the same flawed legal theories the district court had already rejected at the preliminary injunction stage.

Appellants proposed supplementing their complaint because the Secretary had made available (statewide) an online version of Georgia’s absentee ballot application form so that voters could submit their application online as well as by mail, facsimile, and by email. Doc. 53 at 2-3. Again, there is no indication that the Secretary will continue this practice in future elections. And, in any event, Appellants had already alleged in their Second Amended Complaint that the Secretary’s website provided English language absentee ballot request forms, precinct cards, press releases, and other information. Doc. 36 ¶¶48-60. Indeed, Appellants had argued extensively that the absence of a Spanish language absentee ballot application and other voter information from the Secretary’s website should form a basis for liability as to

the Secretary under Sections 203 and 4(e) of the Voting Rights Act.

These proffered new factual allegations were simply more of the same, and their inclusion would not have changed the relevant law or affected the district court's analysis. *Compare* Doc. 44 with Doc. 33 at 11 (noting that the State of Georgia is not a covered jurisdiction under Section 203, and holding that the Secretary's materials do not render Gwinnett's elections "English only"). That is the very essence of futility. *See, e.g. Harvin v. Aten*, 2018 U.S. Dist. LEXIS 235085, *9-10, 2018 WL 10509901 (N.D.Ga. 2018) (denying motion to supplement where additional allegations "do not change the law" as it related to plaintiff's claims and the supplement would therefore be futile); *Emory Univ. v. Glaxo Welcome Inc.*, 1997 U.S. Dist. LEXIS 24044, *12 (N.D.Ga. 1997) (denying motion to amend and supplement complaint to add newly discovered information where new allegations were insufficient to support claim of willful patent infringement and the amendment would therefore be futile).

Appellants contend that the district court did not address their motion separately from the order dismissing the case, Br. at 65, and they assert that there was no undue delay because they filed the supplemental complaint two weeks after the events

alleged in the supplemental complaint took place, *id.* at 67. But as Appellants acknowledge, “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.” Br. 65 n.12. Moreover, Appellants neglect to mention that by the time they asked to supplement their complaint, the defendants’ motion to dismiss had already been fully briefed and argued a full month before.

The district court did not abuse its discretion by refusing to short circuit dispositive motions for futile, duplicative allegations. This Court should affirm the dismissal of Appellants’ claims pursuant to Fed.R.Civ.P. 12(b)(6).

CONCLUSION

For the reasons set out above, this Court should affirm the judgment of the district court dismissing Appellants’ claims for lack of Article III jurisdiction or, in the alternative affirm the dismissal for failure to state a claim upon which relief may be granted.

Respectfully submitted.

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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 10,575 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 29, 2020, 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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