

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

MARTIN COWEN, *et al.*,

*Plaintiffs,*

v.

BRAD RAFFENSPERGER, in his  
official capacity as the Georgia Secretary  
of State,

*Defendant.*

CIVIL ACTION

FILE NO. 1:17-cv-4660-LMM

**DEFENDANT’S RESPONSE IN OPPOSITION TO  
PLAINTIFFS’ MOTION FOR LEAVE  
TO FILE A SUPPLEMENTAL COMPLAINT**

Defendant Brad Raffensperger, Georgia Secretary of State (“Defendant”), files this response in opposition to Plaintiffs’ Motion for Leave to File a Supplemental Complaint, filed May 21, 2024. Dkt. 226. Plaintiffs’ requested relief under Rule 15(d) is not available in the post-judgment context, and even if it were, granting such relief would be unduly prejudicial and likely futile. Therefore, Plaintiffs’ Motion should be denied.

**I. Argument and Citation to Authority**

**A. Rule 15(d) is not applicable in post-judgment situations.**

Fed. R. Civ. P. 15(d) provides 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. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

However, nothing in Rule 15(d) suggests that it may apply to supplement a complaint that has already been dismissed. *See Daker v. Daker*, 2020 U.S. Dist. LEXIS 273255, at \*6 (N.D. Ga. Apr. 30, 2020) (“Moreover, Rule 15 contains no provision for amending a complaint that has been dismissed.”), *reversed in part on other grounds by Daker v. Daker*, 2021 U.S. App. LEXIS 31266 (11th Cir. 2021).

Other courts in other jurisdictions have found that Rule 15, including subsection (d), has no applicability in post-judgment contexts. *See Nextel Spectrum Acquisition Corp. v. Hispanic Info. & Telcoms. Network*, 571 F. Supp. 2d 59, 65-66 (D.D.C. 2008) (“Once a final judgment has been entered, a motion to amend a complaint under Rule 15(a) should not be granted unless the plaintiff first satisfies Rule 59(e)’s more stringent standard for setting aside that judgment. [cits.] The same requirement applies for a motion to amend a complaint under Rule

15(d).”); *United States v. Int’l Bhd. of Elec. Workers*, 72 F.R.D. 507, 513 (E.D. La. 1976) (“Additionally, neither Rule 15(c), permitting the relation back of amendments, nor 15(d), permitting supplemental amendments, is applicable in a post-judgment situation.”); *Moreland v. Robinson*, No. 3:05-cv-334, 2015 U.S. Dist. LEXIS 2708, at \*8-9 (S.D. Ohio Jan. 8, 2015) (“Nothing in [Rule] 15 speaks to post-judgment amendment or supplementation of pleadings.”).

The Eleventh Circuit has not been so explicit as to Rule 15(d); however, the Eleventh Circuit has ruled upon whether Rule 15(a) applies in a post-judgment context, and such cases are instructive because Rule 15(a) and Rule 15(d) offer similar relief, although Rule 15(d) differs in that it seeks to add matters that occurred subsequent to the pleadings to be supplemented. *McGrotha v. Fed Ex Ground Package Sys.*, 2007 U.S. Dist. LEXIS 18794, at \*5 (M.D. Ga. Feb. 24, 2007) (citing Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1504 (1971)); *see* Fed. R. Civ. P. 15(d). However, “the formal distinction between amendment and supplementation is of no consequence, and courts routinely apply Rule 15(a)’s ‘freely given’ standard to Rule 15(d) motions to supplement.” *McGrotha*, 2007 U.S. Dist. LEXIS 18794, at \*5 (internal citations and quotations omitted). *See Ohai v. Delta Cmty. Credit Union*, 2023 U.S. Dist. LEXIS 219079, at \*5 (N.D. Ga. Jan. 18, 2023) (“The standard applied to

supplementing pleadings under Rule 15(d) is the same as the standard applied to amending pleadings under Rule 15(a)[.]”); *Wilcoxson v. Physicians Aesthetics*, 2019 U.S. Dist. LEXIS 229641, at n.2 (N.D. Ga. Oct. 15, 2019) (“The standard under FRCP 15(d) is ‘essentially the same’ as that under 15(a)[.]”). *See also Franks v. Ross*, 313 F.3d 184, n.15 (4th Cir. 2002) (“A supplemental pleading differs from an amended pleading because it relates to matters occurring subsequent to the filing of the initial complaint. [cit.] ... The distinction is of little practical significance, however, because the standard used by a district court in ruling on a motion to amend or on a motion to supplement are nearly identical.”); *but see Lutter v. JNESO*, 86 F.4th 111, n.13 (3d Cir. 2023) (“The standards for amendment and supplementation are similar, but they do not conform exactly as more lenience is afforded to amendment.”).

In this circuit, Rule 15(a) has no applicability in a post-judgment context. *See Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1344-45 (11th Cir. 2010). While some cases leave open the question of whether Rule 15 motions may sometimes apply to complaints that have been dismissed, *see, e.g., Czeremcha v. Int’l Assoc. of Machinists & Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1556 (11th Cir. 1984), it is clear that “[s]uch a motion would be inappropriate [] if the court clearly indicated ... that dismissal of the complaint also constitutes dismissal

of the action.” *Id.* at n.6. *See also Sheffler v. Americold Realty Trust*, 2023 U.S. App. LEXIS 14458, at \*4 (11th Cir. June 9, 2023) (“[T]he right to amend under Rule 15 terminates once a complaint is finally dismissed.”); *Daker v. Humphrey*, 2018 U.S. Dist. LEXIS 242095, at \*5 (M.D. Ga. Nov. 15, 2018). The Eleventh Circuit has recently affirmed that once an action has been fully dismissed, any attempt to seek leave to amend the complaint should be reviewed under the standards governing Rule 59(e) or Rule 60(b), as opposed to the more liberal standard under Rule 15(a). *Carpenters Pension Fund of Ill. v. MiMedx Grp., Inc. (In re MacPhee)*, 73 F.4th 1220, 1250 (11th Cir. 2023).

Here, the Court has clearly indicated that the action is dismissed. *See* Dkt. 214 at 13. The Clerk of Court closed the case. *See* Dkt. 215. Thus, there is no longer a right to amend or otherwise supplement the Complaint pursuant to Rule 15, which is the rule under which Plaintiffs are traveling.<sup>1</sup> Accordingly, this Court should deny Plaintiffs’ Motion.

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<sup>1</sup> The fact that there is still a pending Motion for Reconsideration at this time does not change the finality of the Court’s judgment. *See Hertz Corp. v. Alamo Rent-A-Car*, 16 F.3d 1126, 1132 (11th Cir. 1994) (“The strictures of Rule 59(e) remain dormant, however, until a final judgment has been entered.”); Fed. R. Civ. P. 60(b) (“[T]he court may relieve a party ... from a *final* judgment, order, or proceeding....”).

**B. The Court should deny Plaintiffs’ Motion because Plaintiffs’ attempt to file a supplemental complaint is unduly prejudicial to Defendant, and a supplemental complaint would be futile.**

However, even if the Court finds that Rule 15(d) does apply in post-judgment contexts, the Court should not grant motions to supplement where there is undue prejudice to the opposing party by virtue of allowance of the amendment or where the amendment is futile. *Trilink Saw Chain, LLC v. Blount, Inc.*, 583 F. Supp. 2d 1293, 1329 (N.D. Ga. 2008); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). Both are true here. Defendant would be unduly prejudiced should Plaintiffs be permitted to resurrect a case that has finally been concluded after six years in litigation. Further, permitting Plaintiffs to supplement their claims would be futile, as their proposed “new” claim is nothing more than a thinly-veiled recasting of the “classification” theory of equal protection that the Eleventh Circuit Court of Appeals squarely rejected in *Cowen v. Sec’y of Ga.*, 22 F.4th 1227 (11th Cir. 2022) (“Cowen II”).

**1. Defendant would be unduly prejudiced because the action has already been dismissed.**

A party may be unduly prejudiced where the opposing party attempts to raise a claim late in the litigation which would delay the resolution of the case, such as when significant discovery has already taken place. *See United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 7 (11th Cir. 2015); *Donnelly v.*

*Wal-Mart Stores East, LP*, 844 Fed. App'x 164, 170 (11th Cir. 2021) (no abuse of discretion where district court denied motion to amend complaint more than two months after pleading amendments deadline and significant discovery had taken place). *Cf. Augusta Nat'l, Inc. v. Green Jacket Auctions, Inc.*, 2019 U.S. Dist. LEXIS 241960, at \*10-11 (S.D. Ga. Jan. 8, 2019) (finding no prejudice where there is no evidence that discovery would be delayed or that discovery was substantially completed). *See also Walker v. UPS*, 240 F.3d 1268, 1278 (10th Cir. 2001) (no abuse of discretion where district court refused to allow supplemental claim where discovery was closed, other party had moved for summary judgment on all of appellant's claims, and appellant's proposed new claim would have required additional discovery and precluded entry of final judgment where all original claims had been resolved).

As this Court noted eight months ago, "Plaintiffs cannot assert a new claim at this late stage." Dkt. 214 at 12. This is even more true now, when the Court has finally resolved and disposed of Plaintiffs' myriad and constantly evolving claims and shifting legal theories. Here, Plaintiffs' attempt to supplement their Complaint at this late date is even more prejudicial to Defendant than those cases in which motions to supplement have been rejected because significant discovery has been conducted, or dispositive motions for summary judgment have been briefed and

are awaiting adjudication. *See Trilink*, 583 F.Supp. 2d at 1329 (“Moreover, leave to amend may be denied when the case has progressed to an advanced stage and extensive discovery is nearly complete, particularly where the amendment would require additional extensive discovery.”); *Browman v. Kendall Patient Recovery United States, LLC*, 2023 U.S. Dist. LEXIS 171583, at \*12 (S.D. Ga. Aug. 15, 2023) (“[An e]xample[] of situations where a court might deem an amendment prejudicial [is] if the opponent would be required to engage in significant new preparation at a late stage of proceedings[.]”).

Rather, this is a case that has *already* been resolved as to the merits after three separate motions for summary judgment were ruled upon, Dkt. 113, 159, 214; two appeals to the Eleventh Circuit were heard and decided, *see Cowen v. Ga. Sec’y of State*, 960 F.3d 1339 (11th Cir. 2020); *Cowen II*, *supra*; and a final judgment has been entered, *see* Dkt. 214, 215. Significant discovery has been conducted—and completed—by both parties throughout the pendency of this case, and the *only* matters now pending before the Court are post-judgment motions, *see* Dkt. 216 (Plaintiffs’ Motion for Reconsideration); Dkt. 218 (Defendant’s Bill of Costs). Plaintiffs’ attempt to resurrect this suit by injecting a new claim, based on a statute that has not yet gone into effect, would at minimum expand the scope of the present, already-resolved action; would require both parties to engage in

significant new preparation, likely including discovery on Plaintiffs' new, untested claim; and would necessarily delay the case's resolution by unnecessarily reviving it. To the extent Plaintiffs' proposed supplemental complaint raises a claim that is not already controlled by the Eleventh Circuit's rejection of their rejected classification theory, there would be little prejudice cast upon Plaintiffs if their Motion were denied because if Act 697 does give rise to a viable legal claim, Plaintiffs may initiate a new action if and when their claim becomes ripe, which it has not yet. *See Trilink*, 583 F. Supp. 2d at 1329.

**2. Plaintiffs' Motion is futile because the supplemental complaint, if added, does not add appreciably-different claims or allegations and would be subject to dismissal.**

A potential supplemental complaint is futile when that complaint includes allegations that do not change the analysis previously relied upon or are insufficient to support a claim. *See Harvin v. Aten*, 2018 U.S. Dist. LEXIS 235085, at \*9-10 (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 Wellcome Inc.*, 1997 U.S. Dist. LEXIS 24044, at \*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). *See also Cultor Corp. v. A.E. Staley Mfg. Co.*, 224 F.3d 1328, 1333 (Fed. Cir. 2000) (proposed amended complaint would be futile where district court previously ruled against similar claims); *Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 425 (6th Cir. 1999) (claims sought to be added in proposed amendment were “so similar” to counts in the complaint that had already been decided that inclusion would be futile).

Here, Plaintiffs suggest that Act 697 gives rise to a new Equal Protection claim by creating impermissibly different ballot-access requirements for presidential candidates as compared to U.S. Representative candidates, and that such disparity is not justified by the Secretary’s interest in “that candidates demonstrate a modicum of support among the electorate of the office they seek”, *see* Dkt. 226-1, ¶ 9. However, such a suggestion is unavailing. There is no real difference between Plaintiffs’ proffered supplemental Equal Protection claim and the disparate classification Equal Protection claim that the Eleventh Circuit squarely rejected in *Cowen II*. The fact that Plaintiffs’ initial disparate classification case was based on differential treatment between U.S. Representative candidates and statewide office candidates rather than Presidential candidates provides no meaningful basis for distinction. It is well-settled law that presidential elections are unique since “the President and Vice President are the only elected

officials who represent all the voters in the Nation.” *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). Just as Libertarian candidates could garner support at a statewide level while lacking a significant modicum of support within their congressional district, Libertarian presidential candidates might garner significant support nationally while their congressional hopeful counterparts fail to generate a modicum of support among their local constituents. *See Cowen II*, 22 F.4th at 1235. The nature of the interest in presidential elections is different, *see id.*, at n.3, and the Secretary’s previously-asserted interest in regulating ballot access for U.S. Representative candidates is not implicated, let alone imperiled, by Act 697. Nothing in Plaintiffs’ proposed supplemental complaint suggests its inclusion would compel a different analysis than that already done by the Eleventh Circuit in *Cowen II*, which disposed of Plaintiffs’ previous Equal Protection claim. Accordingly, Plaintiffs’ supplemental complaint is futile.

The proposed supplemental complaint may also be futile where “the complaint, as amended, would be subject to dismissal.” *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771, n.10 (11th Cir. 2000). A complaint may be subject to dismissal if it is not ripe for adjudication or review. *See Cheffer v. Reno*, 55 F.3d 1517, 1523 (11th Cir. 1995) (“[Courts] do not have subject matter jurisdiction to address unripe claims[.]”).

By Plaintiffs' own admission, the relevant portion of Act 697 does not come into effect until July 1, 2024. *See* Dkt. 226, at 2. Thus, at the time of Plaintiffs' filing of their Motion in May 2024, the basis of their claim had not yet arisen. *See Blanco v. Joseph*, 2021 U.S. Dist. LEXIS 187006, at \*3-4 (N.D. Fla. Aug. 26, 2021) (habeas petition premature when provisions at issue had not yet gone into effect).

The Court should evaluate jurisdictional issues before it as of the time of filing. *See Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."); *Support for Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1203 (11th Cir. 2021) ("At the time plaintiffs filed their operative complaint, [the challenged provision] itself specified neither criminal nor civil penalties [and thus did not establish traceability.]" ). Therefore, should the complaint be supplemented at this time, in addition to being a procedural nullity as the current action has been dismissed, the complaint would be subject to dismissal. *See Blue Ridge Mt. Elec. Mbrshp. Corp. v. Ams. Ctr. Corp.*, 2020 U.S. Dist. LEXIS 257705, at \*11 (N.D. Ga. Nov. 18, 2020) (proposed supplemental claim for declaratory judgment denied as futile where basis for claim had not yet arisen). Thus, such supplemental pleading is futile.

Accordingly, for the reasons set forth herein, this Court should deny Plaintiffs' Motion for Leave to File a Supplemental Complaint.

Respectfully submitted, this 4th day of June, 2024.

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**Local Rule 7.1.D Certification:**

By signature below, counsel certifies that the foregoing pleading was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

/s/ Danna Yu  
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2024, I caused to be filed the foregoing  
**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION  
FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT** with the Clerk of  
Court using the CM/ECF system, which will automatically send e-mail notification  
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