

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

**Martin Cowen**, et al.,

Plaintiffs,

vs.

**Brad Raffensperger**, in his  
official capacity as Secretary of  
State of the State of Georgia,

Defendant.

Case No. 1:17-cv-04660-LMM

**Plaintiffs' Reply in  
Support of Their Motion  
for Leave to File a  
Supplemental Complaint**

The plaintiffs respectfully submit this reply in support of their motion for leave to file a supplemental complaint. (ECF 226.) The Secretary doesn't dispute that the plaintiffs here could file an entirely new lawsuit raising the claim contained in the proposed supplemental complaint. (ECF 227 at 9.) That claim isn't precluded by the Eleventh Circuit's most recent ruling in this case because the claim is based on new facts, and the Eleventh Circuit has been very clear that a plaintiff challenging ballot-access restrictions is entitled to bring a new claim

based on new facts. *See Cowen v. Ga. Sec’y of State*, 960 F.3d 1339, 1344-45 (11th Cir. 2020) (“*Cowen I*”). The only question is whether the plaintiffs may do so in this litigation or must file a new, related case that would likely be assigned to the same judge anyway.

**I. Rule 15(d) permits supplementation here.**

The Secretary first argues that Rule 15(d) doesn’t allow a court to permit supplementation after judgment. (ECF 227 at 2-5.) He concedes, of course, that Rule 15 says no such thing. (*Id.* at 2.) The text of Rule 15(d) contains no such limitation and instead permits supplementation “on just terms.” Fed. R. Civ. P. 15(d).

The Secretary also concedes that the Eleventh Circuit hasn’t spoken on the issue except to affirm that leave to supplement should be freely given. (*Id.* at 3.) *See Nance v. Ricoh Electronics, Inc.*, 381 F. App’x 919, 923 (11th Cir. 2010); *see generally* 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1504 (3d ed. 2023).

The Secretary argues only that supplementation under Rule 15(d) isn’t available after judgment because some cases hold that *amendment* under Rule 15(a) isn’t available after judgment. (ECF 227 at 4-5.) But this argument ignores the difference between supplementation and

amendment, and the precedent isn't nearly uniform. Some cases *do* allow amendment after judgment under some circumstances. (*Id.* at 4.) And one key circumstance, the Secretary admits, is whether the action has been finally dismissed. (*Id.* at 5.)

Here, the action hasn't been finally dismissed because the plaintiffs' motion for relief under Rule 59 remains pending. (ECF 216.) *See, e.g., Members First Fed. Credit Union v. Members First Credit Union of Fla.*, 244 F.3d 806, 807 (11th Cir. 2001) (a timely motion for relief under Rule 59 suspends the finality of a judgment). For all of these reasons, the Court's recent entry of judgment is no bar to supplementation.

## **II. There is no prejudice here.**

The Secretary next argues that he will be unduly prejudiced by supplementation because the parties have conducted significant discovery and dispositive motions have been filed and briefed. (ECF 227 at 6-9.) But that's precisely why supplementation is appropriate: if this Court doesn't allow supplementation, the Secretary (and this Court) will have to go through all of that again in a new case.

The Secretary doesn't explain why re-litigating the essential facts of this case is more prejudicial than simply proceeding here. And his argument defies reason. Rule 15(d) was enacted to avoid such unnecessary duplication of effort.

**III. The supplemental complaint isn't futile.**

Lastly, the Secretary argues that the Court should deny leave to supplement because the supplemental complaint would be futile. (ECF 227 at 9-12.) He asserts that it would be futile because the supplemental claim is indistinguishable from the claim that the Eleventh Circuit addressed in *Cowen II*, and because the supplemental claim isn't yet ripe. *See Cowen v. Sec'y of State of Ga.*, 22 F.4th 1227 (11th Cir. 2022) ("*Cowen II*"). But neither argument has any merit.

The proposed supplemental complaint is based entirely on facts that arose after *Cowen II*. (ECF 226-1.) Act 697, passed by the Georgia General Assembly in 2024, allows presidential-electoral candidates nominated by the Libertarian Party, the Green Party, and the Constitution Party to qualify for ballot access in Georgia in 2024 without having to demonstrate *any* support among the electorate of the office they seek. This development undermines the State's previous

justification for the petition requirement at issue in this case and thus gives rise to a new claim for relief stemming from this new disparity. *Cowen II* cannot have addressed this claim because it's based on facts that arose after that decision.

The Eleventh Circuit has repeatedly held, moreover, that earlier ballot-access cases upholding prior laws “do not foreclose the parties’ right to present the evidence necessary” to bring subsequent challenges to the same State’s laws. *Bergland v. Harris*, 767 F.3d 1551, 1554 (11th Cir. 1985); *accord Cowen I*, 960 F.3d at 1343. As a result, *Cowen II* wouldn’t foreclose the plaintiffs’ supplemental claim here even if the new facts occurred before that decision.

The Secretary’s ripeness argument fares no better. He argues that because Act 697 doesn’t go into effect until July 1, 2024, the Court would be bound immediately to dismiss the case for lack of jurisdiction. In other words, even though there is nothing that’s going to stop Act 697 from taking effect in a few days, the Court lacks the power to grant the motion. But that is not the law.

The central concern of the ripeness doctrine “is whether the case involves uncertain or contingent future events that may not occur as

anticipated, or indeed may not occur at all.” 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3532 (3d ed. 2023). But, as the Supreme Court has noted, “[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.” *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974). Here, the Secretary doesn’t claim that Act 697 might not take effect in a few days. It will—because there is nothing to stop it. As a result, ripeness is no bar to the plaintiffs’ motion.

### **Conclusion**

For these reasons, the Court should grant the plaintiffs leave to file their supplemental complaint and order the Secretary to file a responsive pleading within 21 days thereafter.

Respectfully submitted this 18th day of June, 2024.

**/s/ Bryan L. Sells**

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