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

VOTE.ORG, *et al.*,

Plaintiffs,

v.

GEORGIA STATE ELECTION BOARD, *et al.*,

Defendants,

GEORGIA REPUBLICAN PARTY INC., *et al.*,

Intervenor-Defendants.

Civil Action No.:
1:22-cv-01734-JPB

STATE DEFENDANTS' RESPONSE TO
PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

On October 17, 2024, Plaintiffs filed a Notice of Supplemental Authority [Doc. 217] drawing the Court's attention to an opinion from the Western District of Arkansas, *Get Loud Arkansas v. Thurston*, No. 5:24-CV-5121, 2024 WL 4142754 (W.D. Ark. Sept. 9, 2024) ("*GLA*"). Plaintiffs point to the court's holdings regarding standing and the application of the Materiality Provision of the Civil Rights Act to a wet signature requirement on voter registration applications.

This Court should not follow *GLA*. As discussed below, the court's decision is inconsistent with recent Supreme Court and Courts of Appeal

decisions regarding standing and out of step with any rational reading of the Materiality Provision. In addition, the *GLA* decision has been stayed by the Eighth Circuit pending appeal. Am. Order, *Get Loud Ark. v. Thurston,* No. 24-2810 (8th Cir. Oct. 9. 2024) [*see* Doc. 217-2], without, as Plaintiffs suggest (at 1–2), any reference to *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Accordingly, the *GLA* opinion has neither precedential nor persuasive value.

A. On Standing, the District Court in *GLA* Misapplied the Very Supreme Court Precedent Upon Which It Purported To Rely.

Plaintiffs first point to the *GLA* district court's finding that GLA had standing to suggest that Vote.org has standing here. [Doc. 207 at 2–4]. While the district court in *GLA*, 2024 WL 4142754, at *12, cited *Food & Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), the district court went on to reach a holding that is flatly contrary to the Supreme Court's admonition in *Alliance*—i.e., that simply expending costs to comply with the rule was sufficient for standing. *GLA*, 2024 WL 4142754, at *13.

By contrast, in applying *Alliance*, the Ninth Circuit has recently held that such a diversion of resources is *insufficient* to establish standing—as noted in State Defendants' Notice of Supplemental Authority [Doc. 216]. Specifically, in *Arizona Alliance for Retired Americans v. Mayes*, the Ninth Circuit found a voting rights group had failed to establish standing based upon a diversion of resources "to develop training materials or ask constituents

additional questions." No. 22-16490, __ F.4th __, 2024 WL 4246721, at *9 (9th Cir. Sept. 20, 2024), *petition for reh'g en banc docketed*, No. 22-16490 (9th Cir. Oct. 4, 2024), ECF No. 89. The Ninth Circuit held that such a diversion-of-resources claim was an improper attempt by the plaintiffs there "to spend their way into Article III standing by taking new actions in response to what they view as a disfavored policy." *Id.* This was so because "as *Hippocratic Medicine* explains, spending money voluntarily in response to a governmental policy cannot be an injury in fact." *Id.*

Similarly, modifying how GLA registers individuals to vote is simply not a concrete injury to its core mission, which the law at issue there still allowed the organization to pursue. The same applies here to Vote.org, making the district court's holding in *GLA* inapplicable.[1]

B. On the Merits, the District Court in *GLA* Relied on Arguments and Opinions that Plainly Misapply the Materiality Provision.

Plaintiffs also point to the *GLA* district court opinion as supporting their claims that Georgia's handwritten signature requirement on absentee ballot applications violates the Materiality Provision. [Doc. 217 at 4–6]. Here again,

[1] In this case, Vote.org's mission is not "perceptibly impaired," since Vote.org simply switched Georgia voters to an already existing model for sending absentee ballot applications through the mail. And there is no argument that Priorities USA's core mission is perceptibly impaired given that its mission has nothing to do with assisting voters applying for absentee ballots. *See* [Doc. 216 at 5].

the opinion is not remotely persuasive.

1. On the merits, the *GLA* court relied almost exclusively on an opinion from the Western District of Texas in *La Union del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725, 751 (W.D. Tex. 2023) ("*LUPE*"), or earlier opinions in that case. But, like the *GLA* decision itself, that order has likewise been stayed by the Fifth Circuit: There the Fifth Circuit held that "Appellants are likely to succeed on the merits," because states may apply at least as much scrutiny to absentee voting as they do to in-person voting. *See United States v. Paxton*, No. 23-50885, at *7 (5th Cir Dec. 15, 2023), ECF 22 (Mot. for Stay), 31 (Order Granting Temporary Stay), 80 (Order Granting Stay Pending Appeal).

This is no surprise, as the district court in *LUPE* erroneously found that errors in a driver's license number on the absentee-ballot application or return envelope were somehow "immaterial." *LUPE*, 705 F. Supp. 3d at 751–52 ("It is self-evident that a voter's ID number is not material to her eligibility to vote under Texas law. Indeed, by itself, a voter's DPS number or SSN4 cannot offer any information about a voter's substantive eligibility to vote…."). And, although the Fifth Circuit has not yet reached a final decision in the *LUPE* case, under Eleventh Circuit precedent, accepting an erroneous identification number as accurate would mean the person was not who they claimed to be—a very material "error." *NAACP v. Browning,* 522 F.3d 1153, 1175 (11th Cir. 2008).

2. The *GLA* court also made the same erroneous conclusions regarding the application of the Materiality Provision as the court in *LUPE* made—errors addressed at length in State Defendants' Motion for Summary Judgment [Docs. 156 & 156-1], their Reply in Support of their Motion for Summary Judgment [Doc. 205], and their Response to Plaintiffs' Motion for Summary Judgment [Doc. 190].

First, Plaintiffs point to *GLA*'s reliance on Justice Alito's dissent from the denial of certiorari in *Ritter v. Migliori*, 142 S. Ct. 1824 (2022). [Doc. 217 at 4–5]. But the *GLA* court misapplied Justice Alito's words concerning the scope of the Materiality Provision and how it might apply to a wet signature requirement. Specifically, *GLA* referenced the following statement from Justice Alito's dissent:

> Suppose a voter did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it using the standard notation employed when a letter is signed for someone else: "p. p. John or Jane Doe." Or suppose that a voter, for some reason, typed his or her name instead of signing it. Those violations would be material in determining whether a ballot should be counted, but they would not be "material in determining whether such individual is qualified under State law to vote in such election."

GLA, 2024 WL 4142754, at *20 (quoting *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting)). What the *GLA* court and Plaintiffs leave out is Justice Alito's conclusion that such a requirement would still *not* violate the Materiality Provision: "Therefore, under the Third Circuit's interpretation, a ballot signed

by a third party and a ballot with a typed name rather than a signature would have to be counted [because it is not "material" to whether the individual is "qualified" to vote "under State law"]. It seems most unlikely that this is what 52 U.S.C. § 10101(a)(2)(B) means." *Ritter*, 142 S. Ct. at 1826 (Alito, J., dissenting). Indeed, the Third Circuit later adopted the rationale Justice Alito actually set out in his *Ritter* dissent in re-evaluating the date requirement on the absentee ballot envelope in Pennsylvania, finding it did *not* violate the Materiality Provision. *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 134 (3d Cir. 2024), *petition for writ of certiorari docketed,* No. 24-363 (U.S. Oct. 1, 2024). *See also* State Defs.' Reply in Supp. of Mot. for Summ. J. [Doc. 205].

Second, Plaintiffs point to *GLA's* determination that "a state's purported interests are 'not a relevant consideration in analyzing a violation under the Materiality Provision.'" [Doc. 217 at 5 (quoting *GLA*, 2024 WL 4142754, at *18)]. Yet the Third and Fifth Circuits have held otherwise, finding that the Materiality Provision was never meant to eviscerate voting procedures and requirements not directly tied to determining whether someone is qualified to vote. *Pa. State Conf.*, 97 F.4th at 134; *Vote.org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023). The contrary approach taken in *GLA*, based exclusively on the holding of *LUPE*, is erroneous and should not be followed. [Doc. 217 at 5 (quoting *GLA*, 2024 WL 4142754 at *18).] *See also* State Defs.' Reply [Doc.

205] at 20–25.

Third, Plaintiffs point to *GLA*'s holding that the ability to cure a defective signature does not change the fact that the right to vote occurred when the original application was rejected for failure to follow the rules. [Doc. 217 at 5 (quoting *GLA*, 2024 WL 4142754, at *15–16).] This erroneous holding is again based exclusively on *LUPE* [Doc. 217 at 6 (quoting *GLA*, 2024 WL 4142754, at *15)], and is wrong for the reasons State Defendants explained at length in their Motion for Summary Judgment [Doc. 156-1] at 32, 35.

Fourth, Plaintiffs point to *GLA*'s conclusion that qualifications to vote are only those related to U.S. citizenship, state residence, being at least 18 years of age, and no disqualifying condition. [Doc. 217 at 6, quoting *GLA*, 2024 WL 4142754, at *17.] Again, *GLA* relies exclusively on *LUPE*, which has been stayed, as noted above. *GLA*, 2024 WL 4142754, at *17. And the error of such an approach is addressed at length in State Defendants' Motion for Summary Judgment [Doc. 156-1] at 31–39.

3. Finally, and in any event, *GLA* is also distinguishable. First, it drew a distinction between an administrative rule (which the court found to be at odds with Arkansas state law) and a state statute, which is at issue here. *GLA*, 2024 WL 4142754, at *21.

Second, in *GLA* the court noted there was no evidence, at the motion to dismiss stage, that the rule at issue was driven by the "the concept of

'solemnity'" that can often justify voting regulations. *Id.* at *22. Yet here, there is significant and undisputed record evidence of the "solemnity" value of a handwritten signature over a digital signature when it comes to applying for an absentee-by-mail ballot. State Defs.' Mot. for Summ. J. [Doc. 156-1] at 26–30.

CONCLUSION

In short, the analysis and conclusions of the *GLA* district court on the issues of standing and the application of the Materiality Provision are both wrong and inapplicable here. And, for reasons previously explained, the Court should grant summary judgment to State Defendants.

Respectfully submitted this 31st day of October, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing State Defendants' Response to Plaintiffs' Notice of Supplemental Authority has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Gene C. Schaerr
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