

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

BRANDON COBB, et al., etc.,

Plaintiffs,

v.

GEORGIA DEPARTMENT OF  
COMMUNITY SUPERVISION, et al., etc.,

Defendants.

CIVIL ACTION NO.

1:19-cv-03285-WMR

**MOTION FOR LEAVE TO SUPPLEMENT PLAINTIFFS' STATEMENT  
OF ADDITIONAL MATERIAL FACTS IN SUPPORT OF PLAINTIFFS'  
OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT**

Plaintiffs Brandon Cobb, Joseph Nettles, and Mary Hill respectfully seek leave to supplement their Local Rule 56.1 Statement of Additional Material Facts, ECF No. 214-2, and to file the attached Amended Statement of Additional Material Facts and related exhibits (“Amended Statement”).<sup>1</sup> The Amended Statement of Facts includes recent, newly-discovered information about the June 2022 probation revocation of a class member, Mr. Vernon McCorkle, which Plaintiffs have reason

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<sup>1</sup> For the convenience of the Court and Defendants, Plaintiffs have attached both a clean and a track-changes version of their Amended Statement of Facts.

to believe was related to Defendants' failure to communicate effectively with Mr. McCorkle during the course of probation. Amended Statement ¶¶ 128–135. The Amended Statement also includes additional evidence indicating that DCS has treated other putative class members similarly to Mr. McCorkle. Specifically, this evidence reveals numerous instances in which Defendants' own records indicate that a putative class member needs to communicate with American Sign Language, but Defendants still failed to provide access to interpreters (remote or in-person) in encounters with that person. Amended Statement ¶¶ 58(a), 67(a). This evidence also reveals other recent instances in which Defendants fail to comply with the policies and procedures they claim are fully implemented, including by speaking with third parties instead of communicating with the supervisee. Amended Statement ¶ 60(a).

This evidence is directly relevant to the matter of mootness. Granting Plaintiffs' motion will not prejudice Defendants and will aid the Court in resolving the pending Motion for Summary Judgment and Motion for Class Certification. Plaintiffs are prepared to proceed with the hearing scheduled to occur on June 30, 2022, and do not object to Defendants filing a response to Plaintiffs' Amended Statement.<sup>2</sup>

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<sup>2</sup> Plaintiffs met and conferred with Defendants on this motion by phone on June 16, 2022. Defendants did not take a position on the motion at that time. Plaintiffs explained their intent to file this motion today in order to maximize the time for the

## **FACTUAL BACKGROUND**

Defendants produced extensive discovery in this case, including more than 22,500 pages of PDF documents, approximately 500 hours of body camera footage, and approximately 3,000 pages of Excel spreadsheets. Defendants identified 86 supervisees who, according to their records, were deaf or hard of hearing. Discovery closed on most matters in June 2021.

On June 8, 2022, after briefing on the pending motions had closed, Plaintiffs' counsel learned that a putative class member in this case, Mr. Vernon McCorkle, recently had his probation revoked and had been sentenced to two years of incarceration in the Georgia Department of Corrections. Plaintiffs' counsel downloaded the available public documents from Mr. McCorkle's revocation proceedings in Cherokee County, Georgia to understand the nature of the revocation and whether it was related to failure by DCS to communicate effectively with him.

Plaintiffs' counsel then reviewed documents that Defendants had produced in discovery related to Mr. McCorkle. These documents included a "face sheet" that reported Defendants' understanding of Mr. McCorkle's primary language and disability: "The subject is hearing impaired and preferred methods [sic] of

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Court and Defendants have to consider the motion prior to the June 30, 2022 hearing.

communication to use an interpreter.” Brennan-Krohn Decl. Ex. A, at 24. These documents also included an Excel spreadsheet containing Mr. McCorkle’s case notes, which recorded numerous instances, including in 2020 and 2021, in which DCS failed to provide an interpreter for their meetings with Mr. McCorkle, despite their own documentation that he requires an interpreter. *See* Amended Statement, ¶¶ 128-135.

Plaintiffs were concerned by this contradiction between DCS’s understanding of Mr. McCorkle’s preferred method of communication (sign language) and DCS’s failure to provide that method of communication on several occasions up through the end of discovery. This contradiction was especially notable given Mr. McCorkle’s subsequent revocation for what appear to have been technical violations of his probation. (Plaintiffs intend to provide Defendants and this Court with a declaration regarding Mr. McCorkle’s experience as soon as possible.<sup>3</sup>)

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<sup>3</sup> Plaintiffs contacted the Cherokee County Jail on June 9, 2022, the day after they learned of Mr. McCorkle’s confinement there. Plaintiffs have endeavored to arrange an accessible meeting with Mr. McCorkle who, according to DCS’s records, uses sign language, but the Jail has been unable to provide for a direct video call that can accommodate Plaintiffs’ interpreter, who has the legal specialization necessary to accurately interpret an attorney-client meeting. Plaintiffs’ counsel will travel to the Cherokee County Jail in person (with an interpreter holding a legal specialist certificate) and expect to submit to the Court a declaration shortly after that visit. Plaintiffs are filing this motion now in order to provide the Court and Defendants with the maximum opportunity to consider the Motion and the Amended Statement of Facts before the June 30, 2022 hearing.

Following their discovery of the contradictions in Mr. McCorkle’s records and his recent revocation, Plaintiffs re-examined the case notes and documents of other putative class members to determine if Defendants had treated other deaf and hard of hearing supervisees in the same manner—that is, whether there were other instances where one part of DCS’s records show that a person needs communication via sign language, while the case notes reveal that its officers continue to have meetings *without* using a sign language interpreter (whether remote or in person). This re-examination involved a comparison between 43 pages of PDF “face sheets,” which in some instances identify the person’s preferred method of communication, with approximately 3,000 pages of Excel spreadsheets, which contain containing case notes. In this comparison, Plaintiffs found examples of additional failures by Defendants to provide the auxiliary aids and services that Defendants themselves identify as necessary. This review also further revealed additional instances of DCS continuing to engage in practices they have disavowed before this Court, such as relying on family members to “interpret,” using VRI inappropriately due to technical problems, or failing to ensure that CSOs are trained in proper user of VRI. These failures continued through the end of discovery.<sup>4</sup>

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<sup>4</sup> Discovery in this case ended in June 2021, and the case notes produced by Defendants extend only through April 2021. Defendants have not submitted any

Plaintiffs now seek to file their Amended Statement of Facts and the documents referenced therein (included with this Motion as exhibits) to provide the Court the newly-available information about Mr. McCorkle’s revocation, and to include additional evidence in the discovery record, which indicates that, as of the end of discovery in 2021, other putative class members were experiencing similar harms as Mr. McCorkle. This evidence adds to Plaintiffs’ claims that material issues of fact exist as to whether Defendants have discriminated against Plaintiffs and thus summary judgment is not warranted. This evidence is also directly relevant to Plaintiffs’ claims that this case is not moot.

### **ARGUMENT**

“[A] court may permit parties to supplement the summary judgment record with newly discovered or previously available evidence, where doing so would allow for the ‘efficient and expedient resolution’ of the case on the merits.” *AIM Recycling of Fla. v. Metals USA*, No. 18-CV-60292, 2019 WL 5963815, at \*3 (S.D. Fla. Nov. 13, 2019) (quoting *Dietz v. Bouldin*, 579 U.S. 40, 41 (2016)). This is part of district courts’ broad authority and discretion in managing pre-trial proceedings. *See, e.g., Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234, 1269 (11th Cir. 2001);

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additional supplementation or additions to case notes or face sheets documents since June 2021.

*Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997). Courts have an interest in deciding summary judgment motions on the merits, and therefore in considering all relevant evidence when ruling on such motions. *Selectica, Inc. v. Novatus, Inc.*, No. 613-cv-1708-Orl-40TBS, 2015 WL 12843841, at \*2 (M.D. Fla. Sept. 30, 2015).

Even where supplementation is necessary due to a party's "excusable neglect," courts still allow such supplementation if there is no prejudice and if the supplementation would be in the interest of efficient judicial administration. Courts may consider several factors in assessing situations of excusable neglect: the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for delay, whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *See Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 849–50 (11th Cir. 1996), quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394–395 (1993)). But the Eleventh Circuit has held that "[p]rimary importance should be accorded to the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration." *Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1325 (11th Cir. 1996); *see also Fisher v. Off. of State Att'y 13th Jud. Cir. Fla.*, 162 F. App'x 937, 940 (11th Cir. 2006) (quoting *Cheney*, 71 F.3d at 850). Plaintiffs

should be permitted to submit their Amended Statement based on the Court's broad authority and discretion to allow this supplementation. The evidence added in the Amended Statement is directly relevant to Defendants' claims that changes in DCS policies and practices since the onset of this litigation have mooted Plaintiffs' claims. ECF No. 200 at 14-16. This supplement is additive of the extensive evidence already presented by Plaintiffs showing that the case is not moot and that genuine disputes of material fact preclude summary judgment at this stage. ECF No. 214 at 27–37. It will aid the Court in deciding on the merits the pending motions on these and other issues, with a more complete record.

For instance, Defendants assert that the case is moot because they have implemented an ADA Policy which, since September 11, 2019 “has provided VRI for same location communication with hearing-impaired offenders.” ECF No. 200 at 26. But the evidence in Plaintiffs' Amended Statement directly refutes this assertion, showing dozens of additional instances of multiple individuals who DCS *knows* require interpreters, while their CSOs continue to hold meetings *without* VRI (or any other type of interpreter). Amended Statement ¶ 67(a). These instances are consistent with, and additive of, Plaintiffs' existing evidence undermining this claim. The additional evidence underscores the scope of this practice that DCS has disavowed, and that the practice continued through the end of discovery.



The evidence included in Plaintiffs' Amended Statement also shows repeated instances of DCS officers relying on family members of supervisees to serve, improperly, as interpreters, another practice DCS has disavowed. *Id.* ¶¶ 58(a), 60(a). For example, the Amended Statement of Facts includes a note from August 27, 2020 where a CSO stated that a meeting with a signing supervisee "was translated through the offender's boyfriend's sister." *Id.* ¶ 58(a).

And the evidence undermines Defendants' claim that there is extensive training in the proper use of VRI or on other elements of ADA compliance, with evidence of clear confusion. For instance, the Amended Statement of Facts includes a note from a CSO who met with a signing supervisee on January 23, 2021, but did not use VRI: "This officer did not attempt the language line [VRI] due to today being a Saturday." Amended Statement ¶ 44(a).

Defendants will not be prejudiced by permitting Plaintiffs leave to file their Amended Statement of Facts and associated exhibits. As an initial matter, all of the documents at issue are in Defendants' possession or are publicly available. Further, both parties already have briefed the issues, including mootness, and the legal arguments are unlikely to change. The proffered documents are consistent with the record already filed by Plaintiffs, which demonstrates an absence of mootness and genuine disputes of material fact that preclude summary judgment. Further,

Defendants may file a response to this filing, and may supplement their response to Plaintiffs' Rule 56.1 Statement in light of the Amended Statement, or otherwise object or respond to this filing.

Nor will Plaintiffs' motion affect the timeline of proceedings in this case. The Court has not yet held a hearing on the pending motions, nor has it issued an opinion on these motions. Plaintiffs are prepared to proceed with the hearing scheduled for June 30, 2022, and are not requesting that the Court change it. Defendants have time to respond to or oppose this motion before the hearing, and Plaintiffs are prepared to provide supplemental briefing following the hearing if the Court so wishes.

That the putative class members' case notes Plaintiffs are seeking leave to submit had been produced before they filed their initial Rule 56.1 Statement does not change the outcome. Even if the timing of Plaintiffs' presentation of evidence could be considered "excusable neglect" under Federal Rule of Civil Procedure 6(b)(1), the Court still should permit Plaintiffs to file their Amended based on the lack of prejudice and the benefit to efficient judicial administration. As discussed above, there is no prejudice to Defendants. There is no negative impact on judicial proceedings or delay in any timelines or hearings in this case. The proffered Amended Statement will, in fact, *support* the judicial proceedings by ensuring the Court can consider the pending motions with a fuller record. *See Gulf Grp. Holdings,*

*Inc. v. Coast Asset Mgmt. Corp.*, 516 F. Supp. 2d 1253, 1265 (S.D. Fla. 2007) (quoting *Foman v. Davis*, 371 U.S. 178, 181–82 (1962) (“The Federal Rules . . . accept the principle that the purpose of the pleading is to facilitate a proper decision on the merits.”)).

Plaintiffs have acted diligently and in good faith. In opposing Defendants’ motion for summary judgment, Plaintiffs endeavored to review fully all of the voluminous evidence produced by Defendants. Plaintiffs viewed approximately 500 hours of body camera footage, and ensured that a qualified sign language interpreter viewed and assessed the footage whenever supervisees used or attempted to use sign language. Plaintiffs reviewed more than 22,500 pages of PDF documents and approximately 3,000 pages of Excel spreadsheet case notes, which required reformatting of those cells with longer case notes so the full content was visible. Plaintiffs included several examples of case notes in the record of their summary judgment opposition, and class certification motion.

Despite this extensive, good-faith review, the contradictions between (a) evidence reporting putative class members preferred communication methods, documented in PDF “face sheets,” and (b) evidence on the actual methods of communication used by CSOs, documented in Excel spreadsheets, did not become apparent until information about Mr. McCorkle’s revocation came to light. That

incident led Plaintiffs' counsel to quickly re-evaluate the discovery to conduct this comparison of documents and discovery of numerous supervisees concerning the same contradictions that are directly relevant to mootness, and uncover additional examples of conduct that is core to the claims in this case. This Court should permit Plaintiffs to introduce that evidence now, as it will promote efficient judicial administration and will not prejudice Defendants.

**Conclusion**

For the foregoing reasons, Plaintiffs respectfully request that this court grant leave to file the attached Amended Rule 56.1 Statement of Facts, and attached exhibits A through N.

Respectfully submitted this 16<sup>th</sup> day of June 2022.

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**CERTIFICATION OF COMPLIANCE**

I hereby certify that the typeface used herein is 14-point Times New Roman and that the motion is compliant with L.R. 5.1 and 7.1.

Respectfully submitted this 16<sup>th</sup> day of June, 2022,

*/s/ Zoe Brennan-Krohn*

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 16, 2022, I caused the foregoing Motion For Leave To File Amended Statement Of Facts And Additional Record Evidence to be electronically filed with the Clerk of Court using the CM/ECF system.

Respectfully submitted this 16<sup>th</sup> day of June 2022.

*/s/ Tyler J. Fink*

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