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

VOTER PARTICIPATION CENTER and CENTER FOR VOTER INFORMATION, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia; SARA GHAZAL, JANICE JOHNSTON, EDWARD LINDSEY, and MATTHEW MASHBURN, in their official capacities as members of the STATE ELECTION BOARD, Defendants, and REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; and GEORGIA REPUBLICAN PARTY, INC., Intervenor-Defendants.	Case No. 1:21-cv-01390-JPB Judge J.P. Boulee

PLAINTIFFS' MOTION IN LIMINE

INTRODUCTION

Plaintiffs file the following motion in limine to (1) exclude Defense Exhibits

5-67 and 69-73 (selected absentee ballot application alert emails) as inadmissible hearsay under Federal Rule of Evidence 802, or, if such exhibits are admitted, require inclusion of the full set of absentee ballot application alert emails pursuant to Federal Rule of Evidence 106; (2) exclude testimony from State Defendants' rebuttal expert witness in the event that testimony from Plaintiffs' expert witness is excluded; and (3) exclude Intervenor Defendants from introducing exhibits unless they have already been offered by another party pursuant to this Court's Standing Order. Plaintiffs conferred with State and Intervenor Defendants on February 15, 2024 regarding this motion, and Defendants oppose this motion.

SELECTED ABSENTEE BALLOT APPLICATION ALERT EMAILS

Plaintiffs seek to exclude the selected absentee ballot application alert emails on State Defendants' exhibit list (Defense Exhibits 5-67 and 69-73) as hearsay, pursuant to Federal Rule of Evidence 802. These exhibits, which are a portion of communications produced in response to Plaintiffs' Requests for Production Nos. 13-19, s*ee* Ex. A, Pl. First Requests for Prod., at 15-16, largely consist of emails sent by members of the public to the Secretary of State of Georgia that allege having experienced, witnessed, or otherwise become aware of potential incidents of voter fraud or other violations of law related to absentee ballot applications. A few additional emails included among State Defendants' proposed exhibits consist of government officials or members of law enforcement informing the Secretary of

State of absentee ballot application issues that the senders heard or read about secondhand.

These exhibits consist entirely of statements made by non-party (and in some cases, unidentified) declarants *outside* of testimony given during proceedings in this lawsuit.[1] Thus, to the extent that the State Defendants offer these exhibits to "prove the truth of the matters asserted" by them—i.e., that the individuals sending or referenced in these emails did indeed witness or experience what they claimed to witness or experience—the exhibits are inadmissible hearsay under Rule 801. Further, some of these emails—those sent by government officials, members of law enforcement, or the public about information brought to their attention by others (Defense Exhibits 12, 22, 24, 29, 31-33, 38, 43, 60, 62-65, and 69-71)—consist of hearsay within hearsay under Rule 805.[2] None of the exceptions to the rule against

[1] For example, in Defendants' proposed Exhibit 14, an individual purportedly named Ken Ennis emailed the Secretary of State's voter fraud hotline on December 18, 2020, claiming to have received an absentee ballot in the mail that was addressed to a different individual. This emailer also claimed to have received applications addressed to the same incorrect individual before, and to have provided "written notice" to the Fayette County Board of Elections "several times" without ever hearing back. As these statements were made in an email to the state's voter fraud hotline, they were clearly made outside of court proceedings and therefore, cannot be used to prove that this sender actually received an absentee ballot addressed to a different individual in the mail, previously received other communications addressed to that same incorrect individual, or alerted Fayette County to this issue.

[2] For example, in Defendants' proposed Exhibit 22, an individual purportedly named Elizabeth Brown emailed the Secretary of State's voter fraud hotline on August 26, 2020, to report that her mother-in-law received two "voter applications" from the

hearsay outlined under Rules 803 and 804 of the Federal Rules of Evidence apply to these exhibits. As such, the selected absentee ballot application alert emails should be excluded pursuant to Rule 802.

In the event these exhibits are admitted, Plaintiffs move the Court to require Defendants to offer into evidence the full set of absentee ballot application alert emails provided by State Defendants pursuant to Plaintiffs' Requests for Production Nos. 13-19, consistent with Rule 106's completeness requirement. *See* Ex. A at 15-16. Alternatively, Plaintiffs request leave from the Court to introduce the full set of such emails themselves.

Upon introduction of a statement into evidence, Rule 106 permits an adverse party to require the introduction of "any other statement…that in fairness ought to be considered at the same time." During discovery, Plaintiffs requested communications between the Secretary of State's office and other entities concerning the distribution, receipt, and processing of absentee ballot applications.

Center for Voter Information addressed to "Lisa" (the emailer's nickname) at her mother-in-law's home address. Similarly, in Defendants' proposed Exhibit 29, an individual purportedly named Lenny Mercurio emailed the voter fraud hotline on December 1, 2020, to report that his girlfriend, who no longer lives in Georgia, received two "Georgia absentee ballot applications" from the Republican National Committee at her home in Sacramento, California. According to the sender, his girlfriend was "willing to provide" the ballot application and photos. These emails not only consist of statements made outside of court proceedings, but relay issues with absentee ballot applications experienced by people other than the individuals sending the alerts. As such, they cannot be used to prove that the events reported in them actually occurred as they are hearsay within hearsay and must be excluded.

See Ex. A at 15-16. In response, Defendants produced at least 262 complaints about absentee ballot applications received by the Secretary of State during the election cycles taking place from 2018 through 2021.[3] Of these 262 complaints, which already represent only a fraction of the "thousands" of total voter complaints received during this time frame,[4] Defendants have identified just 68 that they consider relevant to and helpful for their defense. Fairness—and therefore Rule 106—dictates that the remaining absentee ballot application alert emails identified in response to Plaintiffs' Requests for Production Nos. 13-19, but not specifically selected as exhibits by Defendants, be admitted as well.

Admitting the full set of absentee ballot application alert emails into evidence serves multiple important purposes. First, considering the full set of these emails provides vital context for the absentee ballot application issues that state officials encountered in the lead-up to the enactment of SB 202, including which issues were most prevalent and which were not. Admitting only those emails specifically

[3] A list identifying the document numbers of each complaint is attached as Exhibit B.

[4] During the preliminary injunction hearing in this case on June 10, 2022, Mr. Germany testified that he was "comfortable" saying that the Secretary of State's voter fraud hotline received "thousands" of complaints – potentially even "tens of thousands" of complaints – in November and December of 2020. *See* Transcript of Preliminary Injunction Proceedings Before the Honorable J.P. Boulee, June 10, 2022, at 84:06-18. Since this estimate pertains to a subset of the 2018 through 2021 election cycle time frame from which Defendants' produced complaints were pulled, the total number of complaints received during this period is likely significantly greater.

selected by State Defendants could provide a false impression of the character and frequency of absentee voting issues being reported by voters to Defendants or those issues most reported to election administrators in recent elections. By contrast, admitting the full set of these communications into evidence would solve this problem by presenting a more complete (and therefore accurate) view of absentee voting concerns communicated by members of the public to election officials during the 2018 through 2021 election cycles.

Further, admitting the full set of absentee ballot application alert emails helps to explain and contextualize Defendants' conduct and motivations in reacting to complaints and issues raised by the public. To the extent Defendants argue that issues raised in their specifically-selected absentee ballot application alert emails informed the enactment or implementation of SB 202 or support a governmental interest served by certain provisions of SB 202, Plaintiffs should be permitted to examine such assertions in light of *all* the election administration and voting concerns related to absentee ballot applications brought to the attention of the Secretary of State through these emails.

STATE DEFENDANTS' REBUTTAL EXPERT

State Defendants filed a renewed motion to exclude the testimony and opinions of Plaintiffs' expert, Dr. Donald P. Green, *see* ECF No. 187, which Plaintiffs oppose. *See* ECF No. 201. Plaintiffs did not at that time move to exclude

the testimony of State Defendants' rebuttal witness Dr. Justin Grimmer because while Plaintiffs disagree with many of his conclusions, Dr. Grimmer—like Dr. Green—is qualified to testify as an expert witness. *See id.* at 12. However, should the Court grant State Defendants' motion to exclude Dr. Green's testimony, Plaintiffs submit this motion in limine to exclude the rebuttal testimony and opinions of Dr. Grimmer. *See* ECF No. 113-4.

Dr. Grimmer's report and testimony "offers evidence that is 'intended solely to contradict or rebut evidence on the same subject matter identified by' [Plaintiffs'] affirmative expert," Dr. Green. *Kroll v. Carnival Corp.*, No. 19-cv-23017, 2020 WL 4793444, at *4 (S.D. Fla. Aug. 17, 2020). This is clear from Dr. Grimmer's engagement throughout his report with Dr. Green's opinions and analysis, especially focusing on Dr. Green's study concerning the Disclaimer Provision, which is no longer at issue in this case. ECF No. 113-4 at 16-17. With respect to the Ballot Application Restrictions still at issue, Dr. Grimmer's rebuttal report (1) questions the evidence on which Dr. Green relies to assert that pre-filled absentee ballot applications increase the use of absentee ballots, *id.* at 17-21; (2) challenges Dr. Green's claims about the difficulty of matching names and determining who previously applied for absentee ballots, *id.* at 21-24; (3) expresses doubt about Dr. Green's conclusions concerning incentives for organizations to avoid targeting individuals who have already requested absentee ballots, *id.* at 24-25; and (4)

challenges Dr. Green's assessment of a field experiment testing transaction costs associated with requesting absentee ballots, *id.* at 25-26.

Thus, should the Court exclude Dr. Green's opinions and testimony, then Dr. Grimmer's rebuttal opinions and testimony in turn become "moot." *Banuchi v. City of Homestead*, 606 F. Supp. 3d 1262, 1284-85 (S.D. Fla. 2022); *accord Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1065 (C.D. Cal. 2010) ("[T]hose portions of an expert's rebuttal report that [address] subjects that were not addressed in the [affirmative] expert report purportedly being rebutted should be excluded."). Put another way, without Dr. Green's opinions and testimony, "there is nothing for" Dr. Grimmer "*to* rebut." *Banuchi*, 606 F. Supp. 3d at 1284-85 (emphasis in original). Accordingly, in the event that the Court excludes the testimony and opinions of Plaintiffs' expert Dr. Green, the testimony and opinions of State Defendants' rebuttal expert Dr. Grimmer likewise must be excluded.

INTERVENORS ARE LIMITED IN THEIR EXHIBITS

Plaintiffs submit this motion in limine to limit Intervenor Defendants' use of trial exhibits to those exhibits previously introduced by Plaintiffs or State Defendants. Intervenor Defendants did not identify any intended trial exhibits in the Pretrial Order, and explicitly stated they were not introducing exhibits, "to avoid duplication and aid in the efficient resolution of this matter." *See* ECF No. 186 at 6. Intervenor Defendants further stated that they did "not *anticipate* offering any

exhibits of their own." *Id.* (emphasis added). Indeed, pursuant to this Court's Standing Order, Intervenor Defendants should be prohibited from doing so, or presenting any exhibit listed in Plaintiffs' or State Defendants' exhibit lists which has not previously been offered into evidence by another party.

This Court's Standing Order states:

> In listing witnesses or exhibits, a party may not reserve the right to supplement their list nor may a party adopt another party's list by reference. Witnesses and exhibits not identified in the Pretrial Order may not be used during trial unless a party can establish that the failure to permit their use would cause a manifest injustice.

See ECF No. 35 at 33; *see also* Fed. R. Civ. P. 16(d) (mandating that a Pretrial Order controls for trial unless modified by the court). Any effort by Intervenor Defendants to introduce an exhibit at trial not previously introduced by either Plaintiffs or State Defendants would be to incorporate another party's exhibit list by reference and should not be permitted.

Such a prohibition makes good sense. To allow otherwise would permit Intervenor Defendants to introduce exhibits without having provided Plaintiffs any notice of the exhibits' perceived utility to Intervenor Defendants. Further, should Intervenor Defendants contend that denying their ability to introduce an exhibit not previously offered by either Plaintiffs or State Defendants would result in some manifest injustice, they can move for the exhibit's entry upon a showing to this Court of the same.

CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that this Court grant their motions in limine to: (1) prevent Defendants from introducing their selected absentee ballot application alert emails (Defense Exhibits 5-67 and 69-73) at trial because they are hearsay, or (alternatively) if these exhibits are admitted require Defendants to introduce the full set of absentee ballot application alert emails pursuant to Rule 106; (2) exclude testimony from State Defendants' rebuttal expert witness in the event that testimony from Plaintiffs' expert witness is excluded; and (3) exclude Intervenor Defendants from introducing into evidence exhibits unless they have already been offered by another party.

Dated this 16th day of February, 2024.

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CERTIFICATE OF SERVICE
AND COMPLIANCE WITH LOCAL RULE 5.1

I hereby certify that I have this date electronically filed the within and foregoing, which has been prepared using 14-point Times New Roman font, with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

Dated: February 16, 2024.

/s/ Danielle Lang
Danielle Lang

Counsel for Plaintiffs