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' OPPOSITION TO INTERVENOR-DEFENDANTS' MOTION IN LIMINE

The Court should deny Intervenor-Defendants' motion in limine. Their arguments go to the merits of Plaintiffs' claims, rather than the admissibility of the

evidence, and are therefore inappropriate (and unavailing). The documents that Intervenor-Defendants seek to exclude—Republican national and state party documents, talking points, absentee ballot applications, and mailers—are highly relevant to Plaintiffs' First Amendment claims related to analogous communications.[1] Intervenor-Defendants sought to join this case because they have a perspective that "share[s] many common questions with the parties' claims and defenses," ECF No. 25-1 at 10, and they may not now claim *ipse dixit* that their related documents are irrelevant. Further, the probative value of this evidence is not substantially outweighed as there is no risk of confusing the issues in a bench trial, its introduction will not cause undue delay, and it is not cumulative. Thus, this evidence should not be excluded.[2]

ARGUMENT

A motion in limine is a trial management tool to limit overly prejudicial evidence from being introduced at trial. *See Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *Gold Cross EMS, Inc. v. Children's Hosp. of Ala.*, 309 F.R.D. 699, 700 (S.D. Ga. 2015). Indeed, excluding evidence is "'an extraordinary remedy which

[1] Though Intervenor-Defendants do not specify the documents they seek to exclude, Plaintiffs believe that the documents at issue are encompassed by PX 34, PX 35, PX 43-46, PX 63, PX 83, PX 86, PX 99, PX 102-110, PX 147, PX 158, PX 159, PX 174, PX 180, PX 194, PX 231, PX 235, PX 262-270. *See* ECF No. 185-8.

[2] As this is a motion in limine, Plaintiffs have not included a full articulation of the case. However, it does not follow that Plaintiffs agree with Intervenor-Defendants' articulation of the case in the "Background" section of their motion in limine.

should be used sparingly,' [and] 'only when unfair prejudice substantially outweighs probative value.'" *Higgs v. Costa Crociere S.p.A.*, 720 F. App'x 518, 520 (11th Cir. 2017) (quoting *United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983)). Thus, "discretion to exclude evidence under Rule 403 is narrowly circumscribed," and does not provide for the wholesale exclusion of a party's produced documents, as Intervenor-Defendants request here. *Id.*

I. The Republican national and state party documents are relevant.

In this case, Plaintiffs make as-applied *and facial* challenges to the Prefilling Prohibition and Mailing List Restriction as unconstitutional infringements of First Amendment liberties.[3] ECF No. 1 at 58. Therefore, contrary to Intervenor-Defendants' claims, any evidence of speech that is affected by the provisions—not

[3] In a facial constitutional challenge to a statute, evidence which proves or disproves the constitutional implications of a challenged law is plainly relevant. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200-02 (2008) (demonstrating how evidence can show the scope of the unlawful conduct in a facial challenge); *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 869-70 (11th Cir. 2013). This is especially true in First Amendment facial challenges. *See VoteAmerica v. Schwab*, No. 21-2253-KHV, 2023 WL 3251009, at *19 (D. Kan. May 4, 2023) (pointing out that "[t]he record reflects" that Kansas' personalized application prohibition "criminalizes a substantial amount of protected speech and that any legitimate applications are hypothetical or rare."). The various mailers at issue here demonstrate the scope of relief required to cure the constitutional infirmities of the challenged provisions. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *see also League of Women Voters of Fla., Inc. v. Lee*, 576 F. Supp. 3d 1004, 1013 (N.D. Fla. 2021) ("the difference between the two turns not on what the parties have pleaded but rather on the relief the court grants") (citing *Doe #6 v. Miami-Dade Cnty.*, 974 F.3d 1333, 1338 (11th Cir. 2020)).

just the Plaintiffs' speech—is relevant and has a "tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401; *see also Travelers Indem. Co. of Connecticut v. Paschal*, No. 4:17-CV-00066-HLM, 2018 WL 6422716, at *2 (N.D. Ga. July 27, 2018) (citation omitted) (noting the "relevance bar is quite low").

Specifically, Plaintiffs argue that the mailing a personalized absentee ballot application with a cover letter is an inseparable voter engagement communication that is protected First Amendment activity. That Intervenor-Defendants also sent integrated mailers with date-prefilled absentee ballot applications and cover letters to express a pro-mail voting message and encourage participation is probative of whether such communications are protected political speech or expressive conduct.[4] Additionally, it demonstrates that the activity is open to all, addresses an issue of public concern, and has a history of conveying a message. *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1344-45 (11th Cir. 2021).

That Intervenor-Defendants' mailers were sent before enactment of SB 202

[4] Intervenor-Defendants claim that Plaintiffs did not use or discuss Intervenor-Defendants' documents during the summary judgment phase, but whether evidence is used at summary judgment does not affect whether it is considered relevant or irrelevant for trial. Even if it did, Intervenor-Defendants' assertion is false. *See* Pl. Resp. in Opp'n to Def. Mot. for Summary Judgment 15, ECF No. 159 (explaining how "Intervenors' mailers . . . intertwined their communications with the enclosed application" and Defendants' witness Brandon Waters stated that "the parts of a mailer are integrated as a single unit that together convey the intent of the message the [sender] is trying to deliver.") (internal citations omitted).

has no bearing on whether this evidence is admissible under Rule 401 because evidence from before enactment of a law that burdens first amendment activity tends to show the subsequent impact of that law. *See*, *e.g.*, *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 193-94 (1999); *Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1238-39 (11th Cir. 2018); *VoteAmerica*, 2023 WL 3251009, at *9-10. Indeed, that prior to SB 202's enactment, Intervenor-Defendants chose to send applications prefilled with the election date to individuals they sought to encourage to vote by mail[5] supports Plaintiffs' arguments that sending prefilled applications is an effective means to communicate a pro-vote by mail message, and that recipients of such communication understand this particular message.

Intervenor-Defendants' assertion that their mailers are not relevant to Plaintiffs' challenge to the Mailing List Restriction is similarly unavailing. Several Republican mailers include "FINAL NOTICE" in all-caps and very large font, suggesting that Intervenor-Defendants sent more than one mailer to voters. PX 45; PX 86. Other documents tend to show that Intervenor-Defendants mailed some individuals multiple absentee ballot applications during the 2020 election. PX 46; PX 147. There is nothing in the record demonstrating that these multiple application mailers were sent only to individuals who had not already requested an absentee

[5] Intervenor-Defendants' declaration that prefilling the date on an absentee ballot is permissible under SB 202 is misleading as this remains an open question, the dispute over which is directly addressed by other evidence in the record.

ballot. And even if Intervenor-Defendants could demonstrate that their duplicative mailers conform with the Mailing List Restriction, that is evidence supporting Plaintiffs' assertion that the provision does not address any state interest in preventing voter frustration with receiving multiple applications when the voter does not vote by mail.

Ultimately, Intervenor-Defendants' arguments go to the merits of Plaintiffs' claims, rather than the admissibility of the evidence. But that is not the point of a motion in limine where the Court is not to "weigh the sufficiency of the evidence in support of the parties' claims and defenses and, in effect, . . . resolve the parties' factual disputes on the eve of trial." *Fox v. Gen. Motors LLC*, No. 1:17-CV-00209-JPB, 2019 WL 13060148, at *2 (N.D. Ga. Oct. 31, 2019) (citations omitted).

II. Republican national and state party documents should not be excluded pursuant to Rule 403.

Pursuant to Rule 403, courts may exclude relevant evidence if its probative value is *substantially* outweighed by factors such as "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. None of these factors apply to the challenged evidence, much less substantially outweigh its clearly probative value.

First, challenges to the admission of evidence pursuant to Rule 403 are generally intended to protect a *jury* from being unduly swayed by evidence that is not highly probative. *See Tome v. United States*, 513 U.S. 150, 174 (1995) (stating

that the Federal Rules of Evidence "rel[y] upon the trial judge's administration of Rule[] 403 to keep the barely relevant, the time wasting, and the prejudicial from the jury"). "Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity." *Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. Unit A Jan. 1981). Accordingly, in a bench trial, the judge sitting as factfinder "can also exclude those improper inferences from his mind in reaching a decision." *Id.*[6] As such, Intervenor-Defendants' concern that the admission of their documents will "confus[e] the issues" misses the mark.

Likewise, Intervenor-Defendants' assertion that introduction of this evidence will waste time or cause undue delay mistakes the issue. Inclusion of evidence that is "crucial" does not create undue delay and it should not be excluded. *Johnson v.*

[6] *See also Mycko v. Sun*, No. 14-62215-CV, 2015 WL 11197788, at *1 (S.D. Fla. May 26, 2015) (citing to *Gulf States Utilities* to hold that the "confus[ion of] the issues…provision[] of Rule 403 [is] not applicable to bench trials"); *Daggett v. United States*, No. 08-21026-CIV, 2010 WL 11553197, at *2 (S.D. Fla. Aug. 24, 2010) (citing to *Gulf States Utilities* in holding that "the concerns of Rule 403," including confusion of the issues, "are lessened at a bench trial"); *Synovus Bank through Bank of Tuscaloosa v. Est. of Haynie*, No. 7:10-CV-2634-SLB, 2012 WL 13027252, at *1-2 (N.D. Ala. May 25, 2012) (citing to *Gulf States Utilities* in refusing to exclude evidence challenged pursuant to both Rule 403's "unfair prejudice" and "confusion of the issues" prongs); *United States v. Jefferson Cnty., Alabama*, No. CV-74-S-12-S, 2009 WL 10689702, at *3-4 (N.D. Ala. Mar. 25, 2009) (same).

United States, 780 F.2d 902, 905 (11th Cir. 1986) (citing Weinstein's Evidence, Para. 403[06] at 403–59–60 (1982)); *see also Banks v. McIntosh Cnty., Georgia*, No. 2:16-CV-53, 2022 WL 2758609, at *5 (S.D. Ga. July 14, 2022) (evidence is considered a waste of time where it pertains to an *ancillary* issue). As demonstrated above, Intervenor-Defendants' documents are highly relevant to multiple issues in this case, including whether mailing a personalized absentee ballot application in encouragement of voting by mail is protected core political speech protected and whether such conduct implicates one or more of the factors articulated in *Burns v. Town of Palm Beach*. 999 F.3d at 1344-45. Far from a waste of time, the mailers are helpful in resolving the issues at the heart of this case. To the extent that any delay would result (it would not), "Rule 403 does not mean that a court may exclude evidence that will cause delay regardless of its probative value." *Johnson*, 780 F.2d at 905 (citing Weinstein's Evidence, Para. 403[06] at 403–59–60 (1982)). Further, these documents are neither overly complex nor require extensive explanation or commentary. Thus, their admission will not cause any delay in judicial proceedings.[7]

Finally, the admission of Intervenor-Defendants' documents is not needlessly cumulative. While Intervenor-Defendants' mailers—like Plaintiffs' mailers—

[7] Intervenor-Defendants invoke *Purcell v. Gonzalez*, 549 U.S. 1 (2006), in declaring that "[s]peed and efficiency are especially important in election cases." Intervenor-Defendants' Mot. in Limine at 6. However, when this trial starts on April 15, 2024, the 2024 general election (occurring on November 5, 2024) will be approximately 28 weeks, or over six months, away.

contain a pro-vote by mail message, their approach differs, including the invocation of specific candidates and political party-oriented messaging. Additionally, Intervenor-Defendants' mailers are not identical to one another. Thus, Intervenor-Defendants' mailers are not cumulative compared to Plaintiffs' nor Intervenor-Defendants' other mailers.[8] *See Johnson*, 780 F.2d at 906 (finding that evidence that was "somewhat different" should not have been excluded at trial as cumulative); *Griffin v. Coffee Cnty.*, 623 F. Supp. 3d 1365, 1379 (S.D. Ga. 2022) (evidence that was similar but not identical was not cumulative). Indeed, these various approaches to expressing the pro-vote by mail message—indisputably a matter of public concern—have one commonality: incorporating absentee ballot applications. Their variations and key commonality speak to the widespread nature of the communications and universality of including an application when attempting to encourage mail voting, both indicative of its communicative nature. *See Burns*, 999 F.3d at 1344. That Intervenor-Defendants have sent out absentee ballot applications as part of packets encouraging people to vote absentee on multiple occasions, and in multiple election cycles, demonstrates the efficacy of the practice, the message it conveys, and its historical foundations under *Burns*. *Id.* at 1344-45. Finally, a determination of whether the probative value of Intervenor-Defendants' documents

[8] For evidence to be cumulative, it must also be relevant. *See* Fed. R. Evid. 403. To the extent that Intervenor-Defendants challenge exhibits as cumulative of evidence they do not claim is irrelevant, those challenged exhibits must also be relevant.

is substantially outweighed by being needlessly cumulative "is best made in the context of trial." *Griffin*, 623 F. Supp. 3d at 1380. If the mailers become cumulative at trial, they may be excluded then. *Id*.

For the foregoing reasons, admission of Intervenor-Defendants' documents will not confuse the issues, cause undue delay, waste time, or needlessly present cumulative evidence. As such, Rule 403 is no bar to their admission.

CONCLUSION

The Court should deny Intervenor-Defendants' motion in limine to exclude Plaintiffs' exhibits relating to the Republican documents, absentee ballot applications, mailers, and talking points.

Dated this 1st day of March, 2024.

/s/ Alice Huling
Danielle Lang*
Jonathan Diaz*
Alice Huling*
Valencia Richardson*
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, D.C. 20005
Tel: (202) 736-2200
Fax: (202) 736-2222
dlang@campaignlegalcenter.org
jdiaz@campaignlegalcenter.org
ahuling@campaignlegalcenter.org

Robert B. Remar
(Ga. Bar No. 600575)
SMITH, GAMBRELL & RUSSELL, LLP
1105 W. Peachtree NE, Suite 1000
Atlanta, GA 30309
(404) 815-3500
rremar@sgrlaw.com

/s/ Katherine L. D'Ambrosio
Katherine L. D'Ambrosio
(Ga. Bar No. 780128)
COUNCILL, GUNNEMANN & CHALLY LLC

vrichardson@campaignlegalcenter.org

75 14th Street, NE, Suite 2475
Atlanta, GA 30309
(404) 407-5250
kdambrosio@cgc-law.com

**Admitted pro hac vice*

Counsel for Plaintiffs

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: March 1, 2024.

/s/ Alice Huling
Alice Huling

Counsel for Plaintiffs