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

VOTEAMERICA, *et al.*,

*Plaintiffs*,

v.

BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.*,

*Defendants*,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

*Intervenor-Defendants.*

Case No.: 1:21-CV-1390-JPB

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**STATE DEFENDANTS' MEMORANDUM**
**IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE**

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## INTRODUCTION

After the Court's recent summary-judgment decision and Plaintiffs' earlier voluntary dismissals, this case presents a narrow question for each provision at trial: Does either challenged provision—the Pre-Filling Prohibition or the Anti-Duplication Provision—violate the First Amendment? The evidence confirms that these important provisions of Senate Bill 202 ("SB 202") do not violate the First Amendment. Indeed, State Defendants will demonstrate at trial that Plaintiffs do not engage in protected speech. But even if they did, each challenged provision is amply supported by evidence showing that it serves compelling state interests in preventing voter fraud or its appearance, preventing voter confusion, increasing voter confidence, and enhancing electoral efficiency.

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But Plaintiffs ask this Court to exclude evidence that State Defendants plan to use to demonstrate these compelling interests. Pls.' Mot. in Limine [Doc. 206] ("Mot."). *First*, Plaintiffs challenge the admissibility of several emails State Defendants included on their exhibit list. *Id.* at 2–6. These emails consist of complaints that members of the public submitted to the Secretary of State regarding duplicate or pre-filled absentee-ballot applications. Although Plaintiffs challenge these exhibits as inadmissible hearsay, this Court has already rejected that same argument, *see* [Doc. 179 at 9 n.11], and Plaintiffs offer no compelling reason for the Court to change course now. Indeed, State

Defendants are not offering these complaints for the truth of the matters asserted in the statements. Instead, State Defendants are offering them simply to show that members of the public actually submitted complaints about these topics before SB 202 was passed.

Plaintiffs' alternative argument about these emails is equally misguided. Plaintiffs argue (at 4–5) that the Court cannot admit these exhibits into evidence unless it also admits *all* emails about absentee-ballot applications that the Secretary of State received. Putting aside that Plaintiffs could have listed such additional emails on their own exhibit list and did not, that is not how the rule of completeness operates. For each exhibit State Defendants listed, they identified the entire record, which is what the rule of completeness addresses. And Plaintiffs have identified no authority for their expansive argument that the rule of completeness extends to the entire contents of an email inbox. If that were true, it would be impossible to admit individual emails in trial proceedings. The Court should thus reject Plaintiffs' novel argument, which would substantially expand the rule of completeness.

*Second*, Plaintiffs ask the Court to exclude State Defendants' expert witness, Dr. Justin Grimmer. *Id.* at 6–8. In Plaintiffs' estimation, Dr. Grimmer's opinion *exclusively* responded to the opinions of Plaintiffs' expert, Dr. Donald Green. Thus, if the Court grants State Defendants' motion to exclude Dr. Green, Plaintiffs argue that the Court must also exclude Dr.

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Grimmer. But this relies on a faulty understanding of Dr. Grimmer's opinions, which (as shown below) extend far beyond pointing out the errors in Dr. Green's report. Accordingly, Dr. Grimmer should be permitted to testify about those opinions, even if the Court—as it should—grants State Defendants' motion to exclude Dr. Green.

## ARGUMENT

As State Defendants demonstrate below, the Court should deny Plaintiffs' request to exclude the public's complaints about duplicate and incorrectly prefilled absentee-ballot applications. And the Court should deny Plaintiffs' request to exclude Dr. Grimmer.

### I. The Public's Complaints About Absentee-Ballot Applications are not Inadmissible Hearsay.

As to the complaints: The Secretary of State's office maintains an email address where members of the public can submit questions or concerns about election-related matters. 6/10/2022 PI Hr'g Tr. 104:20–23 [Doc. 130]; *see also id.* at 8:11–9:2. As this Court has already observed: "It is undisputed that some voters complained [to the Secretary of State] about Plaintiffs' activities." [Doc. 179 at 8–9] (citing complaints). And, as this Court further concluded, these complaints, along with State Defendants' other evidence, demonstrate that the challenged provisions serve "compelling state interests[.]" *Id.* at 26–27.

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In an effort to hamstring State Defendants at trial, Plaintiffs argue (at 2–4) that these complaints must be excluded as inadmissible hearsay under Federal Rule of Evidence ("FRE") 802, and that some of the exhibits should be excluded under FRE 805 as hearsay within hearsay. *See* Mot. 3–4 & n.1. Plaintiffs are wrong on each score. And Plaintiffs are mistaken when they alternatively argue (at 4–5) that FRE 106 requires inclusion of the full set of absentee-ballot application emails.

1. As to hearsay, this Court has already rejected Plaintiffs' argument: "[M]any of the voter complaints serve as evidence of State Defendants' rationale in passing the [challenged provisions] rather than as evidence of the truth contained in the asserted statements." [Doc. 179 at 9 n.11]. Thus, this Court rightly concluded, "the complaints are not hearsay at all." *Id.*

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Plaintiffs have no compelling response to this. Other than passing references to the Federal Rules of Evidence, Plaintiffs do not identify a single authority that supports their request to exclude these exhibits. *See* Mot. at 3–4. In fact, it is unclear whether Plaintiffs even disagree with this Court's previous determination that the referenced exhibits are not hearsay. Rather, Plaintiffs only seek to exclude these exhibits "*to the extent that* the State Defendants offer [them] to 'prove the truth of the matters asserted' by them[.]" Mot. at 3 (emphasis added). As State Defendants do not seek to introduce *any*

of these exhibits for the truth of the matters asserted, that should be the end of the matter.

Rather, State Defendants plan to introduce the exhibits because their mere existence demonstrates the compelling interests behind the challenged provisions, irrespective of whether the complaining member of the public was correct that, for instance, an absentee-ballot application was prefilled with the name of someone who no longer resides at the address. *See, e.g.*, [Doc. 113-2 at 41 (Defs.' Trial Ex. 9), 26 (Defs.' Trial Ex. 14), 34 (Defs.' Trial Ex. 18), 33 (Defs.' Trial Ex. 42), 44 (Defs.' Trial Ex. 66)].[1] Indeed, these exhibits show the types of complaints that voters were submitting during the 2020 election cycle and the issues that legislators and election officials were attempting to address at that same time.

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In fact, many of State Defendants' responses to Plaintiffs' arguments explicitly assume the *untruth* of the complaints. As State Defendants explained during summary-judgment briefing, many "[v]oters were worried that these applications presented an open invitation for voter fraud—a concern exacerbated by voters [incorrectly] believing that the *applications* themselves

[1] This is also reason to deny Plaintiffs' motion as premature. Rather, in accordance with this Court's Standing Order, these objections are better addressed "during trial when the Court will have better context for ruling on the objections." Standing Order ¶ q [Doc. 35].

were actually *ballots*." [Doc. 149-1 at 11] (emphasis in original; citations omitted). As the Eleventh Circuit confirms, offering a plainly false out-of-court statement is not hearsay. *United States v. Rivera*, 780 F.3d 1084, 1093 (11th Cir. 2015).[2] Accordingly, Plaintiffs cannot overcome the fact that State Defendants are not introducing these exhibits for the truth of the matter stated, which is fatal to Plaintiffs' motion.

But there are several additional reasons to deny Plaintiffs' request. For instance, these records are also not hearsay because they will be used only to show their impact on State officials, which, as the Eleventh Circuit explains, also confirms that they are not hearsay: "The hearsay bar does not pertain to statements used to show future effect upon the listener[.]" *United States v. Bachynsky*, 415 F. App'x 167, 175 (11th Cir. 2011); *accord Rivera*, 780 F.3d at 1092 ("[A]n out-of-court statement admitted to show its effect on the hearer is not hearsay.").

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Additionally, these records are not hearsay because they will be used to show voters' states of mind, such as whether they are confused about election procedures or are concerned about potential voter fraud. When introduced for

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[2] To the extent the exhibits are used to demonstrate that voters received multiple applications from Plaintiffs, that fact is undisputed. Plaintiffs themselves state they routinely sent multiple applications to the same voters. Lopach Dep. 109:20–110:15, 111:9–12 [Doc. 162].

that purpose, out-of-court statements also are not hearsay. *See, e.g.*, *United States v. Moore*, 611 F. App'x 572, 578 (11th Cir. 2015) (statement "showing the reason why investigators *believed* they had established probable cause in order to apply for a Title III wiretap" was not hearsay (emphasis added)); *Glock, Inc. v. Wuster*, No. 1:14-CV-568-AT, 2019 WL 13043038, at *15 & n.15 (N.D. Ga. Aug. 9, 2019) (social media comments used to show customer confusion are admissible as they show the customers' states of mind).

For all these reasons, the Court should reject Plaintiffs' attempt to exclude these exhibits.

2. The Court should also reject Plaintiffs' argument (at 3–4) that several exhibits should be excluded as hearsay within hearsay. Specifically, Plaintiffs challenge the admissibility of certain exhibits where the writer is relaying concerns of another person. *Id.* at 3–4 & n.1. As the Eleventh Circuit explains, "[h]earsay within hearsay, or so-called 'double-hearsay,' is admissible only if each part of the combined statements conforms with an exception to the hearsay rule." *United States v. Robinson*, 239 F. App'x 507, 508 (11th Cir. 2007) (citing Fed. R. Evid. 805). But here, the challenged exhibits are not hearsay for similar reasons to those discussed above.

Indeed, when a member of the public writes to relay the experiences of another voter, that email is still admissible because it put officials on notice of voter concern, and it is not being introduced for the truth of the matters

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asserted. *United States v. Gold*, 743 F.2d 800, 818 (11th Cir. 1984). Additionally, it is still admissible to show that there are members of the public concerned or confused about absentee-ballot applications. *Silverton Mortg. Specialists, Inc. v. FDIC for Silverton Bank, N.A.*, No. 1:09-cv-1283-AT, 2012 WL 13001592, at *19 (N.D. Ga. Sept. 28, 2012). And it is admissible to show its impact on State officials. *Rivera*, 780 F.3d at 1092.

Accordingly, Plaintiffs' double-hearsay arguments should also be rejected.

3. Finally, the rule of completeness and FRE 106 do not require admission of other emails the Secretary of State received from members of the public. As the Supreme Court has explained, Rule 106 typically applies only to situations "when one party has made use of a *portion of a document*, such that misunderstanding or distortion can be averted only through presentation of another *portion*." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988) (emphasis added). Here, Plaintiffs do not argue that State Defendants are attempting to introduce only "portion[s] of a document." Indeed, each of State Defendants' exhibits is the *full* communication. Thus, as the Supreme Court confirms, Rule 106 is inapplicable.

Nor can Plaintiffs show that there are other documents "that in fairness ought to be considered at the same time." Fed. R. Evid. 106. As the Eleventh Circuit explains, that portion of FRE 106 merely "allow[s] a party to put a

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statement in context where, without the context, the meaning would be distorted." *Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 1516 (11th Cir. 1993); *accord United States v. Pendas-Martinez*, 845 F.2d 938, 944 (11th Cir. 1988) (This rule only applies when additional evidence "is *necessary* to qualify, explain, or place into context the portion already introduced." (emphasis added)). There are no such issues with context here.

Even if State officials received other emails from the public about absentee-ballot applications beyond those that State Defendants have identified as exhibits, that does not in any way "distort" the existence of those exhibits. Indeed, if they wish, Plaintiffs can easily introduce testimony showing that these exhibits do not constitute the universe of emails received. And State Defendants have never suggested that these represent the entire universe of emails received. Accordingly, there is no context in which the facts would be distorted without presentation of the entire email inbox.

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Moreover, if Plaintiffs really thought there were issues with the completeness of these exhibits, they could have listed the other emails on their exhibit list. But they did not do that. And they have no basis for arguing that the rule of completeness requires State Defendants to introduce *either* all or none of the emails that the Secretary of State received.

Accordingly, the Court should reject Plaintiffs' request to expand the rule of completeness to require State Defendants to introduce additional emails it received from voters discussing absentee-ballot applications.

## II. There is No Basis for Excluding Dr. Grimmer.

Plaintiffs are also misguided in their attempt to exclude Dr. Grimmer's testimony. Mot. at 6–8. Even if Dr. Green's testimony is excluded, as it should be, Dr. Grimmer's testimony should not be excluded because he does far more than deliver rebuttal evidence—as noted on the first page of his expert report. There, Dr. Grimmer expressly states that, *in addition to* responding to Dr. Green, he "also provide[s] in this report my independent analysis of the reasonableness and the effects, if any, of the three challenged provisions of SB 202[.]" Grimmer Rep. at 1 [Doc. 113-4]; *see also id.* ¶¶ 41–42 (addressing arguments by "plaintiffs" and not merely by Dr. Green).

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For instance, on the Pre-Filling Prohibition, Dr. Grimmer offers his own conclusions that:

> Increasing the number of absentee ballot applications could actually be harmful to election administration if it leads to increased numbers of people canceling absentee ballots at the polls if they decide they would rather vote in person. This greatly increases the amount of work required by county election officials and potentially increases the risk of error.

Grimmer Rep. ¶ 35. He also notes that, "if there is a mistake on the pre-filled application, it may be cumbersome for the voter to correct." *Id.* ¶ 36.

Similarly, on the Anti-Duplication Provision, Dr. Grimmer offers his own conclusion that:

> It is trivial to match individuals requesting an absentee ballot to the list of individuals who have already requested an absentee ballot. Using just name and date of birth to make a match eliminates the vast majority of potential false positives, such as parent and child who share the same name.

Grimmer Rep. ¶ 40. He then elaborates that "[i]ncluding address information will eliminate nearly all remaining false positives. In fact, one study of record linkage shows that matching on this information is as good as matching on 9-digit social security numbers." *Id.* Dr. Grimmer then explains, based on his own programming experience, that "[e]ven if the person requesting the ballot makes a slight error in their name, an appropriate and simple to design algorithm (called fuzzy matching) makes checking a list trivial and matching on the other information likely removes false positives." *Id.*

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At each turn, Dr. Grimmer provides his own opinions about the impacts of the challenged provisions, and those opinions do not merely rebut Dr. Green's report.

That is one reason why the case on which Plaintiffs primarily rely is inapposite. Mot. at 7. In *Kroll v. Carnival Corp.*, No. 19-23017-CIV, 2020 WL 4793444 (S.D. Fla. Aug. 17, 2020), the district court sensibly identified one situation in which a party may introduce expert testimony in response to expert testimony offered by another party: that is, "if the expert offers evidence

that is 'intended solely to contradict or rebut evidence on the same subject matter identified by' the affirmative expert of another party." *Id.* at *4 (quoting Fed. R. Civ. P. 26(a)(2)(D)(ii)). But nothing in that statement suggests that this is the *only* situation in which another party can offer expert testimony after expert testimony offered by an opposing party. And nothing in that statement means that a party's expert is *always* and necessarily a rebuttal expert when he submits a report after the other party's expert has submitted her report.[3] Rather, *Kroll* addressed the criteria for an expert being subject to the pre-trial disclosure deadlines in Federal Rule of Civil Procedure 26. Those deadlines are inapplicable here, as Dr. Grimmer submitted his report more than one year before trial. Also, because there were independent conclusions in the expert report, *Kroll* further concluded that "it is not difficult to see that Dr. Suite's opinions are in the nature of an affirmative expert, not a rebuttal expert." *Id.* at *16. The same is true of Dr. Grimmer's report.

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Here, the only reason that Dr. Grimmer's report was submitted after Dr. Green's report is that the parties jointly proposed staggered deadlines for expert reports. *See* [Doc. 68 at 22]. In their proposed scheduling order, the

[3] That is similarly fatal to Plaintiffs' reliance on other cases (at 8) discussing circumstances when a rebuttal expert's testimony should be excluded. Because Dr. Grimmer was not a rebuttal expert, this authority is irrelevant.

parties did not refer to State Defendants' deadline for expert reports as a deadline for *rebuttal*-only reports. *Id.*

Moreover, if Plaintiffs believed there were reasons to exclude Dr. Grimmer's opinions, they could have filed a motion to exclude those opinions when *Daubert* motions were due. But Plaintiffs decided not to do so, and the Court should not countenance Plaintiffs' attempt to recharacterize Dr. Grimmer's report as being limited to rebutting Dr. Green.

## CONCLUSION

Plaintiffs have failed to identify any authority supporting their request to exclude critical evidence showing the compelling interests that the challenged provisions serve. Additionally, Plaintiffs' attempt to exclude Dr. Grimmer fails on the facts and the law. Accordingly, the Court should deny Plaintiffs' motion.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Response 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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