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

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTIONS IN LIMINE

Motions in limine advance the trial process by saving the time and effort of both the parties and the Court by avoiding unnecessary battles over the admissibility of evidence. *Fox v. Gen. Motors LLC*, No. 1:17-CV-00209-JPB, 2019 WL 13060148, at *1 (N.D. Ga. Oct. 31, 2019). If evidence is clearly inadmissible, a motion in limine is the appropriate vehicle to exclude that evidence. *See id*. In responding to Plaintiffs' Motions in Limine, Defendants offer a slim rebuttal, primarily seeking to punt questions of admissibility to trial. Plaintiffs, meanwhile, seek to streamline trial by requesting 1) exclusion of cumulative hearsay evidence that is facially inadmissible for Defendants' proposed uses, 2) exclusion of a rebuttal expert in the event his testimony becomes irrelevant, and 3) enforcement of this Court's rule prohibiting the introduction of exhibits not previously disclosed. These are precisely the kinds of issues appropriate for resolution by motions in limine. For the following reasons, Plaintiffs' Motions in Limine should be granted.

SELECTED ABSENTEE BALLOT APPLICATION ALERT EMAILS

Defendants' argument that they do not intend to use these exhibits for the truth of the matters asserted is flawed. Defendants have not laid a sufficient foundation to use these emails to demonstrate their effect on state officials because they have provided no evidence of what that effect was, and it is unclear how they can do so at trial based on the existing record. Additionally, Defendants cannot

claim that the alert emails show that voters were concerned about or confused by absentee ballot applications received in the mail, without testimony from the authors about whether such interpretations of their out-of-court statements are true. Finally, Federal Rule of Evidence 106 does not apply only to *portions* of a single document collection, but instead requires the admission of the entire set of absentee ballot application alert emails produced in discovery.

1. The Absentee Ballot Application Alert Emails Are Hearsay.

Plaintiffs do not dispute that otherwise impermissible hearsay can in some cases be admitted "to show its effect on the hearer." *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015). But Defendants may not sidestep a hearsay objection by claiming that there was some sort of effect on the listener, without demonstrating the purported effect through other admissible evidence. *See* Fed. R. Evid. 104(b); Fed. R. Evid. 104 Advisory Committee Notes on Proposed Rules Subdivision (b). Defendants have provided no evidence showing that voter concerns communicated to state officials through these emails informed the enactment of SB 202. Without so doing, Defendants may not use the selected alert emails to demonstrate that the challenged provisions of SB 202 were intended to further the state's purported interest in ameliorating alleged voter confusion and

concerns about voter fraud.[1] As such, the selected absentee ballot application emails are not admissible.

Defendants also assert they plan to use their selected absentee ballot application emails to "show voters' states of mind," Def. Opp., ECF No. 209 at 6, but that is quintessentially impermissible hearsay.[2]

"[T]he state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind." *United States v.*

[1] This applies both to alerts describing the purported personal experiences of the sender (hearsay complaints) as well as those communicating alleged occurrences *not* personally experienced by the sender, but relayed by the sender on behalf of a third party (hearsay within hearsay complaints).

[2] The cases to which Defendants point to shoehorn the facts of this case into the "state of mind" hearsay exception do not support their position. In *United States v. Moore*, the court found that a law enforcement officer's testimony about a confidential informant's statements were not hearsay because those statements were used only to demonstrate "why *investigators* believed they had established probable cause" for a wiretap. 611 F. App'x 572, 575 n.2, 578 (11th Cir. 2015) (emphasis added). Crucially, the confidential informant's statements were not used to show the *confidential informant's* "state of mind," but were instead used to demonstrate the state of mind of *investigators*. Thus, this is a classic "effect on the hearer" use of otherwise inadmissible hearsay testimony. *Glock, Inc. v. Wuster* and *Silverton Mortg. Specialists, Inc. v. FDIC for Silverton Bank, N.A.* are trademark infringement cases, a wildly different context from the instant case. *See Glock, Inc. v. Wuster*, No. 1:14-CV-568-AT, 2019 WL 13043038 (N.D. Ga. Aug. 9, 2019); *Silverton Mortg. Specialists, Inc. v. FDIC for Silverton Bank, N.A.*, No. 1:09-cv-1583-AT, 2012 WL 13001592 (N.D. Ga. Sept. 28, 2012). Further, whether a declarant's statement is sufficiently explicit to ascribe a particular state of mind is a fact-specific inquiry. It is certainly not appropriate in this case, where whether voters' emails indicated that they were concerned about voter fraud or confused about the absentee voting process is open to interpretation.

Samaniego, 345 F.3d 1280, 1282 (11th Cir. 2003). Defendants wish to use the emails to show that "many [v]oters were worried that these applications presented an open invitation for voter fraud" because they "believe[ed] that the applications themselves were actually ballots." Def. Opp. at 5-6 (internal citations and quotations omitted). Yet none of the individuals who sent these alerts will testify at trial about whether the receipt of multiple or pre-filled applications made them concerned about voter fraud or confused about the difference between absentee ballots and absentee ballot applications. Instead, the Court must infer the basis for the individuals' concern or confusion from those individuals' out-of-court statements.[3] Requiring such inferences on the part of the Court transgresses the limited use of these documents that the Court identified in its Order on Defendants' Motion for Summary Judgment. ECF No. 179 at 9 n.11. To the degree that these emails are used to show that voters were actually confused or concerned about receiving multiple or pre-filled absentee ballot applications, they are hearsay and must be excluded.

Relatedly, Defendants' argument that statements demonstrating the "untruth of the complaints" cannot be hearsay, *see* Def. Opp. at 5-6, is inapposite. That

[3] This is particularly true for complaints relaying not the sender's own purported experiences, but those of a third party. For such complaints, the alleged confusion or concern of the affected voter is communicated not only out-of-court, but through an intermediary whose reliability cannot be examined.

voters may have been incorrect about the concerns they communicated is irrelevant because Defendants are not using the complaints to demonstrate their untruth.[4] Rather, Defendants are clearly offering them to show the *truth* that voters were concerned about and confused by receiving multiple or pre-filled applications in the mail. Def. Opp. at 5-6. Since the voters in question are not testifying about whether they were actually concerned or confused, the complaints are not admissible, whether the events discussed in them are false or not.[5]

2. Should Defendants' Selected Alert Emails Be Admitted, the Full Set of Absentee Ballot Application Alert Emails Must Also Be Admitted.

Defendants incorrectly state that Federal Rule of Evidence 106 does not require the "full set" of absentee ballot application alert emails.[6] The plain text of

[4] Defendants' reliance on *United States v. Rivera* is similarly irrelevant. Although the court in *Rivera* found the contested statements not to be hearsay in part because they were false, the purported falsity of the at-issue statements simply helped answer the ultimate question: whether they "were offered as evidence solely for the fact that [they were] made and the effect [they] might have upon [their] hearer." 780 F.3d 1084, 1093 (11th Cir. 2015) (internal quotations omitted).

[5] As Defendants note, these complaints are not necessary to prove that Plaintiffs have sent multiple applications to voters. They also should not be admitted for such purpose, since that would clearly involve offering them for the truth of the matter asserted by them – namely, that individuals received multiple or prefilled absentee ballot applications, including from Plaintiffs, which caused them to complain to the state.

[6] Contrary to Defendants' claims, Plaintiffs do not move to admit the "entire contents of an email inbox." Def. Opp. at 2. Instead, Plaintiffs move to include only those emails—requested and produced during discovery—which pertain to absentee ballot applications. *See* Plaintiffs' Motion in Limine, ECF No. 206 at 4; Exhibit B to Plaintiffs' Motion in Limine, ECF No. 206-2.

Rule 106 specifically permits the introduction of "[r]elated [s]tatements" and "other statement[s]," rather than merely "part of a statement." Fed. R. Evid. 106. As a result, the relevant "entirety" for purposes of Rule 106 must be determined on a "case by case" basis and may be "a single document . . . , all the documents . . . [or] some subpart of a document or collection." *United States v. Boylan*, 898 F.2d 230, 256-57 (1st Cir. 1990), *cert. denied*, 498 U.S. 849 (1990); *see also Fair Fight Action, Inc. v. Raffensperger*, 599 F. Supp. 3d 1337, 1343-44 (N.D. Ga. 2022) (permitting defendants to introduce "all of [the governor's] campaign statements" pursuant to Rule 106 because the plaintiffs intended to introduce evidence of a portion of his campaign statements).[7] There is no categorical rule against the admission of a collection of documents pursuant to Rule 106.

As Defendants acknowledge, Rule 106's fairness prong "allow[s] a party to put a statement in context where, without the context, the meaning would be distorted." Def. Opp. at 8-9 (quoting *Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 1516 (11th Cir. 1993)). That is precisely the situation here. In order to demonstrate an alleged "compelling interest[]" in the provisions of SB 202 that

[7] Defendants correctly point out that under *Beech Aircraft Corp. v. Rainey*, Rule 106 may be implicated when a mere "portion of a document" has been introduced. Def. Opp. at 8 (citing 488 U.S. 153, 172 (1988)). But *Beech Aircraft Corp.* says nothing about limiting the applicability of Rule 106 to only situations in which portions of a single document are contested. Thus, it does not follow that Rule 106 *only* applies to situations concerning snippets of a single record.

target "duplicate or pre-filled absentee-ballot applications," Defendants seek to admit *only* those emails which pertain to these exact practices. Def. Opp. at 1, 5. In response, Plaintiffs would show how these complaints represent only a small portion of total communications regarding absentee ballot applications received by the state and have been cherry-picked from a much broader array of voter concerns. It is highly distortive to include 68 documents which, viewed in isolation, would seem to provide support for Defendants' claims of a compelling state interest, while simultaneously excluding at least 190 documents *from the same set* that contextualize that purported state interest in light of other voter concerns of which state officials were aware, but which were nevertheless not addressed by SB 202. This is particularly true for complaints that, on their face, indicate that some individuals needed assistance voting absentee and Plaintiffs' practices, including those ultimately prohibited by SB 202, would be helpful for them. As such, the full set of absentee ballot application alert emails is "necessary to qualify, explain, or place into context" those complaints specifically selected by Defendants as favorable to their argument. Def. Opp. at 9 (quoting *United States v. Pendas-Martinez*, 845 F.2d 938, 944 (11th Cir. 1988)).[8]

[8] Defendants claim that as an alternative to the admission of the entire set of emails, Plaintiffs may "introduce testimony showing that these exhibits do not constitute the universe of emails received." Def. Opp. at 9. While Plaintiffs could introduce testimony to that effect or the parties could stipulate to *this fact*, neither

Finally, Defendants claim that Plaintiffs should have "listed the other emails on their exhibit list" if they thought there were "issues with the completeness" of Defendants' proposed exhibits. Def. Opp. at 9. But Plaintiffs assert that none of these emails—regardless of their inclusion on Defendants' exhibit list—are admissible at trial. It is not Plaintiffs' burden to preemptively introduce a more complete list of inadmissible evidence merely because Defendants may attempt to introduce an incomplete set of inadmissible evidence. Plaintiffs do not seek to affirmatively introduce the full set of emails, but merely to put those emails introduced by Defendants into proper context. If Defendants' proposed exhibits containing voter complaints about multiple and pre-filled absentee ballot application mailers are admitted at trial, Rule 106, as well as basic fairness, require that the entire group of absentee ballot application alert emails be admitted as well.

STATE DEFENDANTS' REBUTTAL EXPERT

State Defendants mischaracterize Dr. Grimmer's report and testimony. State Defendants wrongly assert Dr. Grimmer offers more than rebuttal evidence, relying primarily on his conclusory statement that he provides independent analysis. Def. Opp. at 10. But merely including such a statement does not make it so. Indeed, Dr. Grimmer himself testified in his deposition that he was not asked by Defendants'

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option is as effective as including the full universe of absentee ballot application alert emails and being able to show clear examples of other voter concerns of which Defendants were aware, but which were not addressed by SB 202.

counsel to conduct any independent analysis—only to "evaluate Dr. Green's report." ECF No. 167 (Grimmer Depo. Tr.), 48:19-49:3. Evaluation of Dr. Grimmer's report under the relevant legal standard makes plain that he should be properly characterized as a rebuttal witness. As such, should the Court decide to exclude Dr. Green's testimony, then Dr. Grimmer's responsive testimony should likewise be excluded.

An expert is properly classified as a rebuttal witness when their report and testimony seeks to contradict an opposing party's expert opinions on the same subject matter—they are not "limit[ed in their] analysis only to those methods proposed by the first expert" and "can use . . . additional data . . . so long as it relates to the same subject matter." *See Plantation Pipe Line Co. v. Associated Elec. & Gas Ins. Servs. Ltd.*, No. 1:09-CV-1260-SCJ, 2011 WL 13143562, at *2 (N.D. Ga. Nov. 10, 2011) (quoting *Deseret Management Corp. v. United States*, 97 Fed. Cl. 272, 274 (Fed. Cl. 2011)). That an expert "opin[es] on alternative theories does not convert a rebuttal expert report into an affirmative one." *Lebron v. Royal Caribbean Cruises, Ltd.*, No. 16-24687-CIV-WILLIAMS/SIMONTON, 2018 WL 3583002, at *4 (S.D. Fla. July 26, 2018). In essence, a rebuttal reaching alternative or contrary conclusions is responsive when offered to rebut an opposing party's

expert witness.[9]

Plantation Pipe Line Co., a case concerning liability for claims arising out of a petroleum pipeline leak, is illustrative. 2011 WL 13143562, at *1. There, the defendants asserted that the plaintiff's rebuttal witness was actually an independent expert because he rendered "a distinct and independent opinion." *Id*. The district court found, however, that "[a]ll [] of the reports at issue address this same subject matter"—the duration of the pipeline leak. *Id.* at *2. For this reason, the court concluded that the plaintiff's witness was properly a rebuttal witness, despite his "different methodology." *Id.*

The same rationale applies here. The portions of the Grimmer report that State Defendants specifically cite as independent analysis are themselves instances of rebuttal, in which Dr. Grimmer endeavors to contradict Dr. Green's conclusions and proposes an alternative conclusion. Rather than provide analysis wholly independent from Dr. Green's opinions, the paragraphs of the Grimmer report that

[9] Although not binding on this Court, the district court opinion in *United States ex rel. Montcrieff v. Peripheral Vascular Assocs., P.A.*, 507 F. Supp. 3d 734, 747 (W.D. Tex. 2020), instructively outlines three factors to assess if a report should be categorized as a rebuttal report: "(1) whether the report is purporting to contradict or rebut expert opinions offered by the opposing party as to a claim or defense on which the opposing party has the burden of proof; (2) whether the opinions are on the same subject matter as that identified by the opposing party's expert in its Rule 26(a)(2)(B) disclosure; and (3) whether the evidence disclosed as rebuttal evidence is intended solely to contradict or rebut that evidence." As discussed *infra*, the Grimmer report affirmatively meets all three of these criteria.

State Defendants cite all plainly seek to rebut opinions presented by Dr. Green. *See* Grimmer Rep., ECF No. 113-4 ¶ 35 (seeking to rebut Dr. Green's conclusion that "increasing the number of absentee ballot applications is independently valuable"), ¶ 36 (seeking to rebut Dr. Green's conclusion that "pre-filled ballot applications are more convenient for voters"), ¶¶ 40-42 (seeking to rebut Dr. Green's conclusion concerning the difficulty of matching names of ballot applicants with individuals who have already requested absentee ballots and the problems such difficulty will create for Plaintiffs' mailings).[10]

Furthermore, the Grimmer report's headings demonstrate that the report is clearly "intended solely to contradict or rebut" Dr. Green's opinions, because virtually all substantive headings are framed as responses to Dr. Green's opinions, evincing Dr. Grimmer's intent that his report was written "solely to contradict or rebut" Dr. Green's opinions. *See* Grimmer Rep. at 6, 9, 11, 12, 14, 17, 21, 24, 25.

In attempting to distinguish *Kroll v. Carnival Corp.*, No. 19-23017-CIV, 2020 WL 4793444 (S.D. Fla. Aug. 17, 2020), State Defendants mischaracterize the issue.[11] Plaintiffs do not argue that "a party's expert is *always* and necessarily a

[10] State Defendants correctly avoid citing any language concerning the Disclaimer Provision, which is no longer at issue in this case. *See* Grimmer Rep. ¶¶ 10-29.

[11] The fact that *Kroll* concerned pre-trial disclosure deadlines that are inapplicable here is a red herring. *Kroll*, as well as *Plantation Pipe Line Co.* and other cases on which Plaintiffs rely, all address the central question here—whether Dr. Grimmer's report is properly categorized as a rebuttal report.

rebuttal expert when he submits a report after the other party's expert has submitted her report." Def. Opp. at 12. The expert witness at issue in *Kroll* was found to be offering affirmative testimony (in part) not because of timing but because the majority of his report did not mention the expert he was purported to be rebutting. *Kroll*, 2020 WL 4793444, at *6. By comparison, responding to Dr. Green's analysis and opinions is central to the opinions Dr. Grimmer renders in his report. In fact, the *Kroll* court found it notable that the expert report in that case stated as an afterthought that he was "also asked to pursue" the task of providing rebuttal testimony. *Id.* (internal quotations omitted). In contrast, Dr. Grimmer's report states that he was engaged "to review and respond to [Dr. Green's] Expert Report" and noting that he "*also* provide[s] . . . independent analysis" of the challenged provisions. Grimmer Rep. at 1 (emphasis added).

State Defendants' argument that Plaintiffs should have filed a *Daubert* motion to exclude Dr. Grimmer's opinions similarly misses the point. Plaintiffs do not contest Dr. Grimmer's qualifications as an expert on *Daubert* grounds. *See* Def. Opp. at 13.[12] Rather, Plaintiffs assert that Dr. Grimmer's opinions are plainly

[12] Notably, the opinions of Dr. Grimmer that State Defendants specifically cite or quote as admissible are grounded on the very same type of professional experience that State Defendants argue are inadequate as to Dr. Green's opinions. *See* Def. Opp. at 10-11 (citing Grimmer Rep. ¶¶ 35, 36, 40); Grimmer Rep. ¶ 40 (citing his "professional experience" as the basis of his opinion); Defs.' Mot. in Limine, ECF No. 187-1 at 15 (arguing that "qualification and experience alone are insufficient to

rebuttal opinions that must be excluded if the report and testimony he seeks to respond to (*i.e.*, the opinions of Dr. Green) are excluded.

INTERVENOR DEFENDANTS ARE LIMITED TO PROPERLY DISCLOSED EXHIBITS

Intervenor Defendants' suggestion that Plaintiffs seek to prevent them from introducing any exhibits at trial exaggerates and mischaracterizes Plaintiffs' Motion in Limine. ECF No. 207 at 1. Plaintiffs simply seek to enforce this Court's Standing Order that because Intervenor Defendants did not identify any intended trial exhibits with the Pretrial Order, they are limited at trial to the use of exhibits previously introduced by Plaintiffs or State Defendants. This Court should reject Intervenor Defendants' attempts to sidestep the Standing Order.

Evidence barred by a standing order is inadmissible. *Fox v. Gen. Motors LLC*, No. 1:17-CV-00209-JPB, 2019 WL 13060148, at *4 (N.D. Ga. Oct. 31, 2019) (granting a motion in limine to deny admission of evidence at trial per Court's standing order); *see also Neagle v. Illinois Tool Works, Inc.*, No. 1:08-CV-2080-WSD, 2011 WL 13173913, at *2 (N.D. Ga. Feb. 11, 2011) (granting motion in limine to exclude documents not specifically identified pretrial in accordance with the Court's standing order). Adhering to a standing order is not "strange,"

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render an expert's opinions reliable"). State Defendants' arguments in support of the admissibility of Dr. Grimmer's opinions only underscore that Dr. Green's opinions are admissible, too.

ECF No. 207 at 1, "misdirected," *id*. at 2, nor a "sweeping ruling." *Id*. at 3. It is common practice to identify exhibits before trial, Fed. R. Civ. P. 26(a)(3), and Intervenor Defendants were aware of their obligation to provide an exhibit list if they wanted to introduce any exhibits at trial not previously offered by Plaintiffs or Defendants.

Moreover, this Court's Standing Order exists for good reason—to give notice. Identification of exhibits is necessary to meaningfully provide Plaintiffs with notice that Intervenor Defendants plan to use certain evidence, including evidence that might be used by another party. While Intervenor Defendants do not "anticipate" using any evidence not already introduced at trial, ECF No. 207 at 2, that is not a guarantee. Fairness still requires that all parties operate under the same procedural rules, including those detailed in this Court's Standing Order.

Intervenor Defendants propose that should they choose to introduce an exhibit at trial, Plaintiffs should bear the burden by objecting at trial. *Id.* at 2. But it is *Intervenor Defendants'* burden, not Plaintiffs, to demonstrate why "manifest injustice," *id.* at 3, would occur if Intervenor Defendants were not allowed to introduce their own exhibits at trial. *See* Standing Order, ECF No. 35 at 33 ("a party can establish that the failure to permit their use would cause a manifest injustice"). If Intervenor Defendants seek to introduce evidence at trial notwithstanding their failure to comply with the Standing Order, it is their burden

to show they are entitled to do so.

CONCLUSION

Plaintiffs respectfully request that this Court grant their Motions in Limine.

Dated this 15th day of March, 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: March 15, 2024.

/s/Valencia Richardson

Counsel for Plaintiffs