UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.,

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervenor-Defendants.

Cases Consolidated for Trial:

Case No. 4:21-cv-186-MW/MAF
4:21-cv-187-MW/MAF
4:21-cv-201-MW/MAF
4:21-cv-242-MW/MAF

NAACP, _FRT_, _LOWV_, AND _HTFF_ PLAINTIFFS' SUPPLEMENTAL FILING IN FURTHER SUPPORT OF MOTION TO PRECLUDE DEFENDANTS FROM MAKING UNFOUNDED INSINUATIONS OF ILLEGAL ACTIVITY

On February 1, 2022, the *NAACP*, *FRT*, and *LOWV* Plaintiffs moved to preclude Defendants from further referencing Fla. Stat. § 101.051(2) in cross-examining Plaintiffs' witnesses regarding prior voting line-relief activities, such as providing food, water, or umbrellas to voters, to insinuate that witnesses had violated the statute. ECF No. 505. The Court ordered Defendants to file a response by noon tomorrow, February 3, 2022, ECF No.

506, and offered Plaintiffs an opportunity to "expand upon" or "add a supplement" to the motion. Feb. 1, 2022 Tr. at 659:2–9.

Before and after Plaintiffs filed their motion on February 1, 2022, Defendants have continued—and expanded—their pattern of using cross-examination to make unfounded insinuations that Plaintiffs or Plaintiffs' witnesses engaged in illegal activity. *See* Jan. 31, 2022 Tr. 318:9–324:20 (defense counsel baselessly insinuating that witness Rosemary McCoy engaged in financial impropriety with her organization), Feb. 1, 2022 Tr. 564:4–566:14, 568:25–16 (defense counsel baselessly implying that Common Cause engaged in illegal lobbying).

Defendants' tactic, if unchecked, will waste time, sow confusion, and risk unfair prejudice to Plaintiffs. The Federal Rules of Evidence do not permit broad evidence or insinuations that a person has a bad character or a tendency toward criminality—even where there is evidence that actual crimes have been committed. In this trial, Defendants' repeated attempts to imply that witnesses have engaged in criminal conduct have also been completely baseless. Defendants are repeatedly misunderstanding either what the witnesses are doing, what the law actually prohibited or prohibits, or both.

Whatever the reason for Defendants' tactics, they are inappropriate and risk intimidating and harassing witnesses. Defendants' improper persistence in asking such questions—which are irrelevant to these actions—also wastes time and sows confusion. Thus, in addition to the relief sought in their previous motion, ECF No. 505, Plaintiffs respectfully request that the Court issue a broader order directing Defendants to desist from suggesting or alleging unlawful or criminal conduct without proper factual and legal foundation.

ARGUMENT

Since the outset of this trial, Defendants have repeatedly used cross-examination to groundlessly insinuate that Plaintiffs' witnesses engaged in illegal or criminal activity. Defense counsel employed this tactic with Plaintiffs' very first witness, confronting Cecile Scoon of the League of Women Voters of Florida with the unfounded claim that the League's line-relief activities violated Fla. Stat. § 101.051 before the passage of Senate Bill 90 ("SB 90") and that this activity was "actually a crime." *See* Jan. 31, 2022 Tr. 152:13–23. As explained in Plaintiffs' February 1, 2022 motion, Defendants have no factual or legal basis to suggest that any Plaintiff (or Plaintiff member) violated Section 101.051, either before or after SB 90's enactment. ECF No. 505, at 2–3. To prevent such unfounded harassment of

witnesses, Plaintiffs' pending motion seeks an order barring such questioning about Section 101.051. *Id.* at 4.

Since trial began, defendants have expanded their pattern of using baseless insinuations of illegal activity during cross-examination. For example, in cross-examining Ms. McCoy, the President and CEO of Plaintiff Harriet Tubman Freedom Fighters, Defendants pointed to irrelevant pay stubs in an apparent effort to suggest that the witness had engaged in some sort of impropriety. Jan. 31, 2022 Tr. 318:9–324:20; *see also id.* at 325:2–3 (Court's statement that its patience for asking "silly" or "irrelevant questions" is "growing thin").

In addition, during the cross-examination of Sylvia Albert, Common Cause's Director of Voting and Elections, Defendants cited a draft Common Cause email urging members to contact their state legislators to voice their opposition to SB 90, in an effort to suggest that Common Cause violated lobbying and tax laws. *See* Feb. 1, 2022 Tr. 564:4–566:14, 568:25–16. The insinuation was incorrect and utterly without foundation, as Ms. Albert explained. *Id.* at 569:14–15 ("Grassroots advocacy is not considered lobbying under Florida law"). More to the point, Defendants' implied accusation was utterly irrelevant to Common Cause's challenges to SB 90—or, indeed, to any claim or defense in these actions. *Id.* at 568:4 (Court noting that email

offered by Defendants to insinuate impropriety is irrelevant); *id.* at 568:8–12 (Court noting that document cited by Defendants is "entirely consistent with Ms. Albert's testimony" that Common Cause did not lobby legislators, but instead "communicated with their membership and encouraged them to do so.").

Most recently, Defendants falsely implied just this morning that Alan Madison had done something wrong by volunteering to register voters with a registered third-party voter registration organization ("3PVRO"), rather than personally registering as 3PVRO. Feb. 2, 2022 Realtime Tr. at 37:13-38:2.[1] But Defendants made no showing that the nature of Mr. Madison's registration activities required him to personally register as a 3PVRO or a registration agent of such an organization. *See* Fla. Admin. Code R. 1S-2.042.

[1] "Q. I want to talk to you about voter registration. Are you aware of the requirement that third party voter registration organizations are required to register with and provide certain information to the Division of Elections?
A. Yes.
Q. Okay. And you are not registered as a third party voter registration [] organization; correct?
A. I am not.
A. I am not, but I work with somebody who is.
Q. Okay. And you are not an officer of a registered third party voter registration organization?
A. I am not.
Q. Okay. Are you listed as a regist[ration] agent for a registered third party voter registration organization?
A. No."

And even if there were some basis to believe there had been a violation of the registration requirements—and there is not—that would have nothing to do with the issues in these actions. Rather, Defendants' questions served only to attempt to intimidate Mr. Madison (and potentially discourage him from registering voters in the future).

As a threshold matter, this line of questioning does not even clear Federal Rule of Evidence 401's low bar for relevancy. It does not tend to make a fact more or less probable, nor does it inquire into any fact of consequence in this action. But even if such questioning could clear Rule 401, it should be excluded. If it has any probative value (and it has none), it is significantly outweighed by the serious risk that continuing to make these insinuations on the record would prejudice Plaintiffs and muddy the issues. This court has the power to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." Fed. R. Evid. 611; *see also United States v. Hansen*, 563 F. App'x 675, 677 (11th Cir. 2014) (per curiam) (affirming district court's decision to terminate examination "to avoid wasting time and to protect the witness from harassment"); *Green v. U.S. Steel Corp.*, No. 2:09-cv-30, 2012 WL 4478967,

*6–7 (N.D. Ala. Sept. 26, 2012) (noting in FMLA case, that counsel "cannot . . . harass or embarrass" corporate-representative witness by "seeking to prove that [she] is ignorant of FMLA regulations"); *Lips v. City of Hollywood*, No. 07-cv-60253, 2008 WL 11453674, *5 (S.D. Fla. Sept. 28, 2008) (denying motion for new trial on grounds of court's termination of cross-examination, where "significance of [precluded] questions" was unexplained and questions were unrelated to the claimed injuries at issue).

CONCLUSION

Defendants' repeated insinuations of illegal or criminal conduct are inappropriate, offensive, and time-wasting. Such questions, and the answers they are attempting to solicit, are irrelevant. In any case, any possible relevancy is significantly outweighed by the risk of prejudice to Plaintiffs. If unchecked, Defendants' tactic threatens to harass or intimidate witnesses and to disrupt the orderly presentation of witness testimony in this matter.

Plaintiffs thus respectfully ask the Court to exercise its power under the Federal Rules of Evidence to order Defendants to desist from making irrelevant and baseless allegations or insinuations of illegal or criminal conduct in their cross-examination of Plaintiffs' witnesses.

Dated: February 2, 2022 Respectfully submitted,

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LOCAL RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1(F), the foregoing document contains 1,326 words, excluding the case style, signature blocks, and certificate of service.

/s/ Benjamin L. Cavataro
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served on all counsel of record through the Court's CM/ECF system on February 2, 2022.

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