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, and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Intervenor-Defendants.

Cases Consolidated for Trial:

Case Nos.: 4:21-cv-186-MW/MAF
4:21-cv-187-MW/MAF
4:21-cv-201-MW/MAF
4:21-cv-242-MW/MAF

PLAINTIFFS' MOTION FOR THE ADMISSION OF SENATOR MICHAEL BENNETT STATEMENT OVER DEFENDANTS' OBJECTION

Plaintiffs[1] respectfully request that, for the reasons set forth below, the Court admit the statement of Defendant Michael Bennett that was discussed in Dr. Kousser's expert report, ECF 467-13 at ¶ 71, over the objections interposed by

[1] This motion is filed on behalf of the *Florida Rising* and *NAACP* Plaintiffs.

Defendants at trial, ECF 563 at 1733:21.[2] This Court invited briefing on the issue. *Id.* at 1737:2-16. The statement is relevant to the *Arlington Heights* analysis of the Contested Provisions of SB 90, and the statement is not hearsay. The objection should be overruled, and the statement should be admitted.

I. THE STATEMENT IS RELEVANT TO THE *ARLINGTON HEIGHTS* ANALYSIS.

The *Arlington Heights* framework governs Plaintiffs' intentional discrimination claims. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Under this framework, a court must consider the challenged law's "historical background." *Id.* at 267; *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1322 & n.33 (11th Cir. 2021).

The statement is relevant for two reasons. First, Defendant Bennett's statement, given when he was a State Senator and the Senate President *Pro Tempore*, forms part of the historical background leading up to the passage of SB 90. In his expert report, Dr. Kousser discussed the 2011 passage of HB 1355 as an example of

[2] The statement reads: "Do you read the stories about the people in Africa? The people in the desert, who literally walk two and three hundred miles so they can have the opportunity to do what we do, and we want to make it more convenient? How much more convenient do you want to make it? Do we want to go to their house? Take the polling booth with us? This is a hardfought privilege. This is something people die for. You want to make it convenient? The guy who died to give you that right, it was not convenient. Why would we make it any easier? I want 'em to fight for it. I want 'em to know what it's like. I want them to go down there, and have to walk across town to go over and vote." ECF 467-13 at ¶ 71.

the Florida legislature's attempt to "crack[] down" on early in-person voting (EIP). ECF 467-13 at ¶¶ 67-71. These restrictions were noteworthy, according to Dr. Kousser, because more than half of Black votes in Florida had been cast using EIP in 2008. *Id.* at ¶ 66. Dr. Kousser included Senator Bennett's statement, indicating his opposition to making it "more convenient" to vote and his support for making voters "fight for it," to support the proposition that HB 1355 is a recent historical example of the Florida legislature's efforts to make voting more difficult for Black and Latino voters. *Id.* at ¶ 71.

Indeed, Dr. Kousser's reliance on Senator Bennett's statement is supported by Dr. Burch's testimony on the political science phenomenon, "racial resentment." ECF 536 at 952:6-15. As Dr. Burch described, racial resentment is "the idea that Black people don't live up to those standards of industriousness and effort, and a lack of effort . . . accounts for racial disparities in American society." *Id.* at 956:11-13. The concept of racial resentment helps provide context for Senator Bennett's statement, which indicated support for forcing voters to "fight for [their right to vote]" and "have to walk across town to go over and vote." ECF 467-13 at ¶ 71. Further, Dr. Burch stated that "the research links . . . attitudes of racial resentment to policy preferences." ECF 536 at 953:4-6. Through the lens of racial resentment, Senator Bennett's statement in support of HB 1355 provides critical historical context to evaluate SB 90. ECF 467-13 at ¶ 71.

Arlington Heights requires courts to consider "historical background" in their evaluation of a legislature's intent—"particularly if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 267. As Dr. Burch testified: "what happens in the past both informs, influences, and shapes what happens in the future . . . past politics can set up the politics of the day, but also past politics can either open or close avenues for ways of thinking about the ways that we can move forward . . . past politics and past policies and past actions shape ideology." ECF 536 at 937:18-23. Therefore, Senator Bennett's statement during the debate on HB 1355—one bill in "a series of official actions" taken to restrict the preferred voting methods of Black and Latino voters in Florida—is relevant to evaluating the intent behind the Challenge Provisions of SB 90. FRE 401(b) ("Evidence is relevant if . . . the fact is of consequence in determining the action.").

Second, in subsequent litigation over HB 1355, Defendant Bennett's statement became a focal point of the *Arlington Heights* "contemporaneous statements" analysis in that litigation. *See Florida v. United States*, 855 F. Supp. 2d 299, 354-55, 383-84 (D.D.C. 2012) (concluding that the sections of HB 1355 that reduced early in person voting hours would not be precleared under Section 5 of the Voting Rights Act). As numerous witnesses have testified, there are obvious parallels concerning HB 1355 and SB 90, including that they have the same sponsor and both targeted election practices that had recently been successfully utilized by

Black voters in recent elections. ECF 536 at 885-887 (Austin), 945-958 (Burch); ECF 563 at 1730-33, 1839-1840 (Kousser). Given that HB 1355 and SB 90 have the same legislative sponsor (Dennis Baxley), the fact that the Bennet statement was the subject of scrutiny during consideration of HB 1355 supports an inference that Florida legislators who supported SB 90 were particularly careful not to make comparable statements during deliberations over SB 90.

II. THE STATEMENT IS NOT HEARSAY.

Senator Bennett's statement is not being offered for the truth of the matter asserted. In particular, it is not being offered to show what "people in Africa" in fact do—the sole assertion of fact in the statement—which is of no consequence to this case. Instead, the statement is being offered to show (1) that the statement was made and (2) that it contributes to the historical context leading up to the passage of SB 90. Therefore, the statement is not hearsay. FRE 801(c)(2).

What's more, Senator Michael Bennett is a party to this lawsuit in his capacity as the Manatee County Supervisor of Elections. The Court has already ordered that statements by Supervisors are not hearsay when offered by Plaintiffs because they are statements of party opponents within the meaning of Federal Rule of Evidence 801(d)(2). ECF 545 at 3. Therefore, the statement is not hearsay.

Respectfully submitted this 9th day of February, 2022.

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LOCAL RULES CERTIFICATION

Undersigned counsel conferred with opposing counsel pursuant to Local Rule 7.1(B), and confirms that Defendants and Defendant-Intervenors oppose the requested relief. Undersigned counsel certifies that this motion contains 1,106 words, excluding the case style, conferral certification and certificate of service.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 9th, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel in the Service List below.

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