

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

GEORGIA COALITION FOR THE
PEOPLES' AGENDA, INC., *et. al.*

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his
official capacity as Secretary of State
for the State of Georgia,

Defendant.

Civil Action No.
1:18-cv-04727-ELR

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION IN LIMINE
TO EXCLUDE UNDISCLOSED EVIDENCE**

Pursuant to Federal Rule of Civil Procedure 37(c)(1), Plaintiffs move to preclude Defendant's use at trial of evidence or testimony related to the United States Citizenship and Immigration Services' Systematic Alien Verification for Entitlements ("SAVE") system for purposes of citizenship verification that has not been disclosed to Plaintiffs.

In the parties' proposed consolidated pretrial order, Defendant for the first time identified Blake Evans, Defendant's current Director of Elections, as a potential trial witness. The parties met and conferred on February 28, 2024, during which Defendant's counsel explained that Defendant intended to call Mr. Evans to testify

about, among other things, factual developments that post-date discovery and Plaintiffs' January 2023 limited Rule 30(b)(6) deposition of Ryan Germany, including the state's new voter registration system, known as GARVIS, and the Defendant's current use of SAVE for purposes of citizenship verification of voter registration applicants in "pending for citizenship verification" status. As of Mr. Germany's deposition, Defendant had not completed his second SAVE "audit" of the voter registration applicants in "pending for citizenship verification" status and had not implemented SAVE as part of the routine citizenship verification process. Defendant has made no supplemental disclosure of such matters since the limited deposition of Mr. Germany.

Plaintiffs confirmed the substance of the February 28, 2024 meet and confer in a letter to Defendant's counsel on March 1, 2024. Defendant's counsel responded to this letter on March 5. Contrary to his position during the meet and confer, Defendant's counsel asserted that Defendant has "no plans" to call Mr. Evans as a trial witness "at this time," and if Mr. Evans were to be called as a witness, it would "only be to offer testimony that is consistent with the 30(b)(6) deposition of Mr. Germany."

The Federal Rules of Civil Procedure prohibit the introduction of undisclosed evidence at trial unless the failure to disclose was substantially justified or harmless. Fed. R. Civ. Pro. 37(c). The Court should exclude all evidence concerning

Defendant's use of SAVE that was not disclosed to Plaintiffs, including testimony by Mr. Evans, Mr. Germany, other agents of the Defendant, and/or defense experts, and including any testimony that is reliant upon documents in Defendant's possession, custody and control that have not been disclosed to Plaintiffs.

BACKGROUND

Discovery in this case closed on August 6, 2021. *See* ECF No. 112. The first time Defendant's counsel broached the subject of the Defendant's use of SAVE to verify citizenship with Plaintiffs' counsel was in an email on or around September 29, 2022, *after* the Court entered its order denying Defendant's motion for summary judgment. ECF No. 160.

On January 19, 2023, pursuant to the Court's Order, ECF No. 165, Plaintiffs took a deposition of the Defendant's 30(b)(6) witness, Ryan Germany, limited in scope to Defendant's use of SAVE to verify citizenship. At this deposition, Mr. Germany testified that the decision to potentially use SAVE for purposes of citizenship verification for voter registration was made around the end of 2021. ECF No. 172-2 at 3 (Germany Dep., 24:12-16). Mr. Germany testified that the Defendant's first SAVE "audit" in 2022, during which Defendant ran the backlog of voter registration applicants who were in "pending for citizenship verification" status through SAVE, verified over 60% of these applicants as U.S. citizens. ECF No. 172-2 at 5-7 (Germany Dep., 34:4-45:24). He further testified that the

Secretary's office planned to incorporate SAVE into the regular voter registration process. ECF No. 172-2 at 3 (Germany Dep., 25:7-20). He testified that this integration was anticipated to occur by the end of 2023, ECF No. 172-2 at 11-13 (Germany Dep., 138:14-146:14), though he did not discuss how SAVE would be incorporated in the State's transition from the eNet to GARVIS voter database systems.¹ Mr. Germany also testified that the Secretary was in the early stages of conducting a second SAVE "audit" of the voter registration applicants who were in "pending for citizenship verification" status. ECF No. 172-2 at 13 (Germany Dep., 146:15-147:8).

Based on this and other testimony, on February 8, 2023, Plaintiffs requested an unopposed extension for the filing of a Joint Consolidated Pretrial Order and a Status Conference in 60 days to monitor factual developments related to SAVE. ECF No. 172. Following a March 28, 2023 Telephone Status Conference, the Court administratively closed the case. *See* ECF No. 176.

On September 28, 2023, Plaintiffs sought leave to reopen the discovery period on a limited basis to conduct discovery on Defendant's use and implementation of SAVE since Mr. Germany's January 2023 deposition. ECF No. 185. On October 27,

¹ Mr. Germany provided a far less optimistic estimate for the final implementation of SAVE during his deposition in this matter than he did during his trial testimony in *Fair Fight Action, Inc. v. Raffensperger*, where he testified in 2022 that the final implementation of SAVE was estimated to be a "one-to-three-month project." 634 F. Supp. 3d 1128, 1224 (N.D. Ga. 2022).

2023, the Court denied Plaintiffs' motion to reopen discovery and ordered the parties to submit a proposed consolidated pretrial order within 21 days. ECF No. 194. The parties submitted the proposed consolidated pretrial order on November 17, 2023. ECF No. 195. The Court set the case for a bench trial beginning Monday, April 8, 2024, with a pretrial conference on March 26, 2024. ECF No. 209.

Defendant's case outline included as Attachment B in the proposed consolidated pretrial order asserts "Defendant's use of the Systematic Alien Verification for Entitlements (SAVE) system further reduces any minimal burden [on voters] because individuals who are in Pending-Citizenship status who are confirmed by SAVE to be citizens are moved to Active status." ECF No. 195-2 at 2. During a meet and confer on February 28, 2024, Defendant's counsel confirmed that they intended to call current Elections Director Blake Evans to testify as to the implementation of GARVIS and the Secretary's future plans for SAVE. However, Defendant's counsel then changed course on March 5th, informing Plaintiffs that he no longer planned to call Mr. Evans as a witness, and if he did, "it would only be to offer testimony that is consistent with the 30(b)(6) deposition of Mr. Germany."

ARGUMENT

The Federal Rules of Civil Procedure are clear that "[i]f a party fails to provide information" pursuant to Rule 26(a) or (e), "that party is *not allowed* to use that information" at trial unless the failure to disclose was substantially justified or is

harmless. Fed. R. Civ. P. 37(c)(1) (emphasis added). “The burden of establishing that a failure to disclose was substantially justified or harmless rests on the nondisclosing party.” *Mitchell v. Ford Motor Co.*, 318 Fed. Appx. 821, 824 (11th Cir. 2009) (quoting *Leathers v. Pfizer, Inc.*, 233 F.R.D. 687, 697 (N.D. Ga. 2006)).

Courts in this district examine the following factors in determining whether the failure to disclose information is substantially justified or harmless: “(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party’s explanation for its failure to disclose the evidence.” *Little v. Ford Motor Co.*, No. 1:16-CV-00931-ELR, 2017 WL 6994586, at *5 (N.D. Ga. Dec. 21, 2017) (citations omitted).

Motions to exclude evidence may be granted even in non-jury cases, “especially where resolution of the motion would streamline the trial process.” *Castang v. Kim*, No. 1:22-CV-05136-SCJ, 2023 WL 2373660, at *2 (N.D. Ga. Feb. 2, 2023) (quoting *Salomon Constr. & Roofing Corp. v. James McHugh Constr. Co.*, No. 1:18-CV-21733-UU, 2019 WL 5256980, at *4 (S.D. Fla. Mar. 22, 2019)).

The Court should preclude Defendant from introducing evidence at trial related to the State’s new voter registration system, GARVIS, and the use of SAVE in verifying the citizenship status of voter registration applicants that has not been

disclosed to Plaintiffs. Evidence concerning the use and implementation of GARVIS and SAVE, including testimony based on undisclosed documents or other evidence, would cause significant surprise and disruption at trial.

Plaintiffs have not had an opportunity to contextualize any new evidence that may be included in trial testimony, nor to ensure that Defendant is not merely selectively disclosing evidence while withholding other, potentially mitigating, evidence from Plaintiffs. Undisclosed evidence pertaining to GARVIS and SAVE is the paradigm example of evidence subject to exclusion at trial because prior disclosure is “fundamental and critical to civil litigation for purposes of putting a party on notice of the evidence that it must understand and contend at trial, as well as allowing a party to assess its case.” *Perdum v. Wells Fargo Bank, N.A.*, No. 1:17-CV-972-SCJ, 2020 WL 1467252, at *3 (N.D. Ga. Jan. 6, 2020). *See also Discrete Wireless, Inc. v. Coleman Techs., Inc.*, No. 1:06-CV-0554-GET, 2009 WL 3334873, at *4-5 (N.D. Ga. Mar. 4, 2009), *order clarified on reconsideration*, No. 1:06-CV-554-GGB, 2009 WL 10668901 (N.D. Ga. July 8, 2009) (excluding testimony and evidence of events that occurred after the close of discovery where other party did not have opportunity to conduct further discovery and argued it would be unfairly prejudiced by allowing the evidence at trial).

The Court should ensure that Plaintiffs are not unduly prejudiced by testimony on matters that post-date the discovery conducted in this action.

CONCLUSION

Plaintiffs' Motion in Limine should be granted to exclude evidence concerning Defendant's post-discovery use of SAVE which Defendant has not disclosed to Plaintiffs.

Respectfully submitted, this 5th day of March, 2024.

/s/ Bryan L. Sells

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**Admitted pro hac vice*
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Counsel for Plaintiffs

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1, the undersigned counsel hereby certifies that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1.

Dated this 5th day of March 2024.

/s/ Julie M. Houk

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CERTIFICATE OF SERVICE

I hereby certify that on March 5th, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the counsel of record in this case.

Dated this 5th day of March 2024.

/s/ Julie M. Houk

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