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

GEORGIA COALITION FOR THE PEOPLE'S AGENDA, INC., *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, in his official capacity as Secretary of State for the State of Georgia, *Defendant*.	CIVIL ACTION FILE NO. 1:18-cv-04727-ELR

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE UNDISCLOSED TESTIMONY

INTRODUCTION

This Court has denied Plaintiffs' attempts to obtain additional discovery in this case several times. Faced with an imminent trial, Plaintiffs now seek to have the Court issue a blanket ruling on the admissibility of evidence they do not specifically identify when their concerns could be far more easily dealt with during the course of trial. Plaintiffs admit that they do not know if the evidence about which they complain will actually be offered—in fact, they agree that counsel for the Secretary has told them that their concerns about Mr. Evans' testimony are unfounded.

As discussed below, there is no prejudice to Plaintiffs if the Court defers ruling on this issue now—especially in a bench trial. Rather than take the time to address these issues pretrial, this Court should deny Plaintiffs' motion and deal with any issues regarding evidence disclosure during the trial itself. *See Singh v. Caribbean Airlines Ltd.*, No. 13-20639-CIV-ALTONAGA/Simonton, 2014 U.S. Dist. LEXIS 118559, at *2 (S.D. Fla. Jan. 28, 2014) (quoting 9A Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 2411 (3d ed. 2008). As discussed below, "evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in the proper context." *Benestad v. Johnson & Johnson*, No. 20-60496-CIV, 2022 U.S. Dist. LEXIS 184264, at *4 (S.D. Fla. Mar. 28, 2022) (quoting *United States v. Gonzalez*, 718 F. Supp. 2d 1341, 1345 (S.D. Fla. 2010).

Plaintiffs' request that this Court rule on hypothetical evidence in a vacuum has no legal basis, is pointless, and a waste of the Court's time. The motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this case on October 11, 2018. [Doc. 1]. Discovery began on January 16, 2019. [Doc. 36] and over the next four-and-a-half years, this Court granted a dozen extensions of discovery. [Doc. 36]; [Doc. 49]; [Doc. 53]; [Doc. 55]; [Doc. 58]; [Doc. 68]; [Doc. 78]; [Doc. 89]; [Doc. 96]; [Doc. 103]; [Doc. 108]; [Doc. 112]. The last extension set the end of discovery for more than two

and a half years ago, on August 6, 2021, just shy of five and a half years since the case was filed. When granting the last extension, the Court specifically warned the parties that it would not consider further extensions. [Doc. 112, pp. 2-3].

In the more than two-and-a-half years since discovery closed, pursuant to his constitutional and statutory obligations in elections, the Secretary has updated Georgia election systems where possible, adding the use of the Homeland Security-based Systematic Alien Verification for Entitlements (SAVE) audit in 2022 and 2023 and updating the voter-registration system to a new platform in 2023. In the meantime, another Court in this district determined that the citizenship-matching processes challenged here did not impose an unconstitutional burden on the right to vote and did not violate Section 2 of the Voting Rights Act. *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1223, 1246 (N.D. Ga. 2022). Significantly, that district court decision did not consider the use of SAVE to be dispositive on the questions before it. *Id.* at 1224.

Since discovery closed, the Secretary has continued providing information to Plaintiffs regarding the current citizenship verification processes. That includes the limited 30(b)(6) deposition of the Secretary's office this Court permitted on January 19, 2023; phone conferences to answer questions from Plaintiffs on October 5, 2022, January 27, 2023, June 21, 2023,

and August 8, 2023; emails providing documents and/or information on the SAVE audit process on October 5, 2022, January 19, 2023, June 16, 2023; and conferences with the Court to address the status of the case on March 28, 2023, and August 17, 2023 in addition to conversations with defense counsel and email exchanges during the preparation of the Joint Pretrial Order. [Docs. 189, pp. 2-3; 189-1, 189-2, 189-3].

On October 17, 2023, Plaintiffs filed a "Notice of Trial Readiness" but made that notice contingent on the Court reopening discovery in this case and ordering Defendant to complete all tasks Plaintiffs requested. [Doc. 190]. Plaintiffs' motion to reopen discovery requested that the Court allow them not only the opportunity to serve additional document requests, but also, requested another deposition of the Secretary's office and another opportunity to file new expert reports. [Doc. 185-1, p. 7]; [Doc. 186, p. 2]. The Court denied all of Plaintiffs' requests. [Doc. 194].

Apparently unhappy with this Court's prior rulings, Plaintiffs now file their motion *in limine* to exclude an amorphous category of evidence, namely, any evidence "that has not been disclosed to Plaintiffs" concerning the new voter registration system and implementation of SAVE without pinpointing any specific evidence that Defendant *actually* intends to present at trial. [Doc. 215-1, pp. 6–7].

ARGUMENT AND CITATION OF AUTHORITIES

I. Relevant legal standards.

While Plaintiffs' brief reads more like a discovery motion, they filed a motion *in limine* seeking to exclude evidence at trial. Motions *in limine* are recognized as motions that seek to "exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. U.S.,* 469 U.S. 38, 40 n. 2 (1984). Motions *in limine* in bench trials are frowned upon and often viewed as "superfluous" and "pointless." *Regions Bank v. NBV Loan Acquisition Member, LLC*, No. 21-23578-CIV-MORE, 2023 U.S. Dist. LEXIS 92166, at *2 (S.D. Fla. Feb. 21, 2023) (citations omitted). Motions *in limine* are typically filed to avoid any "undue prejudice" occasioned by the introduction of inadmissible evidence at trial and the inability to "unring the bell" once the jury has heard the evidence. *Singh,* 2014 U.S. Dist. LEXIS 118559 at *2. But this protection is unnecessary in non-jury trials "where it is presumed the judge will disregard inadmissible evidence and rely only on competent evidence." *Id.* It is widely recognized that the court is in a far better position to "assess the values and utility of evidence" and "resolve all evidentiary doubts in favor of admissibility" with "the benefit of the context of trial" rather than ruling on the evidence beforehand. *Id.* at *2–3 (citations omitted).

II. Plaintiffs face no prejudice.

Relying on factors related to disclosure of information during discovery, Plaintiffs claim they would be prejudiced if certain testimony is presented at trial. [Doc. 215-1, p. 7]. As discussed above, Plaintiffs have already received significant disclosures of information related to the new voter-registration system (GARVIS) and the SAVE audit process, so they cannot prejudiced or surprised by those topics at trial.

But there is also no concern about prejudice when the Court is familiar with the issues. Thus, Plaintiffs "'prejudice' argument falls flat because the Court – which is the fact finder in this matter – is already intimately familiar with these transactions given the extensive briefing on the issue in the parties' various memoranda." *Regions Bank,* 2023 U.S. Dist. LEXIS 92166 at *4 (emphasis added). "Thus, there is no concern that the Court might be unduly influenced if it waits until the trial presentation of the evidence to rule on its admissibility." *Id.* The lack of any prejudice should dispose of this motion standing alone.

III. Plaintiffs' request to exclude undisclosed evidence lacks specificity and is better addressed at trial.

Plaintiffs also seek a blanket exclusion of evidence. Specifically, they seek generally to exclude evidence related to the new voter-registration system and SAVE that "has not been disclosed" to them. [Doc. 215-1, pp. 6–7]. But they

acknowledge that significant information on these topics *has* been disclosed to them. In addition to Mr. Germany's deposition and the communications between the parties, the Secretary's efforts to implement the SAVE audit process have been documented in the status reports filed with the Court dated June 26, 2023 [Doc. 179] and August 15, 2023 [Doc. 182]. After Plaintiffs' requests for additional discovery on the State's use of SAVE contained in both status reports were denied, the Secretary again explained the status of the verification process in his response to Plaintiffs' motion to reopen discovery [Doc. 189]. Based upon the numerous filings of the parties, the conferences between counsel and with the Court, Plaintiffs' fear of unfair surprise has no basis in fact.

Further, Plaintiffs "did not present the Court with specific evidence to consider for exclusion," *Castang v. Jeong-Eun Kim*, No. 1:22-CV-05136-SCJ, 2023 U.S. Dist. LEXIS 38417, at *13 (N.D. Ga. Feb. 2, 2023), but rather relied on sweeping generalizations. Such a "sweeping and broad" request for exclusion of evidence *in limine* hinders "the Court's ability to make any meaningfully informed ruling" and are "better suited to be presented as objections at trial." *Regions Bank,* 2023 U.S. Dist. LEXIS 92166 at *4, 6. Plaintiffs' vague assertions concerning evidence that "has not been disclosed to Plaintiffs" is precisely the type of broad statement that does not give this Court the ability to rule in any meaningful way. *Id.* at *6; *Benestad,* 2022 U.S. Dist.

LEXIS 184264 at *26 (denying blanket exclusion of evidence). Plaintiffs' request that this Court issue a blanket ruling now, in a vacuum, does not assist the Court or the parties. Motions *in limine* are best reserved for "issues that the mere mention of which would deprive a party of a fair trial" because it is not the function of federal courts to "issue advisory opinions" nor should the court "rule in a vacuum without having the opportunity to see the proffered testimony in perspective with other evidence in trial." *Apple Inc. v. Corellium, LLC,* Case No. 19-81160-cv-Smith/Matthewman, 2021 U.S. Dist. LEXIS 123082 at *4 (S.D. Fla. June 30, 2021) (citations omitted). It makes far more sense to see if this issue even arises during the trial rather than addressing it pretrial, especially when the category of evidence at issue is not *all* evidence regarding GARVIS or SAVE, but rather *subsets* of those topics that may or may not be presented.

IV. Plaintiffs' request to exclude Mr. Evans' testimony is also best dealt with at trial.

While apparently focused on a set of topics, Plaintiffs' motion also seeks to exclude the testimony of Blake Evans, the current elections director for the Secretary of State. [Doc. 215-1, pp. 2–3]. Mr. Evans took the place of Mr. Harvey, who was deposed in this case when he was the elections director. Because the Court is limited to prospective injunctive relief, *Seminole Tribe of*

Fla. v. Florida, 517 U.S. 44, 73 (1996), Mr. Evans' testimony about current practices is of value to the Court.

But there is no reason to address this particular issue now. As Plaintiffs admit, counsel for the Secretary has informed Plaintiffs' counsel that they have no current plans to have Mr. Evans, a may-call witness, testify at trial. Even if Mr. Evans' testimony was to become necessary at trial, counsel has further stated that Mr. Evans' testimony will be consistent with the testimony of Mr. Germany during his 2023 deposition. During the 2023 deposition, Mr. Germany testified that he consulted with Mr. Evans as the State's Elections Director in preparing for his testimony and specifically discussed with him the State's "ability to do SAVE verifications in the future." Excerpts of Germany Dep., attached as Ex. A, at 15:2–4, 13–16. As Mr. Germany's testimony included information provided by Mr. Evans, Plaintiffs are on notice of the substance of the testimony and there is no surprise.

CONCLUSION

Plaintiffs' motion requests this Court fashion a blanket order on hypothetical evidence that has not been specifically identified. Plaintiffs' argument that they will face prejudice has no merit and should be disregarded. Thus, in this bench trial, the Court should deny Plaintiffs' motion *in limine* and address any evidentiary objections regarding the scope of disclosure during the trial—if that even becomes an issue.

Respectfully submitted this 19th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Response Brief has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Bryan P. Tyson
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