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

ALPHA PHI ALPHA FRATERNITY INC., et al., *Plaintiffs*, v. BRAD RAFFENSPERGER, *Defendant*.	CIVIL ACTION FILE NO. 1:21-CV-05337-SCJ

DEFENDANT'S RESPONSE TO PLAINTIFFS' EMERGENCY MOTION TO EXCLUDE EXPERT TESTIMONY[1]

INTRODUCTION

In their motion, Plaintiffs seek an unfair advantage in the upcoming preliminary injunction hearing by asking the Court to exclude three of Defendant's expert witnesses who will provide critical testimony on the issues before the Court. Plaintiffs chose a compressed timeline for their preliminary-injunction motion and never requested discovery in advance of the hearing. There is simply no authority for Plaintiffs' argument that Rule 26's discovery-disclosure rules apply in the pre-discovery preliminary-injunction phase of a

[1] The issues outlined in this motion apply equally to Plaintiffs' objections to the same three witnesses in [*Pendergrass* Doc. 56] and [*Grant* Doc. 49].

case. Plaintiffs cannot now complain that they will be prejudiced by the timeline that they chose and their motion should be denied.

ARGUMENT AND CITATION OF AUTHORITY

I. Plaintiffs requested that their preliminary injunction motion be heard on an emergency basis before the start of discovery.

Plaintiffs filed their Complaint late on December 30, 2021. [Doc. 1]. Plaintiffs had more than six weeks after the General Assembly passed the legislative plans on November 15 to prepare their case, including the opportunity to obtain experts and prepare expert reports. *See* [Doc. 1, ¶¶ 55, 59]. Plaintiffs filed their preliminary injunction on January 7 [Doc. 26], revised exhibits for one of their experts on January 10 [Doc. 27], and a filed renewed motion for preliminary injunction on January 13 [Doc. 39]. In total, Plaintiffs had almost two full months from passage of the plans to the filing of their motion to prepare their briefs, employ five experts, and prepare five expert reports.

Under the expedited briefing schedule set by the Court [Doc. 36], Defendant had only *five* days after January 13 to respond to all three preliminary injunction motions across three cases covering five remedial plans. [Doc. 45]. Given the timeline, Defendant specifically reserved the right to add additional evidence at the hearing on issues related to partisan and racial

polarization. [Doc. 45, p. 18 n.11]. The parties then conferred and provided the Court with a coordinated plan for the hearing, including identification of witnesses and exhibits, opportunities for objection, and stipulated facts. [Doc. 66, pp. 2-3]. Nothing in that coordinated plan or the Court's order prohibited the identification of additional fact or expert witnesses. At no point have Plaintiffs requested pre-hearing discovery or to depose Defendant's witnesses. Defendant then timely provided his witness list on January 31—still only 24 days from the first preliminary injunction motion filed by Plaintiffs and 18 days from their renewed motion. [Doc. 69].

II. Plaintiffs' motion should be denied because there is no authority supporting their argument that Rule 26 disclosure requirements apply here.

Despite this cooperative process to address the "serious time exigencies," [Doc. 36], combined with this Court's obligations to conduct an "intensely local appraisal of the design and impact of the contested electoral mechanisms," *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quotations omitted), Plaintiffs now complain of being "sandbagged" by the expedited process *they chose* by filing preliminary-injunction motions and asking that they be heard on an expedited basis. [Doc. 75-1, p. 3]. This complaint rings hollow when Plaintiffs had been placed on notice of additional testimony in Defendant's response and when Defendant provided them with topic areas for the new witnesses—

something Plaintiffs have not done for their newly identified witnesses.[2] Plaintiffs have likewise had months to prepare for a hearing that requires Defendant to be ready in a matter of days. Plaintiffs' sole complaint is that they have not received expert reports under a rule that applies for *trial* testimony, not the rushed process Plaintiffs chose to utilize in this case.

Rule 26 is a discovery rule that requires disclosure of an expert witness a party "may use at trial," Fed. R. Civ. P. 26(a)(2)(A), and Plaintiffs cite to no authority to support their proposition that Rule 26 applies in the preliminary-injunction context when discovery has not even started. And the unpublished district court orders on which Plaintiffs rely do not support that proposition. *Atlanta Attachment Co. v. Leggett & Platt*, No. 1:05-CV-1071-ODE, 2006 U.S. Dist. LEXIS 110687, at *21 (N.D. Ga. Mar. 30, 2006) mostly denied attempts to exclude expert witnesses in a patent case in which the parties had already conducted discovery and undertaken claim construction briefing under the court's unique patent rules. In *Spurlock v. Fox*, No. 3:09-cv-0756, 2010 U.S. Dist. LEXIS 100366, at *17 (M.D. Tenn. Sep. 23, 2010), the parties were given two months to conduct discovery in preparation for a preliminary-injunction

[2] Plaintiffs' witness list identifies new witnesses not previously disclosed, including current legislators and a former member of the General Assembly, with no indication about the topics of their testimony. [Doc. 68].

hearing, which has not been allowed or requested here because of the expedited schedule requested by Plaintiffs. The only reported case Plaintiffs cite involved a trademark-infringement issue where the case had been pending for almost four months by the time of the evidentiary hearing—and the district court considered the testimony of both witnesses the moving party sought to exclude. *TWTB, Inc. v. Rampick*, 152 F. Supp. 3d 549, 560 (E.D. La. 2016).

The case Plaintiffs cite from the election context is far less supportive than they claim. *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 U.S. Dist. LEXIS 131980, at *21, *44-45 (M.D.N.C. July 27, 2020) involved *plaintiffs* attempting to submit an expert affidavit with a reply brief in support of a preliminary injunction motion, which the court excluded because it was untimely under Rule 6(c)(2). Indeed, the district court in that case specifically noted that Rule 26 "is a discovery disclosure rule that does not apply to this preliminary injunction proceeding." *Id.* at *20.

Thus, there is simply no legal basis for the Court to severely prejudice Defendant's ability to defend itself in response to Plaintiffs' request for extraordinary relief. This Court has "considerable leeway" in determining the admissibility of expert testimony. *Cook v. Sheriff of Monroe Cty.*, 402 F.3d 1092, 1103 (11th Cir. 2005). And in a preliminary-injunction context, the evidentiary standard is relaxed, such that this Court has to authority to rely

on otherwise-inadmissible evidence, depending on the "character and objectives of the injunctive proceeding." *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995). Other district courts have likewise allowed expert testimony for the limited purpose of deciding the preliminary injunction, while enforcing the expert report requirements for the actual trial. *See Midwest Guar. Bank v. Guar. Bank*, 270 F. Supp. 2d 900, 908 n.2 (E.D. Mich. 2003).

III. Granting Plaintiffs' motion would hamstring the Court's ability to conduct the required analysis in a Section 2 case.

Plaintiffs also appear to misunderstand this Court's role in this case. Section 2 cases are unique. This Court has an obligation to conduct "a searching and meaningful evaluation of all the relevant evidence," *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1228 (11th Cir. 2000), as it conducts its "intensely local appraisal of the design and impact of the contested electoral mechanisms," *Gingles*, 478 U.S. at 79. Plaintiffs' motion is an attempt to prevent this Court from doing exactly that by seeking to exclude witnesses who can provide valuable context and assistance in assessing the complex issues surrounding redistricting and Section 2.

Each one of the witnesses Plaintiffs seek to exclude can provide great assistance to the Court in weighing Plaintiffs' emergency motion. *City of*

Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998). As indicated in Defendants' identification of witnesses, Ms. Gina Wright has factual and expert knowledge regarding redistricting in Georgia and the state's demographics in her role as the Executive Director of the General Assembly's Joint Legislative and Congressional Reapportionment Office. She can assist the Court in assessing the plans offered by Plaintiffs and the adopted plans and has personal knowledge about the creation of the adopted plans that Plaintiffs challenge. Ms. Lynn Bailey has decades of experience as a county elections director, including service during multiple redistricting cycles where voters had to be assigned to new districts. She can assist the Court in understanding the relevant timelines and the impact of the relief Plaintiffs seek on election officials and voters—topics that are relevant to the public interest and equities implicated by Plaintiffs' motion.[3] Dr. John Alford has extensive experience in assessing the impact of polarization, and whether it is racial or political, and his topics were specifically referenced in Defendant's response brief. All of these areas must be assessed by this Court if Plaintiffs are to have the opportunity to "clearly establish[]" their entitlement to

[3] Ms. Wright and Ms. Bailey, in addition to providing expert testimony based on their considerable expertise in areas directly implicated by Plaintiffs' motion, can also provide important factual testimony to the Court.

emergency relief. *McDonald's Corp. v. Robertson*, 147 F. 3d 1301, 1306 (11th Cir. 1998). This Court should not allow Plaintiffs to prevent it from weighing all of the relevant evidence in "these important cases." [Doc. 55, p. 2].

Plaintiffs' motion again demonstrates why grants of summary judgment and preliminary injunctions in Section 2 cases are so unusual. *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F. 3d 1336, 1345 (11th Cir. 2015). These cases involve "fact-driven" legal tests, *id*. at 1348, and proceeding on an incomplete record—especially a record Plaintiffs are trying to ensure is incomplete—impairs the Court's ability to engage effectively with the relevant facts and hinders appellate review. This Court should not allow Plaintiffs to hide from any challenge to their version of the facts by granting their motion but should conduct the searching analysis required by the Eleventh Circuit and Supreme Court.

This is also why there is no prejudice to Plaintiffs that will result from allowing the testimony. This is a non-jury hearing on a preliminary-injunction motion, conducted on an emergency basis on the expedited timeline chosen by Plaintiffs. Defendant will cross examine dozens of witnesses over the six-day hearing—many of which were disclosed for the first time in Plaintiffs' witness list—without the benefit of depositions or discovery. We have preliminary-injunction hearings to allow the weighing of evidence on an expedited timeline.

Plaintiffs will have a full opportunity to explore the "data sources," "methods," and qualifications of the three individuals they seek to exclude at the hearing. [Doc. 75-1, p. 7]. Far from being "unfair," this is the nature of the emergency relief Plaintiffs sought, instead of proceeding on a normal litigation track to trial.

CONCLUSION

Preliminary injunction hearings often mean responding on the fly—that is nothing new, especially when dealing with election procedures. This case should proceed on the schedule outlined by the Court and with all the witnesses identified by all parties to avoid undue prejudice to all sides and to provide the Court the benefit of all relevant evidence.

This 3rd day of February, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned certifies that the foregoing 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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