

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

ALPHA PHI ALPHA FRATERNITY
INC., a nonprofit organization on behalf
of members residing in Georgia;
SIXTH DISTRICT OF THE AFRICAN
METHODIST EPISCOPAL CHURCH,
a Georgia nonprofit organization; ERIC
T. WOODS; KATIE BAILEY GLENN;
PHIL BROWN; JANICE STEWART,

Plaintiffs,

vs.

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

Defendant.

Case No. 1:21-CV-05337-SCJ

**PLAINTIFFS' EMERGENCY MOTION TO EXCLUDE EXPERT
TESTIMONY**

Pursuant to Federal Rule of Civil Procedure 26, Plaintiffs ALPHA PHI ALPHA FRATERNITY, INC., SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, ERIC T. WOODS, KATIE BAILEY

GLENN, PHIL BROWN, and JANICE STEWART (collectively, “Plaintiffs”), respectfully move the Court for an Order to Exclude Defendant’s three newly disclosed expert witnesses: Ms. Lynn Bailey, Ms. Gina Wright, and Dr. John Alford.¹ Plaintiffs have conferred with Defendant’s counsel and Defendant opposes.

Because the preliminary injunction hearing at which the State’s newly disclosed witnesses would be testifying is set to commence on February 7, 2022, there is good cause to resolve this motion on an expedited basis pursuant to Local Rule 7.2(B).

Dated: February 2, 2022

Respectfully submitted,

/s/ Rahul Garabadu

¹ See ECF No. 69.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

The undersigned hereby certifies that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1 of the Northern District of Georgia, using a font type of Times New Roman and a point size of 14.

/s/ Rahul Garabadu _____

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing *Plaintiffs' Emergency Motion to Exclude Expert Testimony* with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel or parties of record on the service list:

This 2nd day of February, 2022.

/s/ Rahul Garabadu

**UNITED STATES DISTRICT COURT
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ALPHA PHI ALPHA FRATERNITY
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Defendant.

Case No. 1:21-cv-5337

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
EMERGENCY MOTION TO EXCLUDE EXPERT TESTIMONY**

INTRODUCTION

Nearly three weeks after Plaintiffs filed their motion for preliminary injunction, two weeks after the State filed its opposition, and within a week of the start of a hearing on Plaintiffs' motion, the State disclosed for the first time that it intends to present testimony from three additional, previously undisclosed expert witnesses.¹ The State did not, however, file any reports by those experts, or any other "statement of all opinions" of the newly disclosed witnesses. These ambush tactics violate Federal Rule of Civil Procedure 26(a)(2)(B) and unduly prejudice Plaintiffs. Because the State has given only a cursory indication of the contents of these experts' testimony or the basis for their opinions, Plaintiffs cannot meaningfully prepare for cross-examination of these expert witnesses or otherwise address the testimony they may give at trial with testimony from Plaintiffs' own experts.

Plaintiffs moved quickly for a preliminary injunction and requested pre-hearing deadlines for the orderly submission of evidence, all to aid the Court in considering the evidence and providing relief as quickly and in as organized a

¹ Defendants' previously undisclosed expert witnesses are Ms. Lynn Bailey, an "expert witness on county election processes and timing," Ms. Gina Wright, an "expert and fact witness on mapdrawing and demographics," and Dr. John Alford, an "expert witness on polarized voting issues." ECF No. 69.

fashion as possible. The State cannot justify springing multiple surprise expert witnesses without any underlying reports, statements of opinions, or the bases upon which the experts relied on Plaintiffs at the eleventh hour. Since the inception of this litigation, the State has understood the nature of Plaintiffs' evidence and had access to Plaintiffs' own expert reports. Furthermore, the State presumptively had access to the officials who helped craft its enacted maps. The Court should accordingly preclude the State from offering the opinions of its three newly disclosed expert witnesses at the coordinated preliminary injunction hearing and afford any other appropriate relief to prevent prejudice to Plaintiffs.

ARGUMENT

A. Rule 26's Disclosure Requirements Apply to This Hearing

Federal Rule of Civil Procedure 26(a) requires that the disclosure of an expert witness be “accompanied by a written report [] prepared and signed by the witness[.]” Fed. R. Civ. P. 26(a)(2)(B). Importantly here, that written report must include “(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; [and] (iii) any exhibits that will be used to summarize or support them.” *Id.* Typically, these disclosures must be made at the time that pretrial disclosures are due. That makes eminent sense, as it prevents one party from being “sandbagged”

at the last minute. *Monopoly Hotel Grp., LLC v. Hyatt Hotels Corp.*, 291 F.R.D. 684, 690 (N.D. Ga. 2013). Requiring parties to exchange expert reports in advance of an evidentiary hearing is particularly reasonable given that expert analysis is often complex, and a primary purpose of the expert disclosure rule is to “narrow the issues for trial.” *Garcia v. Scottsdale Ins. Co.*, No. CV 18-20509-CIV, 2019 WL 1318090, at *2 (S.D. Fla. Mar. 22, 2019).

While the parties are preparing for a preliminary injunction hearing rather than a trial, concerns about “sandbagging” and narrowing issues in dispute are just as applicable here. Numerous courts have recognized the importance of disclosing expert reports in advance of preliminary injunction hearings. *See Atlanta Attachment Co. v. Leggett & Platt, Inc.*, No. 1:05-CV-1071-ODE, 2006 WL 8432432 (N.D. Ga. Mar. 30, 2006) (analyzing compliance with Rule 26(a)(2)(B) in the context of preliminary injunction proceedings); *Spurlock v. Fox*, No. 3:09-cv-0756, 2010 WL 3807167, at *6 (M.D. Tenn. Sept. 23, 2010) (“[T]he compressed timeline for preliminary injunction proceedings does not permit parties to deviate indiscriminately from Rule 26[a](2)(B).”); *TWTB, Inc. v. Rampick*, 152 F. Supp. 3d 549, 559-60 (E.D. La. 2016) (analyzing compliance with Rule 26(a)(2)(B) in the context of preliminary injunction proceedings).

In one recent election-related matter, for example, plaintiffs moved on an expedited basis for a preliminary injunction and submitted incomplete expert reports, which they later sought to supplement in a reply brief containing additional expert declarations. *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, No. 1:20CV457, 2020 WL 4288103, at *10 (M.D.N.C. July 27, 2020). In striking the belated declarations, the court explained that Rule 26 is “designed to afford opposing parties a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.” *Id.* at *7, *15 (internal quotations omitted). In other words, the “clear purpose of [the Rule] is to prevent unfair surprise by eleventh hour filings.” *Id.* at *7. The court held that admitting additional, previously undisclosed expert opinions would “constitute[] unfair surprise” and struck the submissions. *Id.* at *7, *15. The same considerations apply more forcefully here, where the State has not belatedly disclosed expert opinions, but rather has failed to disclose any such opinions at all.

B. The Court Should Exclude The Opinions Of The State’s Newly Disclosed Experts

Under Federal Rule of Civil Procedure 37, the default sanction for failure to comply with Rule 26’s requirements is that “the party is not allowed to use that information or witness to supply evidence *on a motion, at a hearing, or at a trial.*” Fed. R. Civ. Pro. 37(c)(1)(emphasis added). Where, as here, a party does not timely

disclose expert reports, the opinions may not be used in a subsequent proceeding unless the failure to meet the deadline “was substantially justified or is harmless.” *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 718 (11th Cir. 2019) (quoting Fed. R. Civ. P. 37(c)(1)); *see also Finch v. Owners Ins. Co.*, 2017 WL 6045449, at *2 (S.D. Ga. Dec. 6, 2017). The State has put forth no explanation for why it acted in blatant disregard for Rule 26’s requirements. Its failure to provide expert reports for three of its expert witnesses is neither substantially justified nor harmless.

The State has long been aware of the need to provide expert testimony in this case. Plaintiffs filed their Complaint over a month ago and filed a preliminary injunction to which they appended several expert reports shortly thereafter. The State then disclosed a demographer expert and corresponding expert report with its response to Plaintiffs’ preliminary injunction motion, filed two weeks ago. *See* Dkt. 45-1; Dkt. 45-2. Now, with the submission of witness lists in advance of the hearing, the State has belatedly disclosed three *additional* experts, each without any accompanying expert report. The State cannot argue that any new issues have been raised to necessitate this belated disclosure; indeed, the State’s original expert provided opinions on mapping and another declarant provided state election timelines—two of the same subjects its new experts would address, according to Defendant’s witness list. It cannot argue that it was impossible for its experts to

produce written reports; its original expert managed to produce a report on substantially shorter timelines. Simply put, the State knew of the need to timely proffer experts and accompanying expert reports, and knew what subjects it might want to produce experts on, but has nevertheless flouted those requirements in seeking to introduce three new expert witnesses, each without any report.

Permitting the State's new experts to testify, especially without submitting reports, will severely prejudice Plaintiffs. The coordinated preliminary injunction hearing is less than a week away, and the Plaintiffs have no indication of what opinions the State's new experts will offer or the grounds for their conclusions, or even which of the various issues in each topic area the case the experts might purport to address. Were these experts allowed to testify, Plaintiffs would hear new expert opinions for the first time at the hearing and be forced to craft cross-examinations on the fly about complex and wide-ranging topics such as the State's justifications for drawing each of the Senate and House districts in the 2021 Maps in the manner it did, the State's contentions regarding racially polarized voting, and county election procedures. Because the State has not provided any expert reports for its new witnesses, Plaintiffs cannot know whether the new experts' opinions are predicated on undisclosed data sources, or assess the methods the experts might claim to have used in reaching their conclusions.

Accordingly, given the State's disclosure failure, Plaintiffs will be unable to conduct meaningful cross-examination. Nor will Plaintiffs be able to effectively prepare a rebuttal expert presentation in the middle of the hearing, without any advance knowledge of the factual basis underlying the surprise experts' opinions (or for that matter even the contents of those opinions). The State's disclosure violation is precisely the type of litigation by ambush that Rule 26 was meant to eliminate. This Court should not countenance such unfair tactics. Especially because there is no justification for the disclosure failure here, Rule 37's default sanction is appropriate. The Court should bar the state's new experts from offering their opinions in the upcoming preliminary injunction hearing.

CONCLUSION

For the foregoing reasons, this Court should exclude the newly disclosed State expert's testimony at the upcoming preliminary injunction hearing. In the alternative, if the Court does not exclude the testimony of the State's new experts, Plaintiffs respectfully request that the Court minimize the prejudice arising from the State's failure to disclose by: (1) ordering the State to disclose the new experts' reports by 5:00 p.m. on Thursday, February 3, 2022, to give Plaintiffs adequate time to prepare for cross examination and rebuttal; (2) limiting the State's new experts' testimony to data and information already in the record; and (3) affording Plaintiffs

at least two hours to present a rebuttal case, even if that requires extending the hearing past February 14. *See Taylor v. Mentor Worldwide LLC*, 940 F.3d 582, 593 (11th Cir. 2019) (“Rule 37 gives a trial court discretion to decide how best to respond to a litigant's failure to make a required disclosure under Rule 26.”).

Dated: February 2, 2022.

Respectfully submitted,

/s/ Rahul Garabadu

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**[PROPOSED] ORDER ON PLAINTIFFS' EMERGENCY MOTION TO
EXCLUDE EXPERT TESTIMONY**

THIS MATTER comes before this Court on Plaintiffs' Emergency Motion to Exclude Expert Testimony. Upon considering the motion and supporting authorities,

It is hereby **ORDERED** that Plaintiffs' Emergency Motion to Exclude Expert Testimony be, and hereby is, **GRANTED**.

It is hereby further **ORDERED** that Ms. Ms. Lynn Bailey, Ms. Gina Wright, and Dr. John Alford are excluded from testifying, and their names shall be stricken from the witness list.

IT IS SO ORDERED this the _____ day of February, 2022.

STEVE C. JONES
UNITED STATES DISTRICT JUDGE