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-5337**

PLAINTIFFS' REPLY IN SUPPORT OF
THEIR EMERGENCY MOTION TO EXCLUDE EXPERT TESTIMONY

INTRODUCTION

Expert testimony generally requires expert reports.[1] That is the simple rule embodied by Rule 26's expert disclosure requirements, and that simple rule applies to preliminary injunction hearings as much as it does to trials. Requiring parties to exchange reports in advance of an evidentiary hearing is inherently reasonable because expert analysis is often complex. Fairness requires that the opposing party be permitted to effectively cross-examine and present rebuttal testimony from its own expert as appropriate. Here, Defendant has given only a cursory indication of the contents of these experts' testimony or the basis for their opinions. Under these circumstances, Plaintiffs cannot meaningfully prepare for cross-examination or otherwise address the testimony the new experts may give at trial with testimony from Plaintiffs' own experts.

[1] Indeed, in the sole case which Defendant cites to support the proposition that "[o]ther district courts have likewise allowed expert testimony for the limited purpose of deciding the preliminary injunction," Opp. 6, the contested witness had filed a pre-hearing declaration; that case, unlike here, did *not* involve a witness who sought to testify as an expert without a previously submitted report or declaration (i.e., without fulfilling a fundamental prerequisite to serving as an expert in the first place). *See Midwest Guar. Bank. v. Guar. Bank*, 270 F. Supp. 2d 900, 908 n.2 (E.D. Mich. 2003) ("Given the expedited nature of a preliminary injunction hearing, Mr. Mielock's *declaration* will be permitted for the limited purpose of deciding the instant motion." (emphasis added)).

Defendant suggests that it is unable to submit expert reports in compliance with Rule 26 because "Plaintiffs chose a compressed timeline for their preliminary-injunction motion." Opp 1. But this explanation overlooks the fact that Defendant timely identified its demographer expert and submitted an accompanying report two weeks ago. The State claims that Plaintiffs seek an "unfair advantage" by requiring compliance with Rule 26 when it is Defendant who proposes to introduce three new experts, mere days before the hearing is set to begin, without disclosing the opinions these experts will express or the data upon which those opinions are based. As courts confronting similar circumstances have held, Defendant's introduction of these witnesses constitutes unfair surprise to Plaintiffs. This 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

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

Courts routinely analyze compliance with Rule 26(a)'s expert disclosure requirements in the context of preliminary injunction hearings. *See, e.g.*, *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 WL 4024765, at *6 (S.D. Ohio Aug. 27, 2019) (granting motion to block expert testimony at preliminary injunction

hearing due to noncompliance with Rule 26(a)(2)(B)); *Atlanta Attachment Co. v. Leggett & Platt, Inc.*, No. 1:05-CV-1071-ODE, 2006 WL 8432432 (N.D. Ga. Mar. 30, 2006) (analyzing Rule 26(a)(2)(B) compliance in preliminary injunction context); *TWTB, Inc. v. Rampick*, 152 F. Supp. 3d 549, 559-60 (E.D. La. 2016) (same). In this latest cycle of redistricting litigation, State Defendants have routinely submitted expert reports along with the disclosure of their experts in those preliminary injunction proceedings. *See, e.g.*, Secretary of State's Notice of Filing Expert Reports, *Milligan v. Merrill*, No. 2:21-cv-1530-AMM (N.D. Ala. Dec. 14, 2021), ECF No. 66; Expert Report of Brad Lockerbie, Ph.D., *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 4:21-CV-1239 (E.D. Ark. Jan. 19, 2022), ECF No. 53-4. Indeed, one of the State's newly proffered experts here, Dr. John Alford, recently submitted an expert report alongside his disclosure in a similarly expedited preliminary injunction case. *See* Index of Exhibits to State Defendants' Opposition to Brooks Plaintiffs' Motion for Preliminary Injunction at 8-46, *League of United Latin Am. Citizens v. Abbott*, No. 3:21-cv-00259-DCG-JES-JVB (W.D. Tex. Dec. 20, 2021), ECF No. 102-1.

While courts have applied Rule 26 to preliminary injunction hearings, *see In re Ohio Execution Protocol Litig.*, 2019 WL 4024765, at *6, even those courts that have not directly applied the text of Rule 26 to preliminary injunction hearings, have

nonetheless applied the purpose of the rule in the preliminary hearing context to determine whether to permit expert testimony, *see Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4288103, at *7 (M.D.N.C. July 27, 2020). Defendant contends that *Democracy N.C.* stands for the proposition that Rule 26 does not apply to preliminary injunction hearings, but ignores the holding of the case—which substantively applied Rule 26 to the preliminary injunction hearing at issue. *Id.* at *9-10. The court struck portions of a reply brief containing additional expert opinions because the last-minute submission "constitute[d] unfair surprise" in violation of the purpose of Rule 26. *Id.* at *7, *15.

Despite the mandates of Rule 26 and other State Defendants' compliance with the rule in similar election cases in a preliminary injunction posture, the State contends that it may proceed "on the fly" without providing expert reports. The Court should reject that claim.

II. The Court Should Exclude The Opinions Of Defendant's Newly Disclosed Experts Or Otherwise Minimize Prejudice To Plaintiffs

Defendant primarily claims that the default sanction for its failure to comply with Rule 26—exclusion of their new expert testimony—will too severely prejudice its case. *See* Fed. R. Civ. Pro. 37(c)(1) (providing that 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"

(emphasis added)). However, that sanction is the default because it "provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, *at a hearing, or on a motion*[.]" Advisory Committee Notes to Fed. R. Civ. P. 37.

Furthermore, Defendant makes no attempt to suggest that its failure to provide expert witness reports for its newly disclosed experts is substantially justified. *See* Fed. R. Civ. P. 37(c)(1) (providing that the default sanction applies "unless the failure was substantially justified or is harmless"). However, Defendant appears to be attempting to squeeze into Rule 37's "harmless" exception by making the unbelievable assertion that "there is no prejudice to Plaintiffs that will result from allowing the testimony." Opp. 8. Plaintiffs will be severely prejudiced if the State is permitted to elicit expert testimony from experts who have not previously disclosed their opinions or the basis for those opinions.

For example, Ms. Gina Wright is proffered to testify on her "expert knowledge regarding redistricting in Georgia and the state's demographics." Opp. 7. However, Plaintiffs do not know which data sets, sources, or methodologies Ms. Wright will rely on in her testimony. Accordingly, if limited solely to what Ms. Wright says on the stand, Plaintiffs will be forced to effectively cross-examine her without the opportunity to review her sources and methodologies themselves or with their

expert. That is highly prejudicial and does not aid the court in using the adversarial system to elucidate the truth. *See Kemper v. Equity Ins. Co.*, No. 1:15-cv-2961-MLB, 2021 WL 4134413, at *2 (N.D. Ga. Aug. 30, 2021) (explaining that the purpose an expert report is "to convey the substance of the expert's opinion so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary" (quoting *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 762 (7th Cir. 2010))); *see also Watkins v. Sowders*, 449 U.S. 341, 349 (1981) ("[U]nder our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth."); *Marteney v. United States*, 218 F.2d 258, 265 (10th Cir. 1954) ("[T]he purpose of cross-examination is to elicit the truth.").

Similarly, Dr. John Alford's testimony regarding "the impact of polarization, and whether it is racial or political," Opp. 7, will presumptively rely on complex statistical analysis as is common to his craft. Of course, Plaintiffs are left only to presume because of the State's disclosure failure. Nevertheless, statistical analysis cannot be confirmed or refuted "on the fly." And to ask Plaintiffs to do so would be highly prejudicial. Finally, to the extent Ms. Lynn Bailey will testify as an expert witness on "the relevant timelines and the impact of the relief Plaintiffs seek on election officials and voters," *id.*, her opinion testimony will be highly prejudicial to

Plaintiffs without the opportunity to investigate the basis for her opinions prior to her testimony.

This prejudice, which will flow directly from the State's failure to disclose expert reports, is precisely why courts impose Rule 37's default sanction for failure to make proper disclosures under Rule 26. *See DeFrancesco v. Sentry Select Ins. Co.*, No. 1:18-cv-04795-SCJ, 2020 WL 6865782, at *2 (N.D. Ga. Aug. 28, 2020) ("The initial disclosure requirements of Rule 26 'are fundamental to the orderly, efficient, cost-effective and fair litigation of civil cases and the Rule 37(c)(1) remedies are directed at sanctioning a litigant for failing to provide or supplement the most basic information necessary to efficiently and fairly litigate a dispute.'" (citation omitted)). Nonetheless, if the Court does not impose the default sanction, Plaintiffs request as an alternative that the Court (1) order 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) limit the State's new experts' testimony to data and information already in the record; and (3) afford 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.").

Plaintiffs submit that this alternative relief will mitigate the prejudice caused by Defendant's attempt to sandbag Plaintiffs with undisclosed opinions on the eve of the upcoming hearing.

CONCLUSION

For the foregoing reasons, this Court should exclude Defendant's newly disclosed experts' testimony at the upcoming preliminary injunction hearing or alternatively adopt Plaintiffs' prejudice-limiting requests.

Dated: February 3, 2022.

Respectfully submitted,

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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' Memorandum of Law in Support of 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 3rd day of February, 2022.

/s/ Rahul Garabadu