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

FAIR FIGHT ACTION, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official Capacity as Secretary of State of Georgia, *et al.*, Defendants.	)	Civil Action File No. 1:18-cv-05391-SCJ

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO CLARIFY OR MODIFY INTERLOCUTORY ORDERS

Defendants respond to Plaintiffs' Motion to Clarify or Modify Interlocutory Orders (Doc. No. [631]), as follows:

INTRODUCTION

Despite its somewhat innocuous title, Plaintiffs' motion seeks potentially extraordinary relief: the broad and prospective admittance of dozens, if not hundreds, of new declarant witnesses, and supplemental testimony from declarants who have already submitted declarations and been deposed, all disclosed well after the close of discovery and the Court's deadlines. In doing so, Plaintiffs' motion asks the Court to both (a) reconsider and undo a discovery ruling it made over 18 months ago; and (b)

prospectively resolve, in entirely abstract and hypothetical terms, an evidentiary dispute that the Parties previously agreed to withhold while the court considers Defendants' motions for summary judgment. For numerous practical and legal reasons, Plaintiffs' requests should be rejected—at least at this time.

First, this issue is not ripe for review. As the Court is aware, the issue of Plaintiffs' new declarants' admissibility was first raised by Defendants in January 2021, after Plaintiffs unilaterally filed their Third Initial Disclosures that identified over a hundred previously undisclosed declarant "witnesses" they may seek to rely on at trial. Doc. No. [605]. In what Defendants believed was a good-faith compromise, made in the interests of efficiency and conservation of resources, the parties agreed to delay further consideration of this issue while the Court resolved Defendants' motions for summary judgment. Doc. No. [609]. Now, after the Court has significantly narrowed the claims in this case and Defendants' motion for summary judgment remains pending as to Plaintiffs' Section 2 claims, Plaintiffs have curiously reversed course. The principles of the Parties' prior agreement—that all sides will benefit, and efficiency is best served, by reviewing Plaintiffs' proposed new declarants after the Court determines the scope of issues to be resolved at trial—remain sound and should not be disturbed in the current

case posture. To be clear, and contrary to the characterizations in Plaintiffs' Motion, Defendants will entertain discussions with Plaintiffs about the scope of additional witnesses when the scope of trial is set and Plaintiffs have identified the potential witnesses. As things stand, however, Plaintiffs' manufactured evidentiary dispute is hypothetical, unspecific, and premature.

Second, even if the Court were to consider the issue at this juncture, Plaintiffs' arguments fail on the merits. At the outset, the Court has already resolved this dispute. In February 2020, the Court ruled that Plaintiffs were to provide a "final list" of declarants for the specific purpose of avoiding the delay, confusion, and prejudice to Defendants that Plaintiffs now seek to create. Doc. No. [225]. The Court reaffirmed its decision when it declined to consider the testimony of Plaintiffs' previously undisclosed declarants offered in response to Defendants' motion for summary judgment. Doc. No. 617 at 28-19. Moreover, Plaintiffs fail to address, let alone demonstrate, how the introduction of their untimely declarants at this stage could be "substantially justified or harmless" under the Federal Rules. In short, there was never any ambiguity to these orders and Plaintiffs have not shown cause for them to be disturbed.[1]

[1] Plaintiffs feign misunderstanding of these rulings, arguing that they "never interpreted these orders as contemplating, or going so far as to bar" future

Third, Plaintiffs' comparison between its new declarants and the "post-2018 evidence" offered by Defendants is a red herring. Plaintiffs chide Defendants for citing changes to the law and public elections that are subject to judicial notice, while seeking to effectively restart and expand discovery on a potentially massive scale with an ever-expanding list of declarant witnesses. Worse yet, Plaintiffs offer no conceptual end to discovery in this litigation. There are no factual or legal similarities between the Parties' positions and Plaintiffs' attempt to draw a false equivalence between the two should be rejected.

For all these reasons, and as more fully stated herein, Plaintiffs' motion should be denied.

ARGUMENT AND CITATION TO AUTHORITY

I. Plaintiffs' motion is premature and based on a false premise.

In their motion, Plaintiffs seek preemptive resolution of what may very well be a non-issue and Defendants' position should come as no surprise to Plaintiffs in light of the Parties' prior agreement and more-recent

---

declarants. Doc. No. [631] at 2. While a plain reading of the orders would confirm otherwise, it is more likely that Plaintiffs' incomprehension is to avoid their motion being construed as an untimely "motion to reconsider." L.R. 7.2(E) (motions to reconsider must be filed "within twenty-eight (28) days after entry of the order or judgment.").

correspondence. Indeed, Plaintiffs previously agreed that the issue should be deferred until after the Court rules on the pending summary judgment motions. Defendants have never "refused" to meet and confer with Plaintiffs regarding the potential use at trial of their untimely declarant witnesses; it is simply a matter of when and under what circumstances conferral would likely be most productive.

As the Court is aware, this is not the first time this issue has arisen. On January 26, 2021, Defendants filed a Motion and Notice of Objection focusing on Plaintiffs' use, or potential use, of declarants identified after February 14, 2020.[2] Doc. No. [605]. After meeting and conferring on the issue, the Parties filed a joint notice mutually agreeing that the declarations contained in Plaintiffs' Third Disclosures "should not be considered for purposes of summary judgment." Doc. No. [609] at 2. The Parties further agreed "that neither Plaintiffs nor Defendants waive any rights, arguments or objections regarding the Third Disclosures and that such may be raised, if necessary, **after the Court rules on the pending motions for summary judgment**." Id. (emphasis added).

[2] To be precise, these new declarants were identified in Plaintiffs' Third Initial Disclosures, Doc. No. [603], filed nearly a year after the deadline to identify declarants.

Six months after that agreement was reached, Plaintiffs wrote to Defendants re-raising the issue. Doc. No. [631-1]. In response, Defendants re-iterated their belief that deferring the issue remained the most appropriate course, but did not refuse to confer on the issue:

> Respectfully, **we believe it is premature to confer regarding the parties' positions on this issue until after the Court rules on Defendants' renewed partial motion** for summary judgment as to the Voting Rights Act claim. *See* Doc. No. [621]. The Supreme Court's opinion in Arizona Republican Party v. Democratic National Committee has significant implications for this case, and the Court's ruling on our renewed motion may well further narrow the matters at issue. It is for this same reason that we agreed to withdraw our prior motion and defer further discussions on this issue for the time being. **Until we know specifically which of Plaintiffs' claims will proceed to trial, discussing the admissibility of certain testimony seems unnecessary.**
>
> […]
>
> In summary, we do not think a conference now on these matters would be an efficient use of the parties' time and resources. **We are certainly willing to revisit these issues, if necessary, after the Court rules on our renewed motion.**

Doc. No. [631-2] (emphasis added).[3] Further, the Supreme Court's decision in Brnovich v. Democratic Nat'l Comm. was issued only a few days after

[3] At the time this letter was sent, Defendants were under the impression that Plaintiffs' Section 2 claim still encompassed the entirety of their originally

Plaintiffs' June 24, 2021 letter, rendering a meet-and-confer (on an issue that Defendants believed premature in the first instance) exceedingly difficult while the Parties were briefing Defendants' renewed motion for summary judgment.

In any event, the Parties' prior agreement makes sense; it would be inefficient (and likely confusing) to address these questions in purely hypothetical terms. The number and identity of these potential witnesses is unknown—Plaintiffs seek a broad admission of individuals to testify to "post-2018" election experiences. As it stands, Plaintiffs have not identified which, if any, new declarants they may seek to offer at trial or the scope of their potential testimony. Such lack of specificity makes a constructive good-faith discussion on the potential use of these declarants virtually impossible.[4]

For example, Plaintiffs contend that their new declarants include individuals identified from Defendants' document productions made after

---

asserted claims. Doc. No. [623] at n.2. Plaintiffs have since clarified that their Section 2 claim is now limited to HAVA Match. Doc. No. [627] at 14. Regardless, the benefits of resolving this issue *after* summary judgment remain.

[4] Though Plaintiffs have offered to identify which declarants they intend to rely on at trial, Doc. No. [631-4] at 3, this offer is apparently conditioned upon Defendants' preemptive acquiescence to the admission of testimony from these late-disclosed individuals.

Plaintiffs' deadline to disclose their final list of declarants. Doc. No. [631] at 5-6. But without more, there is no way for Defendants to appropriately respond to this contention. It is likely, given the scope of these productions, that most, if not all, of these individuals were in fact disclosed earlier. And it is possible that Defendants would not object to such testimony. The case, however, may narrow more and Defendants lack the ability to currently evaluate (a) the potential prejudice they will face should such evidence be admitted; and (b) what measures, if any, could be taken to mitigate such prejudice. These uncertainties render the current motion premature.

II. Plaintiffs' new declarants are untimely, procedurally improper, and prejudicial.

If this Court chooses to examine the merits of Plaintiffs' motion, a denial is warranted. Plaintiffs' motion represents an improper attempted end-run around this Court's orders, the Federal Rules of Civil Procedure, and the underlying principle that **all** litigation must end at some point—underscored by the extensive discovery in this case and exhaustive record before the Court.

a. Plaintiffs' new declarants violate the Court's prior orders, which correctly ruled that the declarants were inadmissible.

Plaintiffs' effort to expand the record with new declarant witnesses has persistently complicated this case and already needlessly prolonged proceedings. Plaintiffs' present attempt to force their untimely declarants into this case comes even after the Court has ruled—twice—that they are inadmissible and will not be considered.

Fact discovery closed in this case on March 2, 2020, with a special allowance for Defendants to complete the depositions of Plaintiffs' declarants by April 27, 2020. Doc. No. [228]. To this end, the Court *specifically* ordered on February 10, 2020 that "Plaintiffs are **ORDERED** to identify and produce a final list of said declarants [supporting their claims of voter disenfranchisement or suppression] to Defendants by **5:00 p.m. on Friday, February 14, 2020.**" Doc. No. [225] at 1 (underline added). When Plaintiffs unilaterally tried to introduce new declarants in their response to Defendants' Motion for Summary Judgment, the Court ruled unequivocally that they would not, and could not, be considered:

> Even assuming Plaintiffs' declarations and complaints can be reduced to admissible form for trial, however, some evidence cited to support their claims related to absentee ballot cancelation are inadmissible pursuant to this Court's Order. Doc. No. [255] (ordering

> Plaintiffs "to identify and produce a final list" of declarants that Plaintiffs intended to use to support their claims on Friday February 14, 2020). Plaintiffs argue that when "voters attempt[ed] to vote in person, having never received their ballots or unsure if their completed absentee ballots were ever received by the counties," they were "informed they cannot vote, must vote provisionally, or must travel to a centralized office first to formally cancel their ballot." Doc. No. [490], p. 36 (citing PSMF ¶¶ 868–895). Of those cited declarations, many of the ones pertinent to lack of training deal with the June 2020 primary and were thus taken and produced after February 14, 2020. See PSMF ¶¶ 893–895 (citing declarations regarding the June 2020 primary election). **The Court does not consider these declarations.**

Doc. No. [617] at 28-29 (emphasis added).

Nothing in the Court's prior orders suggest that their application was limited to summary judgment proceedings. Under any reasonable interpretation, "final" means *final*; the Court's February 2020 order did not limit its application to only "then-existing declarations" nor did it make any allowance for new declarants procured by Plaintiffs. The Court's summary judgment order reiterated this conclusion and explicitly held that these newly identified declarants were inadmissible "[e]ven assuming [they could] be reduced to admissible form for trial" pursuant to the Court's earlier order. Doc. No. [617] at 28. There is no ambiguity to these decisions.

To get around the unmistakable effect of the Court's orders, Plaintiffs misrepresent the scope of their Motion by describing their new declarants as necessary to present "post-2018 evidence" to counter Defendants' mootness arguments based on the passage of HB 316.[5] Doc. No. [631] at 13. This is incorrect. To be clear, "post-2018 evidence" already exists in this case, and the applicable deadlines for discovery and new declarants passed in, respectively, March and February 2020. See Docs. No. [225] and [228]. Plaintiffs were always able to—and did—submit declarations of voters from the 2019 elections. Moreover, to the extent such declarants could be located, Plaintiffs were likewise not precluded from offering additional declarations concerning the 2018 (or 2019) elections, taken during the discovery period. The fact that they failed to build a winning case on this record speaks only to the merits of their claims—not their ability to present evidence.

In sum, Plaintiffs had ample opportunity to build the record in this case from November 2018 through February 2020; the evidence simply did not support their claims. The Court's earlier decisions are clear, and this

[5] As the Court is aware, HB 316 went into effect on April 2, 2019, well before several 2019 elections took place. In the interests of efficiency, Defendants will not attempt to recap the Parties' extensive arguments on the impact of the legislation here.

issue has been resolved. Accordingly, the Motion should be denied on the same grounds that Defendants, and the Court, have already expressed.

b. Plaintiffs' new declarants are barred by applicable discovery rules, which prohibit untimely new declarant witnesses.

In addition to violating the Court's order for a final list of declarants, Plaintiffs' untimely disclosure of new declarants does not comply with either the Local Rules or the Federal Rules of Civil Procedure regarding discovery. While Plaintiffs agreed to table a debate on these issues when Defendants withdrew their prior Motion for Discovery Sanctions, the underlying reasons to deny Plaintiffs' attempted supplementation remain unchanged. See generally Doc. No. [605].

i. Applicable discovery rules prohibit Plaintiffs' untimely declarants.

Specifically, Local Rule LR 26.1(A) requires that Plaintiffs "make the initial disclosures required by Fed. R. Civ. P. 26(a)(1) at or within thirty (30) days after the appearance of a defendant by answer or motion." These initial disclosures must include the name of "each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment" in its initial disclosures. Fed. R. Civ. P. 26(a)(l)(A)(i). Federal Rule of Civil

Procedure 26(e)(1)(A) imposes an ongoing duty on the parties to supplement their Rule 26 disclosures in a timely manner.

"The initial disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure 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." Davis v. Green, 2015 WL 3604891, at *2 (N.D. Ga. June 8, 2015). A party's obligation to supplement their disclosures, however, "does not extend discovery in perpetuity, rendering the Court's deadlines toothless." Stewart v. VMSB, LLC, 2020 WL 4501830, at *2 (S.D. Fla. July 27, 2020); see also Cook v. Royal Caribbean Cruises, Ltd., 2012 WL 2319089, at *1 (S.D. Fla. June 15, 2012) ("The mere fact that [p]laintiff believes she is or was under a duty to supplement her discovery disclosures does not mean that complying with the duty trumps deadlines in the case and permits trial use of post-deadline disclosures, prejudicial consequences notwithstanding."). Indeed, admitting these declarations at this juncture would beget an entirely new round of discovery: Defendants will depose those declarants, seek Plaintiffs' communications with those declarants, and by the time that additional

discovery is completed, Plaintiffs will no doubt seek to introduce new evidence about the 2021 *and 2022* elections.

Plaintiffs' unilateral and untimely attempt to submit new evidence—in contradiction of the Court's prior orders and after the close of discovery—is wholly improper and a clear violation of this Court's Orders and the Federal Rules. See Reese v. Herbert, 527 F.3d 1253, 1266 (11th Cir. 2008) (expert affidavit disclosed after close of discovery properly excluded as it foreclosed defendant's ability to investigate and depose expert and plaintiff had not "filed a motion to extend the discovery period so as to permit a proper disclosure."); see also Ashman v. Solectron, Inc., 2010 WL 3069314, at *4 (N.D. Cal. Aug. 4, 2010) ("Discovery in this action closed on March 31, 2010. Any supplemental disclosure after such date would be untimely."); Clark v. Wilkin, 2008 WL 2388634 at *2 (D. Utah June 11, 2008) ("Plaintiffs' supplementation of the list of persons having discoverable information was untimely as the fact discovery deadline had already passed.").

In short, Plaintiffs' disclosure of these new declarants is untimely, violates Rule 26, undermines the purpose of the Court's discovery rules, and impermissibly seeks to drag this case on "in perpetuity" because there will always be another election around the corner, if nothing else. Stewart, 2020 WL 4501830, at *2. The prejudice to Defendants in allowing additional

declarant testimony at this stage in the litigation is self-evident: discovery is closed and has been closed; Daubert motions have been resolved; and Defendants would be unfairly prejudiced if they are forced to spend additional time and resources at this stage investigating and deposing these new declarants to rebut their claims. Cf. Debose v. Broward Health, 2009 WL 1410348, at *6 (S.D. Fla. May 20, 2009) (allowing untimely disclosed evidence would be prejudicial "if [d]efendant had to spend the brief time remaining before trial to conduct discovery on these new witnesses."). This consideration is underscored by a sub-set of Plaintiffs' new declarants: those whose deposition testimony was unhelpful to Plaintiffs' case and who now apparently have something new to say. Accordingly, Plaintiffs' untimely declarants should be deemed inadmissible and their Motion denied. Fed. R. Civ. P. 37(b)(2)(ii) & (c)(1).

ii. Plaintiffs cannot show admission of their new declarants would be substantially justified or harmless.

Plaintiffs have also made no attempt to meet their burden of demonstrating cause for inclusion of their untimely new declarants. Rather, Plaintiffs simply offer to make their new declarants available for deposition prior to trial. Doc. No. [631] at 31. While Defendants appreciate this (mandatory) accommodation and putting aside the fact that such would

defeat the purpose of the Court's prior order for a final list of declarants, Plaintiffs' argument does not address—let alone meet—the factors that determine whether untimely-disclosed evidence may be admitted.

When a party fails to comply with the disclosure requirements of Rule 26, as is the case here, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, **unless the failure was substantially justified or is harmless**." F.T.C. v. Nat'l Urological Grp., Inc., 645 F. Supp. 2d 1167, 1179 (N.D. Ga. 2008) (emphasis added). Courts in this District have identified five factors to consider in determining whether a failure to disclose evidence meets this standard:

> (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.

Cambridge Univ. Press v. Becker, 2010 WL 6067575, at *3 (N.D. Ga. Sept. 21, 2010). Each factor weighs against Plaintiffs here.

The first two factors clearly weigh against admission of Plaintiffs' new declarants. Plaintiffs' new declarants purport to offer testimony about alleged, unspecified voting issues previously unknown to Defendants. As has been evident from the course of this case, many of the earlier declarations filed by Plaintiffs cannot withstand the scrutiny of cross-examination.

Regardless, even if additional depositions were to occur, it is presently unclear which, if any, new declarants' testimonies Plaintiffs will seek to offer at trial and/or for what purpose. Defendants are being left in the dark and forced to defend against a proverbial moving target; there is no question that admission of these new declarants' testimony will cause unequivocal and severe prejudice to Defendants. And, by the time the depositions are complete, there will be another election and another cry to keep the wheels of discovery turning.

This makes the third factor all the more relevant: admission of these new declarants would cause substantial disruption to a potential trial in this case. Despite their repeated insistence that they seek a trial on the merits in expeditious fashion, Plaintiffs are certainly aware that admission of these new declarants would effectively force this Court to reopen discovery, to take depositions of the declarants, obtain Plaintiffs' communications with the declarants, and potentially issue subpoenas to third parties regarding the declarants.[6] The time for discovery has come and gone.

[6] As they have stated previously, Defendants do not seek to reopen discovery in this case. The State has dedicated more than enough resources in the massive discovery endeavor that has been this lawsuit. Reopening that process due to Plaintiffs' willful disregard for the federal rules and this Court's orders would cause needless delay as well as an unwarranted expenditure of the Court's (and the Parties') finite time and resources. Defendants would,

Factor four, the importance of the evidence at issue, also weighs against admission of the Third Disclosures. Again, Plaintiffs have not indicated for what specific purpose they intend to use these new declarations.[7] That said, Plaintiffs' Third Disclosures appear to contain over 100 new declarations across 479 pages. Doc. No. [603-1]. And, while Defendants cannot attempt to address any meaningful number of them in this response, a broad review suggests they are of limited probative value and/or, in many instances, wholly irrelevant to Plaintiffs' remaining claims in this case.

Many of Plaintiffs' new declarants addressing the June 2020 primary and November 2020 general elections, for instance, appear to complain about delays in receiving their absentee ballots, which is: (a) not at issue in this case; (b) largely due to the well-publicized strain the COVID-19 pandemic (and the related drastic increase in absentee ballots) placed on the U.S. Postal Service and local elections officials; (c) not traceable to Defendants;

---

reluctantly, be obligated to request that the discovery be reopened only in the event that the Court grants Plaintiffs' Motion and admits the new declarants—which it should not.

[7] While not explicitly stated, Plaintiffs suggest that the new declarants are necessary to combat Defendants' "mootness" arguments. For the reasons stated in Section III below, this argument fails.

and (d) already considered by the Eleventh Circuit in New Georgia Project v. Raffensperger, 976 F.3d 1278 (11th Cir. 2020) (declining to enjoin Georgia's absentee ballot deadline). See, e.g., Doc No. [603-1] at 188 ("Walker H." stated that after his absentee ballot was delayed in the mail, he voted at State Farm Arena in 15 minutes and noted that he "appreciated how straightforward, clear and helpful the team at the Secretary of State's Office was."); at 65 ("Tashiana C." requested a replacement absentee ballot due to mail delays, then returned her absentee ballot and received confirmation of its acceptance on October 31, 2020.) at 275 ("Winfred M.'s" absentee ballot took "about a month" to arrive on October 22, 2020, after which he returned it by dropbox and received confirmation it was accepted.); at 329 ("Paige P." decided to vote early in person after ballot mailed October 9, 2020 was received October 26, 2020.).

Other declarations simply address matters wholly outside the scope of this case, such as that of "Tina P.," who alleges to have encountered a locked dropbox in Clayton County at the beginning of the early voting period. Id. at 323. "Toby K." asserts confusion and concern about his BMD-printed paper ballot, despite the fact Plaintiffs have already dismissed their claims relating to the State's voting machines. Id. at 217. Worse yet, at least one declarant seems to openly admit to potentially violating Georgia election law.

"Dawn P." testified that she received her absentee ballot at her temporary residence in Vermont and then "sent the ballots overnight for $50 from Vermont to a close family friend in Atlanta" to be returned via dropbox, Id. at 333-34. See O.C.G.A. § 21-2-385(a) (delineating that only voters and certain family members may handle ballots). Regardless, none of these declarations—and the others like them—are sufficiently "important" to weigh in favor of their admittance.[8]

The fifth factor also does not weigh in favor of Plaintiffs. While Plaintiffs will presumably contend that their new declarants were not disclosed earlier for the simple fact that their testimony relates to elections occurring after the close of discovery, this is at best an oversimplification. Plaintiffs disclosed these new declarants *en masse* from a period spanning over a year; Defendants do not know when Plaintiffs identified any individual witnesses, the contacts or processes that led to their discovery, how their declarations were prepared, and/or why they were not identified on a rolling

[8] These example declarants are taken from Plaintiffs' Supplemental Third Initial Disclosures. Doc. No. [603-1]. It is unclear from Plaintiffs' Motion, however, whether the entirety of Plaintiffs' potential new declarants is encompassed therein. To the extent that necessary, Defendants reserve all rights and additional objections regarding any still-unidentified supplemental declarants Plaintiffs may seek to offer.

basis if Plaintiffs truly believed their admission was unobjectionable. As such, it is impossible for Defendants to accurately assess how long (and potentially for what purpose) Plaintiffs withheld these new declarants. Further, some of the new declarants are actually old declarants who just have something else to say (notably, *after* their sworn deposition testimony and *after* summary judgment).

That said, Plaintiffs have previously exhibited a willingness to withhold disclosure of similar "evidence" for strategic purpose. As the Court is aware, Plaintiffs last attempted to invoke the testimony of approximately seventy undisclosed declarant witnesses in response to Defendants' motion for summary judgment, similarly arguing that the testimony was regarding the June 2020 primary and therefore previously unavailable. While the Court correctly disregarded these new declarants pursuant to its prior order (Doc. No. [617] at 29), it is nonetheless worth noting that Plaintiffs made no mention of these new declarants in the roughly three weeks between the date of the election, June 9, 2020, and the date Defendants' motion for summary judgment was filed, June 29, 2020. Doc. No. [450]. Nor, for that matter, did Plaintiffs raise the issue during the next month before they filed their response on July 29, 2020. Doc. No. [490]. Plaintiffs simply waited to disclose their new declarants when it suited them. And given that Plaintiffs' motion

represents an about-face from its previously stated position that this issue was best left alone while summary judgment was pending, it seems obvious that this is yet another calculated decision on Plaintiffs' part to force the issue on their own terms.

In short, Plaintiffs have not attempted to meet their burden of demonstrating that admission of the new declarants would be "substantially justified or harmless." Chemence Med. Prod., Inc. v. Quinn, 2014 WL 12538886, at *3 (N.D. Ga. Dec. 30, 2014) ("burden of establishing that a failure to disclose was substantially justified or harmless rests on the plaintiffs."). This ends the inquiry. Id. But even if Plaintiffs had attempted to carry their burden, they would have failed. Every factor that the Court is to consider in evaluating Plaintiffs' new declarants weighs against their admittance.

III. Plaintiffs' and Defendants' respective references to events occurring after 2018 are not the same.

Plaintiffs attempt to draw a comparison between their new declarants and Defendants' references to changes in the law and the results of statewide elections. This is a false equivalency. Plaintiffs' demand for "equity" between the Parties' "post-2018 evidence" is, at best, inaccurate and should be wholly rejected.

At the outset, referencing a change in the law—here, the passage of HB 316—is quite different to proffering substantive new testimony from previously undisclosed declarants over a year after the close of discovery. The former is not even "evidence" to begin with, nor is it subject to discovery rules.[9] Changes in the law go to mootness and, accordingly, affect the Court's jurisdiction to order relief. See Nat'l Advertising Co. v. City of Miami, 402 F. 3d 1329, 1332 (11th Cir. 2005) ("[F]ederal courts lack jurisdiction to hear and decide cases where changes in the law have rendered the case moot."); Seay Outdoor Advert., Inc. v. City of Mary Esther, Fla., 397 F.3d 943, 947 (11th Cir. 2005) ("Constitutional challenges to statutes are routinely found moot when a statute is amended or repealed."). As such, legal mootness may be raised at any point in the proceedings. Cole v. NCAA, 120 F. Supp. 2d 1060, 1068 (N.D. Ga. 2000). Plaintiffs' new declarants do not impact this Court's subject-matter jurisdiction and, accordingly, no similar allowance is afforded to them.

[9] As discussed above, the passage of HB 316 occurred during the pendency of this case and Plaintiffs have already been afforded an opportunity to collect "post-2018 evidence" to rebut Defendants' mootness arguments based thereon. Supra Section II (a). As a practical matter, given the Court's ruling on Defendants' jurisdictional motion for summary judgment, Defendants do not anticipate mootness being a central tenet of their defense at trial.

Plaintiffs' new declarants are also easily distinguishable from Defendants' reference to Senator Warnock's run-off election win in January 2021. Unlike Plaintiffs' proffered new testimonial "evidence," the Court may take judicial notice of the outcome of an election. See, e.g., Martinez v. Bush, 234 F. Supp. 2d 1275, 1307 n.36 (S.D. Fla. 2002) ("We take judicial notice of the election results, which are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'") (quoting Fed. R. Evid. 201(b)(2)). The election of Senator Warnock is not a fact subject to dispute and no depositions or investigations are needed to confirm the veracity of Defendants' assertion in this regard. Plaintiffs are, of course, entitled to argue the *significance* of this election result as it relates to the legal merits of their case, but the mere fact that it occurred is not a matter demanding additional discovery or new factual evidence.

For these reasons, "equity" does not demand that Plaintiffs' new declarants be admitted nor does it require that Defendants be prohibited from referencing HB 316 or similarly judicially noticeable facts such as Senator Warnock's election. Plaintiffs' Motion should accordingly be denied.

CONCLUSION

For the reasons stated herein, Plaintiffs' motion is, at best, premature and, at worst, an improper end-run around this Court's orders, the Federal Rules of Civil Procedure, and the underlying principle that **all** discovery must end at some point. It should be denied.

Respectfully submitted this 1st day of October, 2021.

Christopher M. Carr
Attorney General
GA Bar No. 112505
Bryan K. Webb
Deputy Attorney General
GA Bar No. 743580
Russell D. Willard
Senior Assistant Attorney General
GA Bar No. 760280
STATE LAW DEPARTMENT
40 Capitol Square, S.W.
Atlanta, Georgia 30334

/s/ Josh B. Belinfante
Josh B. Belinfante
Georgia Bar No. 047399
jbelinfante@robbinsfirm.com
Vincent R. Russo
Georgia Bar No. 242628
vrusso@robbinsfirm.com
Carey A. Miller
Georgia Bar No. 976240
cmiller@robbinsfirm.com
Brian E. Lake
Georgia Bar No. 575966
blake@robbinsfirm.com

Alexander F. Denton
Georgia Bar No. 660632
adenton@robbinsfirm.com
Melanie L. Johnson
Georgia Bar No. 466756
mjohnson@robbinsfirm.com
ROBBINS ROSS ALLOY BELINFANTE LITTLEFIELD LLC
500 14th Street N.W.
Atlanta, GA 30318
Telephone: (678) 701-9381
Facsimile: (404) 856-3255

Bryan P. Tyson
Georgia Bar No. 515411
btyson@taylorenglish.com
Bryan F. Jacoutot
Georgia Bar No. 668272
bjacoutot@taylorenglish.com
Diane Festin LaRoss
Georgia Bar No. 430830
dlaross@taylorenglish.com
Loree Anne Paradise
Georgia Bar No. 382202
lparadise@taylorenglish.com
TAYLOR ENGLISH DUMA LLP
1600 Parkwood Circle
Suite 200
Atlanta, GA 30339
Telephone: 678-336-7249

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO CLARIFY OR MODIFY INTERLOCUTORY ORDERS** was prepared double-spaced in 13-point Century New Schoolbook font, approved by the Court in Local Rule 5.1(C).

/s/ Josh Belinfante
Josh Belinfante

CERTIFICATE OF SERVICE

This certifies that I have this date electronically filed the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO CLARIFY OR MODIFY INTERLOCUTORY ORDERS** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record listed on the case.

This 1st day of October, 2021.

/s/ Josh Belinfante
Josh Belinfante