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

FAIR FIGHT ACTION, INC, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, *et al.*, Defendants.	CIVIL ACTION FILE No. 1:18-CV-5391-SCJ

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO CLARIFY OR MODIFY INTERLOCUTORY ORDERS

Defendants do not refute these key points in Plaintiffs' Motion and opening brief: (1) evidence of post-2018 election events is relevant; (2) Defendants themselves rely on post-2018 election events and recently argued that, to prevail, Plaintiffs must proffer the very evidence that is the subject of Plaintiffs' Motion, *i.e.*, evidence that voters continue to experience problems despite post-2018 changes in legislation and alleged changes to Secretary of State training and practices; (3) Plaintiffs could not have disclosed by the Court's February 14, 2020, deadline the declarations and witnesses identified in Plaintiffs' subsequent supplemental disclosures because the elections to which those declarations relate occurred after February 14, 2020, and because the identities of some potential

witnesses were first revealed in documents Defendants did not produce until months after the February 14, 2020, deadline; (4) Plaintiffs' supplemental disclosure in connection with Plaintiffs' response to summary judgment was made fourteen months ago and Plaintiffs' supplemental disclosure in connection with elections occurring after summary judgment papers were filed was made nine months ago, so those disclosures were not last minute surprises before trial; (5) Plaintiffs have offered Defendants the opportunity to take these witnesses' depositions and have urged Defendants to discuss with Plaintiffs how the parties should deal with the ongoing evidence demands inherent in a case seeking prospective relief and containing a mootness defense; and (6) this Court has plenary power to review and clarify or modify an interlocutory order at any time before final decree. *See Hopkins v. World Acceptance Corp.*, No. 1:10-CV-03429-SCJ, 2012 WL 13114503, at *1 (N.D. Ga. May 22, 2012) ("[A] district court has plenary power to modify or rescind an interlocutory order 'at any time before final decree.'") (citation omitted). Plaintiffs' Motion should be granted.

I. Plaintiffs' Motion is not premature.

Defendants' principal argument is that Plaintiffs' Motion is premature until the Court rules on Defendants' pending motion for partial summary judgment on

Plaintiffs' claim under the Voting Rights Act of 1965. (Defs.' Resp. to Pls.' Mot. 2, ECF No. 632 ["Defs.' Resp."].) Defendants are wrong.

Delaying the resolution of the important question of whether the parties may present post-2018 election events at trial does not serve the interests of efficiency and resource conservation and ignores the reality of where the case stands today. Unlike when this issue was raised in January 2021, before the Court's ruling on Defendants' motion for summary judgment, there is no longer a question whether this case will proceed to trial on Plaintiffs' constitutional challenges to Exact Match, voter list irregularities, and inadequate training on cancelling absentee ballots. The outcome of Defendants' pending motion for partial summary judgment thus will not affect the inevitable need for this Court to address the issue presented by Plaintiffs' Motion. This simple fact renders Plaintiffs' Motion ripe for consideration.

Plaintiffs honored the parties' prior agreement, which was to await the Court's ruling on the summary judgment motions pending when the agreement was made. (Joint Notice and Withdrawal of Defs.' Mot. for Disc. Sanctions 2, ECF No. 609.) The Court has now ruled on all but one claim, as to which Defendants subsequently moved for summary judgment. (Order on Def. Mot. for Summ. J. (Juris.), ECF No. 612; Order on Def. Mot. for Summ. J. (Merits), ECF No. 617.)

Under the Court's already-entered summary judgment orders, Plaintiffs' constitutional challenges to Exact Match, voter list irregularities, and inadequate training on cancelling absentee ballots will proceed to trial. *Id*. Defendants' renewed summary judgment motion is confined to Plaintiffs' Exact Match claim under the Voting Rights Act. (*See* Defs.' Br. In Supp. of Renewed Mot. for Summ. J., ECF No. 623.)

Thus, no matter how the Court rules on the renewed motion, the Court's other summary judgment rulings mean the issue presented by Plaintiffs' Motion—the parties' ability to proffer post-2018 election events at trial—will have to be resolved. There is nothing "hypothetical" as to which claims the post-2018 events will be relevant, (Defs.' Resp. 7), and postponing a decision on Plaintiffs' Motion contravenes, rather than promotes, "the interest of efficiency and conservation of resources." (Defs.' Resp. 2.) And, directly contrary to Defendants' Chicken Little scenario of countless witnesses testifying at trial about matters no longer relevant to the case and the substantial pretrial work that would be required to prepare for those irrelevant witnesses, Plaintiffs described in their Motion how their post-2018 election evidence would be limited to the remaining claims proceeding to trial. (*See* Pls.' Mot. 23-24) (identifying what Plaintiffs anticipate their post-2018 evidence would show, *all* of which pertains to the three challenged practices to be

tried).[1] As Defendants themselves acknowledge, (Defs.' Resp. 18, 19-20), now that the Court has narrowed the trial issues through its two summary judgment orders, far fewer witnesses than those disclosed by Plaintiffs after February 14, 2020, will be relevant and thus proffered at trial.[2]

II. Post-2018 election evidence is indisputably relevant.

Defendants acknowledge that post-2018 election events are relevant to this case, (Defs.' Resp. 23-24),[3] and do not dispute that, under binding authority, post-

[1] To address an issue about which Defendants are apparently confused, none of Plaintiffs' declarations are from people whose identity became known to Plaintiffs through Defendants' belated document productions. (*See* Defs.' Resp. 7-8.) Those belated document productions revealed some additional potential witnesses (although not declarants) previously unknown to Plaintiffs. Thus, Defendants controlled the timing of Plaintiffs' disclosure—a disclosure that was not even required given that Defendants possessed this information in the first place.

[2] If Defendants are complaining Plaintiffs have not yet identified by name which declarants Plaintiffs may call at trial, those disclosures are not due until the Pretrial Order. Nonetheless, Defendants have possessed the declarations for months now and, as demonstrated by their Response, (Defs.' Resp. 18-20), can identify declarations rendered irrelevant by the Court's summary judgment orders.

[3] In addition to themselves citing post-2018 events to support their case, Defendants argued that Plaintiffs must proffer post-2018 election evidence to prevail on their claims. (*See, e.g.,* Defs.' Br. In Supp. of Mot. for Summ. J. (Merits) 21, ECF No. 450-1) (contending that "[Plaintiffs' Experts] never reviewed or considered H.B. 316 and its effect on Georgia's matching process."); *Id.* at 32 (arguing Plaintiffs have not "provided any *evidence* of [HB 316's] inadequacy."(emphasis added)); *Id.* at 35 (arguing Plaintiffs have not shown injury flowing from differing practices among Georgia's counties "particularly since the enactment of HB 316."). *See also id*. at 12 (criticizing Plaintiffs' expert for

discovery evidence is highly relevant to show ongoing harm and necessary relief in cases where prospective relief or mootness are issues. (*See, e.g.,* Pls.' Mot. to Clarify or Modify 21-26) (gathering authority from prospective relief cases).)[4]

This leaves Defendants asking the Court to consider the post-2018 election events Defendants proffer but not the post-2018 election events Plaintiffs proffer. Defendants claim this one-sided treatment of post-2018 events at trial would not be

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opinions based on 2018 training manual, not 2020 training materials); Tr. Videoconference Hr'g Proceedings Held Jan. 12, 2021, Before Steve C. Jones 9:8-13, ECF No. 607 ("[T]he evidence is not there *based on the way elections are run in the State of Georgia now.*" (emphasis added)); *Id.* at 109:17-110:2 (arguing that HB 316 made "real substantive changes upon which training necessarily changed. And *there is no evidence in the record that current training modules* are insufficient,…." (emphasis added)).

[4] *See also Brown v. Plata*, 563 U.S. 493, 523–534 (2011) (affirming three-judge panel's discovery order permitting discovery up to a month before trial to explore evidence of current conditions which was relevant to the issue of injunctive relief); *Gaylor v. Greenbriar of Dahlonega Shopping Ctr., Inc.*, 975 F. Supp. 2d 1374, 1389 (N.D. Ga. 2013) (allowing plaintiff to present post-discovery evidence in response to defendants' summary judgment evidence of remedial measures rendering plaintiff's claim moot); *Holmes v. Godinez*, No. 11 C 2961, 2016 WL 4091625, at *3 (N.D. Ill. Aug. 2, 2016) (where petitioners sought prospective injunctive relief, trial court reopened discovery for sixty days to allow inquiry into evidence of current conditions and developments, which was relevant to assess whether an injunction was a proper remedy); *Faust v. Comcast Cable Commc's Mgmt., LLC*, No. CIV.A. WMN-10-2336, 2014 WL 3534008, at *7 (D. Md. July 15, 2014) (denying motion to strike post-discovery declarations because, among other reasons, it was undisputed that the declarations were relevant to the issues raised in the proceedings).

inequitable because Defendants can show the post-2018 legislation they tout without evidence and the Court can take judicial notice of the election of Rev. Sen. Raphael Warnock, whereas Plaintiffs will call witnesses to establish the post-2018 events they want to proffer. (Defs.' Resp. 24.)

Under Defendants' reasoning, if Defendants cite a change in legislation to show the prospective relief Plaintiffs seek is no longer necessary, equity would allow this Court to consider that information but exclude Plaintiffs' witness testimony showing the new legislation has not, in fact, eliminated the harms for which Plaintiffs seek relief. Likewise, if Defendants introduce a fact as to which the Court may take judicial notice, equity would allow this Court to exclude Plaintiffs' witness testimony showing why the judicially noticed fact is incomplete, taken out of context, no longer accurate, or otherwise unpersuasive.[5]

Not surprisingly, Eleventh Circuit precedent forecloses Defendants' novel argument. In *Flanigan's Enter.'s, Inc. of Ga. v. City of Sandy Springs, Ga.*, 868

[5] Defendants are also inaccurate in stating their post-2018 election events are confined to legislative changes and events as to which the Court may take judicial notice. At the summary judgment argument, Defendants argued H.B. 316 "made it easier to use [absentee ballots]" and made "real substantive changes upon which training necessarily changed." (Tr. Videoconference Hr'g Proceedings held Jan. 12, 2021, 109, ECF No. 607.) *See also supra* note 3. The facts supporting those statements are not subject to judicial notice.

F.3d 1248, 1257 (11th Cir. 2017), the Eleventh Circuit evaluated the defendant's contention that its repeal of challenged legislation rendered the plaintiffs' claims moot. Among the factors the Eleventh Circuit considered was "whether the government has consistently maintained its commitment to the new policy or legislative scheme." *Id*. The Eleventh Circuit also directed that "the entirety of the relevant circumstances," including the plaintiffs' affirmative evidence in response, must be considered, and that a court must be persuaded by "the totality of those circumstances" before finding mootness. *Id*. The Eleventh Circuit flatly rejected limiting a plaintiff's presentation of "affirmative evidence" in the manner Defendants argue here. *See also Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F. 3d 1297, 1311 (11th Cir. 2011) (Where the facts surrounding the use of copyrighted materials suggest "a reasonable basis to believe that the [challenged practice] may resume," a mootness defense will not succeed.) Nor have prospective relief cases limited post-discovery evidence as Defendants propose. (*See, e.g.,* Pls.' Mot. 21-26.)

III. Plaintiffs' evidence of post-2018 election events should not be excluded as untimely.

A. Plaintiffs' disclosure of witnesses regarding events in post-2018 elections was timely.

Plaintiffs' disclosure of declarations and witnesses relating to problems experienced in the 2020 and 2021 elections was not, as Defendants claim, untimely.[6] (Defs.' Response 12.) Defendants do not dispute that the potential witnesses Plaintiffs disclosed after this Court's February 14, 2020, deadline (a) are relevant to events that occurred after February 14, 2020, or (b) were first disclosed to Plaintiffs in documents Defendants produced months after February 14, 2020. Thus, none of these potential witnesses *could* have been disclosed prior to this Court's February 14, 2020, deadline and, in any event, Defendants already knew about the witnesses revealed in their own documents.

The Federal Rules of Civil Procedure permit post-discovery disclosures when supplemental information becomes available, and the permissible disclosure period is not restricted to the discovery period. (*See* Pls.' Mot. 27-28) (citing authority that Fed. R. Civ. P. 26(e) requires timely supplementation of disclosures

[6] Defendants also suggest in passing that Plaintiffs' Motion is untimely under Local Rule 7.2(E) (motions for reconsideration). (Defs.' Resp. 3-4 n. 1.) But Plaintiffs are not moving under Local Rule 7.2(E). Reconsideration is not a proper vehicle because the issue raised and argued in Plaintiffs' Motion—the parties' ability to introduce post-2018 evidence at trial—has not already been considered by the Court's interlocutory orders.

but does not require supplements to be served before the discovery deadline).[7] "[T]he Court looks to all of the circumstances which led to the supplemental disclosure to determine whether it was made 'in a timely manner.'" *Howard v. Hartford Life & Accident Ins. Co.*, No. 3:10-cv-192-J-34TEM, 2011 WL 13295386, at *4 (M.D. Fla. Dec. 16, 2011). Instead of judging the timeliness of supplemental disclosures in absolute terms related to discovery deadlines, "[t]iming is better gauged in relation to the availability of the supplemental information." *Dayton Valley Invs., LLC v. Union Pac. R. Co.*, No. 2:08-cvV-00127-ECR-RJJ, 2010 WL 3829219, at *3 (D. Nev. Sept. 24, 2010); *see also Cook v. Royal Caribbean Cruises, Ltd.*, No. 11-20723-CIV, 2012 WL 2319089, at *2 (S.D. Fla. June 15, 2012) (excluding late-disclosed evidence but stating, "[i]f Plaintiff's two experts had issued supplemental reports based on information that

[7] *See also Dayton Valley Invs., LLC*, 2010 WL 3829219, at *3 ("[Rule 26(e)] does not limit the time for supplementation of prior disclosures to the discovery period.") (first citing *U.S. E.E.O.C. v. Bill Heard Chevrolet Corp.*, No. 207-CV-01195-RLH-PAL, 2009 WL 2489282, at *3 (D. Nev. Aug. 12, 2009) (finding that a motion to compel supplemental responses filed after the discovery cutoff date was not untimely because parties remain under a continuing duty to supplement prior discovery responses pursuant to Rule 26(e)); and then citing Fed. R. Civ. P. 26(e) advisory committee's notes to 1993 amendment ("Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches.")).

was unavailable to them by the time of the discovery cutoff, then Plaintiff would be in a different situation.")[8]

Under these governing standards, Plaintiffs timely disclosed declarants and other witnesses describing problems encountered by voters and would-be-voters in the 2020 and 2021 elections. *See also Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2010 WL 6067575, at *4 (N.D. Ga. Sept. 21, 2010) (declining to strike testimony and evidentiary proffers in declarations filed in opposition to summary judgment motion, noting that the declarations did not exist until they were gathered in response to summary judgment, and the moving party "cannot

[8] Defendants cite *Cook* to support their argument that Plaintiffs' disclosures should be excluded as untimely (Defs.' Resp. 13), but *Cook* dictates the opposite conclusion. *Cook*, 2012 WL 2319089, at *2. In *Cook*, the Court refused to exclude evidence of which the plaintiff was unaware prior to the discovery deadline and was therefore disclosed after discovery ended, instead allowing the defendant the opportunity to investigate the newly acquired evidence via deposition. *Id*. Defendants also suggest Plaintiffs "withheld" the declarations (Defs.' Resp. 21) but it is hardly "withholding" to provide declarations related to a June 2020 event in August 2020 nor is it "withholding" to provide declarations related to a November 2020 election in January 2021—particularly where there is no pending trial date. Indeed, this Court has previously vacated an order—which had excluded a late-disclosed expert witness when trial was less than two months away—when the trial was rescheduled and the harm of the late disclosure could now be cured by allowing additional discovery. *Am. Guarantee & Liab. Ins. Co. v. Liberty Surplus Ins. Corp.*, No. 1:15-cv-0949-SCJ, 2018 WL 11250007, at *1 (N.D. Ga. June 11, 2018).

now claim unfair surprise" that the declarants experiences evolved over time "when it was foreseeable that this would occur").

B. Plaintiffs' disclosure of post-2018 election evidence is justified and harmless.

Because Plaintiffs' witness disclosures did not violate any Federal Rule of Civil Procedure, Defendants are wrong in arguing Plaintiffs must show their supplemental disclosures were either substantially justified or harmless under Fed. R. Civ. P. 37(c)(1). *See* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness ***as required by Rule 26(a) or (e)***, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.") (emphasis added). Regardless, Plaintiffs' disclosures were both substantially justified and harmless.

As described above, Plaintiffs' disclosures after February 14, 2020, were justified because those disclosures relate to events occurring after that date and to witnesses first disclosed to Plaintiffs in documents Defendants produced after that date. Plaintiffs' disclosures of this evidence, which pertains to ongoing problems in the 2020 General Election and 2021 Runoff Election, are also justified by the unquestionable relevance of this evidence to the prospective relief Plaintiffs are

requesting and to Defendants' mootness defense, as the Eleventh Circuit and other authority cited in Plaintiffs' opening brief demonstrate. (*See* Pls.' Mot. 13-14.) *See also Flanigan's Enter.'s, Inc. of Ga.*, 868 F.3d at 1257.[9]

The cases Defendants cite regarding untimely disclosures are easily distinguished because they involve parties who offered *no* justification for their untimely disclosures. *See, e.g., F.T.C. v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1180 (N.D. Ga. 2008), *aff'd*, 356 F. App'x 358 (11th Cir. 2009) (plaintiff did not argue its substantial delay was justified); *Davis v. Green*, No. 1:12-cv-3549-WSD, 2015 WL 3604891, at *2 (N.D. Ga. June 8, 2015) (by not responding to defendants' objection to untimely disclosure, plaintiffs failed to justify delay); *Stewart v. VMSB, LLC*, No. 1:19-cv-22593-UU, 2020 WL 4501830, at *2 (S.D. Fla. July 27, 2020) (plaintiff failed to explain why the new information disclosed a month after the pretrial motions deadline could not have been discovered during the discovery period)*; Debose v. Broward Health*, No. 08-61411-CIV, 2009 WL 1410348, at *5-6 (S.D. Fla. May 20, 2009) (defendant failed to show it was

[9] Defendants repeatedly suggest that Plaintiffs' arguments unreasonably mean that the emergence of relevant evidence will be never-ending because elections will continue to occur until this case is tried. If Defendants' argument is accurate, it is an unavoidable by-product of binding Eleventh Circuit precedent, not something Plaintiffs have imposed.

unaware earlier of the late-disclosed witnesses or documents); *Cook*, 2012 WL 2319089, at *2 (plaintiff did not show she could not have supplemented her disclosure sooner).

Defendants' authority also shows that, even had Plaintiffs' disclosures been unjustified, they should be allowed because they are harmless. In *Clark*, the court declined to exclude testimony by untimely disclosed witnesses even though it found the untimely disclosure was not substantially justified. *See Clark v. Wilkin*, No. 2:06-CV-693 TS, 2008 WL 2388634, at *2 (D. Utah June 11, 2008). The court found the unjustifiably late disclosures harmless because they were made more than four months before trial and the Court ruled approximately seven weeks before trial, giving the defendants time to depose the late-disclosed witnesses. *Id*. Here, Defendants received one set of Plaintiffs' supplemental disclosures fourteen months ago and the other set of supplemental disclosures nine months ago, and no trial date in this case has yet been set. *See Clark*, 2008 WL 2388634, at *2.

In *Ashman*, the Court allowed testimony by the party's untimely disclosed witness because the testimony was foreseeable. *Ashman v. Solectron, Inc.*, No. CV 08-1430 JF, 2010 WL 3069314, at *4 (N.D. Cal. Aug. 4, 2010). Plaintiffs' claims for prospective relief and Defendants' mootness defense likewise made Plaintiffs' additional witness testimony about problems in elections held after 2018

foreseeable to Defendants. Indeed, Defendants themselves rely on post-2018 events, and have argued Plaintiffs must present evidence of ongoing problems for Plaintiffs' claims to succeed. Defendants cannot demand this evidence yet feign surprise when Plaintiffs provide it.

CONCLUSION

For the reasons shown in Plaintiffs' Motion and supporting briefs, Plaintiffs request the Court grant Plaintiffs' Motion.

Respectfully submitted this 15th day of October, 2021.

***

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C), specifically Times New Roman 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on October 15th, 2021, I electronically filed **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO CLARIFY OR MODIFY INTERLOCUTORY ORDERS** with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all counsel of record.

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