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.

Civ. Act. No. 18-cv-5391 (SCJ)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO LIMIT THE TESTIMONY OF GABRIEL STERLING

Plaintiffs Fair Fight Action, Inc., Care in Action, Inc., Ebenezer Baptist Church of Atlanta, Georgia, Inc., Baconton Missionary Baptist Church, Inc., Virginia-Highland Church, Inc., and the Sixth Episcopal District, Inc., hereby file this Reply in Support of their Motion to Limit the Testimony of Gabriel Sterling.

INTRODUCTION

Throughout this litigation, Plaintiffs have sought to provide the Court with a complete record on which to decide this case. Defendants recently asserted that there have been significant changes to two sets of practices at issue in Plaintiffs' case: the Secretary of State's administration of the voter registration database and its citizenship verification procedure. These changes were apparently in the works for months, yet Defendants only disclosed one of them in their cursory disclosure of Mr. Sterling as a witness and only disclosed the other one during Mr. Sterling's February 9, 2022, deposition.

Plaintiffs filed this case to enforce constitutional and statutory rights, not to engage in gamesmanship. Thus, if Defendants are in fact on the path toward compliance with the U.S. Constitution and the Voting Rights Act, that would be a good thing. But to enable the Court to assess Defendants' supposed changes—again changes that to date have been referenced *only* through Mr. Sterling's uncorroborated testimony—Plaintiffs need access to documents that will permit

full cross-examination at trial. Mr. Sterling's unsubstantiated and untested statements about allegedly crucial changes to issues at the heart of this case ill-serve Plaintiffs, the Court, and the fair adjudication of this case.

ARGUMENT

I. The status quo is untenably prejudicial to Plaintiffs.

Absent this Court's intervention, Defendants currently plan to adduce testimony from a high-level official from the Secretary of State's Office—Gabriel Sterling—about allegedly relevant changes to the Secretary's practices while depriving Plaintiffs of any meaningful opportunity to examine Mr. Sterling's anticipated testimony. The informational asymmetry could not be starker: Defendants, who know all there is to know about the topics to which Mr. Sterling will testify, are essentially asking Plaintiffs and, by extension, the Court, to accept on their say-so how a brand-new voter registration database (GaRVIS) and a brand-new initiative for verifying citizenship (S.A.V.E.) will change the voting process in Georgia. These new programs are technically complex; Plaintiffs cannot adequately test Mr. Sterling's assertions at trial about the effect of these systems without receiving background information about the features of these systems.

As this Court has recognized, a party "is entitled to a thorough and sifting cross-examination" of the other party's witnesses. *Cephus v. CSX Transp., Inc.*,

No. 14-CV-1891, 2017 WL 5644371, at *2 (N.D. Ga. Jan. 13, 2017) (Jones, J.). For Plaintiffs to be deprived of an opportunity to conduct such a cross-examination of Mr. Sterling would be fundamentally unfair and, worse, would lead to an inaccurate record on central issues in the case. *See Meyer v. Gwinnett Cnty.*, No. 14-CV-00066, 2021 WL 3716652, at *7 (N.D. Ga. Mar. 22, 2021) (discussing "the unfairness of allowing a witness to testify" when the other parties were "unprepared" for cross-examination due to the proponent party's "discovery violations"), *appeal docketed*, No. 21-12851 (11th Cir. Aug. 16, 2021). In this scenario, Plaintiffs would be left to "carr[y] on in the dark" in countering Mr. Sterling's testimony, which is precisely what discovery is designed to prevent. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1947); *see also United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) ("Modern instruments of discovery serve a useful purpose . . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (internal citations omitted)); *cf. Higgs v. Costa Crociere S.P.A. Co.*, 969 F.3d 1295, 1305 (11th Cir. 2020) (citing *Procter & Gamble* in discussing "the spirit of openness and fair play the discovery rules embrace").

The situation at hand—involving Defendants' eleventh-hour claims of supposed changes to the practices Plaintiffs challenge, based only on their own

say-so—is one Plaintiffs have long tried to avoid. It was for this reason that Plaintiffs moved to clarify two of the Court's interlocutory orders concerning the parties' ability to introduce post-2018 evidence, and proposed conducting another Rule 30(b)(6) deposition of the Secretary of State after that motion was granted. *See* Pls.' Mot. Clarify Modify Interlocutory Orders, Sept. 17, 2021, ECF No. 631; Pls.' Proposal in Accordance with Ct.'s Direction 7, Nov. 29, 2021, ECF No. 637. Defendants opposed each of these efforts and contended in their proposed schedule that such "expansive discovery" was neither "authorized" nor "contemplated" by the Court's order granting Plaintiffs' motion to clarify, nor "warranted at this late stage." Defs.' Proposed Schedule for Disc. of Post-2018 Evidence 4, Nov. 29, 2021, ECF No. 638. Yet Defendants now seek to proffer Mr. Sterling, the Secretary of State's Chief Operating Officer, as a sort of unofficial Rule 30(b)(6) witness—one capable of testifying to recent initiatives of the Secretary of State's office as a whole—while taking refuge behind the limitations they urged the Court to adopt. And it turns out that the major changes that only surfaced immediately before and during Mr. Sterling's deposition were underway all the while.

II. Defendants' response misstates the facts and mischaracterizes the Court's Pretrial Scheduling Order.

Defendants contend that their failure to comply with Plaintiffs' requests does not violate this Court's November 30, 2021, Pretrial Scheduling Order for three reasons: (1) that Plaintiffs should have submitted document requests prior to Mr.

Sterling's deposition; (2) that the Court's Order gave Plaintiffs no right to seek *any* electronically stored documents; and (3) that Plaintiffs' requests were unreasonable. Defs.' Resp. Pls.' Mot. Limit Test. G. Sterling 11-12, 14-20, Mar. 21, 2022, ECF No. 748 ("Defs.' Resp."). These arguments are based on misstatements of the relevant facts and continued mischaracterizations of the Court's Order.

A. Plaintiffs were not required to, and could not have, requested the documents at issue before Mr. Sterling's deposition.

In its Pretrial Scheduling Order, this Court entitled Plaintiffs to "obtain relevant documents" with respect to Defendants' additional witnesses concerning post-2018 election matters in advance of deposing such witnesses, and ordered Defendants to "attempt to provide responsive documents on an expedited basis." Order, ¶ 6 & n.3, Nov. 30, 2021, ECF No. 641 ("Nov. 30 Order").

Defendants' contention that Plaintiffs needed to request the relevant documents before Mr. Sterling's deposition is misguided. As an initial matter, the Court's Pretrial Scheduling Order did not require Plaintiffs to *ask* for documents relevant to Defendants' additional witnesses; to the contrary, it placed on Defendants the burden to identify and produce relevant documents, a burden Defendants requested in lieu of having Plaintiffs serve document requests. And, as a practical matter, Plaintiffs could hardly have known which other documents to ask for given how vaguely Defendants identified the topics of Mr. Sterling's

testimony: "(1) efforts in the Secretary's office to enhance and improve the accuracy of county-entered voter data; (2) the efforts undertaken by the Secretary during the 2020 elections to address the COVID-19 pandemic; and (3) the period of time between the November 2020 general election and the runoff election." Pls.' Mot. Limit Test. G. Sterling, Ex. 1, Email from J. Belinfante to A. Lawrence-Hardy and L. Bryan, Jan. 12, 2022, ECF No. 734-1 ("Jan. 12, 2022, Email"). None of these topics mentioned S.A.V.E. or even suggested changes to the citizenship verification process. Although GaRVIS was the subject of one of the documents Defendants produced with this email, Plaintiffs were unfamiliar with the details needed to point them to other relevant documents. Instead, Mr. Sterling sprung these and other details regarding the Secretary's recent efforts upon Plaintiffs *during* his deposition.[1] Plaintiffs could not have asked for documents regarding initiatives Defendants had not yet revealed to them.[2]

[1] Mr. Sterling's testimony about S.A.V.E.—and his claim that the Secretary of State received access to this program for the first time "towards the end of 2021," Pls.' Mot. Limit Test. G. Sterling, Ex. 2, Sterling Dep. 31:16-32:8, Feb. 9, 2022, ECF No. 734-2 ("Sterling Dep.")—was all the more startling to Plaintiffs given the Secretary's own June 2015 PowerPoint representing that it had already "been given access to the [S.A.V.E.] program through U.S. Citizenship and Immigration Services" by that time. *See* Expert Report of Dr. Peyton McCrary ¶ 79 n.192, Apr. 4, 2020, ECF No. 339 (quoting STATE-DEFENDANTS-00127482).

[2] To be sure, Mr. Sterling was frequently unable to address many details of the initiatives about which he testified. *See, e.g.*, Sterling Dep. 32:3-5 ("I couldn't give you the exact months, but it's somewhere in that timeline . . . ."); *id.* at 104:7-8 ("I don't know if we signed off on it yet or not. I just don't recall right now."); *id.* at

In advance of Mr. Sterling's deposition, Defendants produced only two documents "relevant to the topics" about which they said he would speak: (1) a September 2021 Statement of Work regarding the GaRVIS initiative, which Mr. Sterling revealed to be outdated; and (2) an April 2019 Membership Agreement with the Electronic Registration Information Center ("E.R.I.C."). *See* Jan. 12, 2022, Email.

Contrary to Defendants' representations, neither of the documents they produced before Mr. Sterling's deposition concerned the Secretary of State's recent efforts regarding the S.A.V.E. program administered by U.S. Citizenship and Immigration Services ("USCIS"). Defendants' assertion that they produced the August 17, 2020, Memorandum of Understanding between the Secretary and USCIS before the deposition is false; perhaps Defendants confused that document with the E.R.I.C. Membership Agreement. What is more, the Memorandum regarding S.A.V.E. remains the only document Defendants have furnished that relates to Mr. Sterling's testimony about this supposedly critical development. Plaintiffs cannot conduct the "thorough and sifting cross-examination" of Mr.

155:23-24 ("I just don't know off the top of my head."); *id.* at 185:2-4 ("I don't know about the language or how it would look, but I know there was discussions around those kinds of issues."). Mr. Sterling's unfamiliarity with these details only underscores Plaintiffs' need for documents shedding light on them.

Sterling on this topic to which they are entitled without more documents. *See Cephus*, 2017 WL 5644371, at *2.

B. The Pretrial Scheduling Order did not prohibit Plaintiffs from obtaining any electronically stored documents.

Defendants' repeated suggestion that the Court's Pretrial Scheduling Order categorically excused the Secretary of State from producing any electronically stored document is without merit. *See* Defs.' Resp., Ex. 3, Letter from J. Belinfante to J. Creelan, Feb. 23, 2022; *see also* Defs.' Resp. 19 ("What Plaintiffs appear to seek is unquestionably ESI . . . ."). Rather, as Plaintiffs have explained, "[t]he mere fact that documents may be stored electronically—as virtually everything is in the twenty-first century—does not make Plaintiffs' request require an 'ESI search.'" Pls.' Mot. Limit Testimony G. Sterling 13, Mar. 7, 2022, ECF No. 734 ("Pls.' Mot.").

As for Defendants' conclusory assertion that Plaintiffs' requests "would doubtlessly require extensive ESI searches," Defs.' Resp. 14, Defendants fail to explain why documents relevant to recent events regarding GaRVIS and S.A.V.E. would not be readily available to Secretary of State employees with detailed knowledge of these issues. It simply is not credible that the state actors implementing these complex technical changes are conveying information solely by word of mouth—or that any written records of these ongoing changes are buried

so deep in government files that they cannot be found absent "extensive ESI searches." *Id*.

C. Defendants mischaracterize Plaintiffs' document requests and ignore Plaintiffs' attempts to narrow them.

Finally, in painting Plaintiffs' discovery requests as overbroad, Defendants point the Court to the wrong set of requests while overlooking Plaintiffs' good-faith efforts to narrow the scope of their initial requests. Defendants attach to their brief Plaintiffs' initial set of requests, but omit the narrower set of requests Plaintiffs sent on March 2, 2022, on which Plaintiffs' motion is premised. *See* Pls.' Mot., Ex. 3, Email from J. Creelan to J. Belinfante, Mar. 2, 2022, ECF No. 734-3. In fact, as of the filing of this reply, Defendants have yet to respond formally to Plaintiffs' narrowed requests. And the only additional documents Defendants have produced since Plaintiffs filed their motion consist of five records relating to GaRVIS, none of which sheds much further light on this new system.

III. The Court's January 5, 2021, cutoff for post-2018 election evidence applies to Mr. Sterling's testimony.

Defendants also posit that Mr. Sterling's testimony about post-January 5, 2021, developments in the Secretary of State's office is exempt from the cutoff date "for all post-2018 election evidence" the Court imposed in its Pretrial Scheduling Order. *See* Nov. 30 Order ¶ 1. In Defendants' view, that cutoff served only to limit "Plaintiffs' fact witnesses" to testifying about "voting experiences in

or before the January 2021 runoff," without imposing any limit on Defendants' ability to introduce evidence concerning "how elections are currently administered in Georgia." Defs.' Resp. 20.

But by its plain terms, the Pretrial Scheduling Order applies to "*all* post-2018 election evidence," not just the voting experiences of Plaintiffs' fact witnesses. *See* Nov. 30 Order ¶ 1 (emphasis added). And by "post-2018 election evidence," the Court meant evidence pertaining to events after the 2018 general election, not events pertaining to elections as opposed to other election-related evidence. Indeed, the Court's Order referred to Defendants' share of post-2018 election evidence as evidence "related to post-2018 election matters." *Id.* ¶ 6. In fact, given that all other discovery closed in this case on or about April 27, 2020, *see* Order 2-3, Feb. 11, 2020, ECF No. 228, Mr. Sterling's testimony would not even be allowed under the terms of the Pretrial Scheduling Order if it did not consist of post-2018 election evidence.

Thus, to the extent Mr. Sterling's testimony pertains to the Secretary of State's administration of elections after January 5, 2021, it post-dates the Court's subject-matter cutoff for discovery and should be excluded from trial, unless Defendants are ordered to produce the limited number of relevant documents Plaintiffs have requested.

IV. The Court should exercise its broad discretion to fashion an appropriate resolution.

For the foregoing reasons, Plaintiffs ask the Court to "issue any just orders" to cure the prejudice Plaintiffs would otherwise suffer if Mr. Sterling were allowed free reign to testify at trial. *See* Fed. R. Civ. P. 16(f)(1)(C).

This Court has multiple ways it can exercise its broad discretion to fashion an appropriate solution. Plaintiffs identified two of those potential solutions in their motion. One approach would be to order Defendants to comply with Plaintiffs' narrowed document requests set forth in their opening submission. *See* Pls.' Mot. 8-9. This approach would impose little burden on Defendants while providing the Court with the most complete record. Alternatively, the Court could exclude any testimony from Mr. Sterling regarding the recent GaRVIS and S.A.V.E. initiatives.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion and either (a) order Defendants to comply with Plaintiffs' narrowed document requests or (b) exclude any testimony from Mr. Sterling regarding GaRVIS or S.A.V.E. initiatives.

This 28th day of March, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 28, 2022, I filed the within and foregoing **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO LIMIT THE TESTIMONY OF GABRIEL STERLING** with the Clerk of Court using the CM/ECF electronic filing system which will automatically send counsel of record e-mail notification of such filing.

This the 28th day of March, 2022.

/s/ Allegra J. Lawrence
Allegra J. Lawrence