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

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

**DEFENDANTS' "MINI-BRIEF"**
**CONCERNING DEPOSITION DESIGNATIONS**

This brief concerns the legal basis for the "handful of… issues concerning the depositions designations that were mentioned at the April 1, 2022 Pretrial Conference," with this Court. Doc. No. [771] at 2. Defendants have included herein general concepts present throughout the parties' objections but tied those to specific examples where the issues are most prevalent. Because this Court has acknowledged the posture of this case as a bench trial, Defendants do not endeavor herein to further brief all objections and instead offer these exemplars, the legal force of which is applicable to similar objections.

## I. In re: soliciting legal conclusions in the deposition of Governor Brian Kemp in his former capacity as Secretary of State for the State of Georgia.

On January 8, 2020, Governor Brian P. Kemp participated in a limited deposition for purposes of the instant action. Throughout this deposition, counsel for Plaintiffs repeatedly inquired—over the objections of counsel for Defendants—as to Governor Kemp's understanding of his role and responsibilities while serving as the Secretary of State and the Chair of the State Election Board. These inquires elicited objections from counsel for Defendants on the grounds they impermissibly sought legal conclusions from a lay witness. See generally, Fed. R. of Evid. 701.

Counsel for Defendants repeated these objections throughout the deposition and assigned them to the Plaintiffs' applicable designations for Governor Kemp. Plaintiffs form-responded to these objections saying, "[i]t is not asking for a legal conclusion to inquire as to the witness's understanding of the responsibilities of the position he holds." But this is not a situation where a standard managerial employee carrying out his or her duties in the course of business is asked to define and describe his understanding of those duties. The unique role of Secretary of State, as well as the roles of the State Election Board ("SEB") members, creates a situation where many job responsibilities are defined either by statute or regulation. See, e.g., O.C.G.A.

§ 45-13-20, *et seq.*; O.C.G.A. § 21-2-33.1, *et seq*. As a result, many of the questions posed by counsel for Plaintiffs sought to elicit legal conclusions which are inextricably intertwined with a more generalized understanding of then-Secretary Kemp's responsibilities and the responsibilities of individual SEB members.

"The best resolution of this type of problem is to determine whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. If they do, exclusion is appropriate." Torres v. Cty. of Oakland, 758 F. 2d 147 (6th Cir. 1984). Here, the exact scope of the duties and responsibilities of SEB members and the Secretary of State have formed the basis of legal disputes between the Parties throughout this litigation. And certain of those disputes are expected to continue through trial. Consequently, exclusion is appropriate to the extent the thrust of such testimony is, in fact, centered on those legal obligations that remain in dispute.

To be sure, if this were a managerial position in a private corporation, there would be no question that the employee's understanding of his responsibilities does not cross into the realm of improper testimony. But the Secretary of State and Chair of the State Election Board are not ordinary occupations. And Governor Kemp's responsibilities when he served in those

capacities, as well as his understanding of the responsibilities of the members of the SEB, are largely delineated by statute or regulation.[1] This makes them ill-suited for description by lay witness testimony.

Because counsel for Plaintiffs never adequately parsed out these questions in order to avoid asking the witness to provide legal conclusions, Plaintiffs' form-responses to Defendants' objections are insufficient. Accordingly, Plaintiffs may not rely on the statements made by Governor Kemp as they relate to his understanding of the job duties or responsibilities of the Office of Secretary of State or of the State Election Board. In the alternative, such testimony should be limited to the only possible permissible purpose: lay understanding of applicable roles.

## II. In re: use of campaign statements as evidence of intent

During Governor Kemp's deposition, counsel for Plaintiffs asked several questions related to statements made by Governor Kemp in his capacity as a candidate for public office.[2] Plaintiffs then designated these

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[1] Counsel for Plaintiffs appears to recognize this interplay early on in the deposition when he asks Governor Kemp, "do you find it interesting that as a former State Senator and experienced trial lawyer like Mr. Harp that he did not know the **Georgia Law that detailed his duties as an SEB member.**" (Kemp Dep. 18:19-23) (emphasis added).

[2] Kemp Dep. 72:08-20; 89:13-16; 89:20-21; 106:6-107:12; 107:14-17; 108:12-18; 109:14-111:10; 114:01-12.

questions and Governor Kemp's responses as admissible testimony for purposes of this trial. After Defendants objected to these designations on the basis that they are irrelevant campaign speech under Fed. R. Evid. 401, Plaintiffs responded saying,

> [a]s the SOS and Chair of the SEB, Gov. Kemp was chiefly responsible for the administration of Georgia's elections during the relevant time period. Therefore, statements he made throughout that same time period in his capacity as a candidate for office are certainly relevant to the constitutionality of his actions.

But courts should "hesitate to attach constitutional significance to words a candidate utters on the campaign trail." Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 631 (4th Cir. 2017) (Thacker, J., concurring), vacated and remanded sub nom. Trump v. Int'l Refugee Assistance, 138 S. Ct. 353, 199 L. Ed. 2d 203 (2017). Indeed, Plaintiffs' suggested approach "would by itself chill political speech directed at voters seeking to make their election decision. It is hard to imagine a greater or more direct burden on campaign speech than the knowledge that any statement made might be used later to support the inference of some nefarious intent when official actions are inevitably subjected to legal challenges." Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 374 (4th Cir. 2018) (Niemeyer, J., dissenting), cert. granted, judgment vacated, 138 S. Ct. 2710, 201 L. Ed. 2d 1094 (2018). And as the Supreme Court has long emphasized, "the First Amendment 'has its

fullest and most urgent application precisely to the conduct of campaigns for political office.'" McCutcheon v. FEC, 572 U.S. 185, 191-2 (2014), quoting Monitor Patriot Co. v. Roy, 558 U.S. 310, 360 (1971).

Accordingly, Plaintiffs should not be permitted to chill the free speech rights of candidates for office on the vague grounds that consideration of campaign speech in a trial might tend to prove or disprove the constitutionality of an elected officials' later actions. But to the extent this Court deems such campaign speech admissible, it should be accorded little—if any—probative weight for the reasons articulated above.

## III. In re: Defendants' completeness objections

Defendants objected to many of the designations made by Plaintiffs on the basis that they omitted significant portions of relevant context. Plaintiffs noted these objections and stated in response that Defendants, "are welcome to attempt to introduce the entire speech." See generally, Designations and Objections of Deposition of Brian P. Kemp, offered by Plaintiffs. The applicable rule provides, "[i]f a party introduces all or part of a writing or recorded statement, **an adverse party may require the introduction, at that time**, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Fed. R. Evid. 106.

Accordingly, Defendants will introduce the missing portions at the time Plaintiffs introduce them at trial.

## IV. In re: imputing the testimony of Seth Harp to the State Election Board

On January 18, 2022, Defendants informed Plaintiffs that they objected to use of deposition designations of SEB Members and former SOS employees, at least until the evidentiary purpose of those designations was made clear. Specifically, Defendants stated:

> Defendants assume that Plaintiffs' designations of said employees and SEB Members' deposition testimony are being offered as statements by party opponents. However, no proffer has been made which satisfies the requirements of subsections A through E of Fed. R. Evid. 801(d)(2). State Defendants reserve all objections on this basis until the proffer of any of Plaintiffs' designations is made or otherwise until the purpose of Plaintiffs' designations is disclosed.

On March 31, 2022, Plaintiffs informed Defendants that they sought "to impute [Mr. Harp's] statements to the SEB." Now that the purpose of Plaintiffs' designations has been disclosed, Defendants object to Plaintiffs' proposed use of the statements of former SEB Member Seth Harp as statements by a party opponent to be imputed against the SEB. Plaintiffs still have not made **any** proffer that those statements satisfy the

requirements of subsections A through E of Fed. R. Evid. 801(d)(2) and nothing supports a determination that Rule 801(d)(2) has been satisfied.

Rule 801(d)(2) provides that a statement is not hearsay if it is offered against a party opponent **and**:

> (A) was made by the party in an individual or representative capacity;
> (B) is one the party manifested or adopted to be true;
> (C) was made by a person whom the party authorized to make a statement on the subject;
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
> (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Here, the "party" for purposes of the Rule 801 analysis is the SEB, as disclosed by Plaintiffs on March 31, 2022.[3] More specifically, Plaintiffs are not offering the statements against Mr. Harp as an opposing party—presumably, in part because he is no longer a party to this suit—they seek to offer the deposition testimony of Mr. Harp against the SEB. However, the

[3] The only claim pending against the State Election Board is Plaintiffs' claim as to whether the State's HAVA Match process is permissible under Section 2 of the VRA. See Doc. Nos. [68] at 47–48 (dismissing claims under § 1983 and the Help America Vote Act against the State Election Board), [636] at 4 (noting "that the 'sole question before this Court regarding Section 2 is whether Plaintiffs' challenge to Exact Match can proceed.'" (quoting Doc. No. [627] at 14)).

conditions of FRE 801(d)(2) are not satisfied here and that deposition testimony is therefore hearsay.

Defendants remain unaware of the specific provision of FRE 801(d)(2) that Plaintiffs contend applies, but regardless, no provision permits the use Plaintiffs seek. Subsection (A) is inapplicable because the statements made in the deposition were not made by the "party" against whom the statements are offered—the SEB. Likewise, Plaintiffs have offered nothing showing the statements are those which the SEB manifested or adopted to be true under subsection (B). Nor have Plaintiffs made any proffer that Mr. Harp was granted the "'authority to speak or discuss' a particular subject on behalf of the [SEB]" under subsection (C). Calvert v. Fulton Cty., Ga., No. 1:12-CV-2391-CC-LTW, 2015 WL 12862921 at **14–15 (N.D. Ga. Feb. 3, 2015) (citing Woodman v. Haemonetics Corp., 51 F.3d 1087, 1094 (1st Cir. 1995) and Nekolny v. Painter, 653 F.2d 1164, 1171 (7th Cir. 1981)), rev'd on other grounds Calvert v. Doe, 648 F. App'x 925, 928 (11th Cir. 2016) (finding no evidence of authorization to make statements). The only potentially applicable exception is found within subsection (D), but Plaintiffs have offered no showing that Mr. Harp was acting as an agent or employee of the SEB and within the scope of such a relationship—neither the SEB nor Mr. Harp, on his own, have any ability to control or direct the other on any

matter. Indeed, Mr. Harp did not testify as a 30(b)(6) witness on behalf of the State Election Board, nor did any other witness for that matter. Finally, Plaintiffs have made no allegation of a conspiracy between and amongst Mr. Harp and the SEB, or between and amongst any Defendants at all.

In sum, the deposition testimony of Mr. Harp may well be admissible for something, but Plaintiffs have failed to articulate any basis for the purpose they seek to admit it for. When pressed, Plaintiffs have vaguely stated they intend to impute Mr. Harp's deposition testimony against the SEB as a statement by a party opponent, but the SEB made no such statements and Plaintiffs have failed to carry their burden to show otherwise. Mr. Harp's testimony was, and is, his and his alone. Consequently, those statements are hearsay and this Court should limit the use of those statements pursuant to Fed. R. Evid. 105. Absent such limitation, Defendants enter trial shadowboxing against a deposition of an individual being proffered with unknown import.

## V. In re: Defendants' speculation objections for Kevin Rayburn

Counsel for Defendants objected to many of the Plaintiffs' designations for Kevin Rayburn because they constituted inadmissible speculation. "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Fed. R. Evid. 602. Plaintiffs routinely responded to these objections claiming they were waived because they were not timely made during the deposition pursuant to Fed. R. Civ. P. 32(d)(3)(b). But while certain speculative testimony constitutes a waivable form objection, speculation is also a substantive objection relating to the **competency** of a witness to testify as to a particular matter. And the federal rules treat these objections differently. "An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—***is not waived*** by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time." Fed. R. Civ. P. 32(d)(3)(A) (emphasis added).

In the case of Plaintiffs' examination of Mr. Rayburn, for example, the questions posed and his responses often venture into matters he simply was not competent to testify to. Indeed, at times Mr. Rayburn directly notified Counsel for Plaintiffs that his response was nothing more than speculation on his part.[4] These objections are not waived merely because they were raised after the deposition. "If incompetent matter, but not privileged, be adduced [in a deposition], objection thereto may be made at trial if the deposition be offered." Heiner v. N. Am. Coal Corp., 3 F.R.D. 63, 64 (W.D. Pa. 1942); see

[4] Rayburn Dep. 46:11-20; 61:19; 123:11; 144:3.

also Cabello v. Fernandez-Larios, 402 F.3d 1148, 1160 (11th Cir. 2005) (distinguishing "objections to the manner of taking the deposition," which are waived, "from objections to the substance of the testimony (such as relevance or competency)") (citations omitted), Jordan v. Medley, 711 F.2d 211, 217–218 (D.C. Cir. 1983) (noting that objections which would have "obviated or removed" the objection by eliminating the testimony in question are not those which are waivable (quoting Fed. R. Civ. P. 32(d)(3)(A)), League of Women Voters of Fla., Inc. v. Lee, No. 4:21-cv-186-MW/MAF, 2022 WL 610358 at **1–2 (N.D. Fla. Jan. 27, 2022) (holding that the "touchstone is whether the issue could have been fixed had the party objected" and that attempts to answer questions based on speculation could not have been fixed by objection).

## CONCLUSION

Defendants respectfully request that to the extent deposition designations are considered, the Court note the permissible extent of such testimony.

Respectfully submitted this 8th day of April, 2022.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing **DEFENDANTS' "MINI-BRIEF" CONCERNING DEPOSITION DESIGNATIONS** was prepared double-spaced in 13-point Century Schoolbook pursuant to Local Rule 5.1(C).

*/s/ Bryan P. Tyson*
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