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 No.
1:18-cv-05391-SCJ

PLAINTIFFS' RESPONSE TO DEFENDANTS' "MINI-BRIEF"
REGARDING DEPOSITION DESIGNATIONS

BACKGROUND

Plaintiffs respectfully submit this response to Defendants' "mini-brief" regarding deposition designations. Defendants' arguments are based on incomplete representations of what was actually said in the depositions and incorrect statements of evidentiary and substantive law. For that reason, Defendants' objections to Plaintiffs' deposition designations should be rejected.

Perhaps even more significant than the legal dispute is that, at its base, Defendants' brief is but another of their attempts to prevent the Court from considering relevant evidence from the mouths of Defendants' own employees regarding how Defendants administer elections in Georgia. For example, Defendants seek to have the Court disregard Governor Kemp's statements regarding "his role and responsibilities while serving as the Secretary of State and the Chair of the State Election Board." Br. 2. Likewise, they seek to diminish as "speculative" Secretary of State Deputy General Counsel Kevin Rayburn's statements, indeed going so far as to argue that he is not "competent" to testify about various aspects of Georgia election law and administration. That Defendants are unwilling to have the Court evaluate what their senior leadership says, knows, and does not know regarding the administration of elections in Georgia speaks volumes about the strengths of Plaintiffs' claims of maladministration.

ARGUMENT

I. Governor and Former Secretary of State Kemp's Statements Regarding His Understanding of The Role and Responsibilities Of the State Election Board and Secretary of State Are Admissible and Highly Relevant.

Defendants argue that a number of Plaintiffs' designations of Governor Bryan Kemp's deposition testimony are inadmissible under Federal Rule of Evidence 701 because Plaintiffs' sought to solicit legal conclusions from a lay witness. *See* Defs.' 'Mini-Briefing' Concerning Deposition Designations 2-4, Apr. 8, 2022, ECF No. 780 ("Defs.' Br."). That argument, as Defendants themselves seem to recognize at times, is based on a misreading of the relevant deposition designations.

During the deposition, Plaintiffs sought to solicit Governor Kemp's "understanding of the job duties or responsibilities" of the Secretary of State and the State Elections Board ("SEB"), not the actual legal metes and bounds of those roles that could be found in statute or regulation. *Id.* at 4; *cf., e.g.*, Ex. 1,[1] B. Kemp Dep. 34:21-35:1, Jan. 8, 2020 ("Kemp. Dep.") (asking whether Governor Kemp understood that SEB was tasked with ensuring that Georgia elections complied with all state and federal laws); *id.* at 37:5-10 (stating that the sort of questions to which Defendants have objected were "trying to get at the responsibility in

[1] Exhibit 1 includes all cited references to the Kemp deposition.

[Governor Kemp's] mind of the Board" (emphasis added)). Plaintiffs likewise inquired as to Governor Kemp's own awareness of the roles and responsibilities of his previous offices. *See, e.g.* Kemp Dep. at 11:7-9, 11:12-13 (asking whether Governor Kemp was "aware of" the SEB's statutory duties).

Sensibly, Defendants do not contend that a senior government official's understanding of his roles and responsibilities as an election administrator is irrelevant to the question of whether elections are conducted lawfully. *See, e.g.*, *SEC v. Treadway*, 438 F. Supp. 2d 218, 222 (S.D.N.Y. 2006) (holding that testimony about an investment firm executive's "understanding of the underlying regulatory climate" was "relevant to his decisionmaking process during the events at issue"). Indeed, Defendants recognize that Governor Kemp's understanding of his responsibilities would unquestionably constitute appropriate testimony "if [his] were a managerial position in a private corporation." Defs.' Br. 3. But Defendants cite no authority for their alarming view that a public official—particularly one whose actions have a far wider impact on democracy than a "manager in a private corporation"—has less ability to offer the same kind of testimony. Either an executive's understanding of the legal framework in which the executive operates is permissible lay testimony or it is not. Defendants concede it is permissible in the normal case and offer no caselaw or rationale why that rule of admissibility should not apply here.

Moreover, even assuming that any of Governor Kemp's designated testimony contains any legal conclusion (which it does not), the very authority Defendants cite demonstrates why exclusion is unwarranted here. In *Torres v. Cnty. of Oakland*, 758 F.2d 147 (6th Cir. 1985), the Sixth Circuit observed "[t]he problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury," which risks jeopardizing the court's ability "to instruct the jury as to that law." *Id.* at 150 (quotation omitted). Conveying erroneous information to a jury is not a problem in a bench trial. Because the Court can be sure to disregard any testimony containing a legal conclusion when resolving the parties' "legal disputes," *see* Defs.' Br. 3, it should admit potentially relevant statements and decline to exclude any of Governor Kemp's testimony as an improper legal conclusion from a lay person.

II. Governor Kemp's Campaign Statements Can Be Introduced As Evidence of His Intent.

Defendants next contend that deposition designations concerning racial appeals that then-Secretary of State and SEB Chair Kemp made while a candidate for reelection in 2014 and for the governorship in 2018 are inadmissible because they constitute "irrelevant campaign speech" protected from admission by the First Amendment. Defs.' Br. 4-6. Defendants are incorrect.

Plaintiffs offer Governor Kemp's deposition testimony to show that the SOS and SEB actions Plaintiffs challenge were motivated by racially discriminatory

intent while Governor Kemp was the Secretary of State. *See, e.g.*, Kemp Dep. 72:13-18 ("[T]he Democrats are working hard . . . registering all these minority voters . . . if they can do that, they can win this election in November). Such evidence goes to an essential element of Plaintiffs' Equal Protection Clause and Fifteenth Amendment claims alike. *Thompson v. Merrill*, 505 F. Supp. 3d 1239, 1254 (M.D. Ala. 2020). And the Supreme Court has explicitly recognized that "contemporary statements by members of the decisionmaking body," including "legislative" and "administrative" bodies "may be highly relevant" to showing "whether invidious discriminatory purpose was a motivating factor" behind the challenged action. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). Because Governor Kemp was serving as the Secretary of State and Chair of the SEB at the time these statements were made, they qualify as contemporaneous statements by a member of the relevant governmental body.

Defendants' view that Governor Kemp's statements are irrelevant and implicate First Amendment protections is incorrect. As an initial matter, the authorities on which Defendants primarily rely are devoid of any precedential – let alone controlling – value. *See Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 374 (4th Cir.) (Niemeyer, J., dissenting), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 631 (4th Cir.) (Thacker, J., concurring), *vacated and remanded sub nom. Trump v. Int'l*

Refugee Assistance, 138 S. Ct. 353 (2017).[2] And neither separate opinion Defendants rely upon cites any authority for their extreme view that anything said by a candidate is *per se* inadmissible in court pursuant to the First Amendment. *See Int'l Refugee Assistance Project*, 883 F.3d at 374 (Niemeyer, J., dissenting); *Int'l Refugee Assistance Project*, 857 F.3d at 631 (Thacker, J., concurring).

Moreover, to the extent these nongoverning separate opinions hold any value, they are inapposite. In *Int'l Refugee Assistance Project*, the statements at issue were made over a year before the challenged governmental action took place and while the candidate held no elected office. *See* 857 F.3d at 572, 575 (detailing statements starting on December 7, 2015, where the challenged executive order was first issued on January 27, 2017). Indeed, the Supreme Court specifically observed that many of these statements "were made before the President took the oath of office" in ascribing them little probative value. *Trump v. Hawai'i*, 138 S. Ct. 2392, 2418 (2018). As a result, the statements were not "contemporary statements by members of the decisionmaking body." *See Vill. of Arlington Heights*, 429 U.S. at 268. Here, by contrast, the campaign statements were made at a time when Governor Kemp was already serving as the Secretary of State and the

[2] It goes without saying that, as non-majority opinions from another circuit, these authorities are not binding. And in light of the Supreme Court's vacaturs of each, the opinions have "no precedential authority whatsoever." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n. 2 (9th Cir. 1991) (citing *O'Connor v. Donaldson,* 422 U.S. 563, 578 n. 2 (1975)).

Chair of the SEB and, thus, "was chiefly responsible for the administration of Georgia's elections," as Defendants recognize in their briefing. Defs.' Br. 5. Unlike then-candidate Trump, Governor Kemp was the directly responsible for the challenged actions at the time he made his statements.[3]

Defendants' argument amounts to the claim that statements that would otherwise be indisputably relevant to show the racially discriminatory motivation behind challenged governmental action becomes suddenly inadmissible once a relevant official decides to run for another office. Defendants cite no authority for this expansive proposition. Were it the law, it would create a blueprint by which governmental officials could immunize expressions of discriminatory animus from judicial scrutiny simply by declaring their candidacy for some other public office.

Not surprisingly, available precedent is to the contrary. The Supreme Court has long recognized that the First Amendment "does not prohibit the evidentiary use of speech . . . to prove motive or intent" and that such evidentiary use does not

[3] The governing Supreme Court precedent Defendants actually cite is more inapposite still. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014) (addressing the constitutionality of a statute imposing limitations on campaign contributions); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (holding "that a charge of criminal conduct . . . can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co. v. Sullivan*."). Defendants fail to explain how the general principle they quote from these cases applies to render contemporaneous statements of racially discriminatory intent within the meaning of the *Arlington Heights* analysis inadmissible so long as they are made within the context of a political campaign.

"impermissibly chill[] free expression." *Wisconsin v. Mitchell*, 508 U.S. 476, 488-89 (1993). Given that the "use of overt or subtle racial appeals in political campaigns" is relevant to claims under Section 2 of the Voting Rights Act, *see Thornburg v. Gingles*, 478 U.S. 30, 45 (1986), it follows that campaign statements *must* be generally admissible, notwithstanding any First Amendment interests, or else this factor could never be proven.

Thus, because Defendants fail to establish that the First Amendment bars their admission, Plaintiffs may use Governor Kemp's designated campaign statements as evidence of racially discriminatory intent to support their Equal Protection Clause and Fifteenth Amendment claims.

III. The Entirety of Governor Kemp's 2014 and 2018 Campaign Speeches Should Not Be Admitted.

During Governor Kemp's deposition, Plaintiffs introduced the excerpts of two of his recorded campaign speeches both of which were given while he was the Secretary of State and chair of the State Elections Board. *See* Kemp. Dep. 72:11-20, 106:19-107:5. Because Plaintiffs did not read the entirety of both speeches into the record during the deposition, defense counsel raised incompleteness objections to both speeches but defense counsel did not seek to have the entirety of the speech read into the record. *See id*. at 73:7-25, 109:5-12. For the 2014 speech, Plaintiffs' counsel tendered a complete version of the speech. *Id.* at 73:7-25. Defendants now

inform the Court that they "will introduce the missing portions" of Governor Kemp's speeches when Plaintiffs introduce the designation at trial. Defs.' Br. 6-7.

Under Rule 106, "[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 . . . that in fairness ought to be considered at the same time." Fed. R. Evid. 106. Here, Defendants failed to "require the introduction" of the missing portions of Governor Kemp's speeches "at the same time" Plaintiffs introduced and questioned Governor Kemp about the excerpts cited above. *See* Fed. R. Evid. 106. Having thus failed to give Plaintiffs an opportunity to question Governor Kemp—who will not testify live at trial—about these other portions, Defendants should not be permitted to introduce them now.

In the alternative, should the Court permit Defendants to introduce the remainder of Governor Kemp's speeches, Plaintiffs request that the speeches be submitted following the conclusion of Plaintiffs' designated deposition testimony and not in the midst of it.

IV. Seth Harp's Testimony May Be Imputed to the SEB.

Defendants' contention that the deposition testimony of Seth Harp is inadmissible hearsay is unavailing. Mr. Harp's deposition testimony is plainly admissible under both Federal Rule of Evidence 801(d)(2)(D), which directs that party opponent statements are not hearsay, and under Federal Rule of Civil

Procedure 32(a)(3), which permits depositions taken of a party to be used in subsequent court proceedings against that party.

First, statements of a party opponent are admissible non-hearsay where they are made by the party's "agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D). The status of the deponent is assessed at the time the deposition is taken, not at the time the testimony is being offered for admission. *See id.* (applying to statements made "while [the employee or agent relationship] existed"). With good reason, Defendants do not appear to dispute that Mr. Harp was a member of the SEB at the time of his deposition. Plaintiffs took Mr. Harp's deposition on October 16, 2019. Mr. Harp was appointed to the SEB by the Georgia Senate on March 28, 2017, to serve "until his or her successor is selected and qualified." 2017 Sen. Res. 403. His replacement, Matthew Mashburn, was appointed by the Lieutenant Governor in 20202 (and by the Senate on February 1, 2021), and his first meeting as an SEB member was on February 28, 2020. Ex. 2, M. Mashburn Dep. 20:18-24, Jan. 19, 2022].

Defendants nevertheless assert that Mr. Harp could not have been an employee or agent of the SEB because he "on his own" lacked the "ability to control or direct [the SEB] on any matter." Defs.' Br. 9-10. Under Defendants' theory, only executives with unilateral decision-making power could ever act as an

agent—but that is not the law and Defendants cite nothing to the contrary. An individual is an employee or agent for purposes of Rule 801(d)(2)(D) where they are "involved in the decisions" at issue. *Rowell v. BellSouth Corp.*, 433 F.3d 794, 801 (11th Cir. 2005); *see also Farrakhan v. DAL Glob. Servs.*, No. 19-cv-5804, 2021 WL 5238206, at *2 n. 4 (N.D. Ga. July 22, 2021) (admitting statement by an agent of the party "because he was involved in the decision" at issue). Mr. Harp was a sitting member of the SEB at the time of his deposition, with voting powers that directly implicated the SEB's own decision-making powers. He was thus involved in the SEB's decisions to issue (or not issue) rules related to voting and elections administration, Ex. 3,[4] S. Harp Dep. 25:10-15, Oct. 16, 2019, and in SEB investigations (or lack thereof) into voter complaints, *id.* at 38:8-19. Mr. Harp's status as an SEB member more than qualifies him as an "agent or employee" for purposes for Rule 801(d)(2)(D).

Mr. Harp's statements were also well within the scope of his relationship with the SEB, thus satisfying the Rule 801(d)(2)(D) exception. The statements Plaintiffs have sought to introduce relate to the lack of training and preparation Mr. Harp undertook upon beginning his tenure on the SEB, *id.* at 8:2-9:14, his lack of familiarity as a member of the SEB as to what the obligations of the SEB under Georgia law are, *id.* at 22:11-23:9, and the limited diligence he undertook as an

[4] Exhibit 3 includes all cited references to the Harp deposition.

SEB member to evaluate evidence before the SEB of systemic violations of voters' rights, *id.* at 45:9-48:23. This testimony falls well within the scope of his employment. Indeed, the notice of deposition Plaintiffs served Mr. Harp specifically indicated it was seeking his deposition "in his official capacity as a member of the State. Election Board."[5] Mr. Harp's testimony is thus fully admissible under the standards of Rule 801(d)(2)(D).

Second, Mr. Harp's testimony is admissible under Federal Rule of Civil Procedure 32(a)(3), which provides an adverse party "may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)." Fed. R. Civ. P. 32(a)(3). This is similar to the Rule 801(d)(2)(D) standard, in that it considers the status of the deponent "when deposed," and the inquiry into whether a deponent has the requisite relationship to the party is based on the individual's actual role and responsibilities within the organization or government agency. An individual will qualify as an "officer, director, [or] managing agent" so long as "the deponent had decision-making authority within the pertinent governmental agency at a key time." *Glob. Sav. Bank, F.S.B. v. United States*, 61 Fed. Cl. 91, 98 (Ct. Cl.

[5] Defendants' statement that Mr. Harp was not deposed as a 30(b)(6) witness is a red herring, and Defendants cite to no support that the standards for identifying a 30(b)(6) witness should be equivalent to those for identifying an agent or employee for purposes of the hearsay exception.

2004); *see also Founding Church of Scientology of Wash., D.C. v. Webster*, 802 F.2d 1448, 1456 (D.C. Cir. 1986) (finding individuals qualify managing agents "so long as those individuals retained some role in the corporation or at least maintained interests consonant with rather than adverse to its interests"). In making this evaluation, courts have looked to numerous indicia that an individual represents the party, including whether they were represented by counsel for the party in question at the deposition and whether the deponent was permitted to exercise personal judgment over the matter in dispute in the litigation. *See Stearns v. Paccar, Inc.*, No. 91-1423, 1993 WL 17084, at *4 (10th Cir. 1993). The term "managing agent" thus need not be given "too literal an interpretation" and can apply to individuals with "significant independent and/or supervisory responsibility with respect to the aspect of the [party's] activities that are at issue in the case." *Bianco v. Globus Med., Inc.*, No. 12-cv-147, 2014 WL 977686, at *2 (E.D. Tex. Mar. 6, 2014) (quoting *Kolb v. A.H. Bull Steamship Co.*, 31 F.R.D. 252, 254 (E.D.N.Y. 1962)).

For much the same reasons that Mr. Harp's testimony is admissible under Rule 801(d)(2), it is also admissible under Rule 32(a)(3). Once again, Mr. Harp was a voting member of the SEB, exercising independent judgment and decision-making powers over the actions directly at issue in this litigation. Mr. Harp was also represented by counsel who also represented the SEB. *See* Notice of

Appearance of Carey Miller, Feb. 7, 2018, ECF No. 38. Defendants' objection provides nothing to rebut these indicia that Mr. Harp's testimony was in his capacity as an agent of the SEB.

V. Defendants' Speculation Objections for the Own Employee, Kevin Rayburn, Should Be Rejected.

Finally, Defendants argue that objections to many of Plaintiffs' designations of Kevin Rayburn's deposition testimony under Federal Rule of Evidence 602 based on speculation or lack of foundation are not waived despite Defendants' failure to raise these objections during the deposition. Defendants seek an exemption from the normal rule of waiver because they claim these objections qualify as non-waivable objections to Mr. Rayburn's "competence" to testify to the matters at issue under Federal Rule of Civil Procedure 32(d)(3)(A).

As an initial matter, it is striking that Defendants are seeking to exclude testimony from the Deputy General Counsel of the Secretary of State's Office on the ground that he is not competent to testify about central issues of Georgia election law. Even leaving aside the lack of legal merit regarding Defendants' competency argument, as explained below, the mere fact that Defendants would argue that senior legal officers in their office are incompetent on fundamental aspects of their duties is troubling. *Cf., e.g.*, Ex. 4, K. Rayburn Dep. 199:19-201:10, 201:24-202:18, Dec. 6, 2019 (inquiring about post-election assessments).

Indeed, it is precisely the existence of this incompetence that Plaintiffs should be permitted to put before the Court.

Defendants are also wrong on the law. "An objection to an error or irregularity" at a deposition "is waived" if, as relevant here, it "relates to . . . the form of a question or answer . . . or other matters that might have been corrected at that time." Fed. R. Civ. P. 32(d)(3)(B). The Eleventh Circuit has recognized that Rule 32 thus distinguishes between "objections to the manner of taking the deposition," which are waived it not preserved, and "objections as to the substance of the testimony (such as relevancy or competency)," which are not waived. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1160 (11th Cir. 2005). The purpose of requiring the former to be raised at the deposition is to prevent counsel from "sandbagging" the other party at trial with objections that could have been cured. *See id.*; *see also Bahamas Agr. Indus. Ltd. v. Riley Stoker Corp.*, 526 F.2d 1174, 1181 (6th Cir. 1975).

Crucially, Defendants' brief makes no attempt to show that objections based on speculation or lack of foundation constitute objections to competence – *i.e.*, the substance of the testimony – as opposed to the form of the question or answer. With one exception, the authorities that Defendants cite shed no light on this issue. *See Cabello*, 402 F.3d at 1160 (addressing deposition testimony that "did not comply with the oath provision of Federal Rule of Procedure 28(b)"); *Jordan v.*

Medley, 711 F.2d 211, 217-18 (D.C. Cir. 1983) (discussing a question-and-answer "concerning criminal charges").

The only apposite authority Defendants cite, *League of Women Voters of Florida, Inc. v. Lee*, No. 21-cv-186, 2022 WL 610358 (N.D. Fla. Jan. 27, 2022), shows that Plaintiffs have the better of this dispute. The district court in *Lee* noted that "courts have held that objections to 'leading questions, lack of foundation, . . . lack of personal knowledge, [and] speculation . . . ' are waived if not made at the deposition." *Id.* at *1 (quoting *NGM Ins. Co. v. Walker Const. & Dev., LLC*, No. 11-cv-146, 2012 WL 6553272, at *2 (E.D. Tenn. Dec. 13, 2012)); *accord, e.g.*, *House v. Players' Dugout, Inc.*, No. 16-cv-594, 2021 WL 4898071, at *9 (W.D. Ky. Oct. 20, 2021); *Fletcher v. Honeywell Int'l, Inc.*, No. 16-cv-302, 2017 WL 775852, at *1 (S.D. Ohio Feb. 28, 2017); *State Farm Mut. Auto. Ins. Co. v. Dowdy ex rel. Dowdy*, 445 F. Supp. 2d 1289, 1293 (N.D. Okla. 2006). The rule requiring contemporaneous objection makes sense. Had Defendants raised their speculation objection during Mr. Rayburn's deposition, Plaintiffs could have asked further questions to lay a foundation for his response or could have rephased the question so as to avoid calling for speculation.[6] As the Court knows well from experience,

[6] Indeed, Defendants have never argued that their speculation objections could not have been cured had they been raised during the deposition, and any argument to that effect now is waived. *See Reynolds v. Soc. Sec. Admin., Comm'r*, No. 19-cv-1931, 2021 WL 1087240, at *3 (N.D. Ala. Mar. 22, 2021) ("It is well settled that a Court is not required to make a party's argument for them, and failure to

foundation and speculation objections are cured all the time. Were Defendants correct, any speculation objection could be reframed as a competence objection and then deemed unwaivable. That is not the law.

CERTIFICATION

I hereby certify that the foregoing has been prepared with a font size and point selection (Times New Roman, 14 pt.), which is approved by the Court pursuant to Local Rules 5.1(C) and 7.1(D).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court reject Defendants' incorrect arguments regarding the admissibility of various deposition designations.

Respectfully submitted this, the 10th day of April, 2022.

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present argument on an issue can constitute its waiver." (collecting cases)), *aff'd*, No. 21-11633, 2022 WL 853660 (11th Cir. Mar. 23, 2022).

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CERTIFICATE OF SERVICE

I hereby certify that, on April 10, 2022, the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' "MINI-BRIEF" REGARDING DEPOSITION DESIGNATIONS** was filed with the Court using the ECF system, which will serve all counsel of record.

This, the 10th day of April, 2022.

/s/ Allegra J. Lawrence
Allegra J. Lawrence