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

THE NEW GEORGIA PROJECT, REAGAN JENNINGS, CANDACE WOODALL, and BEVERLY PYNE, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and the Chair of the Georgia State Election Board; *et al.*, Defendants.	CIVIL ACTION FILE No. 1:20-CV-01986-ELR

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION AND THE SECOND DECLARATION OF KEVIN J. HAMILTON WITH RELATED NOTICE FILINGS AND EXHIBITS THERETO

I. INTRODUCTION

Defendants ask this Court to take the extraordinary action of either striking Plaintiffs' Reply in Support of their Motion for Preliminary Injunction ("Reply"), ECF Nos. 103–107, or ordering discovery and postponing the August preliminary injunction hearing more than six weeks after Plaintiffs' Motion for Preliminary Injunction ("PI Motion") was filed and despite the fact that the August hearing has been contemplated for over a month. *See* ECF Nos. 109, 111. Nothing about the Reply or its attachments would warrant such relief. Indeed, they are nothing more than a straightforward response to the arguments advanced by Defendants in opposition to Plaintiffs' PI Motion. And in any event, "a motion to strike is not the proper vehicle for challenging matters [outside of the] pleadings," *Chavez v. Credit Nation Auto Sales, Inc.*, 966 F. Supp. 2d 1335, 1344 (N.D. Ga. 2013), and striking Plaintiffs' Reply is disfavored. This is particularly true here, where all the facts in the supporting exhibits were known to Defendants prior to the Reply's filing or should have been fairly contemplated by them given that they reflect the broad problems in the June 9, 2020 Primary Election ("June Primary") and Georgia elections in general. More importantly, as Defendants themselves have pointed out, time is of the essence in this case, and Georgia voters—including Plaintiffs and their constituents—require a swift resolution to ensure that their right to vote is preserved

and they are able to safely and effectively cast a ballot in the November 3 General Election ("November Election"). Accordingly, Plaintiffs respectfully submit that this Court should deny Defendants' Motion and consider the evidence submitted with Plaintiffs' Reply when deciding the PI Motion at the scheduled August 11 hearing.

II. BACKGROUND

On May 8, 2020, soon after it became clear the COVID-19 pandemic would pose significant barriers to the ability of Georgia voters to vote in the November Election without imperiling their health, Plaintiffs filed their initial Complaint in this case. ECF No. 1. On June 3, 2020, Plaintiffs filed their First Amended Complaint, *see* ECF No. 33, challenging five provisions of Georgia law: (1) the lack of standards governing the process for notifying voters regarding incomplete absentee ballot applications ("Notification Process"), O.C.G.A. § 21-2-381(b)(4); (2) the age restriction on those who are allowed to submit one application to vote by mail for an entire election cycle, ("Absentee Age Restriction"), *id.* § 21-2-381(a)(1)(G); (3) the failure to provide prepaid postage on absentee ballot envelopes ("Postage Tax"); (4) the rejection of absentee ballots unless received by 7:00 p.m. on Election Day ("Receipt Deadline"), *id.* § 21-2-386(a)(1)(F); and (5) Georgia's prohibition on

third-party assistance for collecting absentee ballots ("Voter Assistance Ban"), *id.* § 21-2-385(a).

Plaintiffs allege that: (1) these challenged provisions impose an undue burden on the right to vote in violation of the First and Fourteenth Amendments; (2) the Absentee Age Restriction facially discriminates on the basis of age in direct contravention of the Twenty-Sixth Amendment; (3) the Postage Tax operates as an unconstitutional tax on voting under the Twenty-Fourth and Fourteenth Amendments; (4) the Notification Process and Receipt Deadline violate voters' procedural due process rights under the Fourteenth Amendment; (5) the Notification Process allows different counties to apply different standards to notify voters of issues with their absentee ballot applications in violation of the Equal Protection Clause of the Fourteenth Amendment; (6) the Voter Assistance Ban represents an overbroad restriction on political speech and associational rights under the First and Fourteenth Amendments; and (7) the Voter Assistance Ban conflicts with and violates Section 208 of the Voting Rights Act, 52 U.S.C. § 10508. These claims were lodged against all Defendants.

On June 10, 2020, the day after Georgia's disastrous June Primary, Plaintiffs filed their PI Motion. *See* ECF No. 58. The PI Motion was supported by 91 exhibits: 24 voter declarations, 2 expert reports, and 65 reports, articles, and other documents.

ECF Nos. 59-1–59-91. The Parties agreed to an expedited briefing schedule, providing Defendants with four weeks to submit an opposition, and Plaintiffs one week thereafter to submit a reply. ECF Nos. 62, 65. Defendants did not affirmatively request discovery before submitting their opposition.[1]

On June 25, 2020, this Court set a one-day hearing on the PI Motion for August 4 and directed the Parties to submit "a joint proposed schedule of the hearing setting forth how much time is requested by each party for oral argument." ECF No. 80. On July 9, the morning after Defendants filed their responses in opposition to the PI Motion ("Oppositions"), *see* ECF Nos. 90–91, the Parties conferred about the joint proposed schedule. Both Parties agreed that the Court's order contemplated solely oral argument, and that no evidentiary hearing was needed. Accordingly, the Parties agreed to a three-hour hearing, to be divided equally between Plaintiffs and Defendants. *See* ECF No. 93. At that time, Defendants also informed Plaintiffs that they intended to file a *Daubert* motion regarding Dr. Mayer. *Id.*

[1] Plaintiffs' counsel did affirmatively ask if Defendants would consider an expedited discovery schedule once a schedule had been set. *See* Exhibit A. Defendants indicated that they would only agree to expedited discovery if Plaintiffs' fact witnesses could be deposed. Given the tight timeline and substantial resources necessary to defend 24 depositions in just a few short weeks, Plaintiffs agreed to forego limited discovery, and Defendants likewise did not raise the issue of pre-hearing discovery again.

On July 16, 2020, one week later, Plaintiffs subsequently filed their Reply.[2] ECF Nos. 103–107. As explained contemporaneously to the Court and Defendants, Plaintiffs were not able to file their supporting exhibits via the ECF system at the time of filing due to technical difficulties. ECF No. 109-1. Accordingly, Plaintiffs promptly alerted the Court and served the supporting exhibits on Defendants. *See* Exhibit B. Upon the advice of the Clerk's Office, the following day Plaintiffs split up and filed the exhibits under three separate notices. ECF Nos. 105–107. Plaintiffs' evidentiary submissions contained: 97 declarations, 1 rebuttal expert report from Dr. Mayer responding to allegations lodged by the State Defendants, 1 supplemental expert report from Dr. Ball detailing new developments regarding COVID-19, 2 documents from the U.S. Postal Service (USPS) regarding mail delivery discovered after Plaintiffs filed their PI Motion, and 1 courtesy copy of a slip opinion. More than two weeks remained before the August 4 hearing.

On July 17, 2020, Defendants objected to the rebuttal evidence filed in support of Plaintiffs' Reply via email and requested that Plaintiffs either withdraw the

[2] Defendants appear to insinuate that Plaintiffs acted nefariously by requesting an additional ten pages for their Reply during the meet-and-confer. ECF No. 109 at 7 n.5. Notwithstanding that the length of Plaintiffs' Reply has nothing to do with the number of supporting exhibits, Defendants fail to note that such an extension was needed because instead of filing two 15-page replies with this Court (for a total of 30 pages), Plaintiffs filed only one 25-page reply. The dispute is, in any event, irrelevant to the motion to strike.

evidence or agree to postpone the August 4 hearing. ECF No. 109-2. The following business day, the Court independently rescheduled the hearing for August 11, and Plaintiffs' counsel responded to Defendants' objection, explaining that the evidence is not untimely, is proper rebuttal or supplemental evidence, and would not be withdrawn. ECF No. 109-5. Notwithstanding, Plaintiffs' counsel requested a proposal from Defendants with respect to postponing or restructuring the hearing if the Court's one-week extension of the hearing did not satisfy their concerns. *Id.* Defendants did not respond to Plaintiffs' request for a proposal or attempt to work cooperatively as required by Rule 1 of the Federal Rules of Civil Procedure, and instead preemptively filed the instant Motion with the Court. ECF No. 109.

III. LEGAL STANDARD

District courts have "broad discretion over the management of pre-trial activities." *Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234, 1269 (11th Cir. 2001). This includes "broad discretion in deciding what constitutes proper rebuttal evidence. . . . [and] in admitting expert testimony and its decision will be sustained unless it is 'manifestly erroneous.'" *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 601 (9th Cir. 1991) (citations omitted); *see also ITT Corp. v. Xylem Grp., LLC*, No. 1:11-CV_3669-WSD, 2012 WL 12871632, at *3 (N.D. Ga. Oct. 15, 2012) ("Courts are empowered to exercise

their discretion and judgment in determining if a rebuttal expert report addresses the same subject matter as the opposing party's initial expert report.").

When deciding a motion to strike matters outside of the pleadings, courts generally construe them as notices of objection, *see Chavez*, 966 F. Supp. 2d at 1344; *Jordan v. Cobb Cty., Ga.*, 227 F. Supp. 2d 1322, 1346–47 (N.D. Ga. 2001) (collecting cases), and consider each piece of evidence in deciding the motion, "without resorting to an exclusionary process," *Rindfleisch v. Gentiva Health Servs., Inc.*, 962 F. Supp. 2d 1310, 1315–16, *motion to cert. appeal denied*, 24 F. Supp. 3d 1234 (N.D. Ga. 2013). "Motions to strike are generally viewed with disfavor and 'often considered time wasters.'" *Insituform Techs., Inc. v. Amerik Supplies, Inc.*, No. 1:08-cv-333-TCB, 2010 WL 11493292, at *5 n.3 (N.D. Ga. Feb. 19, 2010).

IV. ARGUMENT

A. The evidence supporting Plaintiffs' PI Motion is more than sufficient to support Plaintiffs' requested relief, and Plaintiffs are right to alert the Court to new evidence as it becomes available.

The underlying premise of Defendants' Motion—that Plaintiffs filed the evidence supporting their Reply to "bolster and replace the insufficient evidentiary submissions they filed with the PI Motion," ECF No. 109 at 11—is without merit, and accepting it on its face would have grave implications well beyond this suit. Indeed, Defendants effectively argue that anytime plaintiffs submit evidence with a

reply brief (and, particularly where it is substantial), it indicates that the original filing was deficient. But that is not the law.

As a threshold matter, it is undisputed that plaintiffs carry the burden of proof on a motion for preliminary injunction. *Ga. Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1260 (N.D. Ga. 2018) (citing *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006)). Accordingly, to the extent that new or supplemental evidence becomes available—something particularly likely in a case such as this given the ever-changing circumstances surrounding the pandemic—Plaintiffs are well within their rights to submit additional evidence in conjunction with a reply brief. *Cf. Hammons v. Computer Programs & Sys., Inc.*, No. 05-0613-WS-C, 2006 WL 3627117, at *14 (S.D. Ala. Dec. 12, 2006) ("To ban such evidentiary filings would yield absurd results, as movants would be permitted to submit reply briefs but precluded from submitting the necessary record materials to support them."). And there is certainly no authority indicating that this Court and Plaintiffs are relegated to considering *only* the facts and evidence available as of the day Plaintiffs filed their PI Motion. In cases like this one where facts are developing, election results are coming in, and the pandemic is evolving, Plaintiffs may rely, and the Court may consider, any such developing evidence. *Cf. Burns v. Fox*, No. 1:10-cv-3667-WSD, 2016 WL 6543206, at *2–*3 (N.D. Ga. Nov. 4, 2016) (permissible

to consider newly discovered evidence even after entry of judgment); *see also Mays v. U.S. Postal Service*, 122 F.3d 43, 46 (11th Cir. 1997) (same as to evidence previously unavailable).

More fundamentally here, the sufficiency of Plaintiffs' PI Motion and supporting evidence is clear. Not only is this plain from reviewing the arguments and supporting documents thereto, but it is also evident in Plaintiffs' Reply itself, which repeatedly cites back to the PI Motion in responding to Defendants' arguments. *See* ECF No. 103 at 3, 5–10, 12–18, 20–21, 23. That the new legal and factual arguments made by Defendants, discussed *infra*, also required Plaintiffs to provide additional legal arguments and factual evidence, is not only of no moment, but it is precisely what Plaintiffs are supposed to do to meet their burden on a preliminary injunction motion.

B. Plaintiffs' Reply and supporting evidence are timely rebuttal and supplemental evidence.

Defendants' argument that the evidentiary submissions supporting Plaintiffs' Reply are untimely is without merit.[3] Contrary to Defendants' allegations, the

[3] It does not appear to Plaintiffs that Defendants have asserted that Plaintiffs' evidentiary submission are untimely because they were not able to be uploaded to ECF prior to midnight on July 16, 2020. But even if they had, such an argument would not be successful as Plaintiffs provided actual notice of the evidentiary submissions to Defendants as soon as it became apparent that their submissions

declarations, expert reports, and other documents submitted with Plaintiffs' Reply all constitute proper rebuttal and/or supplemental evidence and are properly contemplated on reply.

When determining whether a declaration filed with a reply is appropriate, courts consider whether the declaration "respond[s] to matters raised in the responses filed by the opposing parties."[4] *Carlisle v. Nat'l Commercial Servs., Inc.*, No. 1:14-CV-515-TWT, 2015 WL 4092817, at *1 (N.D. Ga. July 7, 2015) (citation omitted), *aff'd*, 722 Fed. App'x 864 (11th Cir. 2018); *accord Kason Indus., Inc. v. Dent Design Hardware, Ltd.*, 952 F. Supp. 2d 1334, 1338 n.1 (N.D. Ga. 2013) (considering supplemental declaration that responded to opposing party's arguments); *see also, e.g.*, *Kuehne & Nagel Inc. v. A.G.R. Eshcol Overseas, Ltd.*, No. 13-8919 (LLS), 2014 WL 4059821, at *4 (S.D.N.Y. Aug. 15, 2014) ("[R]eply papers may properly address new material issues raised in the opposition papers so as to avoid giving unfair advantage to the answering party.").

---

could not be processed in the ECF system. *See, e.g.*, *James v. Nationwide Credit, Inc.*, No. 1:06-CV-1397-ODE-GGB, 2007 WL 9701617, at *1 (N.D. Ga. Feb. 21, 2007) (allowing defendant's response filed one day late where "neither plaintiff nor the efficiency of judicial administration has been prejudiced by the delay").

[4] While it is true, as Defendants assert, that Federal Rule of Civil Procedure 6(c) and Local Rule 7.1, ND Ga explain that affidavits supporting a motion must be served with the motion, they are silent as to when affidavits may be filed with a reply, and do not preclude presentation of evidence on reply. *Kershner v. Norton*, No. 02–1887(RMU), 2003 WL 21960605, at *2 (D.D.C. Aug. 14, 2003).

Where the evidence does respond to matters raised in the opposing party's response, courts routinely admit it and consider it in conjunction with the movant's reply. *See Insituform Techs., Inc.*, 2010 WL 11493292, at *5 n.3 (allowing evidence submitted in sur-sur-reply because it was "rebuttal evidence"); *PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, No. CV 05-8891-MMM (FMOx), 2013 WL 12080306, at *4 (C.D. Cal. Oct. 8, 2013), *aff'd in part*, 884 F.3d 812 (9th Cir. 2018) (explaining that a "court may properly consider evidence and argument submitted with a reply that is responsive to points raised in the non-moving party's opposition"); *Van Alstyne v. GC Serv., LP*, No. H-08-3175, 2009 WL 10695068, at *7 (S.D. Tex. Dec. 11, 2009) (accepting evidence offered in reply because it was "offered solely to respond to arguments presented in Defendant's response" and explaining that arguments to the contrary "border on disingenuous and [are] a vexatious waste of the Court's time and resources"). The Court should do so here.

1. Plaintiffs' supporting declarations, ECF Nos. 105-3–105-35, 106-1–106-35, 107-1–107-28 & 107-32, are proper rebuttal evidence.

Each of the 97 declarations supporting Plaintiffs' Reply specifically responds to an issue raised in Defendants' Oppositions and, as a result, is proper rebuttal evidence that should be considered by this Court.

For example, Defendants' Oppositions repeatedly assert that Georgia voters are not harmed by the challenged provisions because voters can vote in person or

utilize drop boxes instead of absentee voting by mail. *See* ECF Nos. 90 at 4, 10, 13–14, 17–19; 91 at 24, 27. While Plaintiffs provided legal responses to that argument, the sufficiency of those voting methods is also a factual matter that Defendants' arguments call into question. As such, Plaintiffs presented declarations rebutting those arguments and demonstrating that Georgia's in-person voting and ballot return methods are in fact *not sufficient* or *not available* to all voters and will not be available in November. *See* ECF Nos. 106-34–106-35; 107-1–107-4 (declarations demonstrating that drop boxes are not a failsafe alternative for mail-in absentee voting); ECF Nos. 105-8; 107-14 (declarations demonstrating problems with voting in person); ECF Nos. 105-10; 105-12–105-35; 106-1–106-13; 106-15–106-30 (declarations demonstrating that voters who do not receive absentee ballots cannot necessarily vote in person); ECF Nos. 106-14; 107-17–107-28 (declarations demonstrating hardships of in-person voting in Georgia). Such material is the very definition of rebuttal: Defendants argued that voters could utilize alternative methods of voting (in-person or drop boxes). These witnesses (the voters) explained why that's wrong. Plaintiffs could hardly be faulted for failing *to anticipate* Defendants' argument and filing responsive materials before Defendants even raised the point.

Similarly, Defendants argued that the USPS's policy of delivering election mail without postage decreases the burdens imposed by the Postage Tax. *See* ECF Nos. 90 at 4; 91 at 2, 7, 23. Accordingly, in addition to submitting legal arguments, Plaintiffs provided factual rebuttal on this point as well, with declarations demonstrating that this policy is not well-known, even among postal workers, and, as such, does not in fact decrease the burdens imposed by the Postage Tax. *See* ECF Nos. 106-32; 106-33; 107-32. Plaintiffs can hardly be faulted for not rebutting the argument before it was made.

In the same vein, in response to Defendants' arguments that voters can pay for postage and/or do not need assistance with ballot return, *see* ECF Nos. 90 at 12–13; 91 at 3–6, 23–24, 30–31, Plaintiffs submitted declarations demonstrating that is not true, *see* ECF Nos. 105-9; 105-11; 106-31.

Indeed, Plaintiffs did this for several arguments with respect to a number of other topics in Defendants' Oppositions. *Compare* ECF Nos. 90 at 3–4, 13, 24; 90-1–90-17; 91 at 15, 17–19 (arguing that voters are provided notice about problems with absentee applications in uniform timeframe), *with* ECF Nos. 105-3; 105-4; 105-7 (declarations detailing voter experiences that demonstrate that no notice or non-uniform notice is provided); *compare* ECF Nos. 90 at 12–14; 91 at 4–5, 27–28 (asserting that voters are to blame for the late arrival of absentee ballots), *with* ECF

Nos. 105-6; 107-5–107-13; 107-15 (demonstrating that absentee ballots arrive late even where voters make every reasonable effort to timely return their ballots); *compare* ECF Nos. 90 at 5–8, 20, 24; 91 at 10–11, 26, 29–30 (arguing that implementation of a postmark deadline is not feasible), *with* ECF No. 107-16 (discussing feasibility of postmark deadline); *compare* ECF Nos. 90 at 11, 16, 19; 91 at 13–14, 33 (arguing that The New Georgia Project does not have standing), *with* ECF No. 105-5 (discussing diversion of resources and other injuries).[5]

More fundamentally, a central premise of Defendants' Oppositions and their attack on the ample evidence Plaintiffs submitted with their Motion, is that such evidence does not demonstrate "systemic harm imposed by Georgia's statute," characterizing the voter declarations filed with the PI Motion as mere "isolated incidents [that] do not establish the 'generality of cases' typically needed to show a

[5] While the arguments set forth above are sufficient, Plaintiffs also note that the bulk of the declarations filed with the Reply pertain to issues that occurred either on June 9 or in the days thereafter and were unavailable to Plaintiffs when they filed the PI Motion. Although Defendants take issue with four declarations that were signed before June 9, ECF No. 109 at 13, two of those declarations, *see* ECF Nos. 106-32; 106-33, were submitted by Plaintiffs to rebut Defendants' reliance on an unknown USPS policy regarding the delivery of election mail without postage, *see* ECF Nos. 90 at 4; 91 at 2, 7, 23. The other two were submitted to rebut Defendants' assertions that voters can rely on in-person voting in lieu of absentee voting, and that this problem only occurred in Fulton County. *See* ECF Nos. 90 at 4, 10, 13–14, 17–19; 91 at 2, 24, 27. The additional declarations show problems in Muscogee and Gwinnett Counties, among others. *See* ECF Nos. 107-19; 107-25.

constitutional violation," ECF No. 91 at 5, 28–29, in essence: that evidence of 24 burdened and disenfranchised voters was not enough to show constitutional violations. Such an argument, of course, *invites* the obvious response: Oh, no it's certainly not isolated. One only need peruse the local and national coverage of the "hot mess" June Primary to know that.

Accordingly, lest the Court also think that the 24 original declarants in this action represented the only burdened and disenfranchised voters in Georgia, not merely a representative sample thereof as Plaintiffs had intended, Plaintiffs submitted the additional 97 declarations to make clear that the burdens the challenged provisions place on Georgia voters are anything but isolated. Rather, they are real and systemic. That Defendants now complain that this *is too much evidence*, is truly extraordinary.[6] One bowl of porridge is too small, the other too big. This is hardly a basis for a motion to strike.

Surely given what occurred in the June Primary, Defendants cannot have expected such a claim to go unanswered, particularly where many of the declarations

[6] Plaintiffs are cognizant of the number of exhibits filed with their Reply and in no way intended to overwhelm the Court or this proceeding by filing 97 declarations. Instead, Plaintiffs sought to rebut Defendants' assertions and avoid a hearsay objection that would have resulted if Plaintiffs had filed newspaper accounts, attorney declarations or some other summary document recounting the voters' experiences.

indicate that the declarants reported the problems they were experiencing directly to one or more Defendants, *see, e.g.*, ECF Nos. 105-4; 105-20; 105-24; 105-28; 105-29; 105-30; 105-34; 106-3; 106-8; 106-22; 106-25; 106-30; 107-22; 107-26, indicating that Defendants already knew of these voters' experiences (or the experiences of those like them), and should have fairly contemplated a response.[7]

The cases Defendants cite to do not require a different result. In *Tishcon Corp. v. Soundview Comms., Inc.*, No. 1:04CV524-JEC, 2005 WL 6038743, at *9 (N.D. Ga. Feb. 15, 2005), the declarations in question were not limited to addressing an argument made by the other side in its responses and were instead intended to replace inadequate evidentiary submissions in support of two motions for summary judgment. Here, in sharp contrast, Plaintiffs' declarations each address matters raised by Defendants in their Oppositions. Similarly, in *Carlisle*, 2015 WL 4092817, at *1, the declaration in question was filed because the defendant did not file *any* evidence in support of its factual assertions regarding service presented in its opening brief, which is more than a little different than Plaintiffs' PI Motion here,

[7] The Court should reject Defendants' assertion that Plaintiffs are attempting to recast the facial challenges as as-applied challenges, ECF No. 109 at 11 n.11, because Plaintiffs are doing no such thing. As explained in Plaintiffs' opposition to the State Defendants' Motion to Dismiss, the preliminary injunction challenge Plaintiffs bring with respect to the November General is an as-applied challenge. ECF No. 96 at 18. And even if it were not, it would be of no consequence as Plaintiffs are likely to succeed on their claims no matter how they are framed. *Id.*

which was supported by no fewer than 91 exhibits, including 24 declarations. Whatever else one might say about the motion, it can hardly be characterized as *lacking* evidentiary support.

And finally, *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1178 (11th Cir. 2002), is inapposite as that case pertains to a request to introduce unsubmitted evidence on a motion for reconsideration, which is obviously not the procedural posture of this case. Accordingly, the declarations submitted by Plaintiffs in support of their Reply constitute proper rebuttal evidence and should be accepted and considered by this Court.

2. Plaintiffs' expert reports, ECF Nos. 105-1 & 105-2, are proper rebuttal and supplemental reports.

Defendants' assertion that Plaintiffs' expert reports are untimely is equally unavailing. As an initial matter, Federal Rule of Civil Procedure 26 firmly establishes that absent a court order a rebuttal report is properly filed "within 30 days after the other party's disclosure." Fed. R. Civ. P. 26(a)(2)(D)(ii). Here, while Defendants provided no expert disclosure, the State Defendants' Opposition directly criticized Dr. Mayer's report on several points, and once such criticisms were disclosed, the State Defendants should have expected them to be answered. *See Gaddy v. Terex Corp.*, No. 1:14-cv-1928-WSD, 2017 WL 3276684, at *3 (N.D. Ga. Aug. 2, 2017) (court has discretion to admit expert report, which can be offered in

rebuttal); *Larson v. Wisconsin Cent. Ltd.*, No. 10–C–446, 2012 WL 368379, at *4 (E.D. Wis. Feb. 3, 2012) ("A rebuttal report should be limited to 'contradict[ing] or rebut[ting] evidence on the same subject matter identified by another party.'" (internal quotation marks and citation omitted)); *Rent-A-Center, Inc.*, 944 F.2d at 601 (court has broad discretion in admitting expert testimony); *see also* Fed. R. Civ. P. 26(a)(2)(D)(ii) (rebuttal report permitted if it is "intended solely to contradict or rebut evidence on the same subject matter identified by another party").

Accordingly, within eight days of those criticisms being disclosed, Dr. Mayer responded to them, well under any timeline contemplated by the Rules. Moreover, there can be no question that Dr. Mayer's report is a rebuttal report as it carefully lays out each criticism lodged by the State Defendants, and then provides a response.[8] *Compare* ECF Nos. 90 at 3, 7; 91 at 6–9, 16, 19–20, 23–24; *with* ECF No. 105-1 at 2–13. Thus, Dr. Mayer's rebuttal report is timely.[9]

---

[8] Dr. Mayer's report also provides analysis of the June Primary. While this analysis is also rebuttal to the State Defendants' criticisms, as explained therein, ECF No. 105-1 at 13–17, this discussion could also properly be considered as supplemental analysis that addresses new information concerning the June Primary that was not previously available for his initial report. *See, e.g.*, *Finch v. Owners Ins. Co.*, No. CV 616-169, 2017 WL 6045449, at *4 (S.D. Ga. Dec. 6, 2017) (explaining that a party can "supplement an expert witness report when it discovers new information that was unavailable at the time [the] initial report was disclosed").

[9] To the extent that Defendants' concern is with the filing of a *Daubert* motion, Plaintiffs agreed to allow the State Defendants additional time to submit their

The same is true for Dr. Ball's expert declaration, *see* ECF No. 105-2, which rebuts Defendants' characterizations of Dr. Ball's opinions about the pandemic, *see* ECF No. 91 at 9. In addition, Dr. Ball's declaration properly provides supplemental analyses based on new information about COVID-19 that became available after his initial declaration. *See Finch*, 2017 WL 6045449, at *4; *E.E.O.C. v. Outback Steakhouse of Fla., Inc.*, No. 06-cv-01935-EWN-KLM, 2008 WL 3992172, at *9 (D. Colo. Aug. 20, 2008) (concluding supplemental report using "new information that was not available to the parties at the time" was proper). Accordingly, the Court should consider the expert declarations filed with Plaintiffs' Reply in deciding the PI Motion.

3. The USPS reports and letter, ECF Nos. 107-30 & 107-31, are proper supplemental evidence.

Plaintiffs also submitted USPS documents with their Reply: (1) a recent report from the USPS Inspector General detailing problems occurring with election mail, including anticipated problems in Georgia, that Plaintiffs had not encountered prior to filing their PI Motion, ECF No. 107-30, and (2) a letter from the General Counsel and Executive Vice President of the USPS that Plaintiffs similarly were not aware

Daubert motion, which provides them with ample opportunity to contest Dr. Mayer's expertise and analysis before the Court. As of the filing of this brief, Defendants have yet to file their *Daubert* motion.

of at the time they submitted their PI Motion, ECF No. 107-31. As discussed *supra*, Plaintiffs bear the burden of proof and cannot be penalized for submitting evidence that they were unaware of at the time that they filed their PI Motion, but learned about later and filed with their Reply. *Cf. Burns*, 2016 WL 6543206, at *2–*3 (permissible to consider newly discovered evidence even after entry of judgment). Moreover, both pieces of evidence, which establish that Georgia voters are at "high risk" of ballots "not being delivered, completed [], and returned to the election offices in time. . . . *due to the time required for election commissions to produce ballots* and Postal Service delivery standards," not due to voters' actions, ECF No. 107-30 at 6–7; *see also* ECF No. 107-31, are also proper rebuttal to Defendants' arguments that it is not the Election Day Receipt Deadline that disenfranchises voters, but Georgia voters' fault, *see* ECF Nos. 90 at 12–14; 91 at 4–5, 27–28.

C. All of Defendants' requested relief is improper and unwarranted.

Notwithstanding the propriety of the evidence submitted by Plaintiffs, there are several procedural and practical grounds that also warrant denial of Defendants' requested relief.

First, as noted, "a motion to strike is not the proper vehicle for challenging matters not contained in pleadings, which FED. R. CIV. P. 7(a) defines to include complaints, answers and court-ordered replies to answers, but not briefs or

supporting exhibits." *Chavez*, 966 F. Supp. 2d at 1344. Thus, striking Plaintiffs' Reply as well as the supporting exhibits (even if this Court were to find them improper or prejudicial for any reason, which they are not) is not the proper course of action.[10] Rather, the Court should note Defendants' objection as it considers the PI Motion and/or craft another appropriate remedy to the objection that falls short of exclusion of the Reply and supporting documentation.[11]

---

[10] Such an action would be particularly severe with respect to the Reply brief because, although Defendants ask the Court to strike Plaintiffs' Reply brief, they do not actually provide any *reason* why the brief itself should be stricken and fail to identify any issues with arguments made in the Reply brief in their Motion. *See* ECF No. 109 at 2–4, 13. The motion should, accordingly, be denied. *See, e.g.*, *Hayes v. Dye*, No. 2008–165 (WOB), 2010 WL 3515578, at *13 (E.D. Ky. Sept. 2, 2010) (denying motion to strike reply brief when other equitable remedies such as "granting leave to file a sur-reply is preferable and more pragmatic than the extreme remedy" of striking brief).

[11] Defendants' objections in any event should go to the weight of the evidence, not its admissibility, particularly in the context of a preliminary injunction motion to be heard by the court and not a jury. *See, e.g.*, *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1069 (11th Cir. 2014) ("[C]ourts must look at the evidence in a light most favorable to admission, maximizing its probative value and minimizing its undue prejudicial impact."); *Larson*, 2012 WL 368379, at *3 (determining the weight of expert testimony, not its admissibility). Alternatively, if the Court finds any one exhibit or portion of an exhibit exceeds the scope of rebuttal, the result is to exclude that one exhibit or the portion thereof, not to strike *all of the exhibits*. *See, e.g.*, *Rindfleisch*, 962 F. Supp. 2d at 1315–16 (rejecting request to strike all challenged documents and instead considering each individually when deciding motion); *Chemfree Corp. v. J. Walter, Inc.*, No. 1:04-CV-3711-JTC, 2009 WL 10664862, at *2 (N.D. Ga. Apr. 10, 2009) (excluding only the portions of lay witness declarations that are "purely expert opinions"); *Quality Lease & Rental Holdings*, No. 6:16-0006, 2019 WL 5865596, at *6 (S.D. Tex. Nov. 8, 2019) (excluding

Second, Defendants' alternative request for relief—postponement and restructuring of the hearing—is equally untenable. The question of whether to hold an evidentiary hearing for entry of a preliminary injunction is within the sound discretion of the court, which "balance[es] between speed and practicality versus accuracy and fairness." *Cumulus Media, Inc.*, 304 F.3d at 1178. Evidentiary hearings are needed only "where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue." *Id.* Here, the need for a swift determination and the lack of contested credibility determinations warrant against converting the August 11 hearing to an evidentiary hearing at this late stage.

As the Court is aware, the issues in this case must be decided swiftly to ensure that Plaintiffs and Georgia voters alike are able to obtain relief in time for the November Election. Absentee ballots for the November Election will be mailed to voters as early as September 15, O.C.G.A. § 21-2-381(a)(1)(A); *id* § 21-2-384(a)(2), and any relief must be granted well before then to ensure that there is sufficient time to implement it. Indeed, Defendants took the position in their Oppositions that it was *already too late* to resolve the issues Plaintiffs raise in this suit. *See* ECF Nos. 90 at 1–2, 22–24; 91 at 34–35. While Plaintiffs disagree with that position, the fact that

---

specific opinions offered in rebuttal report after concluding those opinions, but not others, were "new" because they were not responsive to opposing expert).

Defendants make that assertion warrants against hearing the PI Motion beyond the current August 11 hearing date, which provides Defendants with more than three weeks to prepare. *See, e.g.*, *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1354–55 (N.D. Ga. 2005) (granting preliminary injunction after hearing held six days after plaintiffs filed motion); *see also Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 966, 977 (D. Nev. 2016) (granting preliminary injunction after hearing held two weeks after plaintiffs filed motion).

Moreover, Defendants fail to explain why they need more than three weeks to prepare for the hearing or why it requires restructuring. Indeed, prior to the submission of Plaintiffs' Reply, Defendants did not seek to cross-examine Plaintiffs, their experts, or any of the 24 voter declarants who submitted testimony. It is unclear why these additional voter declarants suddenly warrant such examination. *See* ECF No. 109 at 3 (indicating that Defendants need to test the "veracity" of the voter declarations). If Defendants suspect that a new declarant is lying about his or her experience, Defendants should state as much, as they possess the voter file and ought to be able to verify the facts in the declarations and provide this Court with a sufficient explanation for postponing the hearing. But all 97 declarants "declare[d] under penalty of perjury" that their statements were true and correct, and given the consistency of these declarants' testimony with the numerous news reports and

social media posts that arose on and after the June Primary, *see* ECF Nos. 59-74–59-88, any such assertion of dishonesty appears more than a little unlikely.

For these same reasons, Defendants' request to be given time to conduct discovery before the hearing, is equally unavailing. Notwithstanding that Defendants have not identified a basis for needing discovery into these voter declarants, it appears that Defendants, who have the voter file and who received contemporaneous calls and complaints from most of these declarants, *see, e.g.*, ECF Nos. 105-4; 105-20; 105-24; 105-28; 105-29; 105-30; 105-34; 106-3; 106-8; 106-22; 106-25; 106-30; 107-22; 107-26, already have the facts needed to test the veracity of the declarations. If anything, it is Plaintiffs who should need expedited discovery to probe Defendants about the number of complaints of this nature that they received in relation to the challenged provisions.

For all these reasons, the August 11 hearing should proceed as currently scheduled and structured.

V. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request this Court deny Defendants' Motion to Strike and consider Plaintiffs' Reply brief and all supporting exhibits in deciding the PI Motion.

Dated: July 27, 2020

/s/ Kevin J. Hamilton

Halsey G. Knapp, Jr.
Georgia Bar No. 425320
Joyce Gist Lewis
Georgia Bar No. 296261
Adam M. Sparks
Georgia Bar No. 341578
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW, Ste. 3250
Atlanta, GA 30309
Telephone: (404) 888-9700
Facsimile: (404) 888-9577
hknapp@khlawfirm.com
jlewis@khlawfirm.com
sparks@khlawfirm.com

Marc E. Elias*
Amanda R. Callais*
K'Shaani Smith*
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
ACallais@perkinscoie.com
KShaaniSmith@perkinscoie.com

Kevin J. Hamilton*
Stephanie R. Holstein*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
KHamilton@perkinscoie.com
SHolstein@perkinscoie.com

Lilian Timmermann*
PERKINS COIE LLP
1900 Sixteenth Street, Suite 1400
Denver, CO 80202-5222
Telephone: (303) 291-2354
Facsimile: (303) 291-2454
LTimmermann@perkinscoie.com

Christian Ruiz
Georgia Bar No. 548611
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
Facsimile: (602) 648-7000
cruiz@perkinscoie.com

Counsel for Plaintiffs
**Admitted Pro Hac Vice*

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

THE NEW GEORGIA PROJECT, REAGAN JENNINGS, CANDACE WOODALL, and BEVERLY PYNE, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and the Chair of the Georgia State Election Board, *et al*. Defendants.	Civil Action File No. 1:20-CV-01986-ELR

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a point size of 14.

Dated: July 27, 2020

/s/ Kevin J. Hamilton
Counsel for Plaintiffs

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

THE NEW GEORGIA PROJECT, REAGAN JENNINGS, CANDACE WOODALL, and BEVERLY PYNE, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State and the Chair of the Georgia State Election Board, *et al*. Defendants.	Civil Action File No. 1:20-CV-01986-ELR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 27, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: July 27, 2020

/s/ Kevin J. Hamilton
Counsel for Plaintiffs