

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

LEAGUE OF WOMEN VOTERS
OF FLORIDA, INC., et al.,

4:21-cv-186-MW-MAF

Plaintiffs,

Consolidated for trial with:

4:21-cv-187-MW-MAF

4:21-cv-201-MW-MAF

4:21-cv-242-MW-MAF

v.

LAUREL M. LEE, in her official
Capacity as Secretary of State of
Florida, et al.,

Defendants,

and

NATIONAL REPUBLICAN
SENATORIAL COMMITTEE and
REPUBLICAN NATIONAL
COMMITTEE,

Intervenor-Defendants.

**STATE-LEVEL DEFENDANTS'
AND INTERVENOR-DEFENDANTS' SUPPLEMENTAL BRIEFING**

Secretary of State Laurel M. Lee, Attorney General Ashley Moody (“State-level Defendants”) and Defendant-Intervenors, the Republican National Committee and National Republican Senatorial Committee, file this Supplemental Briefing in response to this Court’s Order dated January 25, 2022 (the “Order”) (ECF No. 471).

The Court's Order directed the parties to address footnote 2 on page 2 of the Parties' Corrected Notice of Filing Pre-Review Copies of Expert Report Trial Exhibits (ECF No. 467), which states that State-level Defendants and Intervenor-Defendants "maintain that in entering into this stipulation they reserved all second-level hearsay objections with respect to all expert materials" and that "Plaintiffs dispute this therefore the issue will need to be resolved at trial." This Court also directed the parties to file portions of the order and/or transcript containing Judge Hinkle's analysis." ECF No. 471 at 1-2. This Supplemental Briefing addresses this Court's directives in turn.

First, State-level Defendants and Intervenor-Defendants have long intended to have an agreement with Plaintiffs to treat expert materials in this case in the same manner as they were treated in *Jones v. DeSantis*, No. 4:19-cv-300. State-level Defendants and Intervenor-Defendants believed this was the agreement in place between the parties in December 2021 and at least part of the purpose behind footnote 11 in the corrected pre-trial stipulation (ECF No. 402 at 19 n.11), which noted that the parties would admit the disclosed expert reports of witnesses who testified but not to the admission of attachments or references within those expert reports. State-level Defendants and Intervenor-Defendants did not know until January 2022 that Plaintiffs were asserting that State-level Defendants' and

Intervenor-Defendants' objections to second-level hearsay contained within the Plaintiffs' experts' reports and other related materials had somehow been waived.

State-level Defendants and Intervenor-Defendants believe this Court should hear the evidence and rule upon the merits of these consolidated cases. Thus, as was done in the *Jones* case, State-level Defendants and Intervenor-Defendants here have agreed to the limited admission of expert reports for testifying experts to streamline trial as much as possible and to help with the orderly presentation of evidence. Indeed, during the parties' January 2022 negotiations, State-level Defendants and Intervenor-Defendants also agreed in good faith to allow Plaintiffs to add the exhibits to the expert reports for Burch, Smith, and Cooper to the exhibits for this Court's consideration, even though Plaintiffs did not include those documents on their December 29, 2021 exhibit list. Although Plaintiffs did not list these exhibits last month as required, Plaintiffs claimed State-level Defendants and Intervenor-Defendants should have "understood" that Plaintiffs might seek to admit them. State-level Defendants and Intervenor-Defendants did not want to involve the Court at that point because no harm would be done; State-level Defendants and Intervenor-Defendants' believed that second-level hearsay objections to those documents were preserved.

Now Plaintiffs suggest that it was also "understood" that State-level Defendants and Intervenor-Defendants agreed to waive second-level hearsay

objections to materials quoted and referenced within Plaintiffs' experts' reports and the accompanying exhibits. But State-level Defendants and Intervenor-Defendants cannot have waived any rights based on Plaintiffs' misunderstanding. *See, e.g., Griffin v. Coca-Cola Enters., Inc.*, 686 F. App'x 820, 822 (11th Cir. 2017) (stating that waiver requires "the intentional relinquishment of a known right"). Although State-level Defendants and Intervenor-Defendants have tried to negotiate in good faith and have accommodated many of Plaintiffs' requests to remove objections, this is a bridge too far, particularly when so many of Plaintiffs' experts quote sources such as newspaper articles or organizational think tanks that are not a part of this lawsuit and advocate political and policy change. Plaintiffs have even suggested that their experts' reports do not contain second-level hearsay, which is not the case, but even if it were, then there should be no harm in State-level Defendants' and Intervenor-Defendants' preservation of the objection.

The law is clear that Plaintiffs' experts are not permitted to testify on the stand as conduits for second-level hearsay, *see, e.g., In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2021 WL 684183, at *2 (N.D. Fla. Feb. 11, 2021) (citing cases), and the philosophical reasoning behind State-level Defendants' and Intervenor-Defendants' position is that Plaintiffs' expert reports and materials should be held to the same standard. This is particularly true when the parties have agreed to admit those reports in a good faith effort to streamline the proceedings and

permit the factfinder to have reviewed materials prior to the start of trial. The admission of Plaintiffs' materials without this preservation, however, particularly when one side of the litigation had every reason to believe that second-level hearsay objections were preserved, will remove all incentive for the parties in future cases to agree to the admission of expert reports.

Second, this limited admission of expert witness materials is reflected in the discussions Judge Hinkle had at the pretrial conference on April 2, 2020 (*see* excerpts of ECF No. 323, attached as Exhibit 1) and in Judge Hinkle's orders dated April 2, 2020 and April 9, 2020 (*see* ECF Nos. 317 and 331, respectively, attached as Exhibit 2). Although some of the discussion overlaps with the consideration of declarations submitted by some of the *Jones*' Plaintiffs' lay witnesses, the concerns and intentions behind the objections and Judge Hinkle's ruling remains the same.

For the above reasons, State-level Defendants and Intervenor-Defendants respectfully request that the Court admit the expert reports and accompanying materials subject to any objections raised by the parties, including the preservation of second-level hearsay.

Dated: January 28, 2022

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

The foregoing complies with the size and font requirements of the Local Rules
and contains 904 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 28, 2022, a true and correct copy of the foregoing was filed via CM/ECF, which served a copy on all parties of record.

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