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

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF GEORGIA; *et al.*, Defendants, THE REPUBLICAN NATIONAL COMMITTEE; *et al.*, Intervenor-Defendants.	Civil Action No. 1:21-cv-2575-JPB
THE NEW GEORGIA PROJECT, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, Defendants.	Civil Action No. 1:21-cv-01229-JPB
GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*,	Civil Action No. 1:21-cv-01259-JPB

Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.*, Defendants.	
SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, *et al.*, Plaintiffs, v. BRIAN KEMP, Governor of the State of Georgia, in his official capacity, *et al.*, Defendants.	Civil Action No. 1:21-cv-01284-JPB
ASIAN AMERICANS ADVANCING JUSTICE–ATLANTA, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, Defendants.	Civil Action No. 1:21-cv-01333-JPB

THE CONCERNED BLACK CLERGY OF METROPOLITAN ATLANTA, INC., *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*,

Defendants.

Civil Action No. 1:21-cv-01728-JPB

MULTIPLE PLAINTIFFS' RESPONSE TO STATE DEFENDANTS' STATEMENT REGARDING CONSOLIDATION

In response to this Court's order on December 9, 2021, the United States, The New Georgia Project, Georgia State Conference of the NAACP, Sixth District of the African Methodist Episcopal Church, Asian Americans Advancing Justice-Atlanta, and The Concerned Black Clergy of Metropolitan Atlanta (together, "Plaintiffs") respond to certain matters raised in Defendants' statement regarding consolidation. *See* State Def.'s Consolidated Statement ["Def. Br."], *United States v. Georgia*, No. 1:21-cv-2575 (N.D. Ga. Dec. 14, 2021), ECF No. 71. Plaintiffs note that they support consolidation for discovery purposes only and ask the Court to address later whether to consolidate for purposes of trial. Plaintiffs are committed to working together to streamline discovery, including coordinating expert witnesses and drafting joint written discovery requests where possible. However, Defendants' "options for streamlining discovery" raised in their December 14, 2021 statement are improper, premature, unrealistic, and would greatly prejudice Plaintiffs' ability to make their case.[1]

I. ARGUMENT

Plaintiffs have already begun, and will continue, to work together to ensure that discovery and motions practice will not involve unnecessary duplication.

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[1] A chart provided by Defendants, *see* Def. Br. at 2-3, contains multiple errors and mischaracterizations regarding claims brought by the various Plaintiffs.

However, Defendants' proposed limitations on fact and expert discovery—requested prior to all parties holding a Rule 26(f) conference—as well as Defendants' unprecedented proposal for a bellwether trial in a voting rights case, would prejudice Plaintiffs' fair opportunity to develop their case. "[T]he trial judge should be most cautious . . . to make sure that the rights of the parties are not prejudiced by the order of consolidation under the facts and circumstances of the particular case." *Diamond Power Int'l, Inc. v. Davidson*, No. 1:04-cv-0091, 2007 WL 4373128, at *2 (N.D. Ga. Dec. 10, 2007) (quoting *Dupont v. S. Pac. Co.*, 366 F.2d 193, 196 (5th Cir. 1966)); *see also* Charles Wright and Arthur Miller, Proceedings in Consolidated Cases, 9A Fed. Prac. & Proc. Civ. § 2385 (3d ed.) (2021). Indeed, many Plaintiff parties have not yet had a Rule 26(f) conference.

First, a large amount of discovery is in *Defendants'* control, including data that confirms the impact of the changes made by SB 202 on various racial and ethnic groups and people with disabilities. The fact that Defendants seek to limit discovery because 2022 is an election year downplays the fact that the State of Georgia chose to pass a law that *addresses elections* and will have multiple negative effects on the ability of minority and other voters to participate in the electoral process.

Second, discussion of trial structure is premature and, regardless, bellwether trials are not appropriate in Voting Rights Act litigation nor in Plaintiffs'

constitutional undue burden claims. The *Arlington Heights* and totality of the circumstances analyses in Section 2 litigation, as well as constitutional undue burden analyses, require an extensive, case-specific, and cumulative factual record, which is particularly ill-suited for the test case approach of a bellwether trial. *See* Def. Br. at 9. Plaintiffs challenge individual harms of SB 202 as well as compounding and cascading cumulative harms because of these provisions. As this Court recognized, the State Defendants' approach of "address[ing] the challenged provisions individually rather than in connection with the specified counts of the Amended Complaint[s] * * * analyzes the challenged provisions out of context and does not account for Plaintiffs' contention that the challenged provisions also collectively violate the law." Order, *Sixth District of the AME Church v. Kemp*, No. 1:21-cv-1284 (N.D. Ga. Dec. 9, 2021), ECF 110 at 16, n.8; *see also id.* at 25, 38. Courts have regularly been able to successfully and efficiently conduct Section 2 litigation with multiple parties, claims, and legal provisions at issue.[2]

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[2] *E.g.*, *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff'd in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *on reh'g en banc*, 830 F.3d 216 (5th Cir. 2016), *and aff'd in part, vacated in part, rev'd in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); *N. Carolina State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016), *rev'd and remanded sub nom. N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *see also* Joint Motion to Consolidate,

Third, Defendants' proposed limitations on fact and expert discovery are improper and premature prior to a Rule 26(f) conference. Plaintiffs each allege related but differing claims regarding SB 202, and retain unique interests in this litigation, including that of the United States to ensure that states comply with federal law. Thus, although Plaintiffs are amenable to proposals such as joint discovery requests in many situations, coordinating on deposition schedules, and accessing a central repository for discovery documents, the Plaintiffs would oppose limitations in a consolidation order that would hamper their ability to vigorously pursue their claims.[3] As Defendants themselves noted, Voting Rights Act and constitutional litigation requires the development of an extensive, case-specific factual record, including the testimony of senior state officials. *See* Def. Br. at 7-8; *see also, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018); *LULAC v. Roscoe I.S.D.*, 123 F.3d 843, 846 (5th Cir. 1997). Discovery will likely include large

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League of Women Voters of Florida v. Lee, Nos. 4:21-cv-186, 4:21-cv-187, 4:21-cv-201, 4:21-cv-242 (N.D. Fla. Nov. 30, 2021), ECF No. 334.

[3] Contrary to Defendants' assertion, bellwether treatment would not promote efficiency, as "[bellwether] trials are not binding on other litigants in the group. The outcomes can be used by the parties to assist in settlement, but the parties can also ignore these results and insist on an individual trial." Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 581 (2008) (citing *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997)). Defendants' citation to Eldon E. Fallon et. al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2325 (2008), is inapposite, as this is not multi-district litigation.

amounts of data within the control of the state and county officials, an examination of the legislative proceedings (including the statements and motivations of legislators), and other evidence.[4]

Likewise, the Defendants' proposed limitation on the number and type of expert witnesses ignores the complex nature of Section 2 litigation and the importance of a variety of expert evidence thereto. If consolidated, Plaintiffs here commit to coordinating to avoid unnecessary duplication in expert discovery. Again, discussion of the number and type of experts should be left in the first instance for the parties to negotiate in a Rule 26(f) conference.[5]

II. CONCLUSION

For the reasons set out above, the Plaintiff groups on this pleading request that this Court decline to impose any of the "options for streamlining discovery" recommended by Defendants.

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[4] Notably, the two cases the State cites as examples of efficient and expeditious discovery, *Rose v. Raffensperger* (1:20-cv-02921-SDG) and *Georgia Coalition for the People's Agenda v. Raffensperger* (1:18-cv-04727-ELR), are inapposite to this litigation. Neither was a consolidated case nor involved court-ordered limits to discovery; rather, the court approved the parties' joint discovery plan in both cases without significant modification.

[5] Plaintiffs will recommend a discovery schedule in their 26(f) discussions with Defendants. Plaintiffs anticipate requesting a six-month discovery period, with briefing scheduled for a preliminary injunction on some claims ahead of the May 2022 federal primary, and another preliminary injunction regarding more fact-intensive claims ahead of the November 2022 general election.

Date: December 17, 2021

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(D)

Pursuant to Local Rule 7.1(D), I certify that the foregoing document was prepared in Times New Roman 14-point font in compliance with Local Rule 5.1(C).

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2021, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

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