

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

BLACK VOTERS MATTER FUND,
MEGAN GORDON, PENELOPE
REID, and ANDY KIM, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his
official capacity as Secretary of State
of Georgia; DEKALB COUNTY
BOARD OF REGISTRATION &
ELECTIONS; ANTHONY LEWIS,
SUSAN MOTTER, DELE LOWMAN
SMITH, SAMUEL E. TILLMAN, and
BAOKY N. VU, in their official
capacities as Members of the DeKalb
County Board of Registration &
Elections; and ERICA HAMILTON,
in her official capacity as Director of
Voter Registration and Elections,
and all others similarly situated,

Defendants.

CIVIL ACTION FILE

NO. 1:20-cv-01489-AT

DEFENDANT SECRETARY OF STATE RAFFENSPERGER'S
RESPONSE IN OPPOSITION TO PLAINTIFFS'
SUPPLEMENTAL BRIEF

Defendant Secretary of State Brad Raffensperger (the "Secretary"), sued in his official capacity, files this Brief in Opposition to "Supplemental Brief Regarding the June 2020 Primary In Support of Their Motion for Preliminary

Injunction” (“Supplemental Brief”). Doc. No. [124]. This Court has twice denied Plaintiffs’ requested relief. Doc. Nos. [83] (denying in part Plaintiffs’ Motion for Preliminary Injunction regarding the June Primary Election), [101] (denying emergency motion for temporary restraining order regarding the August and November elections). Furthermore, the Secretary’s Motion to Dismiss Plaintiffs’ Amended Complaint is currently pending before the Court. Doc. No. [90]. Plaintiffs’ Supplemental Brief is untimely and should not be considered by this Court.

INTRODUCTION AND FACTS

Plaintiffs seek to assert new arguments and replace insufficient evidentiary submissions through the Supplemental Brief and accompanying exhibits. See generally Doc. No. [124]. On April 8, 2020, Plaintiffs filed a Motion for Preliminary Injunction (the “PI Motion”), which asked the Court to require the Secretary of State to “issue guidance to all counties that they must provide postage prepaid envelopes with absentee ballots” and “to revise the absentee ballot application form such that they can be mailed in with postage prepaid and require county election officials to use the revised form.” Doc. No. [2 at 1-2]. Plaintiffs also filed two supplemental briefs in support of the PI Motion prior to the hearing and a “supplemental letter” three days after the hearing. Doc. Nos. [8, 44, 74]. The Court denied the PI Motion as to the June

Primary Election on April 30, 2020, but reserved “judgment on whether injunctive relief is appropriate as to future elections, including the August 2020 runoff and the November general election.” Doc. No. [83 at 3, 12-13].

After the PI Motion was denied, Plaintiffs filed an Amended Complaint on May 11, 2020 and a Motion for a Temporary Restraining Order and/or Preliminary Injunction and for Expedited Briefing (the “TRO Motion”) on May 12, 2020. Doc. Nos. [88, 93]. Plaintiffs explained that the TRO Motion incorporated the PI Motion, and stated that “[t]he main difference between [it] and the [PI Motion was] that [the TRO Motion] only [sought] relief for August and November, since relief for the June elections has been denied.” *Id.* at 3-4. The Court denied the TRO Motion in its entirety. Doc. No. [101 at 4].

Despite the Court’s orders, and not to mention their prior supplemental filings, Plaintiffs continue to attempt to supplement the PI Motion with abandon, even when the Secretary’s Motion to Dismiss, which in-part challenges standing, is pending. See, e.g., Doc. Nos. [8, 44, 67, 90 (seeking to dismiss Amended Complaint, Doc. No. [88]), 122, 124, 127]. Plaintiffs filed declarations leading up to the hearing on the PI Motion—all from voters who either had stamps, could get stamps, or could utilize another absentee voting option, such as a drop box or early in-person voting. See e.g., Doc. Nos. [26, 62,

68]. Plaintiffs now attempt to recharacterize the alleged burden on voters and replace inadequate evidentiary submissions by filing, inter alia, a series of declaration summaries and a summary of a purported expert report, which Plaintiffs ask the Court to consider when deciding the PI Motion. See generally Doc. No. [124].

The Supplemental Brief is improper and unpersuasive for at least four reasons. First, Plaintiffs have not renewed the PI Motion, but rather continually supplement it. Second, Plaintiffs should have submitted the affidavits supporting the PI Motion with such motion. Third, the Court ruled on the PI Motion and TRO Motion, and not in Plaintiffs' favor, and thus Plaintiffs' Supplemental Brief is untimely and should not be considered by the Court. Fourth, the Supplemental Brief relies on previously unsubmitted evidence that does not support a mandatory preliminary injunction requiring prepaid postage on absentee ballot and absentee ballot application envelopes. If Plaintiffs want to renew the PI Motion or file a new motion for preliminary injunction, Plaintiffs need to follow the proper procedures to do so. For these reasons, and as explained more fully below, the Secretary requests that the Court not consider the Supplemental Brief.

ANALYSIS AND CITATION TO AUTHORITY

I. Plaintiffs Have Not Renewed the PI Motion.

The PI Motion was filed over three months ago, and the time (if there ever was one) for wantonly supplementing it is over. Where the local rules, like this Court's, do not allow for the constant supplementing of motions, such supplementing is improper. See Hooten v. United States, No. 500-CV-50-1-V, 2002 WL 32397087, at *3 (W.D.N.C. July 18, 2002) (“A party is not allowed to continually supplement the record at his whim . . . The Local Rules do not provide for the continual submission of briefs.”). Of course, “filing of a never-ending stream of supplemental” documents would create “absurd procedural problems.” Novartis Pharm. Corp. v. Actavis, Inc., No. CV 12-366-RGA-CJB, 2013 WL 7045056, at *8 (D. Del. Dec. 23, 2013) (internal quotations and citations omitted).

Here, Plaintiffs do not cite to a Local Rule or order from this Court authorizing the Supplemental Brief and continuous supplemental declarations. Moreover, Plaintiffs have not requested, and the Court has not expressly allowed, such constant filings. See Bar-Navon v. School Bd. of Brevard County, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 121342, at *2 (M.D. Fla. Jan. 11, 2007) (citing Cumulus Media, Inc. v. Clear Channel Communications, Inc., 304 F.3d 1167, 1178 (11th Cir.2002)) (“Where a party

attempts to introduce untimely, previously unsubmitted evidence absent some showing that the evidence was not available during the pendency of the motion, a court generally should not grant the [motion to supplement].”).

Furthermore, Plaintiffs never renewed their PI Motion after they filed the Amended Complaint. Plaintiffs should likely have done so. Urban Grp. Real Estate Investments, LLC v. Ann Arbor Urban Lifestyle, LLC, No. CV 16-10038, 2016 WL 9403995, at *1 (E.D. Mich. Nov. 14, 2016) (After seeking to amend their complaint, “Plaintiffs did not renew their motion for a preliminary injunction” and thus such motion was no longer pending.); William O’Neil & Co. v. Validea.com Inc., 202 F. Supp. 2d 1113, 1122 (C.D. Cal. 2002) (“If Plaintiffs file an amended complaint, they may renew their motion for preliminary injunction at that time.”). Thus, it does not appear that the PI Motion is properly before this Court—meaning that any supplement to it is also improper.

II. The Court Should Not Consider Plaintiffs’ Supplemental Brief and Attached Declarations.

Plaintiffs’ Supplemental Brief attempts to introduce additional affidavits in support of the PI Motion more than three months after Plaintiffs filed the PI Motion. The Federal Rules of Civil Procedure require that “[a]ny affidavit supporting a motion must be served with the motion.” FED. R. CIV. P.

6(c)(2). Further, according to the Local Rules, “[e]very motion presented to the clerk for filing shall be accompanied by a memorandum of law which cites supporting authority. If allegations of fact are relied upon, supporting affidavits must be attached to the memorandum of law.” LR 7.1A(1), NDGa. Plaintiffs’ attempt to submit evidence that was not previously submitted to the Court prior to the hearing on the PI Motion and without a request to do so is procedurally deficient. See, e.g., Cumulus Media, Inc., 304 F.3d at 1178 (denying party’s request to submit additional evidence through a second evidentiary hearing after a preliminary injunction was issued).

The various declarations and expert report attached to the Supplemental Brief are intended to bolster previous evidentiary submissions in support of the PI Motion. Doc. No. [124 at 30]. However, Plaintiffs’ Supplemental Brief and accompanying declarations in support of the PI Motion are not authorized by the Federal Rules of Civil Procedure or this Court’s Local Rules, and Plaintiffs did not file a motion to supplement the PI Motion. Accordingly, the Secretary requests that the Court not consider the additional arguments and evidentiary submissions in the Supplemental Brief. If Plaintiffs wish to put these issues and declarations before the Court, Plaintiffs should follow the appropriate procedure to do so.

III. The Court Appears to Have Already Ruled Upon the PI Motion.

It is not clear what, if anything, remains to be ruled upon from the PI Motion. The Court denied the PI Motion as to the June 2020 Primary Election on April 30, 2020, but reserved “judgment on whether injunctive relief is appropriate as to future elections, including the August 2020 runoff and the November [2020] general election.” Doc. No. [83 at 3, 12-13]. But when Plaintiffs filed a subsequent TRO Motion, they explained that the new TRO Motion incorporated the PI Motion, and that “[t]he main difference between this motion and the [PI Motion] is that [the TRO Motion] only seeks relief for August and November [2020], since relief for the June elections has been denied.” *Id.* at 3-4 (emphasis added). The Court denied the TRO Motion, meaning that it denied relief as to the August and November 2020 elections too. Doc. No. [101 at 4]. Thus, it is not clear if the PI Motion is still pending as to any future elections or if it has been fully ruled upon. The Court has not requested additional briefing, nor have Plaintiffs requested a status conference or an additional hearing on the PI Motion. The Secretary reserves the right to respond more fully to Plaintiffs’ continued briefing and filings related to the PI Motion should it still be live and if and when the Court defines the parameters of the outstanding issues.

Further, the Court has yet to decide whether Plaintiffs even have standing in this case. The Secretary challenged Plaintiffs' standing in his motions to dismiss and briefs in support. See Doc. Nos. [67, 67-1, 90]. Standing is a threshold jurisdictional question. Bochese v. Town of Ponce Inlet, 405 F.3d 964, 974 (11th Cir. 2005). Thus, to the extent the PI Motion remains pending, the Court should decide standing before further consideration of the "extraordinary measure" of granting the PI Motion as to future elections. Wilf v. Bd. of Regents of the Univ. Sys. of Georgia, No. 1:09-CV-1877-RLV, 2009 WL 10658152, at *1 (N.D. Ga. Sept. 29, 2009) ("A preliminary injunction in advance of trial is an extraordinary measure . . . The 'sole purpose [of a preliminary injunction] is to preserve the relative positions of the parties until a trial on the merits can be held.") (internal citations omitted; brackets in original; emphases added).

IV. The Supplemental Brief Substantively Fails.

Even if the Supplemental Brief were properly before the Court, which it is not, it fails substantively. Focusing on the June 2020 primary election, the Supplemental Brief describes the alleged burdens certain Georgia voters face due to the so-called absentee ballot stamp "requirement." Doc. No. [124 at 2].

The Supplemental Brief's summary of various voter declarations does not evidence a burden placed on voters due to the alleged postage requirement.

First, Fourteen of the declarations attached to the Supplemental brief do not even mention stamps or postage. Doc. Nos. [124-3, 124-11, 124-12, 124-13, 124-14, 124-15, 124-17, 124-19, 124-20, 124-21, 124-24, 124-25, 124-26, 124-27]. Plaintiffs challenge the so-called postage stamp requirement. See Doc. No. [88]. Thus, the declarations that have nothing to do with stamps or postage are irrelevant to this case.

The remaining fifteen declarations are unpersuasive and do not suggest that an unreasonable burden is placed on voters. As for these fifteen, not a single one claimed that an inability to obtain or afford stamps prevented them from going to the polls or casting a ballot in the June 2020 Primary Election. Doc. Nos. [124-1, 124-2, 124-4, 124-5, 124-6, 124-7, 124-8, 124-9, 124-10, 124-16, 124-18, 124-22, 124-23, 124-28, 124-29]. Of these, five appear to have stamps. Doc. Nos. [124-7 at 1, 124-16 at 5, 124-22 at 1, 124-23 at 1, 124-28 at 2]. Five others admit that they can buy stamps with relative ease. Doc. Nos. [124-4 at 1, 124-9 at 2, 124-10 at 3, 124-18 at 3, 124-29 at 3]. Three declarants said they did not have stamps, but did not indicate that they could not obtain or afford stamps, and each went to vote in person. Doc. Nos. [124-2, 124-6, 124-8]. One declarant who stated that she could not afford stamps and/or obtain them (despite having a daughter who can and does drive her and a friend who buys her food at the grocery store—a place that typically sells stamps), appears

to have cast a ballot in person because her daughter drove her to vote in person. Doc. No. [124-1]. The final declarant did not indicate that she cannot obtain stamps, and in fact distributed stamps to others who allegedly may not have stamps. Doc. No. [124-5].

Likewise, the expert report that Plaintiffs put forward is unpersuasive. Dr. Barreto, who has no apparent prior experience with Georgia elections, focuses on the alleged burdens Georgians face as a result of the so-called postage requirement for absentee ballots. Doc. No. [124-35]. However, Dr. Barreto does not discuss the fact that the USPS will deliver election mail even without postage, as the Secretary has already explained. See, e.g., Doc. No. [51 at 15-16]. This renders his report entirely irrelevant and unpersuasive. The Secretary reserves the right to respond more fully to Dr. Barreto's report at the appropriate time in a motion to exclude his testimony.

Finally, as for the handful of emails that Plaintiffs attach and cite to in the Supplemental Brief, (1) to the extent they have anything to do with the alleged stamp requirement, they do not mention the USPS policy of delivering election mail without postage, and (2) they are unauthenticated hearsay and thus should be given little, if any, weight. Doc. Nos. [124-30-124-34]; Fed. R. Evid. 901(a).

CONCLUSION

For the above reasons, this Court should not consider the Supplemental Brief.

This 14th day of July, 2020.

/s/ Vincent R. Russo

Vincent R. Russo

Georgia Bar No. 242628

vrusso@robbinsfirm.com

Josh Belinfante

Georgia Bar No. 047399

jbelinfante@robbinsfirm.com

Alexander Denton

Georgia Bar No. 660632

adenton@robbinsfirm.com

Brian E. Lake

Georgia Bar No. 575966

blake@robbinsfirm.com

Melanie Johnson

Georgia Bar No. 466756

mjohnson@robbinsfirm.com

Robbins Ross Alloy Belinfante Littlefield LLC

500 14th Street, N.W.

Atlanta, Georgia 30318

Telephone: (678) 701-9381

Facsimile: (404) 856-3250

Christopher M. Carr

Attorney General

Ga. Bar No. 112505

Bryan K. Webb

Deputy Attorney General

Ga. Bar No. 743580

Russell Willard

Sr. Asst. Attorney General

Ga. Bar No. 760280
Charlene McGowan
Asst. Attorney General
Ga. Bar No. 697316
Georgia Department of Law
40 Capitol Square SW
Atlanta, GA 30334
cmcgowan@law.ga.gov
Tel: 404-656-3389
Fax: 404-651-9325
Counsel for Secretary of State
Brad Raffensperger

L.R. 7.1(D) CERTIFICATION

I certify that this Brief has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). Specifically, this Brief has been prepared using 13-pt Century Schoolbook font.

/s/ Vincent R. Russo
Vincent R. Russo
Georgia Bar No. 242628