IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Treva Thompson, Timothy Lanier, Pamela King, Darius Gamble, and Greater Birmingham Ministries, Plaintiffs, v. John H. Merrill, in his official capacity as Secretary of State, James Snipes, III, in his official capacity as Chair of the Montgomery County Board of Registrars, and Leigh Gwathney, in her official capacity as Chair of the Board of Pardons and Paroles, Defendants.	)	Civil Action No. 2:16-cv-783-ECM-SMD

STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT AND THEIR EVIDENTIARY OBJECTIONS

On October 15, 2020, this Court ordered Plaintiffs to respond to the State Defendants' supplemental motion for summary judgment on Plaintiffs' categorical Eighth Amendment claim as well as to the objections the State Defendants raised to various evidence Plaintiffs cited in their opposition to the State Defendants' dispositive motion. Doc. 278. The Order made no mention of an opportunity to the State Defendants to reply. Nonetheless, because Plaintiffs responded by relying on more objectionable evidence *and* asserting that they can continue to identify new evidence and new witnesses "up until trial," doc. 280 at 34, the State Defendants offer this limited and brief response, which they pray the Court accepts.

With respect to the substance of the supplemental motion for summary judgment, Plaintiffs argued:

> Second, the national trend is undoubtedly in the opposite direction of Alabama. As the Eleventh Circuit panel emphasized in *Jones*, '[i]n the past two decades, nearly half of the [S]tates have in some way expanded felons' access to the franchise.' [*Jones v. Governor of Florida*, 950 F.3d 795, 801 n. 1 (11th Cir. 2020)] (collecting [S]tate laws expanding voting rights for formerly incarcerated individuals)." . . .

Doc. 280 at 12 (first alteration by the Plaintiffs). Plaintiffs do not mention that the first and second State laws listed in the *Jones* footnote are Alabama laws. *Jones*, 950 F.3d at 801 n.1 ("*See* H.B. 3, 2003 2d Spec. Sess. (Ala. 2003) (streamlining the process by which felons may apply for readmission to the franchise); H.B. 282, 2017 Reg. Sess. (Ala. 2017) (clarifying which felony convictions result in disenfranchisement and omitting drug possession crimes, among others) . . . ."). The first references the creation of the CERV process, while the second concerns the 2017 list delineating which felonies involve moral turpitude.

Plaintiffs further rely upon an October 2020 report from The Sentencing Project, doc. 280-1, which they treat as an expert report and refer to as "recent and authoritative." Doc. 280 at 11-14, 20.[1] Specifically, Plaintiffs rely on the report's analysis—not any underlying government data which might be judicially noticeable—to argue how many felons Alabama disenfranchises, how that disenfranchisement compares to other States, and how Alabama's re-enfranchisement compares to other States. *Id.* at 11-13, 20. In the process, they unfairly rely on The Sentencing Project's calculations about CERV grants, which they compare to mass restorations by the Governors of Iowa, Kentucky, and Virginia, all while ignoring the thousands of Alabama voters re-enfranchised by the 2017 delineation of disenfranchising felonies. If Plaintiffs' "anything goes" approach to evidence is correct, their own website reflects that "an estimated 76,000 people" were re-enfranchised by Ala. Act No. 2017-378. Ellen Boettcher, *Overcoming Barriers: How an*

[1] Plaintiffs also cite to a law review from 2004 by one of the authors of The Sentencing Project report, doc. 280 at 22, again attempting to convert hearsay into an expert opinion.

Alabama Voter Fought to Cast Her Ballot, *available at* https://campaignlegal.org/story/overcoming-barriers-how-alabama-voter-fought-cast-her-ballot (last visited Oct. 26, 2020). In fact, however, that is not how litigation works, and Plaintiffs themselves previously drew a distinction between *what they think* and *what they can swear to in a court of law*, when it suited them. *See* **Exhibit A** at 4 ("Representatives of Campaign Legal Center have indicated that it is their best estimate that up to tens of thousands of Alabamians who might previously have been precluded from voting would not be following the effective date of Act 2017-378, *but Plaintiffs cannot confirm this statement as a legal matter nor is there a sufficient factual basis to ensure the accuracy of that statement*, for the reasons explained above.") (emphasis added). Courts do not exist to make policy judgment based on materials found on the internet, but to resolve cases and controversies where the facts are tested through the adversary process.

Plaintiffs disagree. They contend that "they have a right to supplement their disclosures up until trial to the extent they become aware of or come into possession of relevant information." Doc. 280 at 34. This apparently includes calling a witness at trial whom they have known about since this litigation was filed, but who has *never* appeared on any Initial Disclosures. *See* doc. 280 at 28 ("Mr. Sikes can be called to testify to this evidence at trial . . . ."); doc. 1 at ¶ 121 (citing the Griffin Sikes memo). And, they contend it "is not a proper evidentiary objection," doc. 280 at 33, for the State Defendants to object that "several of the sources relied on by Plaintiffs . . . were not disclosed in discovery," *id.* Plaintiffs are wrong.

Fed. R. Civ. P. 37(c) provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness *to supply evidence on a motion,* at a hearing, *or at a trial*, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c) (emphasis added). Alternatively, or additionally,

different sanctions may be imposed. *Id.* Thus, failure to "to provide information or identify a witness as required by Rule 26(a)" is a proper evidentiary objection, and the State Defendants were right to object "that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence," Fed. R. Civ. P. 56(c)(2), where Plaintiffs relied upon inadmissible evidence, including where the evidence was not timely disclosed.

Pertinent here, Fed. R. Civ. P. 26(a) requires that "a party must, without awaiting a discovery request, provide to the other parties" with the names and contact information of witnesses upon whom they may rely and with documents that the party may use. Fed. R. Civ. P. 26(a)(i) & (ii).[2] "The purpose of Rule 26(a) is to allow the parties to adequately prepare their cases for trial and to avoid unfair surprise." *Russell v. Absolute Collections Servs., Inc.*, 763 F.3d 385, 396 (4th Cir. 2014).

"Every disclosure under Rule 26(a)(1) . . . must be signed by at least one attorney of record in the attorney's own name . . . ." Fed. R. Civ. P. 26(g)(1). "By signing, an attorney . . . certifies that to the best of the person's knowledge, information, and belief formed after a reasonable

[2] More precisely, Fed. R. Civ. P. 26(a) provides: "Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; (ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; (iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." Fed. R. Civ. P. 26(a) (paragraph breaks omitted).

inquiry: . . . it is *complete and correct* as of the time it is made . . . ." Fed. R. Civ. P. 26(g)(1)(A) (emphasis added). The Fifth Circuit has affirmed monetary sanctions[3] against counsel who certified their clients' initial disclosures were complete and correct when they did not include evidence subsequently used in a deposition. *Olivarez v. GEO Group, Inc.*, 844 F.3d 200, 202, 205-06 (5th Cir. 2016). The Tenth Circuit has affirmed monetary sanctions as to litigation counsel who certified their client's initial disclosures without revealing a relevant insurance policy (required to be disclosed by Fed. R. Civ. P. 26(a)(iv)) where it was too late to make a claim on the policy by the time its production was compelled.[4] *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219, 1222, 1224, 1228 (10th Cir. 2015).

Disclosures must be supplemented "(A) *in a timely manner* if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or (B) as ordered by the court." Fed. R. Civ. P. 26(e)(1) (emphasis added). Plaintiffs apparently read this requirement to authorize supplementation "up until trial." Doc. 280 at 34. Based on the cases noted above, it is obvious that a disclosure can come too late even while discovery is on-going.

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[3] "'If a certification violates [Rule 26(g)] without substantial justification, the court . . . must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both.' Fed. R. Civ. P. 26(g)(3). Likewise, a party is subject to sanctions under Rule 37(c)(1) if the 'party fails to provide information or identify a witness as required by Rule 26(a) or (e), . . . unless the failure was substantially justified or is harmless.'" *Olivarez v. GEO Group, Inc.*, 844 F.3d 200, 203 (5th Cir. 2016). The State Defendants are not, at this time, moving for exclusion under Rule 37 and thus do not discuss the factors related to whether exclusion is a proper; the discussion here concerns only the parties' obligations.

[4] Monetary sanctions against in-house counsel who later appeared in the litigation were not upheld. The distinction turned on whether it was proper to sanction counsel, as opposed to the party, when counsel had not yet appeared at the time that the incomplete initial disclosures were certified and there had been no finding of bad faith. *Sun River Energy*, 800 F.3d at 1225-28. None of this is relevant to the State Defendants' point that timely disclosure was required of Plaintiffs.

Additionally, the Fourth Circuit has affirmed a district court decision to exclude witness testimony and new evidence where disclosure made after discovery originally closed. *Russell v. Absolute Collections Servs., Inc.*, 763 F.3d 385, 390-91, 396-98 (4th Cir. 2014). Absolute Collections announced a different defense theory, dependent on different facts, at a pretrial conference. *Id.* at 390. The plaintiff moved to exclude the undisclosed evidence. *Id.* at 390. The court postponed the trial date for weather reasons and re-opened discovery on facts related to the new defense. *Id.* "During the reopened discovery period, Absolute Collection's discovery responses revealed that the facts supporting its bonafide-error defense had changed once again," as the company identified a new witness as well as the existence of a "previously undisclosed third-party" involved in the matter. *Id.* at 390-91. "[T]he district court found that Absolute Collection violated Rule 26(a) and (e)'s disclosure requirements by failing to disclose both the" documents related to the late-disclosed third party and the witness "during the initial twenty months of litigation." *Id.* at 397. The Court of Appeals affirmed. *Id.* at 396-98.

Similarly, the Seventh Circuit affirmed a district court's decision to exclude three witnesses from testifying and limit the testimony of a fourth witness to the subject matter that had been disclosed where "supplemental disclosures came too late—on the eve of trial and after three years of discovery." *Morris v. BNSF Railway Co.*, 969 F.3d 753, 765-66 (7th Cir. 2020). While the First Circuit has found no error where the plaintiff was on notice of an undisclosed witness who had not hired the plaintiff and who had signed disclosed paperwork about the matter, *Pina v. Children's Place*, 740 F.3d 785, 793-94 (1st Cir. 2014), the Seventh Circuit in *Morris* recognized the different context of a case where "many [persons] play a role in the facts, substantial documents productions occur, and the parties have sharply competing views about what information is pertinent to claims and defenses," *Morris*, 969 F.3d at 765. In a case like that (and this),

"supplemental disclosures help to separate wheat from chaff and bring focus to facts." *Id.* "[T]he whole point of introducing the discovery mechanisms listed in Rule 26 was to ensure that trials would no longer be 'carried on in the dark.'" *Id.* (*quoting Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). So too here. As the district court reasoned, "[i]t's one thing to know that a person's name is out there [but] it's another thing to know that the other side is intending to call him as a witness. That's why we have Rule 26(a) disclosures." *Morris*, 969 F/3d at 765 (*quoting* the district court; alterations by the appellate court). The same is true of documents.

Plaintiffs were required to completely and timely disclose their witnesses and documents before discovery closed, when the State Defendants had the opportunity to respond to Plaintiffs' case. The State Defendants are thus justified in objecting to Plaintiffs' invocation of witnesses and documents not disclosed (and, in some cases, not in existence) before discovery closed in July.

Finally, as set out in previously submitted evidence and argument, the State Defendants are entitled to summary judgment on all claims pending against them.

Respectfully submitted,

Steve Marshall
Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that, on October 26, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Armand Derfner (aderfner@derfneraltman.com); Danielle Lang (dlang@campaignlegalcenter.org); James U. Blacksher (jblacksher@ns.sympatico.ca); Jessica Ring Amunson (jamunson@jenner.com); J. Gerald Herbert (gherbert@campaignlegalcenter.org); J. Mitch McGuire (jmcguire@mandabusinesslaw.com); Mark P. Gaber (mgaber@campaignlegalcenter.org); Michael E. Stewart (mstewart@jenner.com); Jason P. Hipp (jhipp@jenner.com); Molly Danahy (mdanahy@campaignlegal.org); Jonathan Diaz (jdiaz@campaignlegalcenter.org); Melissa Takara Fedornak (mfedornak@jenner.com); and, Julie Strass Harris (Julie.StrausHarris@usdoj.gov).

s/Misty S. Fairbanks Messick
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

TREVA THOMPSON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
v.	)	**2:16-cv-783-WKW**
	)	
JOHN H. MERRILL, in his official capacity as Secretary of State, *et al.*,	)	CLASS ACTION
	)	
	)	
Defendants.		

PLAINTIFFS' *REVISED* OBJECTIONS AND RESPONSES TO STATE DEFENDANTS' REQUESTS FOR ADMISSION TO PLAINTIFFS

Plaintiffs object and respond to the State Defendants' Requests for Admission to Plaintiffs as follows:

Request for Admission No. 1

Admit that, from 1868 to May 1996, Alabama's constitution provided all felonies were disenfranchising.

Response: Plaintiffs object that Request for Admission No. 1 seeks admission of a question of law—an impermissible subject for a Request for Admission. *See* Fed. R. Civ. P. 36 (limiting Requests for Admission to "facts, the application of law to fact, or opinions about either"); *see also In re Tobkin*, 578 Fed. App'x 962, 964 (11th Cir. 2014) ("A party may not request an admission of a legal conclusion under Rule 36.").

Request for Admission No. 2

Admit that, at the June 4, 1996 statewide election, Proposed Statewide Constitutional Amendment Number One (1) was on the ballot as follows:

PROPOSED STATEWIDE
CONSTITUTIONAL AMENDMENT NUMBER ONE (1)

Proposing an amendment of the Constitution of Alabama of 1901, repealing Article VIII, relating to suffrage and elections. The amendment would repeal the existing Article VIII, and provide that, in accordance with constitutional requirements, suffrage would extend to residents who are citizens, 18 years of age or older who have not been convicted of a felony involving moral turpitude. This amendment would further provide that the Legislature would provide for certain voting procedures by statute. (Proposed by Act 95-443).

Statewide Amendment No. 1 YES ►

Statewide Amendment No. 1 NO ►

Response: Admitted.

Request for Admission No. 3

Admit that, at the June 4, 1996 statewide election, Proposed Statewide Constitutional Amendment Number One (1) was approved by a vote of 297,261 to 95,612.

Response: Admitted.

Request for Admission No. 4

Admit that Act No. 2017-378 enfranchised tens of thousands of Alabama residents with felony convictions who had been disenfranchised before the Act was enforced.

Response: Plaintiffs deny that Alabama's felony disenfranchisement system is constitutional, and because an unconstitutional law has no effect and is treated as if it never existed, as a legal matter, no Alabama residents were/are disenfranchised, pre- or post-Act No. 2017-378. To the extent Request for Admission No. 4 refers to the factual disenfranchisement of Alabamians notwithstanding the unconstitutionality of that regime, Plaintiffs lack information to either admit or deny Request No. 4 because it is impossible to know how many Alabamians would have been disenfranchised by any given Board of Registrars had they attempted to register to vote prior to Act No. 2017-378's effective date. Based upon Plaintiffs' reasonable inquiry, including through the deposition testimony of Defendants' witnesses, the information Plaintiffs know or can readily obtain is insufficient to enable them to admit or deny Request for Admission No. 4. There is no way to know whether any Board of Registrars would have viewed any particular felony as disqualifying. *See, e.g.*, Ala. Code § 17-3-30.1(b)(1)(b) ("Under general law, there is no comprehensive list of felonies that involve moral turpitude which disqualify a person from exercising his or her right to vote. Neither individuals with felony convictions nor election officials have a comprehensive, authoritative source for

determining if a felony conviction involves moral turpitude and is therefore a disqualifying felony."). It is therefore impossible to know how many Alabamians are permitted to vote under Act No. 2017-378 who would have been denied the right to vote prior to the passage of that law had they attempted to register. Representatives of the Campaign Legal Center have indicated that it is their best estimate that up to tens of thousands of Alabamians who might previously have been precluded from voting would not be following the effective date of Act 2017-378, but Plaintiffs cannot confirm this statement as a legal matter nor is there a sufficient factual basis to ensure the accuracy of that statement, for the reasons explained above.

Moreover, even if Act No. 2017-378 is not invalid because of Section 177(b)'s unconstitutionality, Defendants have unlawfully and unconstitutionally determined to apply it retroactively to disenfranchise Alabamians whose convictions predate the effective date of the Act. Defendants' impermissible interpretation of Act No. 2017-378 has thus had the effect of unlawfully disenfranchising tens of thousands—if not more—Alabamians who should be permitted to register to vote.

Request for Admission No. 5

Admit that the Campaign Legal Center is working with Southern Poverty Law Center to reach Alabama residents who have felony convictions but can vote pursuant to Act No. 2017-378.

Response: Plaintiffs object to Request No. 5 as vague—what is meant by working to "reach" such residents? Plaintiffs also object to Request No. 5 as irrelevant. Subject to the foregoing objections, Plaintiffs admit that Campaign Legal Center and the Southern Poverty Law Center seek to assist eligible Alabamians to exercise their right to vote.

Request for Admission No. 6

Admit that Plaintiffs have not identified a felony that was not disenfranchising before Act No. 2017-378, but is disenfranchising pursuant to Act No. 2017-378.

Response: Denied.

Respectfully submitted,

/s/ *Mark P. Gaber*
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CERTIFICATE OF SERVICE

Pursuant to an agreement memorialized in the Report of the Parties' Planning Meeting, electronic service is acceptable for this document. I hereby serve a copy of the foregoing document on Winn Sinclair (wscinlair@ago.state.al.us), Misty Fairbanks Messick (mmessick@ago.state.al.us), and Laura Howell (lhowell@ago.state.al.us), three of the counsel for Defendants, via email on this 6th day of February 2019.

/s/ Mark P. Gaber
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