IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAN McCONCHIE, *et al.*, Plaintiffs, v. CHARLES SCHOLZ, *et al.,* Defendants,	)))))))))))	Case No. 1:21-CV-03091 Circuit Judge Michael B. Brennan Chief District Judge Jon E. DeGuilio District Judge Robert M. Dow, Jr. Three-Judge Court Pursuant to 28 U.S.C. § 2284(a)
JULE CONTRERAS, *et al.,* Plaintiffs, v. ILLINOIS STATE BOARD OF ELECTIONS, *et al.,* Defendants,	)))))))))))	Case No. 1:21-CV-03139 Circuit Judge Michael B. Brennan Chief District Judge Jon E. DeGuilio District Judge Robert M. Dow, Jr. Three-Judge Court Pursuant to 28 U.S.C. § 2284(a)
EAST ST. LOUIS BRANCH NAACP, *et al.*, Plaintiffs, v. ILLINOIS STATE BOARD OF ELECTIONS, *et al.,* Defendants,	))))))))))	Case No. 1:21-CV-05512 Circuit Judge Michael B. Brennan Chief District Judge Jon E. DeGuilio District Judge Robert M. Dow, Jr. Three-Judge Court Pursuant to 28 U.S.C. § 2284(a)

DEFENDANTS' RESPONSE TO PLAINTIFFS' JOINT NOTICE
REGARDING REMEDIAL HEARING

In advance of the Court's December 3, 2021 status conference, and with the benefit of having received Plaintiff's reply filings on December 1, 2021, Defendants submit this response to Plaintiffs' November 28, 2021 Joint Notice.

Plaintiffs' Joint Notice proposes that these actions be decided on the papers, or in the alternative with only attorney argument. Defendants disagree. Defendants believe an evidentiary hearing that would allow for expert testimony is necessary and the most appropriate way forward. *First*, the parties' collective submissions have presented the Court with voluminous materials, including more than a dozen expert reports. The parties are also engaged in ten expert depositions over the next five days, which will add to the record. Expert testimony, accompanied by brief attorney argument, will help summarize and distill the myriad issues presented across the three actions. It will also allow the parties to incorporate the expert depositions into their cases, which without a hearing (or a sur-reply, discussed below), will have been for naught. Live expert testimony will also allow the Court to ask any clarifying questions and better assess the experts' credibility.

Second, expert testimony is necessary to avoid prejudice to Defendants, because it would provide Defendants' expert the opportunity to address Plaintiffs' reply submissions. This opportunity is especially critical in this action, because Plaintiffs' replies present new analyses, results, fact declarations, and even new proposed remedial maps—much of which is inaccurate and none of which Defendants or their expert has had an opportunity to respond.. For instance, Dr. Weichelt has submitted new proposed liability *and* remedial maps, which have not been analyzed by Defendants and supersede those analyzed by Dr. Lichtman in his report. *NAACP* Dkt. 55-1. Dr. Collingwood then submits new analysis based on Dr. Weichelt's new remedial plan, in addition to other new analyses. *NAACP* Dkt. 55-2. The NAACP Plaintiffs also submitted

declarations from new, never before disclosed fact witnesses in support of their reply statement. *NAACP* Dkts. 55-3, 55-4.

Dr. Grumbach presents a new opinion regarding racially polarized voting that places substantial weight on a single election, and includes a new analysis dependent on "special circumstances" that was not in his initial report. *Contreras* Dkt. 162-1 at 4. Dr. Grumbach also presents new results for Latino and non-Latino voting that were not presented in his initial report, and therefore Defendants have not analyzed or responded to. *Id*. at 2-3. Dr. Chen's reply report Table 1 presents new analysis, as does Dr. Fowler's Figure 1. *McConchie* Dkts. 162-1, 162-2. All of the analysis and information on pages 8-11 of Dr. Gallagher's report is new to his reply report. *McConchie* Dkt. 162-3.

This list is illustrative, not exhaustive. By going beyond responding to Defendant's responsive submission and expert report, Plaintiffs have exceeded the proper scope of reply submissions. Defendants respectfully submit that, because there is not time for a sur-reply before the scheduled hearing date, an evidentiary hearing that allows for expert testimony is the most appropriate and fair way to proceed.

Though Defendants believe live expert testimony is necessary in this case, we share Plaintiffs' concern regarding the risks posed by COVID-19 and the uncertainties associated with the new Omicron variant. The safety of all parties and participants is of paramount importance.[1] Therefore, if the Court determines it is appropriate to forego an in-person hearing, Defendants suggest either a virtual hearing to include expert testimony, or if there will be no hearing at all, that

[1] Should the Court proceed with an in-person hearing, Defendants request the Court require the following to minimize the risk of transmission: (1) proof of vaccination against COVID-19 to enter the courtroom, (2) all attendees wear masks except when on the stand or speaking, and (3) attendance in the courtroom be limited to the parties and their attorneys.

the Court grant Defendants leave to file a sur-reply. In the absence of a hearing, providing Defendants the opportunity to respond to Plaintiffs' replies is fair, but also merited in light of the substantial new analyses, results, maps, and facts contained in Plaintiffs' replies. Indeed, the Court specifically cautioned that such a situation could warrant a sur-reply.[2] *See* Hr'g Tr. (Nov. 5, 2021) at 16:7-10 (DISTRICT JUDGE DOW: " And, of course, I think if there is a reply brief and if it's not confined to traditional reply, then there surely will be a request for sur-reply and, you know, we would deal with that as we see it.").

* * *

Defendants respectfully request the Court proceed with either an in-person or virtual evidentiary hearing, or in the alternative, grant Defendants leave to file a sur-reply.

[2] If the Court is inclined to allow a sur-reply, Defendants request seven days from the Court's order to prepare and file their submission.

Dated: December 2, 2021

Respectfully submitted,

/s/ Sean Berkowitz

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