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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,

Plaintiffs,

v.

Michele Reagan, et al.,

Defendants.

No. CV-16-01065-PHX-DLR

STATE DEFENDANTS AND INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO ADMIT EXHIBITS CONTAINING LEGISLATOR STATEMENTS

Plaintiffs have moved to admit six exhibits that they assert contain the statements of Representative Michelle Ugenti-Rita or can be used to show her knowledge. The Court should sustain Defendants and Intervenor-Defendants' objections thereto because the exhibits are hearsay not subject to any exception, and the non-hearsay purposes for which they are offered do not support their admission as evidence.

Exhibits 87 and 88 are a video recording and transcript of an excerpt of a State Bar of Arizona continuing legal education election law seminar at which Rep. Ugenti-Rita and Senator Quezada spoke. Plaintiffs argue that these exhibits should be treated as not hearsay because Rep. Ugenti-Rita is a party opponent or an effective equivalent thereof, such as a person authorized by a party to make statements on its behalf. [Doc. 390, at 1-2] Rep. Ugenti-Rita, however is not a party to this action and her statements are not admissions of a party opponent under any prong of Fed. R. Evid. 801(d)(2). Plaintiffs sued the Secretary of State and the Attorney General and have made no showing that those officials authorized Rep. Ugenti-Rita to speak for them on these matters. Plaintiffs did not sue the State of Arizona, which they could have done. Indeed, because their constitutional claims arise from the Fourteenth Amendment and the Voting Rights Act, which was enacted to enforce the Fourteenth and Fifteenth Amendments, Eleventh Amendment sovereign immunity does not bar an action against the state. *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003); *Hall v. Louisiana*, 983 F. Supp. 2d 820, 829-30 (M.D. La. 2013) (noting that "Congress has abrogated the states' sovereign immunity for claims arising under the Voting Rights Act").[1]

Even if Plaintiffs had sued the State, a single member of the 90-member Legislature is not the State. Consequently, the statements of one state legislator who is not a named defendant in this action are not party admissions that are exempt from the rule against hearsay. Plaintiffs have improperly conflated the substantive analysis of the

[1] Indeed, plaintiffs regularly sue the state in voting rights cases. *See, e.g., Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc) (State of Arizona, as well as elections officials in all 15 counties, named as defendants).

legislative intent underpinning H.B. 2023 with the evidentiary issues related to admission of exhibits containing Rep. Ugenti-Rita's statements. Plaintiffs argue that Arizona common law does not provide guidance regarding the admissibility of Rep. Ugenti-Rita's statements because the Federal Rules of Evidence apply in this matter, but those rules do not speak to *who* is a party opponent in Arizona for purposes of this matter. Arizona law regarding whose statements may bind the State controls. Under *Ariz. Citizens' Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 325 (2014), the statements of one legislator are not treated as the statements of the Legislature as a whole. *See also Golder v. Dep't of Revenue,* 123 Ariz. 260, 265 (1979). Nor is the Arizona Legislature a party to this matter. As such, Rep. Ugenti-Rita's statements are not the statements of the State Defendants, and are hearsay under Fed. R. Evid. 801(c). Consequently, Exhibits 87 and 88, which are a video recording and transcript of a portion of a State Bar of Arizona continuing legal education seminar, which occurred on April 22, 2016, well after H.B. 2023 was signed into law,[2] are not admissible.[3]

Plaintiffs further argue that Exhibits 87 and 88 should be admitted under the residual exception to the hearsay rule because they are "(A) . . . offered as evidence of a material fact; (B) . . . more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." [Doc. 390, at 3 (citing *United States v. Leal-Del Carmen*, 697 F.3d 964, 974 (9th Cir. 2012))] But in the cited case, the videotape at issue was the only evidence of the statement available, because the government had deported the declarant. Here, Rep. Ugenti-Rita testified at trial, and Plaintiffs' counsel asked her about some of the statements in Exhibits 87 and 88. As such, the exhibits are not more probative on the

[2] The statements at the seminar are thus not contemporary, contrary to Plaintiffs' assertions. [Doc. 390, at 2-3]

[3] Tellingly, Plaintiffs have not offered the statements of other legislators, including Senator Martín Quezada, whose statements are also included in Exhibits 87 and 88, as party admissions.

point for which they are offered than Rep. Ugenti-Rita's in-court testimony, and the Fed. R. Evid. 807 residual exception does not apply.

Exhibit 47 is an email from an Associated Press reporter to Rep. Ugenti-Rita which contains several questions about H.B. 2023. Plaintiffs assert that it "demonstrat[es] Representative Ugenti-Rita's knowledge of the criticisms raised by the reporter in the email," and that her "subsequent failure to respond to these criticisms and questions . . . is probative of whether the justifications offered for H.B. 2023 are tenuous or pretextual." [Doc. 390, at 5] But nothing in the email demonstrates that Rep. Ugenti-Rita read it or that she failed to respond to the reporter or others who asked her similar questions. Just as the non-appearance of a witness at trial is not probative of the witness's ability to vote in the 2016 elections, neither are a reporter's questions probative of the alleged tenuousness of the justifications for a law. The statement is an out-of-court statement by a reporter that does not demonstrate Rep. Ugenti-Rita's knowledge or any lack of responsiveness, and it should not be admitted.

Exhibit 53 is an email thread among several people, including counsel for the State Defendants in this case, in which the procedural status of the case is described. Plaintiffs assert that the statements of the General Counsel to the Arizona House of Representatives "are relevant to Defendants' claim that Representative Ugenti-Rita is not acting in a fashion that is comparable to a party opponent in this litigation." [Doc. 390, at 6] Plaintiffs' description of the relevance of this document demonstrates that it relates only to a collateral matter–whether Rep. Ugenti-Rita is authorized to speak for the State. Items that are "relevant" only because they may lead to admission of other exhibits should be barred by Fed. R. Evid. 401. Moreover, if Rep. Ugenti-Rita were a party to this litigation, counsel for the State Defendants could communicate with her directly and those communications would be protected by the attorney-client privilege and would not be subject to disclosure. The fact that this email exists and was produced to Plaintiffs, and that Rep. Ugenti-Rita was represented by her own counsel at the trial in this matter

demonstrates the opposite – she is not a party to this action. Exhibit 53 is hearsay and not subject to any of the exceptions.

Exhibit 54 is an email regarding the stakeholder meeting that occurred before the 2016 legislative session regarding legislation restricting ballot collection. The Court has already admitted Exhibit 55, which relates to the same subject. And Rep. Ugenti-Rita and State Election Director Eric Spencer testified about who attended that meeting. This email is cumulative of that evidence and should therefore be barred by Fed. R. Evid. 403.

Exhibit 56 is an email from Russell Smoldon, CEO of B3 Strategies, to Rep. Ugenti-Rita, Eric Spencer, and others. Plaintiffs assert that Mr. Smoldon is "a lobbyist for special taxing districts," and that the email is offered to demonstrate Rep. Ugenti-Rita's "knowledge of the lobbyist's requests for changes to the bill and the legislature's response regarding the same." There is nothing in the email, however, that demonstrates that Rep. Ugenti-Rita reviewed it or who Mr. Smoldon represents. Moreover, the two-sentence email from Mr. Smoldon relates to an amendment to *H.B. 2010*, not H.B. 2023. As such, it does not demonstrate Rep. Ugenti-Rita's knowledge and is not relevant to this matter..

Conclusion

For the foregoing reasons, the Court should deny Plaintiffs' motions to admit Exhibits 47, 53, 54, 56, 87, and 88.

RESPECTFULLY SBMITTED this 20th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the CM/ECF registrants.

Karen J. Hartman-Tellez