UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Ohio Organizing Collaborative, *et al.*,[1]

Plaintiffs,

v.

Jon Husted, *et al.*,

Defendants.

Case No. 2:15–cv–1802

Judge Michael H. Watson

Magistrate Judge King

OPINION AND ORDER

Pursuant to the Court's instructions, the parties submitted post-trial briefing addressing several evidentiary objections made at trial. ECF Nos. 109 & 112. The Court addresses only those objections implicating evidence relied on by the parties in their proposed findings of fact and conclusions of law, ECF Nos. 110 & 11, or by the Court in its Findings of Facts and Conclusions of Law, ECF No. 117.

I. Deposition Designations

Pursuant to Federal Rule of Civil Procedure 32, Plaintiffs seek to admit as substantive evidence designated portions of the depositions of three deponents who did not testify at trial—John Weber, Daniel Troy, and Patrick McDonald—as

[1] Plaintiffs amended their complaint to substitute OOC with the Ohio Democratic Party ("ODP"), the Democratic Party of Cuyahoga County ("DPCC"), and the Montgomery County Democratic Party ("MCDP"). Am. Compl., ECF No. 41.

well as portions of the Federal Rule of Civil Procedure 30(b)(6) and individual depositions of Matthew Damschroder, who did testify at trial.

Defendants object to the admission of these designations for any purpose other than impeachment. They further maintain that if the Court admits the designations, then the Court should consider Defendants' substantive objections to the testimony, admit Defendants' cross-designations, and admit the deponents' underlying declarations.

Federal Rule of Civil Procedure 32 permits the use of all or part of a deposition against a party at trial under certain conditions. Specifically, the party against whom the deposition will be used must have been present or represented at the deposition, the deposition must be used at trial to the extent it would be admissible under the Federal Rules of Evidence if the deponent were testifying at trial, and the use of the deposition must be explicitly permitted by one of seven provisions outlined in Rule 32. Fed. R. Civ. P. 32(a)(1)(A)–(C).

Two of those seven provisions are relevant here. First, "[a]n adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) . . . ." Fed. R. Civ. P. 32(a)(3). Additionally, a party may use for any purpose the deposition of a witness who is "more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition . . . ." Fed. R. Civ. P. 32(a)(4)(B).

A. John Weber, Daniel Troy, and Patrick McDonald

Plaintiffs seek to admit portions of the depositions of John Weber, Daniel Troy, and Patrick McDonald pursuant to Rule 32(a)(4)(B). It is undisputed that Defendants were present at the taking of these depositions. It is also undisputed that at the time of trial, all three individuals were more than 100 miles from where the trial took place, and there are no allegations that Plaintiffs procured their absences. *See* DX 71 at ¶ 4, DX 71A (John Weber – 124.548 miles; Daniel Troy – 152.807 miles; Patrick McDonald – 127.453 miles). Defendants nevertheless seek exclusion of the depositions on the grounds that: (1) Plaintiffs failed to demonstrate any efforts to secure the deponents' appearances despite their locations, and (2) the depositions were not designated as trial depositions, and therefore, Defendants did not cross-examine the deponents in the same manner that they would have were the depositions designated as ones for trial. They further request that if the Court admits the deposition designations, then it consider the objections made thereto.

Noting that there is a dearth of case law on these two issues, the Court finds that Defendants' concerns do not warrant the exclusion of the deposition designations. First, although the United States Court of Appeals for the Sixth Circuit does not appear to have ruled on the matter, this Court and other courts have explicitly held that Rule 32(a)(4) does not require the proponent of deposition testimony to demonstrate that the witness would otherwise be unavailable to testify live. *See, e.g.*, *Daigle v. Maine Med. Ctr., Inc.*, 14 F.3d 684,

691–92 (1st Cir. 1994); *Smith v. United States*, No. 3:95cv445, 2012 WL 1453570, at *32 (S.D. Ohio Apr. 26, 2012). Absent any binding precedent to the contrary, the Court declines to read such a requirement into the Rule.

The Sixth Circuit also does not appear to have addressed whether the failure to designate a deposition as a "trial deposition" precludes its admissibility under Rule 32. Other courts, however, have found that the designation of the deposition is immaterial. *See Tatman v. Collins*, 938 F.2d 509, 510–11 (4th Cir. 1991) ("When, as here, the witness' deposition was duly noticed and all parties had the opportunity to attend (and did attend), it may be introduced at trial, subject to the rules of evidence, if the witness is unavailable as described in Rule 32(a)(3). It is irrelevant to the issue that one party or the other initiated the deposition, that it was initiated only for discovery purposes, or that it was taken before other discovery was completed."); *Estate of Thompson v. Kawasaki Heave Idus.*, 291 F.R.D. 297, 303 (N.D. Iowa 2013) (rejecting the argument that the use of a Rule 30(b)(6) deposition in a party's case-in-chief should be prohibited because the deposition was a discovery and not a trial deposition) (citation omitted); *but see Griffin v. Foley*, 542 F.3d 209, 220–21 (7th Cir. 2008) (prohibiting the plaintiffs from offering evidentiary depositions at trial but doing so in light of the unique procedural circumstances surrounding the taking of evidentiary and trial depositions in that particular case). In the absence of any binding authority to the contrary, and in light of the fact that Rule 32 does not differentiate between "discovery" and "trial" depositions for use at trial, the Court

declines to preclude the depositions at issue on the ground that they were not designated as trial depositions.

Accordingly, the Court **OVERRULES** Defendants' general objection to the admission of the designated portions of the depositions of John Weber, Daniel Troy, and Patrick McDonald.[2] To the extent the Court relies on any of the designations in its Findings of Fact and Conclusions of Law, however, it will address Defendants' substantive objections to those designations and consider any cross-designated portions to the extent permitted by the Federal Rules of Evidence. The Court notes that doing so will mitigate any potential prejudice to Defendants arising from the nature of the cross-examinations conducted at the depositions. The Court declines, however, to admit the deponents' underlying declarations, as they constitute inadmissible hearsay, and Defendants have not articulated any other evidentiary basis for their admission.

B. Matthew Damschroder

1. 30(b)(6) Deposition

Plaintiffs seek to admit designated portions of Matthew Damschroder's ("Damschroder") Rule 30(b)(6) deposition on behalf of the Ohio Secretary of State pursuant to Federal Rule of Civil Procedure 32(a)(3). Defendants object, arguing that admission of the testimony is unnecessary because Damschroder testified at trial.

[2] As the Court finds the deposition designations admissible under Rule 32(a)(4), it need not address Plaintiffs' argument as to the admissibility of Patrick McDonald's and John Weber's deposition testimony under Rule 32(a)(3).

The Sixth Circuit does not appear to have addressed whether a Rule 30(b)(6) witness's appearance at trial precludes the admission of his deposition testimony under the current version of Rule 32(a)(3).[3] Other courts, however, have admitted the deposition testimony of a testifying Rule 30(b)(6) witness to the extent it is not repetitive of his live testimony. *See, e.g.*, *Estate of Thompson*, 291 F.R.D. at 305–06 (overruling objection to the introduction of video deposition testimony of 30(b)(6) witness who would be testifying live and stating that the court has "discretion to exclude parts of the deposition that are unnecessarily repetitious in relation to the testimony of the party on the stand, but [the court] may not refuse to allow the deposition to be used merely because the party is available to testify in person." (internal quotation marks and citation omitted)); *SanDisk Corp. v. Kingston Tech. Co., Inc.*, 863 F. Supp. 2d 815, 817 (W.D. Wis. 2012) (overruling objections to the admission of Rule 30(b)(6) deposition testimony of witnesses who testified at trial, noting that under Rule 32(a)(3), the testimony may be used by an adverse party "for any purpose" regardless of the witness's availability) (citation omitted); *cf. Superior Driving Co., Inc. v. Watts*, No. 06–197, 2008 WL 533804, at *2–3 (E.D. La. Feb. 22, 2008) (stating that Rule 32(a)(3) "allows a party's deposition to be used by an adverse party regardless of

[3] *But see Pingatore v. Montgomery Ward & Co.*, 419 F.2d 1138, 1142 (6th Cir. 1969) (explaining that a former version of Rule 32(a)(3) "permits the deposition of a party to a suit to be used by an adverse party for any purpose at the trial, even though the party was present at the trial and testified orally." (citations omitted)); *Black v. United Parcel Serv.*, 797 F.2d 290, 293 (6th Cir. 1986) (applying the former version of Rule 32(a)(3) and finding the presentation of a managing agent's deposition testimony at trial reasonable where he was physically present in the courtroom and able to testify).

the presence or absence of the deponent at the hearing or trial and regardless of whether the deponent is available to testify or has testified there." (citing *Fey v. Walston & Co., Inc.*, 493 F.2d 1036, 1046 (7th Cir. 1984) (additional citation omitted)).

The Court finds these decisions persuasive. Indeed, Rule 32(a)(3) is silent on the issue, and absent binding authority to the contrary, the Court declines to read in the limitation advocated by Defendants. Moreover, decisions excluding deposition testimony of Rule 30(b)(6) witnesses who will appear to testify live are not particularly instructive in this case, as they largely address circumstances where courts excluded the deposition testimony in an effort to promote judicial efficiency at trial. *See, e.g.*, *Gonzalez Prod. Sys., Inc. v. Martinrea Int'l Inc.*, Case No. 13–cv–11544, 2015 WL 5439254, at *3 (E.D. Mich. Sept. 15, 2015) (prohibiting the use of a Rule 30(b)(6) witness's video depositions *in lieu of* his live testimony because the plethora of anticipated hearsay objections to the deposition testimony would undermine the court's ability to efficiently run the trial); *Williams v. Jackson*, No. 2:07–cv–110, 2011 WL 867528, at *2 (E.D. Ark. Mar. 14, 2011) (citing the interest in judicial efficiency in declining to admit the deposition testimony of witnesses qualifying under Rule 32(a)(3) who would be available to testify at trial). Here, Plaintiffs did not seek to nor did they read the deposition designations into the record at trial but rather sought to admit them for the Court's post-trial consideration. Judicial efficiency in conducting the trial was therefore not a concern.

Accordingly, the Court **OVERRULES** Defendants' general objection to the admissibility of the designated portions of Damschroder's Rule 30(b)(6) deposition *that are not duplicative of his live testimony.* In so doing, the Court overrules Defendants' objection to the testimony as cumulative under Federal Rule of Evidence 403. Should the Court rely on any of the designations in its Findings of Fact and Conclusions of Law, it will address Defendants' substantive objections to those designations and admit any cross-designated portions to the extent permitted by the Federal Rules of Evidence and Federal Rule of Civil Procedure 32(a)(6). Damschroder's declaration will not be admitted, however, for the same reasons articulated above.

2. Individual Deposition

Plaintiffs also seek to admit designated portions of Damschroder's individual deposition in which he testified in his capacity as the Deputy Assistant Secretary of State/Director of Elections. They argue that as the Deputy Assistant Secretary of State/Director of Elections, Damschroder constitutes the Secretary's managing agent, thereby rendering his deposition testimony in that capacity admissible under Rule 32(a)(3). Defendants object only on the grounds that admission of such testimony would be cumulative of Damschroder's testimony at trial. For the same reasons articulated with respect to Damschroder's Rule 30(b)(6) deposition testimony, Defendants' objection is **OVERRULED**. Should the Court rely on any of the designations in its Findings of Fact and Conclusions of Law, it will address Defendants' substantive objections to those designations

and consider any cross-designated portions to the extent permitted by the Federal Rules of Evidence.

II. The Ohio Channel Legislative Session Videos and Transcripts

Plaintiffs seek to admit videos of Ohio General Assembly legislative hearings, PX 0001, PX 0003, PX 0005, PX 0007, PX 0009, PX 0011, PX 0013, PX 0015, PX 0017, as well as transcripts of some of the videos, PX 0002, PX 0004, PX 0006, PX 0008, PX 0010, PX 0012, PX 0014, PX 0016, PX 0018. Defendants seek to exclude all videos and transcripts.

A. Videos

Defendants seek to exclude the videos on several grounds, each of which the Court finds unavailing. First, the principle that courts turn to legislative intent when interpreting a statute only if the statute's plain language is ambiguous is not applicable to the Court's consideration of Plaintiffs' equal protection claim pursuant to *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264–65 (1977) and its progeny. As explained in the Court's Findings of Fact and Conclusions of Law, evidence of legislative intent in passing a statute, including the contemporaneous statements of legislators, is properly considered when considering whether a statute was passed with a racially discriminatory purpose. *See* ECF No. 117 at 109–111. Indeed, in conducting that analysis here, the Court does not interpret the meaning of the challenged laws but rather examines whether evidence demonstrates that they were passed

with discriminatory purpose. Accordingly, the principle invoked by Defendants, although correct, is inapposite.

Second, Defendants' argument that the isolated statements of the individual legislators depicted in the videos are not probative of the intent of the entire General Assembly implicates the weight of the evidence, not its relevance. Indeed, *Arlington Heights* explicitly recognized that legislative history may be "highly relevant" to the discriminatory purpose inquiry, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 268. The same is true of Defendants' concerns regarding the potential for confusion and prejudice. The fact that the videos do not depict the complete legislative process behind the passage of the challenged laws is a factor to consider when evaluating the weight of the evidence, not its relevance.[4]

Third, the Court rejects Defendants' contention that any use of the videos in this case is prohibited by Ohio Revised Code § 3353.07, which states that "[s]ervices provided by the Ohio government telecommunications service shall not be used for political purposes included in campaign materials, or otherwise used to influence an election, legislation, issue, *judicial decision*, or other policy of state government." Ohio Rev. Code § 3353.07 (emphasis added).

[4] This applies equally to Defendants' contention that the videos are edited or incomplete. Defendants make no more than generalized allegations that the videos *may* be edited, and they make no specific objection that anything relevant to Plaintiffs' claims is missing from the videos.

Defendants cite no authority, and the Court has found none, to support the proposition that this state statute prohibits the use of legislative session recordings as evidence in federal court.

Last, Defendants' hearsay objection is not well taken, as the videos are being offered not to prove the truth of the matter asserted but rather to prove knowledge and intent.

Accordingly, Defendants' objections to the admission of the legislative session videos are **OVERRULED**.

B. Transcripts

Plaintiffs also seek to admit transcripts of the legislative session videos to aid the Court in its review of the videos' contents. Defendants first object based on the same grounds as their objections to the videos. Those objections are overruled for the same reasons articulated above.

Defendants also seek to exclude the transcripts on the additional ground that they are incomplete and inaccurate. With respect to completeness, Defendants argue the transcripts are mere portions from videos which were themselves possibly edited and capture only portions of the General Assembly floor debate.

Regarding their accuracy, Defendants points out that various statements and votes of Senators are repeatedly recorded as "inaudible."

Plaintiffs contend that the videos are offered solely to show the legislature's knowledge and intent and not for the truth of the statements made in

the videos. As such, Plaintiffs contend the videos and accompanying transcripts do not raise hearsay concerns. Moreover, Plaintiffs contend that a declaration of their paralegal, Ms. Roberts, properly authenticates the transcripts, and the court reporters who prepared the transcripts certified their accuracy.

"[T]he use of transcripts is a matter committed to the sound discretion of the trial judge and [will be reversed] only for an abuse of discretion." *United States v. Osher*, No. 91–1990, 983 F.2d 1070, 1991 WL 379440, *2 (6th Cir. Dec. 15, 1992). The standard is whether the transcripts bear a semblance of reliability. *See United States v. Jacob*, 377 F.3d 573, 581 (6th Cir. 2004) (internal citation omitted).

The Court finds the transcripts are admissible. The certificate of accuracy prepared by the court reporters who transcribed the videos satisfies the Court as to the accuracy of the transcripts. Moreover, Defendants "make only generalized claims as to the inaccuracies of the . . . transcript[s] and ha[ve] failed to indicate any passage which is specifically wrong." *Osher*, 1991 WL 379440, at *2. There is nothing in the record to indicate the transcripts are inaccurate or incomplete other than Defendants' bare allegations of the possibility of inaccuracy and incompleteness. Additionally, unlike in *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983), where the transcripts purported to decipher inaudible portions of the recordings, these transcripts accurately reflect when the video is inaudible or unintelligible. An actual designation of "inaudible" in the transcript makes it less likely the transcript will mislead the Court. *United States v. Anderson*, 452 F.3d

66, 78 (1st Cir. 2006) (distinguishing *Robinson* because in *Anderson*, the government never attempted to interpret the inaudible portions of the recordings but rather specifically noted that those portions of the tape were unclear and stating, "[t]hus, the jury in this case was not able to turn to the transcripts to comprehend the unintelligible portions of the conversation . . . ."); *see also United States v. Shaba*, No. 88–1535, 875 F.2d 868, 1989 WL 43294, at *2 (6th Cir. May 2, 1989) ("The *Robinson* case reflects the concern that if the tape recordings, which are evidence, are unintelligible, the transcripts *purporting to decipher those tapes* will cease being mere aids and will become the evidence.") (emphasis added). Finally, the Court does not find that the unintelligible portions of the videos and accompanying transcripts are so substantial as to render the entire videos or transcripts untrustworthy. Accordingly, the Court finds the transcripts, as a whole, are trustworthy, reliable, and admissible.

Nonetheless, the transcripts are unnecessary given the admissibility of the videos themselves. Accordingly, the Court will admit the transcripts for the limited purpose of aiding the Court for citation purposes. That is, where appropriate in its Findings of Fact and Conclusions of Law, the Court will cite the transcript of the video rather than the video itself. Nonetheless, the Court will not cite the transcript without first independently verifying whether the portion cited is an accurate transcription of the video. For these reasons, Defendants' objection is **OVERRULED**.

III. Declaration of Doug Preisse

Plaintiffs seek to admit the declaration of Doug Preisse in which he acknowledges that he made the following statement when he was a member of the Franklin County Board of Elections in August 2012: "I guess I really actually feel we shouldn't contort the voting process to accommodate the urban—read African-American—voter-turnout machine . . . . Let's be fair and reasonable . . . ." PX 125. They further seek to admit the newspaper article in which the statement was published to provide context. PX 94. Defendants seek to exclude both exhibits on the grounds that: (1) the statement is irrelevant; (2) the declaration is inadmissible hearsay; and (3) any probative value of the statement is outweighed by its prejudicial effect.

While Defendants are correct that Preisse's declaration is irrelevant to the intent of the General Assembly in passing the challenged laws or of the Secretary in issuing the challenged directives, the statement is relevant to the Court's analysis of Plaintiffs' Voting Rights Act claim, specifically the totality of the circumstances inquiry into whether African Americans have less opportunity than other members of the electorate to participate in the political process. *See Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986).

Nevertheless, the declaration attesting to its veracity constitutes inadmissible hearsay. In so finding, the Court rejects Plaintiffs' contention that the declaration is admissible under Federal Rule of Evidence 807, as it does not constitute evidence of a material fact. *See* Fed. R. Evid. 807(a)(2). Accordingly,

the Court **SUSTAINS** Defendants' objection and excludes Exhibits 94 and 125. Additionally, Douglas Preisse's emergency motion to quash Plaintiffs' subpoenas, ECF No. 86, is denied as moot.

IV. Dr. Timberlake's Proffered Testimony

Plaintiffs' expert, Dr. Jeffrey Timberlake, authored an initial report in which he concluded that the elimination of Golden Week disproportionately affects African American voters. PX 109. Defendants' expert, Dr. McCarty, authored a rebuttal report responding to that conclusion. DX 20. Specifically, Dr. McCarty compared data regarding early voters from the 2010 and 2014 elections and concluded that the elimination of Golden Week did not significantly affect African American voter turnout. *Id.* at 3, 10–14.

At trial, Dr. Timberlake proffered testimony addressing Dr. McCarty's analysis. Tr. Trans. 153–58, 163–64, ECF No. 97. Specifically, he testified that after receiving Dr. McCarty's rebuttal report, he used Dr. McCarty's data and technique to compare the early-in-person ("EIP") voting rate in 2010 and 2014 by blacks versus whites. *Id.* Defendants object to the admission of this testimony, arguing that it constitutes an improper oral sur-rebuttal in violation of the Magistrate Judge's discovery order.

In order to address Defendants' objection, the Court must first recount the discovery dispute addressed in the discovery order at issue. The data that Dr. McCarty relied on in his rebuttal report was obtained from Clark Bensen ("Bensen"), an expert who had obtained the data in connection with *N.A.A.C.P. v.*

Husted, No. 14–cv–404 (S.D. Ohio). Tr. Trans. 147, ECF No. 97 (Coontz). Specifically, Bensen had collected data for the 2008, 2010, 2012, and 2014 elections, but he provided analysis of only the 2010 and 2014 data to Dr. McCarty. *Id.* at 144 (Voigt). Defendants initially produced only the 2010 and 2014 data to Plaintiffs in discovery. Upon Plaintiffs' motion to compel, the Magistrate Judge ordered Defendants to produce the 2008 and 2012 election data Bensen collected, but she declined to permit Plaintiffs to submit supplemental reports. Order, ECF No. 56; Tr. Trans. 144, ECF No. 97 (Voigt).

Defendants contend that Dr. Timberlake's testimony constitutes a supplemental expert report in violation of the Magistrate Judge's Order. Plaintiffs' contend that Dr. Timberlake's testimony is not a supplemental expert report but rather proper rebuttal testimony not precluded by the Magistrate Judge's Order.

The cases Plaintiffs cite largely fail to support their position because in most of those cases, courts were deciding whether to permit true rebuttal testimony in response to an opposing party's primary expert. *See* Pls' Evidentiary Brief 52–55, ECF No. 112 (citing cases). In this case, however, Plaintiffs are not asking to admit rebuttal testimony to Defendants' primary expert—Dr. McCarty was designated only as a rebuttal expert for the defense. Thus, Dr. Timberlake's proffer is presumably sur-rebuttal, rather than rebuttal, testimony. Thus, most of the cases regarding rebuttal testimony cited by Plaintiffs are inapposite.

However, as a few of those cases note, and as the Court's own research has confirmed, the admissibility of Dr. Timberlake's proffer depends on whether Dr. McCarty was serving as a true rebuttal witness or whether he should have been designated, at least for the testimony to which Dr. Timberlake wants to respond, as a primary expert. If Dr. McCarty's testimony was not itself true rebuttal testimony, then he should have been identified as a primary expert, and Dr. Timberlake's proffered testimony is permissible as rebuttal testimony. *See, e.g.*, *Carroll v. Allstate Fire and Cas. Ins. Co.*, Case No. 12–cv–7 (D. Colo. Oct. 4, 2013) (ECF No. 103 of that docket) (sustaining the plaintiffs' objection to a magistrate judge's opinion and order denying plaintiffs' experts' "surrebuttal" testimony after finding that the proffered testimony is more appropriately characterized as "rebuttal" testimony because the defendant's "rebuttal" expert should have been characterized as an "affirmative" expert).

The Court need not determine whether Dr. McCarty was improperly designated as a rebuttal rather than an affirmative expert. His opinion arguably went beyond the bounds of rebuttal testimony when, in addition to attacking Dr. Timberlake's analysis, Dr. McCarty then offered testimony about conducting his own, different analysis using individual, rather than aggregate, data for years different than those used by Dr. Timberlake. *See Duff v. Duff*, No. 4–345, 2005 WL 6011250, at *4–*5 (E.D. Ky. Nov. 14, 2005) (quoting *TC Sys. Inc. v. Town of Colonie, N.Y.*, 213 F. Supp. 2d 171 (N.D.N.Y. 2002)). Because this testimony arguably exceeded the bounds of rebuttal testimony, the Court will admit Dr.

Timberlake's proffered testimony out of fairness, and it matters not whether the Court chooses to admit it as sur-rebuttal testimony or characterizes it as true rebuttal testimony to portions of Dr. McCarty's opinion that should have been made in a primary expert disclosure. In so doing, the Court rejects Defendants' argument that the testimony is inadmissible under Rule 702. Defendants' objection is therefore **OVERRULED**.

V. Plaintiffs' Exhibit 92

Defendants object to the admission of Plaintiffs' Exhibit 92, a photograph of a voter fraud billboard that reads "Voter Fraud is a Felony! Up to 3 ½ YRS & $10,000 Fine," followed by an excerpt from Dr. Timberlake's expert report. *See* PX 92; Tr. Trans. 75, ECF No. 96. At trial, the Court admitted the billboard but excluded the excerpt. Tr. Trans. 75, ECF No. 96. The Court permitted the parties to further brief the objection in post-trial briefing.

Having reviewed the briefing, the Court reaffirms its ruling at trial. The billboard does not constitute inadmissible hearsay, as it is not offered for the truth of the matter asserted. Moreover, the evidence is relevant to the Court's analysis of Plaintiffs' Voting Rights Act claim regarding whether the totality of the circumstances suggests that African Americans have less of an opportunity than other members of the electorate to participate in the political process. Defendants' objection is therefore **OVERRULED**.

VI. Plaintiffs' Exhibits 97 and 98

Defendants object to the admission of Plaintiffs' Exhibits 97 and 98, emails that Matthew Damschroder authored while employed by the Franklin County Board of Elections. The Court **SUSTAINS** Defendants' objection on relevance grounds and declines to admit the emails as business records. Even assuming the emails were relevant to Plaintiffs' invidious discrimination claim, the evidence would not change the Court's analysis.

The Clerk shall terminate ECF Nos. 75, 76, and 86.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT