Multiple Documents

Part	Description
1	13 pages
2	Exhibit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, et al., Defendants.	**UNITED STATES' OPPOSITION TO PARTS FOUR AND FIVE OF DEFENDANTS' MOTION IN LIMINE** Civil Action No. 1:13-CV-658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Civil Action No. 1:13-CV-660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 1:13-cv-861

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE PARTS FOUR AND FIVE.

I. INTRODUCTION

The United States respectfully submits this brief in opposition to parts four and five of Defendants' Motion in Limine, which moves to exclude expert testimony on intentional discrimination, as well as evidence or testimony that relies on newspaper articles. ECF No. 287, 13-cv-861.[1] This Court should deny these portions of Defendants' motion because the expert testimony offered by the Plaintiffs in this case easily satisfies the standard for the admissibility of expert testimony established by the Federal Rules of Evidence. Moreover, the sources relied on by Plaintiffs' and their experts to prove a discriminatory purpose on the part of the North Carolina General Assembly are vital to a proper understanding of the intent behind the enactment of HB 589, and are admissible.

To evaluate the North Carolina General Assembly's purpose, this Court is required to make an inquiry into the motivation for the passage of HB 589 under the analytical framework set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), including any direct and circumstantial evidence of discriminatory intent. The evidence at issue is both relevant and admissible to provide this Court with a complete picture of the direct and circumstantial evidence of the North Carolina General Assembly's discriminatory intent. Thus, it is not surprising

[1] In these portions of their motion in limine, Defendants seek to exclude expert testimony relating to discriminatory purpose (part 4) and certain newspaper articles on which Plaintiffs' experts relied (part 5). *See* Mem. In Support of Defs.' Motion in Limine at 7-11, ECF No. 288, 13-cv-861. In addition, the United States supports the private plaintiffs' opposition to Defendants' Motion in Limine in its entirety.

that Defendants have failed to bring to the attention of this Court any case in which such testimony has been ruled inadmissible. Thus, this Court should deny the Defendants' motion and fully consider this evidence as it reaches its determination in this case.

II. ARGUMENT

A. Discriminatory Purpose is a Proper Subject for Expert Opinion and a Subject About Which the United States' Expert is Eminently Qualified to Opine.

Defendants seek to preclude Plaintiffs' experts' testimony on discriminatory purpose on the ground that it purportedly constitutes an impermissible legal conclusion. This argument is flawed. Rather Plaintiffs' experts' testimony assists the Court in resolving highly relevant and unusually complex factual questions concerning the intent of the North Carolina General Assembly, while also remaining well within the confines of admissible expert testimony.

To begin, Defendants are flatly wrong to claim that discriminatory purpose is a legal conclusion. In *Rogers v. Lodge*, 458 U.S. 613 (1982), the Supreme Court held exactly the opposite. Pointing to its then-recent decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), that a finding of "an intent to discriminate on racial grounds" in a Title VII case "is a pure question of fact," *id.* at 622 (quoting 456 U.S. at 288), the Court expressed itself "of the view that the same . . . standard applies" to findings that an election system "is being maintained for discriminatory purposes," *id.* at 623. *See also, e.g.*, *Jones v. City of Lubbock*, 727 F.2d 364, 371 (5th Cir. 1984) (treating discriminatory purpose in a case under the Voting Rights Act as a question of fact). Thus, the only real

question is whether this particular factual question is one on which expert testimony can assist the court's analysis. It is.

Federal Rule of Evidence 702 governs the admissibility of expert testimony. Under Federal Rule of Evidence 702, a witness may provide expert opinion testimony if she is "qualified as an expert by knowledge, skill, experience, training, or education," Fed. R. Evid. 702, and if her testimony is "relevant and reliable." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). It is well-settled that expert witnesses may provide opinion testimony about any relevant factual issue in a case, including outcome-determinative factual disputes. Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue."); *S.E.C. v. Johnson*, 525 F. Supp. 2d 70, 78 & n.8 (D.D.C. 2007) ("Although [a] particular factual conclusion is associated with one of the more significant factual disputes between the parties, that does not make it off limits for expert opinion."). Further, expert testimony is relevant if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 591 (1993). And expert testimony is reliable if it employs scientifically valid reasoning or methodology that is properly applied to the facts of the case. *Id.* at 592-93.

In this case, the expert testimony the United States seeks to introduce meets all those criteria. It employs well-developed social scientific methods to assist this court in answering the question whether the North Carolina General Assembly acted, at least in part, with a racially discriminatory purpose. Testimony on the North Carolina General Assembly's intent is both highly relevant to the court's resolution of this case and a

proper subject of expert testimony. "[A]ssessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'" *Bossier Parish I*, 520 U.S. at 488 (quoting *Arlington Heights*, 429 U.S. at 266). Beyond looking at evidence of the effect of a voting change on the ability of minority voters to participate equally in the political process, a court must assess: the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; the sequence of events leading up to the decision; and whether the challenged decision departs, either procedurally or substantively, from the normal practice. *See id.* (quoting *Arlington Heights*, 429 U.S. at 266-268). Finally, a court must examine the contemporaneous statements and viewpoints held by the decision-makers. *See id.*

Courts in voting rights cases routinely admit expert testimony concerning discriminatory intent and the history of discrimination in voting. *See, e.g.*, *Cromartie v. Hunt*, 526 U.S. 541, 547-48 (1999) (discussing intent evidence); *United States v. Blaine County*, 363 F.3d 897, 912-913 (9th Cir. 2004) (discussing expert testimony on history of discrimination); *Garza v. County of Los Angeles*, 918 F.2d 763, 767, fn.19 (9th Cir. 1990); *Hall v. Louisiana*, No. 12-00657-BAJ-RLB, 2015 WL 3604150, at *14 (M.D. La. June 9, 2015) (discussing expert testimony on history of racial discrimination); *Veasey v. Perry*, No. 13-CV-00193, 2014 WL 5090258, at *2, 21 (S.D. Tex. Oct. 9, 2014) (crediting expert testimony on history of discrimination in voting and on discriminatory purpose evidence, in the course of finding discriminatory purpose), *stay granted on other grounds*, 769 F.3d 890 (5th Cir. 2014); *Texas v. United States*, 887 F. Supp. 2d 133, 161

(D.D.C. 2012) (relying in part on expert testimony in finding discriminatory purpose), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013); *United States v. Brown*, 494 F. Supp. 2d 440, 452 & n.13 (S.D. Miss. 2007) (crediting discriminatory purpose testimony offered by expert, in the course of finding discriminatory purpose), *aff'd*, 561 F.3d 420 (5th Cir. 2009); *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 286 (D.S.C. 2003) (discussing expert testimony on history of racial discrimination); *Johnson v. DeSoto Cnty. Sch. Bd.*, 995 F. Supp. 1440 (M.D. Fla. 1998) (discussing intent evidence); *Bolden v. City of Mobile, Ala.*, 542 F. Supp. 1050, 1075 (S.D. Ala. 1982) (same). Courts have also found that such experts satisfy the requirements of Rule 702. *See, e.g., Perez v. State of Texas, No.* 11-CA-360 (W.D. Tex. July 9, 2014) (three-judge court) (denying motion to exclude expert testimony on discriminatory purpose in voting rights case) (order attached); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1005 (D.S.D. 2004) (finding discriminatory purpose expert in voting rights case had education, training, skill and knowledge to make him a reliable expert and satisfy Rule 702 and *Daubert*).

In this case, the United States offers Dr. Steven F. Lawson's expert testimony to assist this Court in determining whether the North Carolina General Assembly had a discriminatory purpose when it enacted HB 589. Dr. Lawson's declarations address the evidence in the legislative record, in the media, and in other non-confidential sources concerning HB 589's purpose to determine whether there is evidence that the legislature intended to disenfranchise minority voters who disproportionately relied on the voting processes that HB 589 eliminated. Dr. Lawson's declaration concludes that evidence

exists that the legislature intended to discriminate against minority voters in passing HB 589. That said, it stops well short of drawing conclusions as to the legal implications of this finding. In fact, Dr. Lawson specifically noted that he hoped that his "analysis *will assist* the court in assessing the degree to which a racially discriminatory intent was among the factors underlying the 2013 adoption [of HB 589]." PX 47 Lawson PI Decl. at ¶ 7 (emphasis added).

Furthermore, Dr. Lawson's knowledge, skill, experience, training, and education undoubtedly meet Rule 702's requirements. Dr. Lawson is a Professor Emeritus at Rutgers University, having also taught in and chaired the History Departments of the University of South Florida and the University of North Carolina-Greensboro. *See* PX 47 Lawson Decl. at ¶ 1, 2; *Curriculum Vitae*, Steven F. Lawson, attached as Ex. A. Dr. Lawson is a "specialist in twentieth-century American History" and has "written extensively on the civil rights movement and black politics, particularly in the period since World War Two." *Id.* at ¶ 3. He has also "published two award-winning books, *Black Ballots: Voting Rights in the South, 1944-1969* (1976) and *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982* (1985)." His other books, *Running for Freedom: Civil Rights and Black Politics Since 1941*, 4th edition (2014) and *Debating the Civil Rights Movement, 1945-1968*, 2nd edition [with Charles Payne] (2006) "are used widely in colleges throughout the country." *Id.* In addition, his "publications also include thirty journal articles, book chapters, and book essays." *Id.* As a leading scholar in his field Dr. Lawson "participated as an academic consultant in the making of the television documentary film series *Eyes on the Prize, Parts 1 & 2*, which aired on Public

Broadcasting System and won numerous awards." *Id.* at ¶ 4. Defendants have not questioned Dr. Lawson's qualifications as a specialist in twentieth-century American History.

Dr. Lawson's declaration provides this Court with a sophisticated and broadly-derived assessment of the contemporary historical context in which HB 589 was passed and signed, to render his conclusion that this action was taken with a racially discriminatory purpose. His declaration covers the full range of factual evidence that supports this finding of intentional discrimination. It properly leaves to the court the question what legal consequences flow from that finding. Accordingly, his testimony falls well within the proper scope of expert opinion under Rule 704(a) as well as meeting Rule 702's requirements.[2]

B. Plaintiffs' Reliance on Newspaper Articles Does Not Constitute Inadmissible Hearsay.

Throughout this case, Defendants have strenuously objected to any discovery involving members of the legislature. For over a year, and through numerous rounds of briefing and argument, they resisted disclosing legislator emails—even emails to and from outside third parties—on the basis of legislative privilege. *See e.g.* Memorandum Order at 3-8, ECF No. 219, 13-cv-861. They also resisted Plaintiffs' deposition subpoenas on the same ground. *See* ECF No. 44, 13-cv-861 (Motion to Quash Subpoenas to State Legislators). Now, Defendants object to Plaintiffs' use of public statements made by legislators and recorded in contemporaneous news articles to

[2] Moreover, Defendants have not brought to the attention of this Court any instances in which peers of Dr. Lawson have criticized the methodology he employs in this case.

determine whether HB 589 was motivated, at least in part, by an impermissible intent. Defendants cannot have it both ways.

In their declarations, Plaintiffs' experts rely on a well-accepted qualitative method to describe the intent with which an historic and troubling change to North Carolina's election law, HB 589, was adopted. Their methods are anchored to and drawn from the legislative record, well-established social science literature, reliable demographic data, media (including pertinent newspaper articles and press releases), and other non-confidential sources. Plaintiffs' experts clearly may rely upon newspaper articles and the quotations recorded therein to form their opinions. Under the Federal Rules of Evidence, expert witnesses may base opinions on a particular type of evidence "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Fed. R. Evid. 703. In particular, social scientists, such as the Plaintiffs' experts, reasonably may rely upon newspaper articles. *See Katt v. City of N.Y.*, 151 F. Supp. 2d 313, 357 (S.D.N.Y. 2001); *cf. Scott v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998) (holding that a sociologist, who was proffered as an expert in the anti-cult movement, was permitted to rely upon newspaper articles); *Mann v. Univ. of Cincinatti*, 114 F.3d 1188, at *2 (6th Cir. 1997) (holding that a psychological expert was permitted to rely upon newspaper articles); *Bolden v. City of Mobile, Ala.*, 542 F. Supp. 1050, 1060-66 (S.D. Ala. 1982).

For his part, the United States' expert Dr. Lawson noted that he "supplemented [primary source materials from the North Carolina General Assembly and the State Board of Elections] with another primary source commonly used by historians: contemporary

newspapers." PX 47 at ¶ 8. As he explained "[i]n conjunction with official records, newspaper articles can help scholars construct a fuller account of the actions of and comments made by participants that would otherwise be lost in explaining the events under review." *Id.* And in conducting his research, he "sampled an extensive collection of newspapers from throughout the state and compared their articles to each other for consistency." *Id.*

Evidence contained in news articles is part of the general historical context that surrounded the enactment of HB 589 and is thus highly relevant to understanding the complex question of legislative purpose in this case. *See Bethune-Hill v. Va. State Bd. of Elections*, No. 3:14cv852, 2015 WL 3404869, at *12 (E.D. Va. May 26, 2015) ("Direct evidence of discriminatory intent is not necessary to prevail [in a Voting Rights Act case]. . . . For evidentiary purposes, Plaintiffs may resort to various sources of information, including . . . 'newspaper articles' . . . ." (quoting *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011)). Furthermore, statements in newspaper articles, like any out-of-court statements, are not hearsay when they are offered as evidence of motive, intent or state of mind. Fed. R. Evid. 803(3). In this case, such statements could be offered as circumstantial evidence of what individual legislators thought, to explain what other legislators expected from the legislative process, or for actions they might or might not take, and not for the truth of the matter stated. *Id.*

Moreover, Federal Rule of Evidence 807, the "residual exception to the hearsay rule[,] exists for the circumstance '[w]hen a party seeks to introduce out-of-court

statements that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available.'" *United States v. Dunford*, 148 F.3d 385, 393 (4th Cir. 1998) (quoting *Tome v. United States*, 513 U.S. 150, 166 (1995)). Here, Plaintiffs' experts relied on statements that were widely reported by numerous reputable news sources. Defendants have not impugned the credibility or reliability of these news sources, generally; nor have they indicated that any legislator quoted in those articles questioned the accuracy of the quotations at the time. And there can be no denying that under *Arlington Heights*, contemporary statement by legislators are highly relevant to the question of legislative purpose.

Finally, the United States fully supports the private Plaintiffs' assertion that any objection on hearsay grounds to Plaintiffs' introduction into evidence of newspaper articles should be determined at the time that such evidence is offered based on the foundation provided and the purpose for which it is being offered.[3] Defendants now attempt to shield legislators' public statements by claiming, without support, that such statements are unreliable. In the circumstances of this case, Defendants, not the Plaintiffs, have continually resisted the opportunity to cross-examine legislators as to the accuracy of their statements whether contained in news articles or in any other source. Thus, the United States avers that this Court must take into account Defendants' position

[3] Further, per the joint stipulation of the parties, Defendants have waived objections to news articles, and other documentary evidence, contained in the Preliminary Injunction record. *See* ECF No. 259, 13-cv-861, ¶ 2 ("The parties agree that the exhibits identified in Exhibit A shall be incorporated into the trial record as trial exhibits."); *see also id.* Ex. A; *see e.g.*, PX0081, Laura Leslie, *NC Voter ID Bill Moving Ahead with Supreme Court Ruling*, WRAL.com (June 25, 2013).

concerning legislative privilege, and their concomitant resistance to any discovery, when determining the issue of the admissibility of the public statements of legislators contained in news articles.

III. CONCLUSION

For the reasons given above, the Court should deny parts four and five of Defendants' Motion in Limine.

Dated: July 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2015, I electronically filed the foregoing **Opposition to Motion in Limine**, using the CM/ECF system in case numbers 1:13- cv-658, 1:13- cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

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Attachment A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ; HAROLD DUTTON, JR.; GREGORY TAMEZ; SERGIO SALINAS; CARMEN RODRIGUEZ; RUDOLFO ORTIZ; NANCY HALL and DOROTHY DEBOSE

Plaintiffs

v.

STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; NANDITA BERRY, in her official capacity as Secretary of State of the State of Texas

Defendants

CIVIL ACTION NO.
11-CA-360-OLG-JES-XR
CONSOLIDATED ACTION
[Lead case]

ORDER

Pending before the Court is the State Defendants' Motion to Exclude Testimony of Plaintiffs' Experts James C. Harrington, Dr. Theodore Arrington, and Dr. Henry Flores (Dkt. no. 1057). The United States filed a response (Dkt. no. 1115); the Task Force filed a response (Dkt. no. 1119), and MALC filed a response (Dkt. no. 1110). After reviewing the motions, responses, and the applicable law, the Court finds that the State's motion should be granted in part and denied in part.

Plaintiffs designated their testifying expert witnesses on February 28, 2014. The Texas Latino Redistricting Task Force ("Task Force" plaintiffs) designated Henry Flores, Ph.D., a political scientist, to supplement his 2011 testimony and to provide testimony on whether the State of Texas acted with a discriminatory purpose when it enacted the 2013 State House plan. (Dkt. no. 969). The United States designated Theodore S. Arrington, Ph.D., a political scientist, as its expert witness to provide testimony on whether the State of Texas acted with a discriminatory purpose when it enacted the 2011 Congressional and State House plans and the persistence of voting discrimination in Texas since the adoption of the Voting Rights Act. (Dkt. no. 967). The Mexican American Legislative Caucus ("MALC") designated James C. Harrington, a civil rights attorney, as a person with expert knowledge to testify on the issue of whether there is a compelling or substantial reason the Texas Legislature or a court should not cut county lines in order to create minority opportunity state election districts should there be a necessity to do so to obtain proper representation. (Dkt. no. 966). The State Defendants seek to strike the reports of these experts and exclude their testimony prior to trial on the merits.

Defendants do not challenge the experts' qualifications. They seek to strike Mr. Harrington's expert testimony because he offers legal conclusions. They seek to strike the testimony of Drs. Arrington and Flores based on relevancy and reliability.[1]

[1]Defendants are not currently challenging Dr. Arrington's report or testimony as it relates to equitable relief under Section 3(c), but only as it relates to the constitutional challenges asserted against the 2011 Congressional and Texas House plans.

Rule 702, Federal Rules of Evidence, governs the admissibility of expert testimony. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), the Supreme Court instructed that district courts are to perform a "gatekeeping" role concerning the admission of expert testimony to protect the jury. At the outset, the Court notes that this is a bench trial. A three judge panel, not a jury, will be the trier of fact. The Court is not faced with the same concerns expressed in the *Daubert* and *Kumho Tire* line of cases because it will not have to function as a gatekeeper for a jury. *See Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000)("Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury"); *see also Whitehouse Hotel L.P. v. IRS Commissioner*, 615 F.3d 321, 330 (5th Cir. 2010)("there being no jury, there is no risk of tainting the trial by exposing a jury to unreliable evidence.").[2] The Court cannot simply abandon its duty to scrutinize expert testimony under *Daubert*, but bench trials allow far greater flexibility to hear the testimony at trial and then give the evidence whatever weight it deserves. *SmithKline Beecham Corp. v. Apotex Corp.*, 247 F.Supp.2d 1011, 1042 (N.D. Ill. 2003)(J. Posner, sitting by designation). District courts routinely take this approach, which allows the evidence to be presented in the context of trial, "where a full foundation, vigorous cross-examination, and the presentation of contrary evidence can more fully enlighten the

[2] *Accord Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009)("while *Daubert*'s standards must still be met, the usual concerns regarding unreliable expert testimony reaching a jury obviously do not arise when a district court is conducting a bench trial"); *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006)("Where the gatekeeper and the factfinder are one and the same – that is, the judge – the need to make such decisions prior to hearing the testimony is lessened"); *Deal v. Hamilton Co. Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004)("The 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial"); *United States v. Brown*, 415 F.3d 1257, 1268-69 (11th Cir. 2005)("Those barriers [to opinion testimony] are even more relaxed in a bench trial situation"); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1301 (Fed. Cir. 2002)("these concerns are of lesser import in a bench trial").

Court with regard to the value of an expert's opinion." *In re Sunpoint Securities, Inc.*, 2006 WL 6650385 *1 (Bkrtcy. E.D. Tex. Sept. 26, 2006).[3]

One notable exception is expert testimony that offers conclusions of law. Even in bench trials, testimony will be excluded prior to trial if the expert is merely providing legal opinions which invade the province of the court. *See, e.g., Enniss*, 916 F.Supp.2d at 714 (motions to exclude denied in other respects, but granted to the extent the experts were offering legal conclusions on how lease provisions should be interpreted by the court); *Rader v. Bruister*, 2013 WL 6805403 *16 (S.D. Miss. Dec. 20, 2013)(expert allowed to testify, but not about whether the defendants met their fiduciary duties, which was a legal conclusion for the court); *Lyondell Chemical Co. v. Albemarle Corp.*, 2007 WL 5527509 *3 (E.D. Tex. March 9, 2007)(allowed expert testimony, except to extent he offered legal opinion on ultimate allocation of remediation costs).

An expert opinion "is not objectionable just because it embraces an ultimate issue" to be decided by the trier of fact. Fed.R.Evid. 704(a). However, experts may not offer legal opinions or advise the Court on how the law should be interpreted or applied to the facts in the case. *See Estate of Sowell v. United States*, 198 F.3d 169, 171 (5th Cir. 1999); *see also Askanse v. Fatjo*, 130 F.3d 657, 672-73 (5th Cir. 1997). Expert testimony in the form of legal opinion invades the province of the Court and does not assist the trier of fact.

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[3] *Accord Enniss Family Realty I, LLC v. Schneider Nat'l Carriers, Inc.*, 916 F.Supp.2d 702, 713-14 (S.D. Miss. 2013); *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F.Supp.2d 1250, 1256 (M.D. Fla. 2009); *Harris v. Bruister*, 2013 WL 6805155 *18 (S.D. Miss. Dec. 20, 2013); *Clark v. Phi, Inc.*, 2013 WL 5701658*2 (E.D. La. Oct. 18, 2013); *Nassri v. Inland Dredging Co.*, 2013 WL 256747 *1 (M.D. La. Jan. 23, 2013); *Cordes v. OSG Ship Management UK, Ltd.*, 2013 WL 2355449 *3-4 (E.D. La. May 29, 2013); *In re Katrina Canal Breaches Consol. Litigation*, 2012 WL 4328354 *1 (E.D. La. Sept. 20, 2012); *Wyeth v. Apotex, Inc.*, 2009 WL 8626786 *2 (S.D. Fla. Oct. 6, 2009).

The State claims that MALC's expert, Mr. Harrington, should be precluded from testifying because he offers only improper legal opinions. (Dkt. no. 1057, p. 3). The Court has reviewed Mr. Harrington's report and agrees with the State. Mr. Harrington's report includes a legal and historical analysis on Article III, Section 26 of the Texas Constitution and how that provision may be reconciled with other provisions in the Texas Constitution, amendments to the United States Constitution, and Section 2 of the Voting Rights Act. MALC offers Harrington's testimony "to assist this Court's ultimate determination regarding how to balance the interplay between Section 2 of the Voting Rights Act and Article III, Section 26's 'whole county rule' in redistricting." (Dkt. no. 1110, p. 4). Essentially, Mr. Harrington is offering his opinion on how the law should be applied in this case, which is a question for the Court to decide.[4] For this reason, Mr. Harrington's testimony will be excluded.

The State defendants object to the testimony of Drs. Flores and Arrington as unreliable. The State does not dispute that Drs. Flores and Arrington have extensive experience as political scientists and have served as expert witnesses in many federal voting rights cases. However, the State asserts that their testimony does not meet the reliability test under *Daubert* because their "methodology" has not been "tested" and is "incapable of being tested" and their analysis has not been "published" or "subject to peer review." (Dkt. no. 1057, pp. 6-7). Plaintiffs assert that the experts' analysis of the facts and data is no different than the type of analysis offered by the 2011 experts in this litigation and accepted by other

[4]This same type of legal analysis could be addressed in a bench brief, and parties on both sides may submit bench briefs to assist the Court in resolving the legal issues in this case.

courts in past voting rights litigation. Plaintiffs also note that the typical *Daubert* factors cannot be mechanically applied in this case.

After reviewing the reports and the applicable law, the Court agrees with the Plaintiffs. The Flores and Arrington analysis is based on essentially the same facts and data that the 2011 experts relied upon, and the same facts and data that the Court will need to examine in making its decision on the merits. Flores also analyzes the post-2011 facts and data, which relate to the 2013 redistricting plans. Their methodology may not fit all the *Daubert* factors for scientific testimony, but it does not need to fit those specific factors to be admissible. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) (the *Daubert* factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony"); *see also Stolt Achievement Ltd., v. Dredge B.E. Lindholm*, 447 F.3d 360, 366 (5th Cir. 2006)("experts may testify on the basis of their own 'personal knowledge or experience.'")(quoting, in part, *Kumho Tire*, 526 U.S. at 149)); *United States v. Brown*, 415 F.3d 1257, 1266 (11th Cir. 2005)("The rules relating to *Daubert* issues are not precisely calibrated and must be applied in case-specific evidentiary circumstances that often defy generalization"). Ultimately, "[w]hether an expert's testimony is reliable is a fact-specific inquiry." *Burleson v. Texas Dept. of Criminal Justice*, 393 F.3d 577, 584 (5th Cir. 2004). To the extent there are any vulnerabilities in the experts' analysis of the facts and data, the State will have the opportunity to expose them on cross examination.

The State also contends the experts should not be permitted to testify about what the Legislature may have intended when it enacted the plans being challenged. The State claims

that the Court is capable of determining legislative intent and expert testimony on the issue is not helpful; in other words, the testimony does not meet the relevancy test under *Daubert.* (Dkt. no. 1057, pp. 8-12). The State argues that expert testimony about a party's "intent, motive, or state of mind" should always be excluded, but none of the cases cited by the State involved redistricting in which legislative intent was the issue. Plaintiffs assert that the experts' testimony is not simply "state of mind" testimony. Plaintiffs contend the experts are uniquely qualified to analyze voluminous facts and complex data and put it into context, and their analysis will assist the trier of fact in understanding the evidence in this case. Plaintiffs note several cases in which the courts have considered expert testimony relating to legislative purpose or intent, including the preclearance proceedings on the plans being challenged herein. (Dkt. no. 1115, p. 5).

Legislative purpose, intent, or motivation is not easy to determine because the inquiry is not limited to the subjective intent of one individual. *See Hunt v. Cromartie*, 526 U.S. 541, 546, 119 S.Ct. 1545 (1999)("The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'")(quoting, in part, *Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 266 (1977)). Evidence on legislative intent may include but is not limited to: testimonial and documentary evidence on legislative process, procedure, and tradition; voter registration data; voter turnout data; voting pattern data; historical data; geographic data; demographic data; the map drawing process; proposed and enacted plans; the details of how each district changed; and the consequences of such changes. Experts in redistricting cases

assist the trier of fact by using their knowledge and experience to piece this information together and put it in context for the court to consider. This necessarily includes any inferences or deductions that the expert may draw from the information he has reviewed and analyzed. As in all cases, the Court can give the expert's testimony whatever weight it deserves. Any expert testimony that will "assist the trier of fact to understand the evidence or to determine a fact in issue" meets the relevancy requirement. *Daubert*, 509 U.S. at 589. The proposed testimony of Flores and Arrington meets this requirement.

Counsel should caution the experts not to offer legal conclusions or comment on the subjective intent of any individual legislator or staff member. They may, of course, testify as to what they infer or deduce were the reasons behind the State's actions as long as they lay a proper foundation for such opinions. With that caveat, the State Defendants' Motion to Exclude Testimony of Drs. Theodore Arrington and Henry Flores (Dkt. no. 1057) is DENIED, but the State Defendants' Motion to Exclude Testimony of Expert James C. Harrington (Dkt. no. 1057) is GRANTED.

It is so ORDERED this 9 day of July, 2014.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE
[*on behalf of the three judge panel*]

General Information

Court	United States District Court for the Middle District of North Carolina; United States District Court for the Middle District of North Carolina
Federal Nature of Suit	Civil Rights - Voting[441]
Docket Number	1:13-cv-00660