

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

NORTH CAROLINA STATE)
CONFERENCE OF THE NAACP, *et al.*,)
)
Plaintiffs,)
)
v.) 1:13CV658
)
PATRICK LLOYD MCCRORY, in his)
official capacity as Governor of North)
Carolina, *et al.*,)
)
Defendants.)
_____)
LEAGUE OF WOMEN VOTERS OF)
NORTH CAROLINA, *et al.*,)
)
Plaintiffs,)
)
and) 1:13CV660
)
LOUIS M. DUKE, *et al.*,)
)
Plaintiffs-Intervenors,)
)
v.)
)
THE STATE OF NORTH CAROLINA, *et al.*,)
)
Defendants.)
_____)
UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) 1:13CV861
)
THE STATE OF NORTH CAROLINA, *et al.*,)
)
Defendants.)
_____)

**MEMORANDUM IN OPPOSITION TO MOTIONS BY THE UNITED STATES AND
THE NAACP TO EXCLUDE TESTIMONY BY DR. STEPHAN THERNSTROM**

On 18 January 2016, the United States filed a motion to exclude the testimony of Dr. Stephan Thernstrom. On that same date, the NAACP Plaintiffs filed a motion to exclude portions of Dr. Thernstrom's testimony which they contend relate only to issues already tried by this Court in July 2015. For reasons stated below, both motions should be denied.

BACKGROUND

On 30 December 2015, defendants served upon plaintiffs the expert report of Dr. Stephan Thernstrom. Dr. Thernstrom's academic credentials are impeccable. Thernstrom has a Bachelor's of Science from Northwestern University (1956), a Masters in History from Harvard (1958), and a Ph.D. from Harvard in History of American Civilization (1962). He has been on the faculty of many prestigious universities including Harvard, UCLA, Trinity College, and the University of Cambridge. He served as a senior fellow for the Manhattan Institute from 1999-2009. He is currently the Winthrop Professor of History Emeritus for Harvard University. He is a member of numerous professional organizations and has been awarded many prizes and grants during his very distinguished career. NAACP Plaintiffs' Motion to Strike, Ex. E, pp. 37-45.

Thernstrom has spent almost his entire professional life studying race and ethnicity. This study has included evaluating patterns of conduct by different ethnic and racial groups. Dr. Thernstrom has written or edited at least 10 books dealing with conduct and levels of achievement by racial and ethnic groups as well as countless articles on the same subject. He has been qualified as an expert in voting rights cases, cases dealing with racial preferences in education, employment discrimination, and discrimination in the provision of public services. *Id.*

Despite having a long and distinguished career which involves extensive investigation and study of the conduct and achievement levels of racial and ethnic groups, the United States

argues that Dr. Thernstrom should not be allowed to testify because he is a historian and not a political scientist.¹ The NAACP argues that Dr. Thernstrom's report should be excluded because it includes a review of prior testimony Dr. Barry Burden and Dr. Charles Stewart predicting dire consequences for minority voters because of the elimination of same-day registration ("SDR"), and out-of-precinct voting, as well as the reduction of the number of days for early voting.

Given the prior rulings by this Court on prior motions to strike expert testimony, it is hard to fathom why plaintiffs have filed this motion. Dr. Thernstrom is an eminent historian who has made a career studying behavior by racial groups. In Thernstrom's opinion, plaintiffs' experts focus only on the alleged burdens resulting from changes of the North Carolina election law without equal consideration of the benefits of voting or other factors that might motivate members of a racial group to engage in any activity including voting. Thernstrom's review of prior testimony by Stewart and Burden relates directly to the credibility of their prediction of dire consequences and insurmountable burdens they claim will result from the enforcement of North Carolina's photo ID requirement, as amended by S.L. 2015-103. Moreover, while Burden does not use the term "Calculus of Voting" in his report of December 2015, he repeatedly talks about alleged disproportionate "burdens" imposed on minorities by North Carolina's photo ID law. The Court will recall that Burden's concept of "burdens" is the key component of his calculus of voting theory. Similarly, Dr. Stewart described H.B. 589 as the greatest restriction of voting rights since the enactment of the Voting Rights Act. The credibility of testimony by these two experts on the burdens allegedly imposed by North Carolina's photo ID law is directly related to

¹ The Court will recall the extensive expert testimony by Dr. Allen Lichtman, an expert offered by the NAACP Plaintiffs. Lichtman testified on almost every issue in this case despite the fact that he is a historian and not a political scientist.

their prior predictions about SDR, out-of-precinct voting, and the reduction of days for early voting.

The expert report and testimony which Plaintiffs challenge will be offered in a trial where the judge will be the trier of fact. There is no jury to protect from alleged undue influence caused by expert testimony. *See, e.g., Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) (“When making these determinations, the district court functions as a ‘gatekeeper’ whose role is to keep experts within their proper scope, lest apparently scientific testimony carry more weight with the jury than it deserves.” (internal quotation marks omitted)); *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) (“Most of the safeguards provided for in *Daubert* are not essential in a case such as this where a district judge sits as the trier of fact in place of a jury.”); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1301-02 (Fed. Cir. 2002) (noting that a “concern underlying the rule in *Daubert* is that without this screening function, the jury might be exposed to confusing and unreliable expert testimony,” and although the court must apply the *Daubert* standards in a bench trial, “these concerns are of lesser import”).

Dr. Thernstrom is a highly credible expert witness whose testimony regarding the behaviors of minority voters will effectively dispel the testimony of plaintiffs’ expert that minority voters are less able to comply with election laws that apply to all voters without regard to race. However, in a bench trial, even should the trial court find the case for admissibility to be weak, the evidence should be admitted but given little weight. *See SmithKline Beecham Corp. v. Apotex Corp.*, 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003) (finding that in a bench trial “it is an acceptable alternative to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled,” and stating that “*Daubert* requires a binary choice—admit or exclude—and a judge in a bench trial should have discretion to admit questionable technical evidence,

though of course he must not give it more weight than it deserves”). There is no jury to protect here and the Court should consider Dr. Thernstrom’s testimony.

CONCLUSION

The Court has already allowed and considered opinion testimony by many of plaintiffs’ experts who are far less qualified to offer an opinion in a voting rights case than Dr. Thernstrom. The Court should deny plaintiffs’ motions, allow Dr. Thernstrom to give his opinion, and then give Dr. Thernstrom’s opinion the weight and credibility to which the Court finds it to be entitled.

This, the 21st day of January, 2016.

NORTH CAROLINA DEPARTMENT OF
JUSTICE

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day filed the foregoing **MEMORANDUM IN OPPOSITION TO MOTIONS BY THE UNITED STATES AND THE NAACP TO EXCLUDE TESTIMONY BY DR. STEPHAN THERNSTROM** 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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This the 21st day of January 2016.

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