

**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.)

**NAACP PLAINTIFFS’
MEMORANDUM IN SUPPORT
OF MOTION TO STRIKE IN
PART THE EXPERT REPORT
OF DR. STEPHAN
THERNSTROM**

Case No.: 1:13-CV-658

LEAGUE OF WOMEN VOTERS OF)
NORTH CAROLINA, et al.,)
)
Plaintiffs,)
)
v.)
)
THE STATE OF NORTH CAROLINA, et al.,)
)
Defendants.)

Case No.: 1:13-CV-660

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THE STATE OF NORTH CAROLINA, et al.,)
)
Defendants.)

Case No.: 1:13-CV-861

INTRODUCTION

The NAACP Plaintiffs move to strike in part the expert report of Dr. Stephan Thernstrom. The Defendants retained Dr. Thernstrom in mid-November 2015—well after the July 2015 trial—ostensibly to offer opinions in rebuttal to those offered by Plaintiffs’ experts during the Photo ID stage of the case. Indeed, as the Court made clear in adopting the Rule 26(f) report filed for this stage of the case, Defendants’ rebuttal expert reports were to be “be limited to the topics addressed in the updated [Plaintiffs’ supplemental] reports.” The 35-page report issued by Dr. Thernstrom in late December goes well beyond this scope. While Dr. Thernstrom attempts in small part to respond to the opinions offered by Plaintiffs’ experts at this stage, the majority of the report is spent re-hashing issues and analysis by Plaintiffs’ experts in previous reports issued in 2014 and early 2015. These issues were already the subject of extensive expert discovery, and were litigated during the trial this past summer. Defendants had ample opportunity to designate rebuttal experts prior to that trial, but never designated Dr. Thernstrom. Defendants’ latest disclosure and attempt to re-tread old ground is far out of time and the sections of his report that do not address Plaintiffs’ more recent expert disclosures should be stricken.¹

¹ The NAACP Plaintiffs understand that the United States is filing a motion to exclude Dr. Thernstrom’s testimony pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). While the NAACP Plaintiffs believe such motion has substantial merit, the present motion is limited to issues regarding the improper scope of Dr. Thernstrom’s opinions and testimony at this stage of the litigation.

BACKGROUND

The parties have been disclosing experts in this litigation for nearly two years. First, in conjunction with the preliminary injunction hearing in 2014, both Plaintiffs and Defendants disclosed experts in April 2014. Those experts served written reports, were deposed, and, in some cases, testified at the July 2014 hearing. Then, in advance of the trial on the merits conducted this past summer, Plaintiffs and Defendants again had the opportunity to disclose experts: Plaintiffs disclosed experts on February 12, 2015; Defendants served rebuttal reports on March 16; and Plaintiffs served sur-rebuttal reports on March 24. Notably, at the time such expert discovery was proceeding, the parties expected challenges to the Photo ID Requirement to be a part of the July 2015 trial and therefore addressed both Photo ID and non-Photo ID issues in their respective reports. The experts disclosed in the spring of 2015 were again deposed and nearly 20 such experts testified at the July 2015 trial. Although Defendants disclosed four experts prior to the July 2015 trial, Defendants did not disclose Dr. Stephan Thernstrom.

On November 4, 2015, the Court approved of the Rule 26(f) report submitted by the Plaintiffs related to the trial regarding North Carolina's Voter Photo ID Requirement, which had been deferred from consideration during the July 2015 trial. [*See* Nov. 4, 2015 Text Order adopting ECF No. 382².] That Rule 26(f) report called for the parties "to serve any updated reports of experts under Rule 26(a)(2)" no later than December 4, 2015, and further provided that "[a]ny rebuttal or supplemental expert reports must be

² All docket entries are in reference to case no. 1:13-cv-658.

served no later than December 30, 2015 and must be limited to the topics addressed in the updated reports.” [ECF No. 382, ¶ 4(d).]

In accordance with that schedule, on December 4, the NAACP Plaintiffs served brief supplemental reports from two of its experts from this past summer: Dr. Barry Burden and Dr. Lori Minnite. (*See* Exs. A and B.) Dr. Burden’s supplemental report totaled 6 pages, and Dr. Minnite’s report was just 5 pages in length. Each expert limited their analysis to the June 2015 amendments to North Carolina’s Photo ID Requirement. (*See* Ex. A at 1 (Dr. Burden describing his supplemental report as “explain[ing] how the modification of the photo ID law found in SL 2015-103 affects the conclusions I reached”); Ex. B at 1 (Dr. Minnite explaining that her “report supplements [her] February 12, 2015 expert report . . . to take account of recent changes to North Carolina’s challenged voter identification requirements”).)

On the same day, the United States submitted a report from Dr. Charles Stewart, who also testified at trial this summer. (*See* Ex. C.) Dr. Stewart’s report was limited to: (1) information available to the General Assembly before the passage of HB 589 that pertains to racial disparities in the possession of photo identification; (2) the effect of Session Law 2015-103 (“HB 836”) on the “no-match” lists that Dr. Stewart had previously evaluated for reports issued prior to the July 2015 trial; and (3) confirmation that the racial disparities in Photo ID possession existed after passage of HB 589 and HB 836.

On December 30, the Defendants served three expert reports of their own. Two of the reports—from Dr. M.V. Hood III and Dr. Janet Thornton—were supplements to reports issued before the July 2015 trial. Dr. Hood’s 6-page report analyzed the amended Photo ID Requirement, and Dr. Thornton’s 25-page report was primarily an attempt to rebut the updated matching analysis of Dr. Stewart.

Then came Dr. Thernstrom. Previously undisclosed in the litigation, Dr. Thernstrom was not retained by Defendants until “mid-November 2015.” (*See* Jan. 7, 2016 S. Thernstrom Dep. (excerpts attached at Ex. D) at 159:1-19.) At the outset of Dr. Thernstrom’s 35-page report, he described his duty as being “to assess the expert witness testimony offered by experts for the Plaintiffs in the most recent round of expert submissions at the beginning of December.” (*See* Ex. E at 3.) But Dr. Thernstrom’s analysis was not nearly so limited. Rather, Dr. Thernstrom spent the majority of his report criticizing opinions expressed by Dr. Burden and Dr. Stewart in prior reports issued before the July 2015 trial—including reports issued in April 2014, February 2015, and March 2015. For instance:

- Dr. Thernstrom attempts to address Dr. Burden’s prior opinions regarding the “calculus of voting” and “effect of habit”—two theories that Dr. Burden never discussed in his recent December 2015 report. (Ex. E at 3-6.)
- Dr. Thernstrom discusses at length the turnout in North Carolina’s general election in 2014—an election in which the Photo ID Requirement at issue in the upcoming trial was not even applicable. In doing so, Dr. Thernstrom comments on the prior analysis conducted by Dr. Stewart and Dr. Burden—analysis disclosed in those experts’ reports in April 2014, February 2015, and March 2015, but not in their December 2015 supplemental reports. (*Id.* at 7-22.)

- Dr. Thernstrom discusses the percentage of minority officeholders for various North Carolina offices—something Dr. Burden addressed previously (including at trial) but did not touch upon in his December 2015 report. (*Id.* at 22.)
- Dr. Thernstrom criticizes statistics and a matching analysis performed by Dr. Stewart in June 2015—an effort for which Defendants could have disclosed Dr. Thernstrom at the time (and indeed did disclose another expert, Dr. Thornton, to attempt to rebut at that stage). (*Id.* at 26-28.)

One need look no further than the footnotes in Dr. Thernstrom’s report to see that he is addressing primarily the Plaintiffs’ experts’ pre-July 2015 reports. (*See, e.g., id.* at nn. 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 23, and 28 (alternately citing the reports of Drs. Burden and Stewart from April 11, 2014; February 12, 2015; March 24, 2015; April 3, 2015; and June 2, 2015).) It is only on page 33 of 35, which bears the heading “The Addition of the ‘Reasonable Impediment Option’” that Dr. Thernstrom turns his attention—for two and a half pages—to the issues addressed in Plaintiffs’ experts’ December 4, 2015 reports. (*See id.* at 33-35.) Indeed, throughout the nonresponsive sections of his report, Dr. Thernstrom explicitly acknowledges that he is not responding to the only issue in the upcoming trial—the Photo ID Requirement—deploying phrases like “the Photo ID requirement, a subject I will take up later in this report.” (*See, e.g., id.* at 8.)

When he was deposed on January 7, 2016, Dr. Thernstrom admitted that he had not been retained until mid-November and that his analysis was based in part on Plaintiffs’ experts’ prior, pre-July 2015 reports. (Ex. D at 159:1-19, 164:3-165:7, 175:13-176:2.) The appendix to Dr. Thernstrom’s report, which was produced for the first time

during his deposition (*see* Ex. D at 155:24-156:7, 160:1-5), confirmed that he consulted multiple pre-July 2015 reports in preparing his latest report. (*See* Ex. F.)

ARGUMENT

The Court should exclude those portions of Dr. Thernstrom's report that respond to Plaintiffs' experts' reports submitted before the July 2015 trial (including before the 2014 preliminary injunction hearing) or which raise new issues not raised in the Plaintiffs' experts' recent reports.

In preparing for discovery related to last summer's trial, the parties negotiated and the Court approved a discovery plan requiring both sides to disclose experts and serve the appropriate rebuttal reports and sur-rebuttal reports by particular deadlines. [*See* ECF Nos. 206, 227, 230.] Defendants had the opportunity at that time to designate experts to rebut Plaintiffs' experts or to file *Daubert* motions to exclude Plaintiffs' expert reports as unreliable. Indeed, with regard to two such Plaintiffs' experts, Dr. Burden and Dr. Stewart, Defendants availed themselves of that opportunity, proffering experts who attempted to rebut Dr. Burden's and Dr. Stewart's opinions. And when Dr. Burden and Dr. Stewart testified at the July 2015 trial, they were cross-examined and the Defendants again proffered experts who attempted to rebut their trial testimony.

Having already had a full bite at the apple, Defendants now proffer a brand new expert to re-tread old ground regarding issues and opinions that they could have

attempted to rebut in advance of the July 2015 trial.³ But the Rule 26(f) report submitted by the Plaintiffs, consented to by the Defendants, and adopted by the Court expressly forbids them from doing so. The report is clear:

Expert discovery. The parties shall be entitled to serve any updated reports of experts under Rule 26(a)(2), which shall be served no later than December 4, 2015. Any rebuttal or supplemental expert reports must be served no later than December 30, 2015 and ***must be limited to the topics addressed in the updated reports.***

[ECF No. 382, ¶ 4(d) (emphasis added), adopted by Text Order on November 4, 2015.]

As described above, Dr. Thernstrom’s report goes well beyond the “topics addressed in the updated reports” served by Drs. Burden, Minnite, and Stewart, which were properly limited to the remaining issues at this stage of the case. For instance, Dr. Thernstrom spills considerable ink discussing turnout in the 2014 election—even though (a) North Carolina’s Photo ID Requirement (which is the subject of this stage of trial proceedings) was not in effect during the November 2014 election (as Dr. Thernstrom acknowledges), and (b) Plaintiffs’ experts do not address that issue in their recent reports. While that topic was the subject of substantial trial testimony as well the

³ To be clear, the NAACP Plaintiffs are not objecting on grounds that Dr. Thernstrom is a new expert at this stage—nothing in the Rule 26(f) report adopted by the Court limited the parties to submitting reports from previously disclosed experts. Rather, it is the *substance* of Dr. Thernstrom’s report that the NAACP Plaintiffs challenge. Notwithstanding that he is a new expert in the case, Dr. Thernstrom’s disclosure would have been proper had he limited his report to issues addressed in the recent supplements offered by Plaintiffs’ experts—as the Court’s scheduling order required. Likewise, the disclosure of an expert from this past summer would have been *improper* had that expert (like Dr. Thernstrom) failed to limit his or her disclosure to the topics addressed in the Plaintiffs’ experts’ reports.

Plaintiffs' post-trial proposed findings of fact filed this past summer, *see* ECF No. 364, ¶¶ 268-79, it is *not* at issue in the upcoming proceedings and—for that reason—Plaintiffs' experts did not address it in their recent reports.⁴

Similarly, Dr. Thernstrom's attempt to address social science theories that Dr. Burden first disclosed in this case in his April 2014 expert report and testified to at trial this past summer comes far too late and constitutes improper rebuttal testimony at this stage. *See Boles v. United States*, 2015 WL 1508857, *4-5 (M.D.N.C. Apr. 1, 2015) (excluding expert report that "focuse[d] on . . . a topic on which Defendant did not submit an expert report" on the ground that it "[s]imply put . . . does not qualify as rebuttal" and excluding the report). While Dr. Thernstrom *might* have been a proper expert to attempt to address Dr. Burden's (or Dr. Stewart's) opinions at an earlier stage of the litigation, his late-breaking disclosure goes beyond the scope of permissible expert disclosures for this stage of trial. Those portions of his report that fail to address topics in Plaintiffs' experts' December 2015 reports should be stricken.

Finally, it is not enough to say that certain parts of Dr. Thernstrom's analysis concern the Photo ID Requirement generally, and therefore should be permitted. By the

⁴ Although Dr. Thernstrom suggested during his recent deposition that his criticism of Dr. Burden's and Dr. Stewart's prior analysis was appropriate to the extent it concerned those experts' credibility, his analysis fails to raise anything new or, more importantly, anything related to those experts' most recent reports. Turnout data from the 2014 election was available and was discussed at length by Dr. Burden and Dr. Stewart as well as Defendants' experts Dr. Thornton, Dr. Hood, and Dr. Trende in the trial this past Summer. Defendants should not get another chance to repackage the same arguments they made at that time.

time of the the General Assembly’s late-breaking amendment to the Photo ID Requirement (just three weeks before the July 2015 trial), the parties had already engaged in ample discovery—including expert discovery—regarding the Photo ID Requirement before that trial. Had the Defendants wished to disclose Dr. Thernstrom to offer general testimony and opinions regarding the Photo ID Requirement at that time, they could have. Having failed to do so at that stage, the Defendants cannot shoehorn Dr. Thernstrom’s new analysis of the Photo ID Requirement generally into a period of expert discovery that the Court expressly limited to the *amendments* to the Photo ID Requirement and Plaintiffs’ experts’ analysis of those amendments.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court strike pages 3 (beginning with the subheading “Dr. Burden’s ‘Calculus of Voting’”) through 32 of Dr. Thernstrom’s December 30, 2015 report, and bar him from testifying regarding the opinions expressed on those pages at the upcoming trial.

Dated: January 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2016, I electronically filed the foregoing **NAACP PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE IN PART THE EXPERT REPORT OF 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.

/s/ Daniel T. Donovan

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