IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

SYLVIA BRUNI; TEXAS DEMOCRATIC PARTY; DSCC; DCCC; and JESSICA TIEDT,

Plaintiffs,

v.

RUTH R. HUGHS, in her official capacity as the Texas Secretary of State,

Defendant.

CIVIL ACTION NO. 5:20-cv-00035

DEFENDANTS' OPPOSED MOTION TO EXCLUDE THE EXPERT DECLARATION AND TESTIMONY OF DR. ALLAN LICHTMAN

"[Allan] Lichtman's ultimate opinions on legislative intent . . . constituted nothing more than his attempt to decide the ultimate issue for the court, rather than assisting the trier of fact in understanding the evidence or any fact at issue. . . . [T]he court doubts seriously that this is the proper role for expert testimony. . . . Second, and independently, the court disregards Dr. Lichtman's opinions because his approach was single-minded and purposefully excluded evidence that contradicted his conclusions. . . . Third, Dr. Lichtman refused to consider that legislators can have legitimate policy differences over these election mechanisms unrelated to race[.]" *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 494-97 (M.D.N.C. 2016), *rev'd and remanded sub nom. N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

So too here. Dr. Lichtman admits that he used the same methodology to analyze the same issues in this case as he did in *McCrory*. Ex. 1 at 290:12–291:7. His declaration is nothing more than legal conclusions based on unreliable and biased methods. As such, it is not competent evidence.

NATURE AND STAGE OF THE PROCEEDINGS

On June 1, 2017, Governor Abbott signed HB 25, a bill abolishing straight ticket voting in Texas elections. Nearly three years later, Plaintiffs filed suit challenging HB 25. On March 30, 2020, Plaintiffs moved for a preliminary injunction and attached a declaration from Dr. Lichtman in support. The Secretary now moves to exclude Lichtman's declaration as well as any testimony he may offer.

STATEMENT OF THE ISSUE

This motion presents a single issue: Should the Court exclude the declaration and testimony of Plaintiffs' expert Dr. Allan Lichtman? The answer is yes because Lichtman presents an improper and unreliable legal opinion.

The party seeking admission of expert testimony must establish that "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

"[E]xpert testimony is admissible only if it is both relevant and reliable." *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002). That is the "overarching concern" when assessing the admissibility of expert testimony. *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 227 (5th Cir. 2007) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

ARGUMENT AND AUTHORITIES

I. Lichtman Offers Impermissible Legal Opinion

It is well-established that "an expert may never render conclusions of law." *Goodman v. Harris Cty.*, 571 F.3d 388, 399 (5th Cir. 2009); *Snap-Drape, Inc. v. C.I.R.*, 98 F.3d 194, 198 & n.8 (5th Cir. 1996) ("We have repeatedly held that [Rule 704(a)] does not allow an expert to render conclusions of law." (collecting cases)). Experts also may not opine on how the law should be applied in a particular case;

that is a question for the factfinder. *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997). Courts exclude expert testimony on that basis. *See, e.g.*, *Arredondo v. Flores*, No. L-05-191, 2008 WL 11393147, at *7 (W.D. Tex. July 9, 2014).

But that is exactly what Dr. Lichtman does in his report and deposition testimony—so much so that he *twice* disclaims offering a legal conclusion.[1] ECF 19-2 at 2, 8. Lichtman's report reads like a legal brief in which he purports to apply "the *Arlington Heights* methodology" and "Senate Factors" to conclude that:

> 1) The law abolishing the option in Texas for straight-ticket voting (HB 25) was adopted with the intent to limit African American and Hispanic voters' political participation.
> 2) The totality of circumstances, as gauged by the Senate Factors, demonstrate that the elimination of straight-ticket voting will cause an inequality of opportunity for African American and Hispanic voters to participate fully in the political process in Texas and elect candidates of their choice.

ECF 19-2 at 2. No doubt, these are the exact legal holdings the Plaintiffs are hoping for in this case, which makes sense given that Dr. Lichtman—in lieu of any sort of scientific or quantitative analysis—simply conducted a legal analysis under two distinct legal frameworks.

Dr. Lichtman is "a political historian," and his "degree is in history and [his] appointment is as distinguished professor of history." Ex. 1 at 229:20–230:3. But Dr. Lichtman explicitly admits that he does not use the frameworks for the "Arlington Heights Analysis" and the "Senate Factors" in his professional, scholarly work. Ex. A. at 251:12–252:14. He explains that he only uses these "methodologies" "in the context of litigation." *Id.* The risks of allowing someone without proper legal training to conduct such analyses are apparent in Dr. Lichtman's methodology and further justify excluding him.

[1] Ironically, what constitutes a legal opinion is, itself, a legal opinion. *United States v. Keys*, 747 Fed. Appx 198, 207 (5th Cir. 2018).

His deposition testimony confirms that the "methodology" he employed to render his expert opinion was nothing more than his own attempt at applying the *Arlington Heights* factors and "Senate Factors." Ex. A at 33:6–14 (agreeing that "for this case [Dr. Lichtman] did do an Arlington Heights analysis" in order to "determine whether the Texas legislature acted with discriminatory intent when it passed HB 25"); *id.* at 189:22–190:3 (explaining that "every piece of legislation has a purpose and it is the Arlington Heights framework that enables you to decide whether that purpose included intentional discrimination"); *id.* at 37:20–38:2 (describing his process as using "the basic guidelines of Arlington Heights"); *id.* at 115:20–23 (explaining that "my analysis – Arlington Heights are a guideline and my analysis is both based on Arlington Heaths and my methodology as a practicing historian of 50 years"); *id.* at 251:3–11 (explaining that Dr. Lichtman uses the Senate Factors to analyze "whether or not there are these impediments. . . . in the context of a voting rights case").

Lichtman identifies no other methodology for his opinion—outside his caveat that he "bring[s] to bear on that 50 years of experience as a historian"—and his report simply tracks the *Arlington Heights* factors and Senate Factors. ECF 19-2 at 6-8 ("This report uses the *Arlington Heights* factors only to assess intentional discrimination in, and disparate impact of, the challenged repeal of straight-ticket voting. This report likewise uses the Senate factors only to assess the totality of circumstances that inform whether eliminating straight-ticket voting in Texas will impede minority voting opportunities."). Thus, he attempts to instruct the Court on the proper application of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and the proper application of the Senate Factors.

But he, in fact, gets it wrong. The plaintiffs in this case must "overcome the presumption of legislative good faith" to show that the Texas Legislature acted with discriminatory intent when it passed HB 25. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Dr. Lichtman did not apply that presumption in his analysis.

> Q. When you were doing your Arlington Heights analysis of the legislature's intent in 2017 in passing HB 25, did you apply a presumption of good faith?
>
> A. **I don't know what that means.**
>
> …
>
> Q. Okay. As a political historian doing the type of analysis that you do in this case, do you have an understanding of what presumption of good faith means in doing an intent analysis?
>
> A. I don't know how you mean it but [] I'll tell you how I approached this. Maybe that'll answer your question before. Which is to look at the evidence and see where it leads. . . . what did the proponents of HB 25 say in justification? How does that stand up to analysis? **There's no presumption, you know, for or against.** You look at the evidence and see where it leads.

Ex. A at 283:14–18 (emphases added), 284:10–285:1 (emphasis added).

Lichtman is not an attorney, and even if he were, his attempted application of legal standards is unhelpful, wrong, and out of bounds for an expert.

II. Lichtman's Testimony Is Unreliable

Dr. Lichtman's testimony is inadmissible for the independent reason that he has not shown it to be "the product of reliable principles and methods," as required by Rule 702(c). An expert must identify the methodology employed and demonstrate that it is "reliable" and was "reliably applied." Fed. R. Evid. 702. Establishing the reliability of an expert's testimony "requires some objective, independent validation of the expert's methodology." *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998). The reliability of expert testimony may be assessed by many factors, including "whether the expert's theory or technique: (1) can be or has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error or standards controlling its operation; and (4) is generally accepted in the relevant scientific community." *Burleson v. Tex. Dep't of Criminal Justice*, 393 F.3d 577, 584 (5th Cir. 2004). An "expert's testimony must be reliable at each and every step or else it is inadmissible," and that reliability requirement "applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the

facts and the conclusion, et alia." *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 354 (5th Cir. 2007) (internal quotation marks omitted). Lichtman's expert testimony falls well short of this standard for several reasons.

Lichtman offers no reliable, testable methodology for reaching his conclusions. *Arlington Heights* and the "Senate" factors are legal standards, not a valid methodology for an expert witness, and applying legal standards to facts is a role reserved for the factfinder. Moreover, Lichtman offers nothing to validate his so-called methodology beyond his bare, unsupported assurance that "[t]he methodology I employ here and the opinions I have reached are the product of standard principles and methods used in my field of history, which are consistent with Supreme Court guidelines[,] *Arlington Heights*, and the Section 2 Senate Factors." ECF 19-2 at 2. Notably, he does not cite any "historians in [his] field" who could verify the validity of his methods or any example of a historian applying the *Arlington Heights* factors as he does in his report. *See id.* And there is no way to test his analysis to objectively validate his application of those factors. Such unexplained, unverifiable, and untestable analysis is fundamentally inconsistent with the requirements of Rule 702 and *Daubert*. Assurances by an expert that "he has utilized generally accepted scientific methodology is insufficient." *Moore*, 151 F.3d at 276. "An expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and this estimate must be testable." *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005).

Lichtman's conclusions cannot be verified or replicated; therefore, there is no way for this Court to judge the reliability of his analysis or the accuracy of his conclusions. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Kumho Tire*, 526 U.S. at 157 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)); *see also Joiner*, 522 U.S. at 146 ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."). An

expert's credentials and an opinion that "it is so" is insufficient. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987). Such unsupported opinion offers no assistance to the factfinder and should be excluded. *Id.*

Further, courts have not responded well to Lichtman's unreliable "expert" work, often striking the exact type of testimony Lichtman has offered here. *One Wisconsin Inst., Inc. v. Thomsen,* 198 F. Supp. 3d 896, 917 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019) ("Defendants contend that Dr. Lichtman's testimony invaded the province of the court by offering an opinion on an ultimate issue in the case, and that it was therefore not a proper topic for expert analysis. The court agrees."); *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 605 (E.D. Va. 2016), *aff'd*, 843 F.3d 592 (4th Cir. 2016) (holding against Lichtman's opinion that Virginia passed voter ID laws with discriminatory intent under *Arlington Heights* and the "Senate" factors and noting that he only relies on circumstantial evidence); *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227 (M.D. Ala. 2013), *judgment entered*, 2:12-CV-1081, 2013 WL 6913115 (M.D. Ala. Dec. 20, 2013), *and vacated and remanded*, 575 U.S. 254 (2015) (explaining that Dr. Lichtman failed to consider whether factors other than race motivated the legislation, instead claiming that various patterns "suggest" race as a motivating factor).

Dr. Lichtman confirmed in his deposition that he used the same "methodology" in *North Carolina State Conference of the NAACP v. McCrory*, *One Wisconsin Institute, Inc. v. Thomsen,* and *Lee v. Virginia State Board of Elections* that he used in the current case. Ex. A at 290:12–292:13. Much like he did in North Carolina, Dr. Lichtman has only searched out the facts that support his preconceived assumptions about this case. Ex. A at 36:1–37:18 (admitting that Lichtman searched only for "examples of ways in which Texas legislature *has* acted with discriminatory intent") (emphasis added). In fact, when asked whether he had found *any* sources that were contrary to his conclusion that Texas acted with discriminatory intent in passing HB 25, Lichtman responded, "It's not a meaningful

question" and refused to discuss or answer any questions about things he chose not to include in his report. *Id.* at 49:11–25, 205:18–20 (Q. "Why did you not include any of [the Bexar County Elections Clerk's] testimony in your report? A. "I don't answer 'not' questions like that."). This biased approach ultimately ensured Lichtman's eventual opinion would be that Texas acted with discriminatory intent. Thus, it can come as no surprise that Dr. Lichtman, in working as a testifying expert witness in 13 cases over the past four years, has *never* found that a Republican-controlled legislative body lacked discriminatory intent when it passed whatever law was being challenged. *Id.* at 289:25–290:11.

With no way to test or evaluate the reliability and accuracy of Lichtman's analysis—particularly in light of the single-minded, biased approach to this analysis—the Court cannot rely on his testimony.

CONCLUSION

Defendants respectfully request that the Court exclude Dr. Lichtman's report and testimony.

Date: June 6, 2020

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

I certify that on June 5, 2020, I conferred with counsel for Plaintiffs about the foregoing motion. Plaintiffs are opposed.

/s/ Todd Lawrence Disher
TODD LAWRENCE DISHER

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2020, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties.

/s/ Todd Lawrence Disher
TODD LAWRENCE DISHER