IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FAIR FIGHT ACTION, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official Capacity as Secretary of State of Georgia, *et al.*, Defendants.	)	Civil Action File No. 1:18-cv-05391-SCJ

DEFENDANTS' RESPONSE TO MOTION TO EXCLUDE TESTIMONY OF DR. JANET THORNTON

Defendants Brad Raffensperger, in his official capacity as Secretary of State of the State of Georgia (the "Secretary"), and State Election Board Members Rebecca Sullivan, David Worley, and Anh Le, also sued in their official capacities (collectively, the "Defendants"), oppose the motion of Plaintiffs Fair Fight Action, et al. ("Plaintiffs") to exclude the testimony of Defendants' expert witness Dr. Janet Thornton ("Motion").

I. Introduction

Dr. Thornton is a highly qualified statistician who provided expert critiques of Plaintiffs' proffered expert, Dr. Michael Herron. Doc. No. [277]. Because Dr. Thornton demonstrated the logical and analytical fallacies with

Dr. Herron's preset conclusions, Plaintiffs seek to exclude her testimony on the flimsiest of grounds. In fact, Plaintiffs do not even challenge much of Dr. Thornton's analysis, including that Dr. Herron selectively utilized 2016 election data after omitting it completely.

The flaws in Plaintiffs' Motion are easy to find. For example, Plaintiffs assert that Dr. Herron's testimony is the result of "detailed statistical analysis," Doc. [448-1] at 6, that apparently only political scientists can counter. [Id.] at 5-6. Yet, Dr. Herron himself described his analysis as mere "counting exercises." (Herron Dep. Tr. at 36:6-17; 37:3-8; 129:1-9; 146:4-12; 146:14-19; 152:17-24).[1] Similarly, Plaintiffs argue that closing or relocating polling locations can "disenfranchise" voters, but on the other hand, they claim that it takes an expert to determine that an individual who actually voted in a new polling location knows the location of it. Doc. [448-1] at 11. This is grabbing at straws.[2]

[1] The transcript of Dr. Herron's deposition is filed with the Court in this case at Doc. No. [409].

[2] Plaintiffs—who offer no less than three witnesses to testify on the law of elections, the Voting Rights Act, and the obligations of the Secretary of State—claim that Dr. Thornton cannot recognize that counties play a significant (indeed, exclusive) role in locating and moving polling locations. Doc. No. [448-1] at 12-18. Contrary to Plaintiffs' contention, this is not a legal conclusion.

Plaintiffs' strategy is obvious and impermissible. They seek to use Dr. Herron's testimony to show that the acts of non-parties, Georgia's 159 counties, have had a disparate impact on voters of color and then link that conduct to the State Defendants who played no role in the questioned conduct. The problem is, however, that Georgia law does not empower the Secretary to stop the counties from moving or consolidating polling locations. Dr. Thornton's testimony shows that Dr. Herron's analysis is incomplete and admissible if Dr. Herron is permitted to testify.

II. Abbreviated Factual Background

The facts of this case are laid out in detail in Defendants' Brief in Support of their Motion for Summary Judgment, Doc. [450-1], and Statement of Material Facts, Doc. [451], filed June 29, 2020, and need not be repeated here. For purposes of this motion, the relevant facts are as follows.

Dr. Michael C. Herron opined (1) that the impact of polling location changes in Georgia was not "racially neutral;" and (2) that polling place location changes negatively impact voter turnout. Doc. [241 at 6]. Dr. Janet Thornton, Managing Director at Berkeley Research Group, provided a rebuttal report, Doc. [277], and second rebuttal report, Doc. [277], based on her knowledge and expertise as a statistician. She concluded that Dr. Herron's aggregate, state-wide analysis ignored the variations and

individual decision-making that occur at the county level. Doc. [277 at 5]. In addition, Dr. Thornton highlights the importance of considering the 2016 election, which Dr. Herron later did, albeit on a limited basis.

III. Argument and Citation to Authority

Dr. Thornton is highly qualified and her testimony is admissible for showing analytical flaws with Dr. Herron's analysis. Obviously, if this Court grants Defendants' Motion to Exclude Dr. Herron's Testimony, Doc. [406], there would be no need for Dr. Thornton to testify.

A. Dr. Thornton is qualified to render opinions and critiques of Dr. Herron's testimony using her expertise in statistical analyses.

Dr. Thornton is Managing Director at Berkeley Research Group, a consulting firm that specializes in the application of economic, econometric, and statistical analysis. Doc. [277] at 1. She received her doctoral and master's degrees in economics from The Florida State University, and a bachelor's degree in economics and political science from the University of Central Florida. *Id*. For 30 years, Dr. Thornton has prepared analyses for litigation, regulatory compliance, and risk assessment matters. *Id*. at 2. In the areas of election issues and voting rights specifically, she has experience in comparing the racial composition of voter turnout by election type and with regards to provisional ballots. *Id*. She has also analyzed the effects of

changes in the number of early voting days and has testified with regard to simulated maps prepared in redistricting matters. *Id*.

This experience leaves Dr. Thornton well qualified to render opinions using statistical analyses, which she models to the relevant subject matter or issue. Doc. No. [277] at 2. Here she utilizes her expertise in statistical analysis to assess Dr. Herron's assertions regarding polling place closures and any alleged impact on black voters. Doc. No. [277] at 5.

First, despite Plaintiffs' assertion that Dr. Herron performed "multiple, detailed statistical analyses," Doc. No. [448-1] at 6, Dr. Herron himself repeatedly characterizes the calculations in his report as simple "counting exercises." (Herron Dep. Tr. at 36:6-17; 37:3-8; 129:1-9; 146:4-12; 146:14-19; 152:17-24). He literally counted names and individuals to reach his conclusions. *Id*. While Defendants question whether any level of sophisticated expertise is required for a counting exercise, surely Dr. Thornton, who holds a Ph.D. in economics and is Managing Director for a research group that performs statistical analyses, qualifies for such a simplistic exercise. Doc. No. [277] at 21.

Second, Plaintiffs' critique that Dr. Thornton's opinions are "ungrounded in statistical analysis" is unfounded. Doc. No. [448-1] at 7. Plaintiffs' position on this point is curious considering that Dr. Thornton

utilized Dr. Herron's own programming logic in performing her analyses, (Thornton Dep Tr. at 18:11-19:12), a fact which Plaintiffs explicitly acknowledge.[3] Doc. No. [448-1] at 15. As a rebuttal witness, Dr. Thornton need not produce models or methods of her own. *Navelski v. Int'l Paper Co.*, 244 F. Supp. 3d 1275, 1302–03 (N.D. Fla. 2017) (citing *In re Zyprexa Products Liability Litigation*, 489 F.Supp.2d 230, 285 (E.D.N.Y. 2007)). Furthermore, Dr. Herron's counting exercises are another name for "descriptive statistics or descriptive comparisons, they're not analyses." (Thornton Dep Tr. at 34:23-25). It is improper to draw any statistical inference from such descriptive comparisons because there is no statistical test. (Thornton Dep Tr. at 34:25-35:4). Thus, it is actually Dr. Herron's opinions that are ungrounded in statistical analyses. Dr. Thornton is well qualified to point out this flaw.

Third, Plaintiffs make the incredibly strained argument that Dr. Thornton is not qualified to opine on election administration and voter behavior. Doc. No. [448-1] at 11-12. The criticism presumes that it takes expert testimony to opine about objectively obvious facts, including that a voter who votes in a new location knows where that location is. [Id.] at 11.[4]

[3] The transcript of Dr. Thornton's deposition has been filed with the Court in this case at Doc. No. [445].

[4] Plaintiffs criticize Dr. Thornton's conclusion that "'it is likely that voters whose polling place changed prior to the 2016 election and who then voted in

Beyond this, Plaintiffs attack Dr. Thornton's critique that Dr. Herron should have looked at the effect of polling place changes between 2014 and 2016, and between 2016 and 2018. Doc. [448-1] at 11. Dr. Herron recognized this and then—only after his deposition—amended his analysis to address this obvious omission. Doc. [294] at 35-45. Dr. Thornton then showed how he failed to apply his own analysis when it did not support his (and Plaintiffs') underlying claim. Doc. [350] at 7-16. This too requires no particular statistical expertise (though Dr. Thornton clearly possesses it); it merely shows how Dr. Herron's methodology leads to no conclusive finding and is unreliable, irrelevant, and will not assist the trier of fact.

C. Dr. Thornton's testimony will assist the trier of fact because she analyzed data at the county level and considered alternative reasons for polling place closures.

Dr. Thornton's testimony is helpful to the trier of fact because it highlights issues with Dr. Herron's methodology that result in misleading conclusions. Put simply, Plaintiffs will attempt to impugn county-made decisions on the State through Dr. Herron's testimony. Dr. Thornton

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2016 would have known of their polling place at least two years prior to the election.'" Doc. No. [448-1] at 11 (citing Doc. [277] at ¶ 27). Their criticism is that "Dr. Thornton relied on no statistical analysis for this conclusion; instead, she offered an opinion based on her understanding of voter behavior." [Id.]

highlights acts and omissions of those counties that Dr. Herron either ignored or did not fully analyze. Courts routinely reject testimony of this type, which relies on selectively chosen data tending to lend credence to the expert's theory. *In re Hanford Nuclear Reservation Litig.*, 894 F. Supp. 1436, 1450 (E.D. Wash. 1995). Thus, Dr. Thornton's opinions are highly relevant if Dr. Herron is permitted to testify.

1. *Dr. Thornton analyzed data at the county level.*

Dr. Thornton critiqued Dr. Herron's methodology that utilized an aggregate, state-wide approach. Doc. [277] at 7. His approach is misleading because it fails to account for significant variations at the county level that could have skewed the state-wide aggregate result. (Thornton Dep Tr. at 23:10-24). In other words, the aggregate, state-wide approach is an overall statistic that masks the variability at the individual county level and leads to misleading results. [Id.] Dr. Thornton, in contrast, identified and adjusted for the variation by performing calculations at the county level. (Thornton Dep Tr. at 24:3-6; 25:2-5).

With this approach, Dr. Thornton modeled the county decision-making process, reasoning it is the counties that decide locations of their respective polling places. Doc. [277] at 5-6. Accounting for the existence of different decision-makers is an importation consideration, as courts have previously

deemed the failure to do so a deficiency in statistical analysis. *Copeland v. CVS Pharmacy, Inc.*, No. CIVA 1:03CV3854 JOF, 2006 WL 2699045, at *44 (N.D. Ga. Sept. 15, 2006), aff'd, 225 F. App'x 839 (11th Cir. 2007).

Further, this analysis is not based on a legal conclusion as Plaintiffs claim. Doc. [448-1] at 14-15. The parties apparently agree that expert witnesses cannot opine on the law. This is refreshing given that Drs. Jones and Brown-Dean, and Mr. Kennedy each opine on what the law is, and what the Secretary's legal obligations are. The problem for Plaintiffs here, however, is that Dr. Thornton does not opine on the law. Even Dr. Herron recognizes the role that counties play in choosing polling locations. Doc. [241] at 10, 75.

Two additional reasons show the flaw in Plaintiffs' argument. First, one can simply read a law without opining on it. Just as with any other resource, Dr. Thornton can read a statute to determine a process and then model it. Reading the plain text of a statute does not involve interpreting the law or providing any legal conclusion on it. Second, analyzing data for variables that falsely impact results is exactly the type of analysis that statisticians such as Dr. Thornton perform to determine the accuracy of

results. Indeed, it was Dr. Thornton's charge to opine on the accuracy of Dr. Herron's analysis. Doc. [448-1] at 15.

Plaintiffs also fault Dr. Thornton for using examples of county variability to show the unreliability of Dr. Herron's statewide approach. Doc. [448-1] at 26. For example, Dr. Thornton removed Bibb County from the calculation to show the significant impact one individual county can have on the overall state-wide result. Doc. [277] at 13. This exemplar was in furtherance of her point that there is large variability in closures at the county level that skew and even reverse the overall result. [Id.]; Thornton Dep Tr. at 60:25-61:4.

Dr. Thornton's example showed Dr. Herron's state-wide analysis masks the variability between counties. In contrast, Dr. Thornton's methodology is not misleading in the slightest and Plaintiffs persuasive authority misses the mark. *United States v. Norris*, No. 1:05-cr-479-JTC/AJB, 2007 WL 9655845, at *17 (N.D. Ga. May 8, 2007) involved a psychiatrist whose methods were already deemed unreliable and attempted to extrapolate those methods to diagnose a group of individuals with various syndromes. *Holliday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1288 (N.D. Ga. 2002) involved experts who used incorrect facts, whereas Dr. Thornton used the same ones as Dr. Herron. The cases are inapposite. Dr. Thornton explained

what she did and showed the result. Dr. Thornton is testing Dr. Herron's theory and analysis, which is clearly something Plaintiffs hope to avoid. Dr. Thornton's identifications of these issues will help the trier of fact in assessing Dr. Herron's testimony.

2. *Dr. Thornton reasonably considered the reason for polling place closures.*

Dr. Thornton critiques Dr. Herron's failure to consider and adjust for the reasons polling places were closed or changed. Doc. [277] at 7-8. She argues that certain polling places should be excluded from the analysis based on the reason they were closed. [Id.] For example, if a polling place itself decided not to serve as a polling location anymore or if the facility was permanently closed or torn down, Dr. Thornton argues the closures should be excluded. [Id.] In other words, closures that were out of the control of elections officials should not be used in a study that concludes there is a racial impact of polling location closures. [Id.] at 7. In her report, Dr. Thornton identified demolished polling locations to further show why Dr. Herron should have considered the reason for polling place changes. (Thornton Dep Tr. at 40:15-41:15).

In response, Plaintiffs argue Dr. Thornton "could offer no support for her contention that the *reason* for a poll closure, rather than the fact of

closure itself, is necessary." Doc. [448-1 at 19. (emphasis in original). The reason is obvious – despite Dr. Herron's contentions that the identity of the decision-maker does not matter, Doc. [294] at ¶¶11, 13, there are multiple instances throughout the report where Dr. Herron assigns decision-making responsibility for polling place changes, and thus any alleged disparate impact of said changes, to jurisdictions' election officials. S*ee, e.g.*, Doc. [241] at ¶¶6, 12, 14. As importantly, the entire purpose of Dr. Herron's testimony is so that Plaintiffs can show a racial impact on polling location changes. Doc. [448-1] at 6, 15. But, if polling locations change because of forces of nature or other reasons that are out of the control of policymakers, Dr. Herron's conclusion is not only unreliable, it is completely misleading. Dr. Thornton rightfully points this out, and her testimony is admissible on this point.

Dr. Thornton likewise explains the relevance of the racial and political demographics of the county election boards. Doc. [350] at 2, 4-5. She opines they are another important factor in analyzing the reasons and decision-making process for polling place closures. (Thornton Dep Tr. at 26:19-30:1). Thus, Dr. Thornton recognizes that other potential factors may be influencing an outcome and need to be adjusted for in the analysis. (Thornton Dep Tr. at 41:16-42:2; *Id*. at 44:1-8). Plaintiffs argue that statewide policy makers

considered race when deciding various policies, but they now claim that Dr. Thornton cannot make the same analysis herself. Plaintiffs' logic, therefore, is plainly flawed and self-serving.

Courts have agreed that when experts fail to consider other obvious explanations for their conclusions, it weighs against admissibility or is grounds for outright exclusion. *Ballard v. Keen Transp., Inc.*, No. 4:10-CV-54, 2011 WL 474814, at *5 (S.D. Ga. Feb. 3, 2011) (failure to consider other obvious explanations weighed against admissibility of expert's testimony); *See also Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 (9th Cir.1994); *In re Denture Cream Prod. Liab. Litig.*, No. 09-2051-MD, 2015 WL 392021, at *18 (S.D. Fla. Jan. 28, 2015), aff'd sub nom. *Jones v. SmithKline Beecham*, 652 F. App'x 848 (11th Cir. 2016). At the very least, these courts have shown the admissibility and importance of testimony such as Dr. Thornton's, which identifies the alternative explanations Dr. Herron fails to consider. In this regard, Dr. Thornton's testimony will help the trier of fact in highlighting the analytical missteps and failures in Dr. Herron's testimony.

In short, Dr. Thornton's testimony will assist the trier of fact because she identifies significant issues with Dr. Herron's methodology that result in misleading results and conclusions.

D. Dr. Thornton's methodology is reliable.

Dr. Thornton's methodology is reliable as each decision she made was grounded in well thought out reasoning with the purpose of eliminating irrelevant variables and those that skew results. Plaintiffs accuse Dr. Thornton of cherry-picking evidence for not excluding from her analysis counties where the rates of closures for black voters and white voters were the same.[5] Doc. [448-1] at 24. Plaintiffs claim there would be "no comparison" to make. [Id.] This is incorrect; the comparison is that the rates were the exact same.

In analyzing and comparing the races of voters with polling place changes, Dr. Thornton excluded from her analysis the 31 counties that did not have polling place changes.[6] Doc. [227] at 15. Plaintiffs argue Dr. Thornton selectively chose this data. Doc. [448-1] at 24. Plaintiffs' persuasive authority is inapplicable and even helpful to Defendants. *In re Traysol Prod. Liabl. Litig.-MDL-1928, No. 08-MD-1928*, 2013 WL 1192300, at

[5] Further, it is Dr. Herron who plainly cherry picked his own analysis to support Plaintiffs' conclusions, and Dr. Thornton points this out in her report. Doc. [350] at 2.

[6] Plaintiffs argue Dr. Thornton assumed that no decision was made in those counties and that she should have included them because "no decision is a decision." Doc. [448-1] at 21. Plaintiffs' claim that "no decision is a decision," however, is a policy argument, not a statistical one.

*14 (S.D. Fla. Mar. 22, 2013) involved questions of a medical differential diagnosis where the Plaintiffs' expert acknowledged that he reviewed only "selections from [the] medical records prepared by … attorneys." By comparison, Dr. Thornton reviewed everything Dr. Herron did and applied different (and superior) analysis. *In re: Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019-20 (5th Cir. 1997) did not even involve a Daubert challenge, and there, the sample size was deemed not representative of future plaintiffs. Here, the debate between Drs. Thornton and Herron is whether to count counties that did not relocate or change any polling locations. In other words, it is about the correct analysis and not the sample size itself (that issue is reserved for Dr. Graves's report). Next, *Barber v. United Airlines, Inc.,* 17 Fed. App'x 433, 437 (7th Cir. 2001), involved an expert who refused to consider contraindicatory data. If anything, that describes Dr. Herron's decision not to apply all of his analysis to the 2016 data, which Dr. Thornton demonstrated guts his overall conclusions.

Plaintiffs also attack Dr. Thornton's critique of Dr. Herron's inclusion of absentee and early voters in calculations on election day turnout. Doc. [448-1] at 22. Likewise, Plaintiffs critique Dr. Thornton's argument that early and absentee voters would not be impacted by changes to where voters vote on election day. Doc. [277] at 16. The issues raised by Plaintiffs as to

Dr. Thornton's assumptions are best addressed on cross-examination and are not grounds for exclusion. *See, e.g.*, *Royale Green Condominium Ass'n, Inc. v. Aspen Specialty Insurance Co.*, 2008 WL 2279197 (S.D.Fla.) (refusing to exclude expert testimony predicated on assumptions that can be explored on cross-examination); *See also Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002); *Coles v. Jenkins*, No. CIV. A. 97-0031-C, 1998 WL 964506, at *4 (W.D. Va. Dec. 22, 1998).

Lastly, Dr. Thornton explained both in her report and in her deposition that she used Dr. Herron's same code but modified it to run by county rather than across counties (Thornton Dep Tr. 18:20-19:20; Doc. [277] at 6). Thus, Plaintiffs' argument that Dr. Thornton failed to explain her methodology is unfounded. Doc. [448-1] at 23. To the extent Plaintiffs' complaint is that Dr. Thornton did not copy and paste the actual code itself into the report, Plaintiffs are correct; however, Dr. Herron did not do so either. Additionally, providing the code was unnecessary considering Dr. Herron and presumably Plaintiffs are already in possession of it.

E. Dr. Thornton has never been excluded as an expert witness.

In a last ditch attempt to attack Dr. Thornton's testimony, Plaintiffs cite a few instances in which Dr. Thornton's expert testimony was admitted

by the court and given "limited weight," to somehow lend credence to the argument Dr. Thornton's testimony should be outright excluded here. Doc. [448-1] at 24. This argument is meritless for two reasons. First, out of 20 cases over the last four years, no court has excluded Dr. Thornton as an expert witness. Doc. [277] at ¶ 13 and Appendix A. This includes the three cases cited by Plaintiffs. Second, of the three cases, two of them (*Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio) and *Common Cause v. Lewis*, No. 18-cvs-014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019)) were redistricting cases with testimony and issues distinct from the present matter. Other courts' view of Dr. Thornton's testimony is immaterial when the issues and testimony were distinct and irrelevant to the case at hand.

IV. Conclusion

For the above reasons, Defendants respectfully request Plaintiffs' Motion be denied.

Respectfully submitted this 29th day of July, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing **DEFENDANTS' RESPONSE TO MOTION TO EXCLUDE TESTIMONY OF DR. JANET THORNTON** was prepared double-spaced in 13-point Century Schoolbook font, approved by the Court in Local Rule 5.1(C).

/s/ Josh Belinfante
Josh Belinfante

CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2020, I caused to be served the foregoing **DEFENDANTS' RESPONSE TO MOTION TO EXCLUDE TESTIMONY OF DR. JANET THORNTON** with the Clerk of Court using the CM/ECF system, which will send e-mail notification of such filing to counsel of record.

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