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

FAIR FIGHT ACTION, *et al.*, Plaintiffs, vs. BRAD RAFFENSPERGER, in his official capacity as the Secretary of State of Georgia; *et al.*, Defendants.	Civil Action No.: 1:18-cv-05391-SCJ

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE THE EXPERT REBUTTAL TESTIMONY OF PROFESSOR THOMAS BRUNELL

INTRODUCTION

This Court is aware of Defendants' motions and accompanying briefs requesting the Court exclude the expert testimony of Drs. Smith, McDonald, and Herron. Doc Nos. [405], [402], and [406]. As explained in those briefs, this Court should not consider their testimony in this case. But if this Court admits the testimony—or some part of it—Defendants submitted the expert rebuttal testimony of Dr. Thomas Brunell so that the fact finder might be made aware of the statistical and analytical shortcomings of Plaintiffs' experts. Plaintiffs approach Dr. Brunell as if he were a freestanding expert

offering his opinion in a vacuum instead of serving as a rebuttal expert. And this failure to distinguish between a typical expert report and an expert rebuttal report in response to another purported expert renders Plaintiffs' attempt to exclude Dr. Brunell's testimony difficult to comprehend.

First, Plaintiffs allege that Dr. Brunell is not qualified to offer rebuttal responses to their experts because he has not engaged in precisely the same statistical analysis on the exact subject matter of this case. But novelty on a particular subset of the broader subject in which one is an expert hardly demands a conclusion that he is unqualified. Indeed, with respect to Dr. Smith, Brunell clearly demonstrated a better underlying comprehension of the data the two analyzed, if for no other reason than that Dr. Smith inserted his own (inaccurate) assumptions whenever he encountered a data set he did not understand. Doc No. [405], p. 5.[1] If this Court admits Dr. Smith's assumptions, surely Dr. Brunell's testimony on the same data but utilizing an accurate understanding of the data points will prove useful, and aid the fact finder in their judgment on the applicable issues.

Second, Plaintiffs state that Dr. Brunell's opinions somehow go beyond the role of an expert because he is "improperly weigh[ing] the evidence like a

[1] All page citations in this brief are to the blue ECF numbers at the top of each page.

factfinder, not an expert." Doc. No. [447-1], p. 16. But Dr. Brunell does no such thing. Dr. Brunell does not offer an opinion on the legal and factual credibility of Plaintiffs' experts but instead opines on the scientific sufficiency of their analysis. As a well-qualified political scientist, this is surely something he, as a rebuttal expert, is in an appropriate position to do. It will, of course, be up to this Court as the fact finder to make the credibility determination as to which of the experts is correct. See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig., 978 F. Supp. 2d 1053, 1070 (C.D. Cal. 2013) (holding that where conflicting expert testimony creates a battle of the experts, "the resolution… is properly left to the [factfinder].")

Finally, Plaintiffs demand the Court bar Dr. Brunell's testimony because it will not be "helpful" to the fact finder. As discussed below, while Dr. Brunell's testimony may not be helpful to the Plaintiffs' case, it is certainly highly relevant given the testimony provided by their experts and will undoubtedly assist this Court in navigating the often scientifically dubious analysis they undertake to support Plaintiffs' experts' opinions.

ARGUMENT AND CITATION TO AUTHORITY

This Court is well aware of the relevant Daubert standard on expert opinion admissibility, and it need not be repeated here. Plaintiffs' Motion

improperly applied this standard with respect to Dr. Brunell's expert rebuttal testimony.

I. Dr. Brunell is qualified to offer expert rebuttal reports on the topics discussed by Smith, McDonald, and Herron.

"Rule 702 takes a liberal view of expert witness qualifications." Leathers v. Pfizer, Inc., 233 F.R.D. 687, 692 (N.D. Ga. 2006) (citations omitted). "It does not mandate that an expert be recognized as a leading authority in the field in question; instead, it simply requires that he or she be 'competent and qualified by knowledge, skill, experience, training, or education to render the opinion.'" Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp. 2d 1293, 1304 (N.D. Ga. 2008) citing Pfizer, Inc., 233 F.R.D. at 692. "Gaps in an expert witness's qualifications or knowledge generally go to the weight of the witness's testimony not its admissibility." Pfizer, Inc., 233 F.R.D. at 692 (emphasis added). Plaintiffs improperly conclude that, because Dr. Brunell's expertise is in the field of political science generally, he is not qualified to opine on the more narrow topics within this action. But "an expert's training does not always need to be narrowly tailored to match the exact point of dispute in a case." McGee v. Evenflo Co., 2003 U.S. Dist. LEXIS 25039, at *7-8 (M.D. Ga. Dec. 11, 2003). Moreover, trial courts have been reversed where they decline to admit proffered testimony "simply because . . .

the proposed expert does not have the specialization that the court considers most appropriate." Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777, 782 (3d Cir. 1996).

The case cited by Plaintiffs in support of their position that Dr. Brunell is not qualified is readily distinguishable from the case at bar. Conroy v. Vilsack excluded testimony where the proffered expert had "never researched or written about," the topic she was called upon to analyze as an expert. 707 F. 3d 1163, 1168 (10th Cir. 2013). The proposed expert in Conroy held a Ph.D. in business and previously worked in human-resource management and organizational behavior. But she was called upon to offer an expert opinion about sex stereotyping in the work place and how it may have manifested itself against the plaintiff. The trial court found the proposed expert was entirely unfamiliar with sex-stereotyping analysis prior to being retained in the case, and that prior to the case she had no recollection of articles or cases on the topic. Id. Still, the Court did not deem this lack of knowledge fatal to her expert status standing alone.

The trial court then considered "whether sex stereotyping was within the reasonable confines of [the expert's] expertise." Id. at 1168-1169 (internal quotations omitted). But the plaintiff could not "articulate any meaningful argument in support of that proposition, only asserting in conclusory fashion

that sex stereotyping was 'clearly' within the reasonable confines of [the expert's] experience and expertise." Id. at 1169. The district court declined "connect the proverbial dots" for the plaintiff, and it was on those grounds that they refused to admit the expert testimony.

Unlike in Conroy, the actions of the parties, the statements of Dr. Brunell, and the underlying facts paint a very different picture. First, Dr. Brunell's CV speaks for itself, despite Plaintiffs' claims. Dr. Brunell's political-science expertise has previously extended to the subset of election administration. See, e.g. Doc. No. [211], p. 17 (CV entry describing a 2015 article co-authored in part by Dr. Brunell entitled, Election Administration and perception of Fair Elections). Plaintiffs attempt to diminish or explain away this scholarship directly on point because "the article did not reflect any independent analysis on the subject . . . and borrowed data from another study . . ." Doc. No. [447], p. 14. But Plaintiffs do not explain why borrowing data from another study renders Dr. Brunell's article unworthy, nor do they question the reliability or accuracy of the underlying data. Instead, Plaintiffs would prefer if Dr. Brunell had developed the data himself rather than borrowing from other experts in the field. But even the Federal Rules of Evidence do not demand such an exacting requirement for expert opinion admissibility. "The Rule 702(b) 'facts or data' upon which the expert-opinion

must be based may come from the expert's personal observation, or the expert may simply be 'made aware of' those facts or data." In re Toyota Motor Corp., 978 F. Supp. 2d at 1065. If the data is good enough to be admissible in court, surely it's good enough to be used in qualifying an expert under the same standard.

Dr. Brunell is also a recent recipient of a grant from the University of Sydney for the United States Studies Centre and The Election Integrity Project. Doc. No. [211], p. 16. This grant reflects Dr. Brunell's broader commitment to, and expertise in, election integrity generally—an issue Plaintiffs would surely agree they challenge in this lawsuit.

Dr. Brunell is well qualified to opine in the areas for which Defendants tender him as an expert. He has gone head-to-head with a prior rebuttal report in response to Dr. Smith in a different case. "[T]he case broadly was about signature mismatch. So Professor Smith wrote a report and I wrote a rebuttal report, you know, basically the same way that I did for this case, you know, talking about the shortcomings of his analysis, what he – what he left out, those sorts of things." Doc. No. [449-1] at 30:9–15. Despite Plaintiffs' complaints that Dr. Brunell lacks expertise in voter-list maintenance, Dr. Brunell testified that he regularly works with large voter-registration

databases as part of other areas of his scholarship and testimony. Doc. No. [449-3] at 208:20-209:7.

It strains credulity for Plaintiffs to claim Dr. Brunell is not qualified to opine on Dr. McDonald's survey methodology because he "does not teach survey design," or because he has not "offered an opinion on survey design in any court." Doc. No. [448-1], p. 15. Dr. Brunell clearly utilizes surveys as part of his professional activities as a political scientist: in his report and deposition, he noted his extensive familiarity with the American National Election Study, and discussed the intricacies of that study at length with Plaintiffs' counsel. Doc. No. [449-1] at 42:5-19; [449-2] at 130:24-132:22, 137:5-138:14. And while Plaintiffs might disagree with the conclusions Dr. Brunell draws regarding the effects of Dr. McDonald's small sample size for his survey, that argument goes to weight, not admissibility, of the opinions. "Disputes as to the strength of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony." Kennedy v. Collagen Corp., 161 F. 3d 1226, 1231 (9th Cir. 1998) citing McCullock v. H.B. Fuller Co., 61 F. 3d 1038, 1044 (2d Cir. 1995).

II. Professor Brunell appropriately embodies the role of an expert rebuttal witness.

Plaintiffs next claim Dr. Brunell's testimony is inadmissible because he improperly weighs the evidence like a fact finder and because he did not conduct any independent analysis on the data reviewed. But this misconstrues the role of an expert rebuttal witness.

A. Professor Brunell is not standing in the shoes of the fact finder.

Defendants do not dispute that experts "may not testify on the sufficiency of the evidence," from a legal perspective. Doc. No. [447-1], p. 16. But the purpose of a rebuttal expert is to shed light on the sufficiency—or more accurately, lack of sufficiency—of a conflicting expert from a scientific perspective. "As a rebuttal witness, [the expert] may rely largely on other expert reports, as he does, and point out flaws in their methodologies or conclusions." In re Toyota Motor Corp., 978 F. Supp. 2d at 1065 (emphasis added). What Plaintiffs attempt to paint as "legal conclusions" are actually criticisms of the underlying methodologies and conclusions of Plaintiffs' proposed experts. This is well within the role of the rebuttal witness.

Plaintiffs highlight several examples from Dr. Brunell's report and deposition to support their position that his rebuttal report improperly invaded the province of the fact finder. First, they take issue with the fact

that Dr. Brunell's report points out that "there is no evidence any of the rejected absentee ballots . . . were rejected wrongly." Doc. No. [447-1], p. 17. They claim this opinion by Dr. Brunell is appropriate because "[e]xamination of the motivation for rejection of absentee ballots is simply not a part of Dr. Smith's opinion, and Dr. Smith said as much when deposed." Id. But Plaintiffs make the mistake of assuming that because Dr. Smith did not put certain information into his purported expert analysis, it is must be useless to consider at all. If this were the case, the so-called "battle of the experts" would not be much of a battle. Indeed, any expert that encountered a weakness in some portion of his opinion could simply avoid criticism by declining to acknowledge it altogether. This is antithetical to the rigor required by scientific analysis, and this Court should not allow an expert to shield the weakness of his opinion through strategic silence.

Similarly, Plaintiffs claim Dr. Brunell "usurps the Court's role as the gatekeeper of expert testimony," by questioning Dr. Smith's decision to base his expert opinion less on the data before him and more on his own experience. Id. at 18. Defendants do not dispute Plaintiffs' contention that "the law is clear that experts may offer opinions on the basis of their experience." Id. But Plaintiffs cannot rely on their expert's experience as a sword to achieve admissibility before the Court, and then also use that

experience as a shield to block any rebuttal expert's questioning of the scientific sufficiency of that experience. This Court will have the final say as to what expert opinion testimony will be admitted in this case, but it should not be deprived of relevant information that might limit the weight and persuasive value of expert testimony. "[A] district court's gatekeeper role under Daubert is 'not intended to supplant the adversary system or the role of the jury.'" Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir. 2003), citing Maiz v. Virani, 253 F.3d 641, 666 (11th Cir. 2001).

B. As a rebuttal expert witness, Dr. Brunell appropriately analyzed the relevant data.

Plaintiffs finally attempt to exclude Dr. Brunell's expert rebuttal testimony for two final reasons: (1) he conducts no independent analysis of Dr. McDonald's or Dr. Herron's data; and (2) his opinions improperly rely on factual assertions from unidentified sources. Doc. No. [447-1], pp. 19-25. Neither of these reasons, however, affect the admissibility of Dr. Brunell's opinion in this case.

As earlier noted, rebuttal witnesses "may rely largely on other expert reports . . . and point out flaws in their methodologies or conclusions." In re Toyota Motor Corp., 978 F. Supp. 2d at 1065. Thus, Plaintiffs' contention that

Dr. Brunell's testimony is inadmissible because he fails to conduct an "independent analysis" of the data falls flat. Once again, Plaintiffs' complaints with Dr. Brunell's opinion and analysis more accurately concern their relative weight and persuasive value, not their admissibility. The appropriate avenue for Plaintiffs to voice their concerns is on cross-examination, not through a Daubert motion. "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." In re Toyota Motor Corp., 978 F. Supp. 2d at 1069.

Finally, Plaintiffs claim Dr. Brunell's opinion should not be admitted because it "relies on unattributed hearsay." Doc. No. [447-1], p. 23. But this is not the standard for expert opinion admissibility, which Plaintiffs subsequently acknowledge. Id. at p. 24 n.7 ("Of course, 'an expert may rely on hearsay evidence as part of the foundation for his opinion so long as the hearsay evidence is the type of evidence reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.' Knight v. Miami-Dade Cty., 856 F. 3d 795, 809 (11th Cir. 2017) (citations omitted)"). Despite this acknowledgement, Plaintiffs offer no evidence that the information Dr. Brunell relied on from the Secretary of State's office is not of

the kind experts use when analyzing voter registration records. In fact, had Plaintiffs' expert conducted a similar investigation of Georgia's voting processes before speculating about what the fields in the absentee file meant, his opinion would not have been overly dependent on the faulty assumptions that destroyed its reliability in the first place.

As an expert witness, Dr. Brunell is plainly permitted to use hearsay or other inadmissible evidence in forming his overall expert opinion:

> The Rule 702(b) "facts or data" upon which the expert opinion must be based may come from the expert's personal observation, or the expert may simply be "made aware of" those facts or data. Fed. R. Evid. 703. The "facts or data" need not be independently admissible if those facts or data are of the type(s) experts in the field would reasonably rely upon. Id.

In re Toyota Motor Corp., 978 F. Supp. 2d at 1065. In obtaining this information from the Secretary of State's office, Dr. Brunell utilized an authoritative source to assist in filling in gaps from Dr. Smith's underlying data. It offers this Court an explanation for why Dr. Smith's analysis was fundamentally flawed from the outset. Not only is Dr. Brunell's opinion with this added information admissible under Daubert, it will greatly assist the fact finder in wading through the underlying data.

CONCLUSION

Dr. Brunell is an expert rebuttal witness. His testimony is admissible under the Daubert standard. While the purported expert testimony of Drs. Smith, Herron, and McDonald should not be admitted in the first place, if it is, Dr. Brunell's testimony is necessary and helpful to the fact finder.

Respectfully submitted this 29th day of July, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE THE EXPERT REBUTTAL TESTIMONY OF PROFESSOR THOMAS BRUNELL was prepared double-spaced in 13-point Century Schoolbook pursuant to Local Rule 5.1(C).

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