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

FAIR FIGHT ACTION, INC., *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

Civil Action No.
1:18-CV-5391-SCJ

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE THE EXPERT TESTIMONY OF PROFESSOR THOMAS BRUNELL

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PRELIMINARY STATEMENT

Plaintiffs' opening memorandum in support of their motion to exclude the testimony of Professor Brunell identified a number of infirmities, including his lack of qualifications in the subject matters upon which he seeks to opine, his attempt to usurp the role of the factfinder, and his attempt to launder the unattributed factual statements of the party paying him in the guise of expert testimony. Defendants' principal response is that a lower standard governs the admission of expert rebuttal testimony. The law does not support Defendants' attempted distinction, nor does Professor Brunell meet even that lower standard.

Defendants attempt to show Professor Brunell is qualified to testify on election administration and other topics in his reports—based on a small subset of tangentially related experience, which they present in a misleading manner. Defendants then attempt to argue Professor Brunell is entitled to opine on the sufficiency of the evidence presented by Drs. Smith, Herron, and McDonald simply by virtue of being a rebuttal expert and slapping the label "scientific" on his testimony. Those arguments do not excuse a clear invasion of the province of the Court.

Finally, Defendants try to justify Professor Brunell's regurgitation of hearsay evidence as expert opinion by reciting the legal standard permitting experts

to rely on hearsay evidence as one of many inputs when forming opinions. But Defendants make no attempt to demonstrate Professor Brunell actually formed an expert opinion relying on hearsay evidence; instead, he is trying to introduce new factual evidence in the guise of expert testimony.

For all of these reasons, Professor Brunell's reports, (ECF Nos. 211, 276, & 292), and testimony should be excluded.[1]

ARGUMENT

I. Professor Brunell lacks relevant qualifications and experience.

Defendants failed to carry their burden of showing Professor Brunell is "qualified by background, training, and expertise to testify competently regarding the matters he intends to address." *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1027 (11th Cir. 2014). Defendants (1) concede Professor "Brunell's expertise is in the field of political science generally," (ECF No. 487 at 4), rather than in the specific subject matter of the expert reports he purports to

[1] As explained in Plaintiffs' opening brief, other courts have found Professor Brunell's rebuttal opinions of limited value. *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1058 n.621 (S.D. Ohio 2019) (noting that Professor Brunell's rebuttal report and testimony "suffer[] from a scarcity of explanation"), *vacated on other grounds sub nom. Householder v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 101 (2019); *Common Cause v. Lewis*, No. 18-cvs-014001, 2019 WL 4569584, at *90 (N.C. Super. Ct. Sept. 3, 2019) (noting that Professor Brunell's rebuttal opinions "reflect a failure to understand the work of Plaintiffs' experts").

rebut; (2) do not dispute Professor Brunell's testimony that this "may have been the first time" he conducted the analysis reflected in his rebuttal reports, (ECF No. 447-2 at 77:21); and (3) identify several examples in his CV that appear to be tangentially related to the subject matter of his rebuttal reports.Defendants' efforts do not satisfy Defendants' burden to show Professor Brunell has "specific experience or background with the topic in dispute" such that his expert testimony should be admitted. *Trilink Saw Chain, LLC v. Blount, Inc.*, 583 F. Supp. 2d 1293, 1304 (N.D. Ga. 2008).

Defendants do not dispute Professor Brunell's primary expertise and expertise lies in redistricting, not election administration or survey design. (*See* Pltfs' Mem. of Law in Support of Pltfs' Mot. to Exclude the Expert Testimony of Professor Thomas Brunell 9, ECF No. 447-1.)[2] Undeterred, Defendants suggest Professor Brunell's expertise in other aspects of political science should be sufficient. (ECF No. 487 at 4-5 (citing *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3d Cir. 1996)).) Their reliance on out-of-circuit precedent, however, is misplaced. The *Holbrook* case concerned the erroneous exclusion of testimony

[2] In contrast, Defendants acknowledged that Dr. Smith—whose reports Professor Brunell seeks to rebut—does in fact hold specific, relevant expertise. (*See* ECF No. 405 at 11 (acknowledging that Dr. Smith holds "expertise in the area of state elections").)

regarding cancer diagnosis because the court did "not deem the proposed expert to be the *best* qualified or because the proposed expert does not have the specialization that the court considers *most* appropriate." *Holbrook*, 80 F.3d at 782 (emphasis added). The *Holbrook* court found exclusion improper because the proposed expert had examined the plaintiff and routinely engaged in the analysis about which he intended to testify. In contrast, Professor Brunell does not routinely perform the type of analysis about which he seeks to testify—instead, he has done so only a single time, and that was in connection with this litigation. Plaintiffs' motion does not depend on the contention that Professor Brunell is not the most qualified—he is simply *not* qualified.

Professor Brunell is plainly not qualified to offer a rebuttal report regarding Dr. Smith's analysis of Georgia voting files, admitting that this litigation "may have been the first time" Professor Brunell conducted such an analysis. (Brunell Dep. 77:21; *see* ECF No. 447-1 at 10.) That Professor Brunell—having analyzed voter files for the first time as a paid expert in this case—is now qualified to offer opinions to rebut an expert, Dr. Smith—who routinely conducts the type of analysis of voter data he engaged in for this litigation and who has analyzed hundreds of millions of voter registration records over the course of his career—defies belief. (ECF No. 168 ¶ 16 (explaining Dr. Smith "routinely conduct[s] this

very type of data processing across the states" for his academic research and that he has "processed hundreds of millions of voter registration records across several states").)

Defendants fail to show Professor Brunell's prior experience qualifies him to testify regarding Georgia's voter files and their import on the administration of the state's elections. According to Defendants, Professor Brunell is qualified because:

- He was the coauthor of a single publication—out of sixty-three publications listed on his CV—that touches on a relevant topic, even though, unlike here where he conducted statistical analysis, he simply took the analysis of others for granted. (ECF No. 487 at 6 (citing ECF No. 211 at 17); ECF No. 211 at 17-22).) In that article on voter's perceptions of election systems, Professor Brunell took a preexisting analysis of the administration of election systems and studied whether well-run systems are perceived by voters to be more fair. *See* Thomas Brunell et al., *Election Administration and Perception of Fair Elections*, 38 Electoral Studies 1, 1-9 (2015). Defendants hold up this article as evidence of expertise in election administration. (ECF No. 487 at 6). At best, it is evidence Professor Brunell can read the work of other researchers in his field.

- He received a visiting fellowship at an Australian university that has the title "Election Integrity Project," which supposedly reflects his "expertise in, election integrity generally." (ECF No. 487 at 6 (citing ECF No. 211 at 16).) Defendants' assertion is misleading. Professor Brunell's research during that fellowship was "Partisan gerrymandering," not election administration. (*See Tom Brunell*, The Electoral Integrity Project, https://sites.google.com/site/electoralintegrityproject4/about-this-project/people/tom-brunell (last visited Aug. 10, 2020).)
- He testified that he drafted a rebuttal report to Dr. Smith in a case Defendants do not cite, apparently a reference to *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017 (N.D. Fla. 2018), *appeal dismissed as moot sub nom. Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790 (11th Cir. 2020) (ECF No. 487 at 7), a case concerning signature mismatch issues not at issue here. But the report was not admitted into evidence, and as the Northern District of Georgia has previously held, experience gained in preparation for testifying in litigation does not confer "expertise." *Trilink Saw Chain*, 583 F. Supp. at 1305-06.

These scant and unrelated experiences do not satisfy Defendants' burden to show Professor Brunell's testimony in this case is "sufficiently related to [his areas

of expertise] so as to be within their 'reasonable confines.'" *Conroy v. Vilsack*, 707 F.3d 1163, 1169 (10th Cir. 2013).[3] Accordingly, his testimony regarding election administration offered as rebuttal to Dr. Smith should be excluded.

With respect to Professor Brunell's qualifications to rebut Dr. McDonald's survey methodology, Defendants do not actually demonstrate Professor Brunell's qualifications in that area either. (ECF No. 487 at 8.) Defendants admit Professor Brunell has neither taught survey design nor testified on the subject. (*Id*.) And their assertion that Professor Brunell "utilizes surveys as part of his professional activities" is not clear and does not explain how this qualifies Professor Brunell as an expert. (*Id*.) Defendants also argue that Professor Brunell's familiarity with the American National Election Study is evidence of his expertise in survey design. (ECF No. 487 at 8.) Even if familiarity with a single survey were sufficient to qualify one as an expert on survey design, review of Professor Brunell's deposition reveals Professor Brunell was unaware of key information about the survey. (*See*

[3] Defendants' attempt to distinguish *Conroy*, 707 F.3d at 1169, boils down to the following: the party offering expert testimony in that case made no attempt to link the expert's general knowledge to the specific subject matter of the litigation, while Defendants are making an attempt to show that Professor Brunell has relevant knowledge here. For the reasons explained above, however, those attempts fall flat, and Professor Brunell's expertise does not extend to election administration. Ultimately, Defendants have "failed to carry [their] burden to show that [Professor Brunell] was qualified to opine" on the specific topic at issue in the litigation. *Id*.

ECF No. 449-2 at 130:24-132:22.) Professor Brunell was not even knowledgeable on that particular survey, much less survey design generally.

Finally, Defendants concede Professor Brunell is not qualified to offer a rebuttal opinion to Dr. Herron, as they fail to offer any response to Plaintiffs' arguments regarding Professor Brunell's lack of qualifications in the areas of list maintenance or the racial impact of polling place changes. (No. ECF 447-1 at 11.)

II. Professor Brunell usurps the role of the factfinder and offers inappropriate testimony.

Professor Brunell offers testimony on the sufficiency and relevance of Plaintiffs' evidence, invading the province of the Court. (ECF No. 447-1 at 16-20.) In response, Defendants appear to argue that Professor Brunell is free to offer whatever arguments he wants because, in effect, rebuttal experts are subject to a lower standard. (ECF No. 487 at 9.) This position is entirely unsupported and incorrect. *See Brantley v. Int'l Paper Co.*, No. 2:09-230-DCR, 2017 WL 2292767, at *18 (M.D. Ala. May 24, 2017) (observing that rebuttal expert "must satisfy *Daubert*'s standards," i.e., that he "is qualified, that he relied on sufficient data and reliable methodology, and that his testimony would be relevant"); *Cospelich v. Hurst Boiler & Welding Co., Inc.*, No. 1:08CV46-LG-JMR, 2009 WL 8599064, at *2 (S.D. Miss. July 7, 2009) (excluding rebuttal testimony where the expert failed to employ a reliable methodology or illustrate how his experience informed his

analysis); *accord* Fed. R. Evid. 702 (standards apply to all expert testimony). In any event, Professor Brunell's testimony cannot clear even the lower bar for rebuttal experts that Defendants set for him.

First, Defendants admit Professor Brunell is not permitted to offer an opinion on the sufficiency of the evidence. (ECF No. 487 at 9.) They instead depend on a distinction between legal sufficiency and sufficiency "from a scientific perspective." (*Id.*)[4] Defendants rely on this unexplained distinction to argue it was appropriate for Professor Brunell to offer a rebuttal opinion on the sufficiency of the evidence that absentee ballots were wrongly rejected, even though Dr. Smith did not opine on the reasons that absentee ballots were rejected. Accordingly, Professor Brunell's testimony did not meet even the lower standard of rebuttal expert testimony proffered by Defendants because it did not "point out flaws in [the opposing expert's] methodologies or conclusions." *In Re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, 978 F. Supp. 2d 1053, 1065 (C.D. Cal. 2013). Instead, Professor Brunell opined on the fact that Dr. Smith did not examine Georgia's motivation for rejecting black

[4] Based on the testimony at his deposition, Professor Brunell does not appear to believe that he is opining about sufficiency from a "scientific perspective." He repeatedly describes his opinions as "useful information for the court," not the product of a scientific approach (ECF No. 449-2 at 103:14-15; 42:18-19; 170:24-171:4.)

voters' absentee ballots at a higher rate than white voters—an issue beyond the scope of Dr. Smith's report. (ECF No. 447-1 at 13.) "Rebuttal testimony is permitted only when it directly addresses an assertion raised by an opponent's experts." *Burger King Corp. v. Berry*, No. 18-20435-CIV-MARTINEZ/AOR, 2019 WL 571483, at *2 (S.D. Fla. Jan. 8, 2019) (quoting *In re Trasylol Prods. Liab. Litig.*, No. 09-01928, 2010 WL 4065436, at *2 (S.D. Fla. Aug. 6, 2010)).

Second, Defendants attempt to resuscitate Professor Brunell's criticism of Dr. Smith's opinion that the flaws in Georgia's election data are serious and significant compared to election data from other states that he has studied. (ECF No. 168 at 9.) Defendants rehash their argument that Professor Brunell was questioning the "scientific sufficiency of that experience." (ECF No. 487 at 11.) As with the criticism above, simply labeling an inadmissible opinion as "scientific" does not cure the infirmity. Professor Brunell did not question the methodologies that Dr. Smith actually used in his analysis of the election data of Georgia or other states; he was instead making a legal argument, which is improper expert testimony, regardless of whether the expert is offering a rebuttal opinion. *See Cordoves v. Miami-Dade Cty.*, 104 F. Supp. 3d 1350, 1365 (S.D. Fla. 2015) (excluding rebuttal expert testimony that "reads less like an expert's opinion and more like a lawyer's *Daubert* motion to exclude [the other expert's] testimony").

Finally, Defendants make unsupported arguments about the methods underlying Professor Brunell's rebuttal opinions. Regarding Professor Brunell's rebuttal of Dr. McDonald's and Dr. Herron's reports, Defendants argue that Professor Brunell "appropriately analyzed the relevant data," (ECF No. 487 at 11), but Professor Brunell himself testified that he did not remember even getting the data used by Dr. Herron or Dr. McDonald, let alone analyzing it. (ECF No. 447-1 at 17-18.) While Defendants are correct that a rebuttal expert may "point out flaws" in the methodologies of their opposing experts, *In Re Toyota Motor Corp.*, 978 F. Supp. 2d at 1065, such testimony nonetheless requires a level of rigor consistent with the expert's field that is simply lacking from Professor Brunell's reports in this case.

III. Professor Brunell inappropriately seeks to introduce hearsay evidence through the guise of expert opinion.

Defendants misapprehend Plaintiffs' critique of Professor Brunell's attempt to launder hearsay in the guise of expert testimony. (*See* ECF No. 447-1 at 23-25.) Professor Brunell's testimony is inadmissible not because it "relies" on hearsay, but instead because he "simply repeats the hearsay of the client who retained him, without any independent investigation or analysis." *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 429 (S.D.N.Y. 2009); *accord Jones Creek Inv'rs, LLC v. Columbia Cty.*, No. CV 111-174, 2013 WL 12141348, at *16 (S.D.

Ga. Dec. 23, 2013) (excluding expert testimony because it was based on hearsay without any independent investigation or analysis by the expert). A comparison between *Knight v. Miami-Dade Cty*., 856 F.3d 795 (11th Cir. 2017), upon which Defendants rely, and the instant case is instructive. In *Knight*, the expert relied on hearsay statements made by officers at the scene "in concert with his review of the photographs, investigative reports, forensic reports, and [a fact witness's] testimony" to form a larger opinion about a key issue in the case. 856 F.3d at 809. Here, Professor Brunell does not rely on information about Georgia's elections data, provided to him by unattributed representatives of his client, to form a larger opinion; he merely regurgitates what was told to him. Simply passing on what he has been told is inconsistent with the level of rigor typically employed by a political scientist. (ECF No. 447-1 at 24.) Professor Brunell's approach to hearsay evidence is instead consistent with the testimony that was excluded by the Northern District of Georgia in *Jones Creek*, 2013 WL 12141348, at *16, where the expert offered no independent investigation or analysis of the hearsay evidence. While an expert may rely on hearsay evidence in forming an opinion, the expert may not publish that hearsay for the purposes of proving its truth. *United States v. Ramos*, 725 F.2d 1322, 1324 (11th Cir. 1984) (admitting hearsay statements solely to show the basis for expert opinion, "not for the truth of their assertions"); *accord*

In re James Wilson Assocs., 965 F.2d 160, 172-73 (7th Cir. 1992). Even if Professor Brunell relied on what he was told, Professor Brunell may not testify to the truth of that hearsay. His currently unidentified source must testify and be subject to cross-examination.

CONCLUSION

For the foregoing reasons, and the reasons stated in Plaintiffs' opening memorandum, (ECF. No. 447-1), Plaintiffs respectfully request the Court grant Plaintiffs' motion to exclude Professor Brunell's rebuttal reports, (ECF Nos. 211, 276, and 292), and testimony and for such further relief as this Court may deem just and proper.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE THE EXPERT TESTIMONY OF PROFESSOR THOMAS BRUNELL** has been prepared with a font size and point selection (Times New Roman, 14 pt.), which is approved by the Court pursuant to Local Rules 5.1(C) and 7.1(D).

Respectfully submitted, this, the 13th day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE THE EXPERT TESTIMONY OF PROFESSOR THOMAS BRUNELL** was filed using the Court's ECF system, which will serve all counsel of record.

This, the 13th day of August, 2020.

/s/Allegra J. Lawrence
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