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.

Civ. Act. No. 18-cv-5391 (SCJ)

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO EXCLUDE THE EXPERT TESTIMONY OF SEAN P. TRENDE

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INTRODUCTION

Defendants' response to Plaintiffs' Motion to Exclude the Expert Testimony of Sean P. Trende is a series of non-sequiturs. First, Defendants respond to Plaintiffs' challenge that Mr. Trende's qualifications are inadequate by arguing Rule 702 has "liberal minimum qualifications" and Mr. Trende has written extensively online about elections—arguments that do not address Plaintiffs' core point that the reason Mr. Trende is not qualified to critique Dr. Graves' research design is that Mr. Trende has no experience in peer reviewing academic research design. Second, Defendants respond to Plaintiffs' challenge that Mr. Trende's analysis does not meet Rule 702(d) (which focuses on whether the expert reliably *applied* methodology to the facts of the case) by arguing his testimony meets Rule 702(c) (which focuses on whether the methodology itself, as opposed to its application, is reliable). Third, Defendants respond to Plaintiffs' challenge that Mr. Trende's testimony is irrelevant by arguing his testimony will not be confusing, as if irrelevant evidence is admissible so long as it is comprehensible. Defendants have not carried their burden to demonstrate Mr. Trende's testimony satisfies *Daubert*'s criteria, and this Court should grant Plaintiffs' motion to exclude Mr. Trende's testimony.

I. Defendants' lax application of the Rule 702 standards to Mr. Trende undermines their position on their motions to exclude Plaintiffs' experts.

Defendants defend Mr. Trende's qualifications by asserting, among other things, that (1) having an advanced degree "standing alone" should be sufficient to qualify one as an expert; (2) "*Daubert* requires no underlying academic credentials"; and (3) peer review is only one of four factors to be considered regarding reliability. (ECF No. 485 at 7-8.) Defendants acknowledge these factors are "useful in determining whether the expert is qualified," but say they are not necessary and Rule 702 requires only "liberal minimum qualifications." *Id.* at 7.

Defendants' arguments, if accepted by the Court, are fatal to Defendants' own motions to exclude the testimony of Plaintiffs' experts. For example, Defendants seek to exclude Dr. Khalilah Brown-Dean for having only a Ph.D. in political science, not a J.D. (even though Mr. Trende has no Ph.D. at all). (*See* ECF No. 387 at 2, 14.) Defendants criticize Dr. M. Adrienne Jones, who does have a J.D. and also two advanced degrees (including a Ph.D.) in political science, because she accepted two non-tenure track positions before taking her current tenure track appointment (even though Mr. Trende is not a professor, much less one on a tenure track). (*See* ECF No. 386 at 7.) They likewise criticize Dr. Jones for having only two peer-reviewed works (even though Mr. Trende has none) and

for primarily teaching college-level coursework (even though Mr. Trende apparently teaches at this level, too). (*Id.* at 8-9.) If Mr. Trende is qualified, Dr. Brown-Dean and Dr. Jones are far more so.

Similarly, in response to Plaintiffs' statement that Mr. Trende's prior expert work addressed wholly different areas of election law, Defendants take the broad position that, because Mr. Trende's expertise "relates to all of American politics," it applies to the particular facts here. (ECF No. 485 at 8.) Yet Defendants simultaneously argue that Plaintiffs' experts Dr. Kenneth R. Mayer and Kevin Kennedy, who both have dramatically more experience in election systems than does Mr. Trende, cannot testify because they have not administered elections in *Georgia*. (ECF No. 396 at 16, ECF No. 403 at 9-10.) If Mr. Trende is qualified, Mayer and Kennedy are far more so.

Defendants' positions as to methodology and helpfulness similarly apply double standards. For example, as to Mr. Trende, Defendants argue that so long as t-tests are a generally accepted methodology employed by statisticians, all criticisms of whether Mr. Trende applied that methodology correctly here go exclusively to weight and not admissibility. (ECF No. 485 at 10-11.) Yet in seeking to exclude Dr. Peyton McCrary, Defendants admit his methodology is generally accepted in some contexts but claim Dr. Payton should not have applied

it here. (ECF No. 404 at 7-8.) And as to virtually every one of Plaintiffs' experts, Defendants assert their testimony is unhelpful, confusing, or both, yet argue that, with respect to Mr. Trende, the Court need play no gatekeeper role. (ECF No. 485 at 18.)

Defendants' arguments in defense of Mr. Trende sink their motions to exclude Plaintiffs' experts. If this Court denies this motion, it should likewise reject Defendants' *Daubert* motions.

II. Defendants fail to address the relevance of Mr. Trende's lack of experience critiquing research methodology.

Defendants' effort to prove that Mr. Trende's qualifications are "robust" ignores these undisputed facts: Mr. Trende has never designed a research question suitable for peer review and academic publication, and Mr. Trende has no experience reviewing the research design of others. Yet, Mr. Trende is being proffered to do exactly what he has no experience doing—critiquing and rejecting the research question and design of Dr. Stephen C. Graves, a professor with sterling academic credentials, decades-long experience, and regularly published, peer-reviewed work. Mr. Trende simply does not have the credentials or experience for the task at hand.

The closest Defendants come to responding to this shortcoming is to cite case law stating that a methodology need not have been peer reviewed to survive

review under Rule 702(c). (ECF No. 485 at 7.) That is the wrong focus. Plaintiffs' point about peer review relates to Mr. Trende, not the methodology. Mr. Trende himself has never peer reviewed other academics' work or had his own work peer reviewed by others. That makes Mr. Trende ill qualified to critique Dr. Graves' research design.

Defendants highlight Mr. Trende's previous experience as an expert witness. (ECF No. 485 at 8.) Plaintiffs, however, already detailed in their Memorandum of Law in Support of Their Motion to Exclude several reasons why this Court ought not infer much from Mr. Trende's prior expert work, (ECF No. 443-1 at 12), the most important of which is that experience testifying elsewhere does not impart expertise in the subject matter of the testimony here, *see Thomas J. Kline, Inc. v. Lorillard, Inc*., 878 F.2d 791, 800 (4th Cir. 1989) (labeling as "absurd" the proposition that merely serving as an expert in other cases imbued the witness with expertise in the case at hand). Because Defendants have not established Mr. Trende has the experience required to critique Dr. Graves' research design, Defendants have not established Mr. Trende is qualified to render the opinion Defendants proffer here.

III. Defendants' reliability argument conflates Rule 702(c) and 702(d).

Plaintiffs demonstrated that, in calculating statistical significance for the relationship between wait times and the share of Black registered voters, Mr. Trende artificially inflated his p-value calculation by choosing an incorrect null hypothesis. (ECF No. 443-1 at 15.) Mr. Trende therefore did not "reliably appl[y] the principles and methods to the facts of the case" as Federal Rule of Evidence 702(d) requires, and his opinion is not admissible.

Defendants argue in response that, because t-tests and non-parametric tests are empirically validated and rooted in science, they are premised on reliable principles and methods. (ECF No. 485 at 11-12.) They are, but that simply means those tests satisfy Federal Rule of Evidence 702(c) (requiring the testimony to be "the product of reliable principles and methods"). It does not satisfy the next step in the analysis—Rule 702(d)—which requires the expert to have "reliably *applied* the principles and methods to the facts of the case" (emphasis added). While Mr. Trende applied a recognized tool of statisticians, he did so unreliably given the particular facts of this case.

Dr. Graves was seeking to answer a specific question: Is the Fulton County data consistent with the larger finding of a 2019 nationwide report from the Bipartisan Policy Center and the Massachusetts Institute of Technology (the

"BPC/MIT Report") that Black voters experience longer wait times? To address that question, the possibilities that Black voters either face the same wait times as white voters or face shorter wait times as white voters are functionally equivalent. If either of these hypotheses is true, the hypothesis that Black voters face longer wait times is false. Mr. Trende's decision to assign half of the significance to the possibility that Black voters face shorter lines is inappropriate because that possibility has no independent research or legal significance.

Defendants contend that "[w]hile Plaintiffs may not be interested in whether non-Hispanic Whites wait longer than African Americans, Defendants certainly are. This Court should also take an interest in that question, because longer wait times for non-Hispanic White voters would be fatal to Plaintiffs' case." (ECF No. 485 at 13.) This argument demonstrates a fundamental misunderstanding of the distinction between one-tailed and two-tailed tests. Using a one-tailed test would not exclude the possibility that white voters face longer lines than do Black voters. To the contrary, *only* a one-tailed test would examine the relationship between race and voting times in a manner useful in this litigation.

Conducting a one-tailed test compares (a) the probability that Black voters face longer lines with (b) the *combined* probability that Black voters face shorter lines than white voters as well as the probability that they face the same lines as

white voters. That approach makes perfect sense because, notwithstanding whether Black voters face shorter lines than white voters *or* lines no longer than white voters, Defendants will contend that Plaintiffs' disparate impact claim fails.

By contrast, a two-tailed test compares (a) the probability that there is a relationship between the percentage of Black voters and wait time (either positive or negative) with (b) the probability that there is no such relationship. This approach is less analytically helpful—to either Plaintiffs or Defendants—because it groups together two possibilities having opposite legal significance. Using a two-tailed test will not, as Defendants claim, provide Defendants with helpful evidence. Defendants prefer a two-tailed test simply because it artificially reduces the statistical significance of Dr. Grave's tests.

Defendants' argument that both two-tailed and one-tailed tests are widely taught in statistics and well-understood, (ECF No. 485 at 11-12), is the very reason why the incorrect application of those tests represents a serious methodological flaw, not just fodder for cross-examination. Defendants make a point of citing statistician Jim Frost for the proposition that "[t]ypically you need a strong reason to move away from using two-tailed tests." (ECF No. 485 at 13.) But Defendants omit what Mr. Frost says in the very next sentence: "On the other hand, there are some cases where *one-tailed tests are not only a valid option, but truly are a*

requirement." Jim Frost, *When Can I Use One-Tailed Hypothesis Tests?* https://statisticsbyjim.com/hypothesis-testing/use-one-tailed-tests/ (last visited Aug. 5, 2020) (emphasis added). Which option is correct is driven by the relevant research question, not the researcher's personal preferences. *See* Hyun-Chul Cho & Shuzo Abe, *Is Two-Tailed Testing for Directional Research Hypotheses Tests Legitimate?* 66 J. Bus. Res. 1261, 1261 (2013) ("Standard textbooks on statistics clearly state that non-directional research hypotheses should be tested using two-tailed testing while one-tailed testing is appropriate for testing directional research hypotheses."). Mr. Trende's decision to apply two-tailed testing to a directional hypothesis was not a reliable application of statistical methodology to the facts at hand, and therefore warrants exclusion. Nothing in Defendants' response addresses that fundamental problem.

IV. That Mr. Trende's opinion may not confuse the Court does not make it relevant or helpful.

Plaintiffs showed in their motion to exclude that the statistical significance of the relationship between the Fulton County data, standing alone, and the entire population of voters is irrelevant. (ECF No. 443-1 at 20-22.) The purpose of Dr. Graves' analysis was not to show that the Fulton County dataset in and of itself

constitutes statistical proof that Black voters face longer lines.[1] Ample other evidence, such as the BPC/MIT Report and several predecessor reports, already provides a basis for this Court to conclude that Black voters, on average, face longer waits to vote.[2]

What Dr. Graves showed is that the same trend that exists in the national data appears in the Fulton County dataset. Because Dr. Graves did not purport to make a claim about what can be said about the entire population of voters based solely on the Fulton County dataset, he had no reason to calculate the statistical significance of that relationship.

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[1] Defendants repeatedly suggest that this fact was elicited only by Mr. Trende's report, as if Plaintiffs had been hiding it. (ECF No. 400 at 9.) That is inaccurate. Dr. Graves states in his report's introductory paragraph: "Based on my analysis that I report here, it is my opinion that the general findings of the BPC/MIT report, for the case of Fulton County in Georgia are accurately stated." (ECF No. 166 at 3, Report at 1.) Nothing in Dr. Graves' report states or implies that a statistician could use the Fulton County data on its own to establish a statistically significant relationship for the larger population of all voters.

[2] Defendants are wrong in saying Plaintiffs are "bereft" of evidence of widespread voter suppression as a result of long lines and that Dr. Graves' report is the sole evidence that "draws a racial connection to line length." (ECF No. 485 at 1, 3.) The BPC/MIT Report, its predecessor reports, and the evidence set forth in Plaintiffs' Statement of Additional Facts filed in support of their opposition to Defendants' motions for summary judgment, ECF No. 506 ¶¶1066-1071, are all evidence of these facts.

Mr. Trende's opinion is irrelevant as rebuttal evidence because it rebuts nothing Dr. Graves asserted, either directly or implicitly. Defendants both muddle statistics and misunderstand Dr. Graves' opinion when they argue that because Dr. Graves offered a "*statistical* analysis," the factfinder would "definitely be interested in and aided by an understanding whether the assertions Dr. Graves makes about the applicability of a national trend to Georgia's individual circumstances are underpinned by a statistically significant dataset." (ECF No. 485 at 19 (emphasis in original).)

A particular dataset does not have statistical significance, standing alone. Statistical significance tests the strength of the relationship that can be asserted between a particular dataset and a population. *If* Dr. Graves had attempted to use the Fulton county dataset to make a claim about the population, *then* it might well be relevant to ask if that claim were statistically significant. But Dr. Graves made no such claim, because the BPC/MIT Report itself relied on a robust dataset to show a relationship between Black participation and voting. What Dr. Graves examined was whether anything in the subset of the data from Georgia suggests that Black voters fare better in Georgia than they do nationally. To do so, he used a linear regression to compare the Fulton County subset of the BPC/MIT data to the

full dataset. (ECF No. 166 at 5, Report at 3.) Nothing in Mr. Trende's report suggests Dr. Graves erroneously conducted that test.

Instead, what Mr. Trende did was conduct a separate analysis, using t-tests and a Wilcoxon test to compare the Fulton County data to the population of voters. (ECF No. 195 at 10-11.) That is to say, Mr. Trende examined a different relationship than Dr. Graves examined, ran a different sort of statistical test, and then calculated the statistical significance of his own chosen test. It is no criticism of Dr. Graves that he did not calculate the statistical significance of a test he never purported to run and that is relevant only to the strength of an opinion he has never purported to offer.

Defendants' counter argument is that because this case will be tried without a jury, the Court's gatekeeper role in weeding out unhelpful information is lessened. (ECF No. 485 at 18.) That the Court is less likely than the jury to be confused by Mr. Trende's testimony does not establish his testimony is helpful. As Defendants acknowledge, Federal Rule of Evidence 403 first requires evidence to be probative; confusion comes into play only if it outweighs the evidence's probative value. (*Id.*) Mr. Trende's testimony, however, is not probative because it seeks to establish something not in dispute: that Dr. Graves did not demonstrate a

statically significant relationship between the Fulton County dataset and the entire population of voters. This Court should exclude Mr. Trende's testimony.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant their motion to exclude Mr. Trende's testimony.

CERTIFICATE OF COUNSEL REGARDING FONT SIZE

I hereby certify that the foregoing 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 THEIR MOTION TO EXCLUDE THE EXPERT TESTIMONY OF SEAN P. TRENDE** was filed with the Court using the ECF system, which will serve all counsel of record.

This, the 13th day of August, 2020.

/s/ Allegra J. Lawrence
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