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 SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE THE EXPERT TESTIMONY OF DR. JANET R. THORNTON

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PRELIMINARY STATEMENT

Rather than demonstrate the admissibility of Dr. Thornton's opinions, Defendants offer a brief that sidesteps Plaintiffs' challenges, provides conclusory assertions, distorts Plaintiffs' arguments and case law, and styles "responses" as arguments to exclude Dr. Herron. Defendants' bluster does nothing to prove the reliability or admissibility of Dr. Thornton's opinions.

Dr. Thornton's testimony should be excluded for three main reasons. First, her opinions do not sufficiently rely on her qualifications in statistical analysis. Second, her opinions will not assist the factfinder as she engages in, and openly bases her testimony upon, impermissible legal conclusions. Third, the "analyses" Dr. Thornton sparingly offers are unreliable, based either on her speculation, unsupported assertions, or invalid methods.

ARGUMENT

I. Defendants have failed to establish Dr. Thornton's qualifications are sufficient to support the opinions she offers.

While Defendants defend Dr. Thornton's qualifications in statistical analysis, they have failed to show that Dr. Thornton uses her knowledge and experience with statistical analysis to rebut Dr. Herron's testimony.

First, rather than demonstrating the admissibility of Dr. Thornton's opinions, Defendants resort instead to attacking Dr. Herron's expertise and analysis. (Defs'

Response to Mot. to Exclude Testimony of Dr. Janet Thornton 5, ECF No. 486 (disparaging Dr. Herron's work as "simplistic exercise[s]")). Essentially, Defendants' argument is that because Dr. Herron's reasoning did not rely on a "statistical test," Dr. Thornton's rebuttal need not be supported by expertise. (ECF No. 486 at 6 (citing Ex. 1 (Thornton Dep. at 34:25–32:3)).) That is doubly wrong. While Dr. Herron did not conduct a statistical sampling analysis, he *did* rely on his experience with voter files and with data analysis in reaching his conclusions. By contrast, Dr. Thornton grounded her critiques only in her assumptions about the law and about voter behavior—*not* in any methodological criticism, statistical or not. (*See* Pltfs' Memorandum of Law in Support of Pltfs' Mot. to Exclude Expert Testimony of Dr. Janet M. Thornton 5–7, ECF No. 448-1.) While a rebuttal expert need not produce models of her own, her critiques must draw upon her expertise — otherwise, her qualifications are beside the point.

Second, Defendants argue, seemingly in the alternative, that Dr. Thornton's testimony must be based on statistical analyses because she used Dr. Herron's own data and programming logic. (ECF No. 486 at 6.) Plaintiffs agree Dr. Thornton could rely on Dr. Herron's data, yet this does not excuse her use of rampant assertions unsupported by Dr. Herron's data, nor does it permit her to manipulate his data in unreliable ways. In the case Defendants cite, the court only deemed the

rebuttal expert's opinion to be "sufficiently grounded in his expertise" because he "provided a reasoned basis for each criticism [] and furnished reference materials in support his positions." *Navelski v. Int'l Paper Co*., 244 F. Supp. 3d 1275, 1303 (N.D. Fla. 2017).

Last, Defendants agree Dr. Thornton offers opinions on voter behavior and election administration that do not rely on her statistical expertise, but then misconstrue her opinions as "objectively obvious facts," which "require[] no particular statistical analysis." (ECF No. 486 at 6-7.) For example, the problem is not, as Defendants claim, that Dr. Thornton opined that a "voter who votes in a new location knows where that location is." (*Id*. at 6.) Rather, Dr. Thornton's testimony is inadmissible because in support of her criticism of Dr. Herron's approach to the 2016 election, she posits without the experience to do so that polling place changes affect voter turnout *only* because they might cause voters not to know where to vote. (*See* ECF No. 448-1 at 6.) Defendants do not even attempt to argue this opinion is supported by her expertise in statistical analysis, instead portraying her conclusion as an incontrovertible fact.[1] Defendants' confidence in

[1] Defendants again deflect from the challenges to Dr. Thornton's opinions by further attacking Dr. Herron's analysis of the 2016 election as if they confused their response with a motion to exclude Dr. Herron. (*See* ECF No. 486 at 7 (arguing that Dr. Thornton "merely shows how Dr. Herron's methodology leads to

the accuracy of this conclusion is surprising, given that Dr. Thornton herself admitted in her deposition that a polling place change could affect voter turnout for other reasons, such as a lack of public transportation and a farther distance to travel. (Thornton Dep. 45:18–46:21.)

Though Defendants attempt to establish that Dr. Thornton "has experience" in election issues and voting rights, ECF No. 486 at 4, this "experience" is gained from serving as an expert witness in statistical analysis and economics. (*See* ECF No. 448-1 at 7.) "[E]xperience developed as a professional expert witness is not sufficient" to qualify Dr. Thornton as an expert in voter behavior and election administration. 29 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Evid. § 6264.1 (2d ed. 2020).

To the extent Defendants admit Dr. Thornton relies on no expert qualifications in offering her opinions of voter behavior because no expertise is needed to understand these allegedly "obvious facts," this argument weighs in favor of exclusion. (*See* ECF No. 448-1 at 6–7.) If Dr. Thornton's opinions are simply common sense, they are within the understanding of an average lay person

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no conclusive finding and is unreliable, irrelevant, and will not assist the trier of fact").) Yet, they support Plaintiffs' argument for exclusion of Dr. Thornton's testimony by claiming Dr. Thornton used no statistical expertise to criticize Dr. Herron's revised analysis of the 2016 election. (*Id*. at 7.)

and thus will not assist the factfinder. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty.*, 402 F.3d 1092, 1112 (11th Cir. 2005) (court properly excluded as unnecessary and within the understanding of a layperson expert testimony that correctional officer should review inmates' medical requests).

Thus, Defendants' attempts to defend Dr. Thornton's qualifications only lend further support to Plaintiffs' motion for exclusion.

II. Defendants have failed to prove Dr. Thornton's testimony will assist the trier of fact.

Defendants' attempts to prove Dr. Thornton's testimony will aid the factfinder fare no better. Defendants argue that Dr. Thornton does not impermissibly opine on legal issues because "one can simply read a law without opining on it." (ECF No. 486 at 9.) Dr. Thornton did not, however, "simply read the law." She formed an "understanding of the statute," Thornton Dep. 23:3, and concluded O.C.G.A. § 21-2-265 gave decision-making power to counties. (*See* Report of Janet R. Thornton ¶¶ 19, 21–22, Mar. 24, 2020, ECF No. 277; Report of Janet R. Thornton ¶¶ 2, 5, 5 n.4, Apr. 30, 2020, ECF No. 350; Thornton Dep. 21:17–23:24.) Defendants themselves state that Dr. Thornton "*reason[ed]* it is the counties that decide locations of their respective polling places," and cite the pages in her report where she explains her reliance on the statute. (ECF No. 486 at 8 (emphasis added).) Defendants' argument that "just as with any other resource," a

statute can be the basis for an expert's opinion, *id*. at 9, ignores precedent establishing that a statute is different than other resources and prohibits experts from forming legal conclusions based on statutes, which is just what Dr. Thornton does. (*See, e.g.*, *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990); *Leathers v. State Farm Mut. Auto. Ins. Co.*, No. 1:12-cv-00198-SCJ, 2012 WL 13014634, at *4 (N.D. Ga. Dec. 3, 2012) (Jones, J.).) Defendants offer no legal authority rebutting that precedent. In addition, Dr. Thornton herself admitted that she is not a lawyer and did not know how the statute had been interpreted or applied. (Thornton Dep. 21:17-22:20.)

Defendants offer a second, but equally unsatisfactory defense of Dr. Thornton's proffer of what are essentially legal opinions. They claim Dr. Thornton could not have run afoul of the prohibition against opining on legal conclusions because she was merely operating as a statistician, accounting for variables affecting the accuracy of Dr. Herron's analysis and evaluating the accuracy of his results. (ECF No. 486 at 9-10.) Defendants miss the mark. The issue is not that she analyzed data for variables, the issue is *how* she identified the new variable of county decision-making, namely through impermissible interpretations of the law, which continued to drive her dominant criticism that Dr. Herron's analysis ignored county-level factors.

Defendants do not hide that Dr. Thornton's opinions are not offered to rebut Dr. Herron's methodology and statistical analysis, but rather to advance Defendants' claim that Plaintiffs pin "county-made decisions on the State." (*Id*. at 7.) Defendants openly argue that Dr. Thornton's county-level analysis is necessary because "the state-wide approach is an overall statistic that masks the variability at the individual county level and leads to misleading results." (*Id*. at 8.) As Dr. Thornton admitted in her deposition, she could find no methodological failure from a statistical perspective in Dr. Herron's statewide analyses, Thornton Dep. 23:6–14, rather, it was her interpretation of the statute that shaped her opinion that no statewide analysis could be helpful, *id*. 23:15–24.[2]

Defendants attempt to salvage the legitimacy of Dr. Thornton's analysis by framing it as "model[ing] the county decision-making process." (ECF No. 486 at 8.) However, Dr. Herron's reports examine the *effect* of polling place adjustments, not the decision-making process behind these adjustments, as he is concerned only with racial impacts of these adjustments and not racial animus. (*See* ECF No. 448-

[2] Defendants recycle Dr. Thornton's baseless accusation that Dr. Herron's state-wide analysis is "misleading" by failing to account for county variation. As Plaintiffs' opening brief demonstrates, however, and as Dr. Thornton admitted in deposition, Dr. Herron explicitly acknowledged county differences in his report. (ECF No. 448-1 at 23; Thornton Dep. 32:6–23.)

1 at 11 n.6 and 15.) Indeed, Defendants' only authority for their proposition that a failure to consider "the existence of different decision-makers" is a deficiency in statistical analysis is the employment discrimination case *Copeland v. CVS Pharmacy, Inc*., No. 1:03-cv-3854-JOF, 2006 WL 2699045, at *44 (N.D. Ga. Sept. 15, 2006), *aff'd*, 225 F. App'x 839 (11th Cir. 2007). *Copeland* is an employment discrimination case in which Plaintiff claimed wrongful termination and improperly relied on data from divisions of the Defendant where he did not work. Similarly, Defendants proffer a poorly supported tit-for-tat argument to defend Dr. Thornton's opinion that Dr. Herron's analysis should have accounted for election board demographics.[3] They claim Plaintiffs have elsewhere argued racial animus underlies certain election policies, and therefore Dr. Thornton may argue that Dr. Herron's report should have considered race-based reasons for polling place closures, which may involve county election board demographics. (ECF No. 486 at 12–13.) This argument disregards the fact that Dr. Thornton serves as a rebuttal witness only to Dr. Herron's testimony, not to the entire case, and Dr. Herron's report solely examines racial impacts, not animus. (*See* ECF No. 448-1 at 15–16.)

[3] Defendants do not argue that there is evidence in the record of election board demographics.

Defendants offer an additional but equally weak justification for Dr. Thornton's insistence on examining the reasons for poll closures and changes. They allege Dr. Herron's report assigns decision-making authority for polling place changes, and therefore, they claim, he must assign responsibility for the racial effects he finds to these decision-makers. (ECF No. 486 at 12.) This inferential chain is far-fetched and unfounded. And Defendants only offer three examples—out of the combined 139 pages in Dr. Herron's two reports—none of which remotely prove their point. In not one of these examples does Dr. Herron suggest the reasons for closures or the identities of election officials matter for his analysis.[4] Indeed, Dr. Herron mentions jurisdictions' ability to change their polling places to explain the historic preclearance requirement under the Voting Rights Act and to provide context for *Shelby County v. Holder*, 570 U.S. 529 (2013). (ECF No. 241 ¶¶ 12, 14.)

Defendants also defend Dr. Thornton's county approach that dropped Bibb County, a large county with many voters of color, as "not misleading in the

[4] Defendants also argue Dr. Thornton's testimony is admissible because it "identifies . . . alternative explanations." (ECF No. 486 at 13.) Again, Dr. Herron's report does not provide any explanations for the racial impacts of polling place closures precisely because it only examines the effects of the closures, and thus reasons or explanations for closures are irrelevant.

slightest," yet they do not dispute Plaintiffs' challenge that Dr. Thornton's methodology for removing Bibb County is unreliable. (ECF No. 486 at 10.) While Defendants would like the Court to believe that Dr. Thornton used "examples" to demonstrate county variability, *id*., Bibb County is the *only* county she tests. (*See* ECF No. 448-1 at 20–21.) Defendants do not even address Plaintiffs' argument that Dr. Thornton wrongly characterized Bibb County as "one small county" nor that her selection of Bibb County was far from random. (*See id*. at 20–21.)

When addressing Bibb County, Defendants oddly challenge the applicability of Plaintiffs' legal authorities offered to support exclusion of Dr. Thornton's opinions that rely on mischaracterizations of Dr. Herron's reports. (ECF No. 486 at 10; *see* ECF No. 448-1 at 22–24.) Defendants do not contest that Dr. Thornton's opinions misstates Dr. Herron's testimony and do not mention these opinions in connection with their challenge of these authorities or elsewhere in their brief. Rather, they make the broad and unsupported claim that these cases are inapposite because "Dr. Thornton explained what she did and showed the result." ECF No. 486 at 10–11. However, as Plaintiffs' opening brief demonstrates, Dr. Thornton repeatedly mischaracterized the contents of Dr. Herron's reports.

III. Defendants have not met their burden to establish Dr. Thornton's methodologies are reliable.

Rather than demonstrating Dr. Thornton's methodologies are reliable,

Defendants offer "rebuttals" that erroneously depict Plaintiffs' arguments or fail to respond to Plaintiffs' arguments for exclusion. For example, Defendants do not adequately address Plaintiffs' contention that Dr. Thornton's methodology is flawed by her omission of key data—those fifty-eight counties with no closures. As Plaintiffs pointed out in their opening brief, while Dr. Thornton's stated basis for the exclusion was that there would be "no comparison" because the closure rates were the same (zero), that same logic should have also led to exclusion of counties where non-zero closure rates were the same for Black and white voters. (ECF No. 448-1 at 19; Thornton Dep. at 55:16–20 ("A. Well, because for the remaining you would have had a zero percent closure rate for both African Americans and Caucasians, so there's no comparison. Q. Just because the two rates are the same? A. Yeah, there's no information to glean.").) Claiming that Dr. Thornton reasonably included in her analysis counties where non-zero closure rates were the same, Defendants confusingly argue: "Plaintiffs claim there would be 'no comparison" to make. This is incorrect; the comparison is that the rates were the exact same." (ECF No. 486 at 14.) Yet, this is *exactly* the point Plaintiffs advance in their opening brief—if Dr. Thornton is to exclude counties with no closures, she should also exclude counties where the closure rates are the same.

Defendants' attempt to distinguish Plaintiffs' authorities falls flat. First, even assuming Dr. Thornton reviewed all Dr. Herron's analyses, *In re Trasylol Prod. Liab. Litig.*, supports the exclusion of conclusions based on "incomplete and selective" evidence, such as Dr. Thornton's arbitrary exclusion of fifty-eight counties. No. 08-MD-1928, 2013 WL 1192300, at *14 (S.D. Fla. Mar. 22, 2013). Dr. Thornton does not "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id*. (citing *Guinn v. Astrazeneca Pharm. LP*, 602 F.3d 1245, 1255 (11th Cir. 2010)). Second, and relatedly, *In re Chevron* demonstrates the requisite "level of intellectual rigor," namely, that a sample drawn from a complete dataset must abide by statistical principles. *In re Chevron U.S.A., Inc*., 109 F.3d 1016, 1019-20 (5th Cir. 1997). (*See* ECF No. 448-1 at 19-20.) Plaintiffs' challenge to Dr. Thornton's dropping fifty-eight counties is precisely about the validity of the sample Dr. Thornton produced. (See ECF No. 448-1 at 19-20.) Last, contrary to Defendants' representation, *Barber v. United Airlines, Inc*., 17 F. App'x 433, 437 (7th Cir. 2001), supports Plaintiffs' argument for exclusion of Dr. Thornton's testimony for her selective omission of fifty-eight counties.

IV. Other courts have discounted Dr. Thornton's testimony.

Contrary to Defendants' allegations, the courts in the three election cases Plaintiffs cited found Dr. Thornton's testimony deficient for the same reasons described here. In the two redistricting cases, the courts found Dr. Thornton "misses the point of [the expert's] analysis," "did no work to assess" whether her criticisms would change the expert's conclusions, "misapprehends" the expert's opinions and methodology, "offered no proof or analysis to substantiate [her] claim[s]," and made "significant methodological errors" in her attempted statistical analyses. *Common Cause v. Lewis*, No. 18-cvs-014001, 2019 WL 4569584, at *81, *82, *84, *86 (N.C. Super. Ct. Sept. 3, 2019). These courts also ruled that her description of the plaintiffs' expert's opinion "is wrong," that "[s]everal factual and legal problems are apparent in Dr. Thornton's analysis" such that her analysis "has nothing to do with" and "without more, says nothing about" the topic of plaintiff's expert report, and that her statistical analyses are "simplistic and not particularly helpful." *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1055, 1056, 1057 (S.D. Ohio), *vacated on other grounds sub nom. Householder v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 101 (2019). The court in the voting rights case also found Dr. Thornton's opinions were "simplistic and not credible." *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 838 (D. Ariz.

2018), *rev'd on other grounds sub nom. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020). These criticisms of Dr. Thornton's testimony ring true here and provide further support for exclusion.

CONCLUSION

For the foregoing reasons and the reasons presented in Plaintiffs' opening memorandum of law, Plaintiffs respectfully request that the Court grant Plaintiffs' motion to exclude Dr. Thornton's expert reports, ECF Nos. 277 and 350, and her testimony.

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 DR. JANET R. THORNTON** 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 I filed the foregoing **PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE THE EXPERT TESTIMONY OF DR. JANET R. THORNTON** using the Court's ECF System, which will send copies to all counsel of record.

This, the 13th day of August, 2020.

/s/ Allegra J. Lawrence
Allegra J. Lawrence