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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,  
Plaintiffs,

v.

Michele Reagan, et al.,  
Defendants.

No. CV-16-01065-PHX-DLR

**PLAINTIFFS' RESPONSE IN  
OPPOSITION TO DEFENDANTS'  
MOTION *IN LIMINE* REGARDING  
PLAINTIFFS' EXPERT DR.  
JONATHAN RODDEN**

1 In their Trial Brief and Motion *in Limine*, Doc. 356 (“Defs.’ Br.”), Defendants  
2 contend that Dr. Rodden’s analysis of the disparate impact resulting from Arizona’s  
3 disenfranchisement of out-of-precinct (“OOP”) voters is not reliable and that Dr.  
4 Rodden’s analysis of home mail service is outside the scope of his expertise and not  
5 reliable. As Dr. Rodden’s reports and his testimony at trial demonstrate, however, he is a  
6 leader in his field, he is amply qualified to offer the opinions at issue, and his analysis is  
7 reliable. Defendants’ challenge to Dr. Rodden’s testimony should be rejected.

### 8 ARGUMENT

9 A witness may offer an expert opinion into evidence if “(a) the expert’s scientific,  
10 technical, or other specialized knowledge will help the trier of fact to understand the  
11 evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or  
12 data; (c) the testimony is the product of reliable principles and methods; and (d) the expert  
13 has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702;  
14 *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The *Daubert* analysis  
15 is not “a heightened threshold,” but instead asks courts to avoid “subjective belief and  
16 unsupported speculation.” *Ambrosini v. Labarraque*, 101 F.3d 129, 134 (D.C. Cir. 1996)  
17 (internal quotation marks omitted). Here, Dr. Rodden’s analysis easily meets these  
18 standards, and Defendants’ arguments to the contrary are without merit.

19 Disparate impact of OOP disenfranchisement. One of Defendants’ arguments is  
20 that Dr. Rodden’s analysis of the disparate impact resulting from the disenfranchisement  
21 of OOP provisional voters is not reliable. That argument does not hold up to scrutiny.

22 Initially, it is important to note that Dr. Rodden analyzed the racial disparity in the  
23 disenfranchisement of OOP voters in two different ways: (1) through an approach using  
24 individual-level data that estimates race based on individuals’ surnames, Census data  
25 regarding their residence, and other factors; and (2) through ecological-inference analysis.  
26 Ex. 95-033-044 (Rodden 1st Rpt.); Ex. 96-013-038 (Rodden 1st Rebuttal); Ex. 97-07-044,  
27 061-068 (Rodden 2d Rpt.); Ex. 98-08-014, 027-036 (Rodden 2d Rebuttal). And while  
28 Defendants purport broadly to challenge Dr. Rodden’s analysis of the racial disparities in

1 OOP voting, their motion only discusses the first of Dr. Rodden’s two approaches—the  
2 analysis using individual-level data. *See* Defs.’ Br. 13-14.<sup>1</sup> Defendants have thus waived  
3 any *Daubert* challenge to Dr. Rodden’s ecological-inference analysis, which finds even  
4 larger racial disparities in OOP voting than his individual-level analysis finds. Ex. 97-10  
5 (Rodden 2d Rpt.) (The individual-level analysis “provides a more conservative estimate of  
6 these disparities. If one adopts the data and assumptions of the aggregate [i.e., ecological-  
7 inference] approach ... , one comes away in each county with consistently *larger*  
8 estimates of racial disparities than with the more cautious individual-level approach.”).

9 In any event, Defendants’ challenge to Dr. Rodden’s individual-level analysis fails.  
10 As his testimony makes clear, the approach Dr. Rodden used “initially gained traction in  
11 research using medical records, where public health researchers wished to make  
12 inferences about race based on individual records in which information about names and  
13 residential geography was available without racial or ethnic self-identification,” and it  
14 “has recently become quite common not just in academic studies, but also in court cases  
15 related to the Voting Rights Act.” Ex. 97-011 (Rodden 2d Rpt.). In fact, the approach “has  
16 now become standard in the social sciences.” Ex. 96-013 (Rodden 1st Rebuttal).

17 While this alone establishes the reliability of Dr. Rodden’s approach, further  
18 confirmation of its reliability is provided by Dr. Rodden’s ecological-inference (i.e.,  
19 “aggregate”) analysis and analysis conducted by Maricopa County. In particular, “[t]he  
20 results of the individual-level analysis and the aggregate analysis are consistent. Both  
21 uncover evidence of pronounced racial disparities in out-of-precinct voting among the  
22 same racial groups in the same counties, meaning that under either test the conclusion  
23 drawn is clear: minority voters are disparately disenfranchised due to Arizona’s policy of  
24 not counting votes cast out-of-precinct.” Ex. 97-010 (Rodden 2d Rpt.). Likewise, surname  
25 analysis conducted by Maricopa County found clear racial disparities in OOP voting in  
26

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27 <sup>1</sup> Had Defendants challenged the reliability of ecological-inference analysis, their  
28 challenge would have failed. *See* Ex. 97-08 & n.5 (Rodden 2d Rpt.); *Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302, 320 (N.D.N.Y. 2015) (ecological inference “well-accepted”).

1 the 2012 general election. *See* Ex. 96-013 n.1, 021 (Rodden 1st Rebuttal) (surname  
2 analysis conducted by Maricopa County Elections Department for 2012 election “suggests  
3 that although 15 percent of registered voters have Hispanic surnames, around 24 percent  
4 of all ‘out of precinct’ provisional ballots were cast by those with Hispanic surnames”)  
5 (citation omitted); 10/6 Trial Tr. 870:18-872:8 (Purcell) (8% of provisional ballots cast by  
6 voters with Hispanic surnames were not counted because they were out of precinct, versus  
7 6% of provisional ballots cast by voters who do not have Hispanic surnames).

8 Moreover, courts have regularly relied on (and experts have regularly conducted)  
9 analysis that is similar to—and often less sophisticated than—Dr. Rodden’s individual-  
10 level analysis. *See* Ex. 97-011 n.7 (Rodden 2d Rpt.) (providing examples); *Veasey v.*  
11 *Abbott*, 830 F.3d 216, 250-51, 264-65 (5th Cir. 2016) (en banc) (finding that expert  
12 analysis, including surname analysis, supported district court’s findings regarding  
13 disparate impact of voter ID law), *cert. denied*, 137 S. Ct. 612 (2017); *United States v.*  
14 *Vill. of Port Chester*, No. 06 Civ. 15173(SCR), 2008 WL 190502, at \*9 & n.13 (S.D.N.Y.  
15 Jan. 17, 2008) (“Neither party disputes that Spanish Surname Analysis is an accepted  
16 methodology . . . .”); *United States v. Berks Cty., Pa.*, 277 F. Supp. 2d 570, 576 (E.D. Pa.  
17 2003) (relying on surname analysis in determining that county’s election practices  
18 violated the VRA); *see also* 10/6 Trial Tr. 848:13-849:2, 867:21-872:8 (Purcell)  
19 (describing use of surname analysis and U.S. Department of Justice approval of method).

20 Defendants’ critiques of Dr. Rodden’s individual-level analysis are unpersuasive.  
21 While Defendants state that Dr. Rodden “did not know the actual error rate of his race  
22 estimations,” Defs.’ Br. 13, this overlooks the fact that the possibility of misclassifying an  
23 individual’s race is built into the analysis, which does not “classify individuals as a one or  
24 a zero” but instead develops a probability that an individual is a particular race. *See* 10/4  
25 Trial Tr. 395:6-396:8. To the extent that Defendants are referring to *measurement* error,  
26 their critique misses the mark because “there’s always measurement error in the social  
27 sciences,” whether one is talking about Census data or any other large set of data; “when  
28 we collect data, we always do so with error.” 10/4 Trial Tr. 394:10-25. The existence of

1 such error does not call into question the reliability of Dr. Rodden's analysis any more  
2 than it would call into question an analysis based on Census data. Further, as Dr. Rodden  
3 explained, "any measurement error in the estimation of race probabilities w[ould have led  
4 him] to *underestimate* the true difference in rates of out-of-precinct voting between ...  
5 groups." Ex. 97-015, 069-072 (Rodden 2d Rpt.) (emphasis added); *see also* Ex. 96-015-  
6 017 (Rodden 1st Rebuttal); 10/4 Trial Tr. 393:7-399:12; 10/5 Trial Tr. 590:20-594:6.

7 Defendants' claim that Dr. Rodden cannot speak to the reliability of the algorithm  
8 he used is similarly strained. Dr. Rodden uses this algorithm in his academic work. 10/4  
9 Trial Tr. 392:10-12; 10/5 Trial Tr. 590:2-17. It has been "vetted," "is something that other  
10 academics use," and is "now being used widely among medical researchers." 10/4 Trial  
11 Tr. 392:18-22. Dr. Rodden knows "the individuals who generated this approach and ha[s]  
12 been in touch with them about it," and he "understand[s] very well ... how it works." 10/4  
13 Trial Tr. 392:15-17. And, while Dr. Rodden did not develop the algorithm, Defs.' Br. 14,  
14 that has little bearing on whether he can speak to its reliability. No one could credibly  
15 suggest that only the developers of Stata or another statistical software package could rely  
16 on that package to conduct expert analysis—just as there is no basis for suggesting that  
17 Dr. Rodden cannot rely on the algorithm at issue here. For this reason and those set forth  
18 above, the challenge to Dr. Rodden's analysis of OOP voters should be rejected.

19 Disparities in home mail delivery. Defendants' arguments as to Dr. Rodden's  
20 analysis of home mail delivery—challenging his qualifications and the reliability of the  
21 data—were addressed and rejected at trial. As the Court explained, "[t]his is basically ... a  
22 statistical analysis which this expert's done many times, and the data is basically simply  
23 information gathered from the post office as to who can receive and send mail. It's not  
24 more complicated than that." 10/4 Trial Tr. 377:23-378:2. The Court thus properly held  
25 that Dr. Rodden is qualified and overruled Defendants' objections. 10/4 Trial Tr. 378:3-6.

26 While Plaintiffs believe that ruling resolves Defendants' challenge to Dr. Rodden's  
27 mailability analysis, Plaintiffs note that the Court's ruling was clearly correct. As Dr.  
28 Rodden explained, his regular work involves the use of "large administrative data sets,"

1 and he is “very familiar with lots of different individual-level administrative data  
2 sources.” 10/4 Trial Tr. 373:16-374:12. Likewise here, the data upon which Dr. Rodden  
3 relied is “a large administrative data set to which a code produced by a government  
4 agency was appended and there was a matching process that allowed ... [him] to add this  
5 bit of information to all the individuals in the data set. So it’s very similar to what [Dr.  
6 Rodden] do[es] on a day-to-day basis.” 10/4 Trial Tr. 377:5-10. Dr. Rodden plainly has  
7 the qualifications, skill, and experience necessary to conduct the mailability analysis.

8 The data used for the mailability analysis is also reliable. Dr. Rodden looked into  
9 the reliability of data from Infogroup (from which he received the data at issue) and  
10 determined that “this was a group that many others rely upon,” that it is “a reputable  
11 firm,” and that the type of data that Dr. Rodden used could only be obtained from a firm  
12 like Infogroup that licenses with the U.S. Postal Service. 10/4 Trial Tr. 375:22-376:13.  
13 Thus, “this is as if the census department decided that it would not allow [him] to go  
14 directly on to census FactFinder and download the data that [he] needed, but it forced  
15 [him] to go through some third party.” 10/4 Trial Tr. 376:18-22.

16 There is no reason that this government data, relayed through a third party, should  
17 not be trusted.<sup>2</sup> And the fact-witness testimony in this case corroborates Dr. Rodden’s  
18 finding that Native Americans are far less likely than other Arizonans to have home mail  
19 delivery. Ex. 97-057 (Rodden 2d Rpt.); 10/4 Trial Tr. 174:16-175:14 (Gorman) (“In my  
20 experience, no one on the Navajo Nation[] receive[s] their mail from the U.S. Post Office  
21 at their home.”); 10/5 Trial Tr. 317:11-320:4 (Fulton) (“[I]n Springerville, there is -- there  
22 is some home delivery services. But throughout the rest of [Apache] county, it’s post  
23 office box.”). Dr. Rodden’s mailability analysis is reliable.

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24  
25 <sup>2</sup> Defendants assert that “Dr. Rodden admitted that his use of DPV data will  
26 incorrectly classify some addresses as not having home mail service” and that “he is  
27 unable to identify the error rate associated with this technique, and he is not aware of any  
28 scholarship relating to that rate.” Defs.’ Br. 15. As Dr. Rodden testified, however, these  
are simply examples of measurement error—here, the result of “some small transcription  
errors in the voter file” and “a really trivial problem.” 10/5 Trial Tr. 512:18-513:15. In  
addition, Defendants’ claim that Dr. Rodden’s results are unreliable because they rely on  
his individual-level race estimates, Defs.’ Br. 15, fails for the reasons discussed above.

1  
2 Dated: October 10, 2017

s/ Joshua L. Kaul

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 10, 2017, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

s/ Michelle DePass



## General Information

<b>Court</b>	United States District Court for the District of Arizona; United States District Court for the District of Arizona
<b>Federal Nature of Suit</b>	Civil Rights - Voting[441]
<b>Docket Number</b>	2:16-cv-01065
<b>Status</b>	CLOSED