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34 IN THE UNITED STATES DISTRICT COURT

35 FOR THE DISTRICT OF ARIZONA

36 Leslie Feldman, et al.,

37 Plaintiffs,

38 v.

39 Arizona Secretary of State's Office, et al.,

40 Defendants.

No. CV-16-01065-PHX-DLR

**STATE DEFENDANTS AND
INTERVENOR-DEFENDANTS'
REPLY IN SUPPORT OF MOTION
IN LIMINE REGARDING
PLAINTIFFS' EXPERT DR.
JONATHAN R. RODDEN**

1 Plaintiffs had ample opportunity in discovery and at trial to show that Dr. Jonathan
2 Rodden's quantitative analysis of out-of-precinct ("OOP") ballots and home mail service
3 was "the product of reliable principles and methods." Fed. R. Evid. 702(c). They failed to
4 meet this burden, and so Dr. Rodden's trial testimony in these areas should be excluded.

5 **I. Plaintiffs' Individual-Level Analysis of OOP Voting Is Not Reliable.**

6 Dr. Rodden failed to establish at trial that he used a reliable methodology to opine
7 on whether minority voters have cast OOP ballots at disproportionate levels. To the
8 contrary, Dr. Rodden confirmed that he relied on a statistical algorithm that he did not
9 prepare—and with an unknown error rate as applied to Arizonans—to assign racial
10 probabilities to individual voters. (10/5 Trial Tr. 522:4-11, 528:8-20.) Based on Dr.
11 Rodden's own calculations, OOP ballots cast by white voters only accounted for 0.08% of
12 the total ballots cast in the 2016 general election, whereas OOP ballots cast by Hispanic,
13 African-American, and Native American voters only accounted for 0.04%, 0.01%, and
14 0.008%, respectively. (10/5 Trial Tr. 546:6-547:12, 548:10-550:16.) These numbers,
15 combined with the unknown error rate of the algorithm, speak for themselves. And none
16 of Plaintiffs' attempts to defend the reliability of Dr. Rodden's OOP analysis have merit.

17 First, Plaintiffs attempt to confuse the *Daubert* issue through statistical jargon,
18 asserting that Dr. Rodden's analysis suffered from measurement error rather than an error
19 rate. But they ignore Dr. Rodden's testimony that the degree of measurement error in his
20 racial predictions is also *unknown*. (10/5 Trial Tr. 565:20-566:3.) Regardless of the
21 terminology, the reliability problem remains the same: Dr. Rodden cannot quantify the
22 degree to which individual predictions of the race of Arizona voters comport with reality.

23 Second, Plaintiffs point to Dr. Rodden's hypothesis that measurement error only
24 under-estimates any alleged disparities in OOP voting. Dr. Rodden never actually tested
25 this theory, however, by conducting a survey of Arizona residents to ascertain their actual
26 race, which he could have then compared to the estimations produced by the Imai/Khanna
27 algorithm. (10/5 Trial Tr. 537:14-538:8, 539:6-540:16.) Moreover, even though courts
28 have long recognized the ability of an expert to identify an error rate as an important part

1 of Rule 702 analysis, *see Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 594 (1993),
2 Plaintiffs do not cite a single case disregarding this factor based on an expert's self-
3 serving testimony that any error only cuts in favor of his or her conclusions.

4 Third, Plaintiffs contend that other courts have accepted surname analyses by
5 different experts. But that is irrelevant. The specific methodologies used by other
6 professionals in other matters are not before this Court. Dr. Rodden is the purported expert
7 at issue, and he admitted that this case is the first matter, in his extensive experience as an
8 expert witness, in which he has made individual racial predictions without relying on a
9 third-party vendor. (10/5 Trial Tr. 525:4-14.) And in the one case where Dr. Rodden relied
10 on a vendor to conduct the racial estimations, he admitted that this vendor drew upon
11 more extensive data than Dr. Rodden used here. (10/5 Trial Tr. 525:17-23.)

12 Fourth, Plaintiffs rely on Dr. Rodden's testimony that he and other academics use
13 the Imai/Khanna algorithm in their academic work. But that does not mean that Dr.
14 Rodden's specific analysis in this case meets the *Daubert* standard. Academic work in
15 unrelated areas cannot negate the lack of a known error rate or the miniscule rates of OOP
16 ballots from which Dr. Rodden has attempted to divine racial disparities.

17 Fifth, Plaintiffs argue that the results of Dr. Rodden's OOP analysis are consistent
18 with a Maricopa County report on the 2012 general election. But this report has not been
19 admitted into evidence, and there has been no testimony from the individual who prepared
20 it to show that he or she used a methodology that comes even close to approaching the
21 *Daubert* standard.¹ Regardless, "the test under *Daubert* is not the correctness of the
22 expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow*
23 *Pharm., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) ("*Daubert II*").

24 Sixth, Plaintiffs contend that Dr. Rodden properly relied on the Imai/Khanna
25 algorithm, despite his complete lack of involvement in its development, by asserting that
26 "[n]o one could credibly suggest that only the developers of Stata or another statistical

27 ¹ Additionally, the report addressed voters with Hispanic surnames in Maricopa County,
28 as opposed to Dr. Rodden's statewide analysis of several racial groups.

software package could rely on that package to conduct expert analysis.” (Doc. 376 at 4.) The argument misses the critical point that the Imai/Khanna algorithm, and the racial estimations it produces, is the linchpin for Dr. Rodden’s conclusions regarding alleged disparities. Dr. Rodden did not simply use a software program as an aid; he instead relied on another professional’s statistical model to make the very racial projections on which his opinions are based. And one of the algorithm’s developers (Dr. Imai) has an advanced statistics degree, which Dr. Rodden does not have. (10/5 Trial Tr. 522:21-523:2.) As Plaintiffs do not dispute, Dr. Rodden, “however well credentialed he may be,” cannot “be the mouthpiece of a scientist in a different specialty.” *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002). His OOP-related testimony should be excluded.

II. Plaintiffs’ Ecological Inference Analysis of OOP Voting is Not Reliable.

Plaintiffs note that Dr. Rodden performed an “ecological inference” (“EI”) analysis that compared the residences of OOP voters against the Census demographic data for these areas. (10/5 Trial Tr. 550:21-551:8.) But Dr. Rodden readily admitted that his EI analysis is much less reliable than his individual-level analysis, and that the Court should thus focus on the latter approach. (10/5 Trial Tr. 551:9-15, 552:21-23; *see also* 10/4 Trial Tr. 386:7-20.) Given this testimony, the failure of Dr. Rodden’s individual-level analysis to satisfy *Daubert* necessarily means that his EI analysis cannot be relied on either.

III. Plaintiffs’ Analysis of Home Mail Service is Not Reliable.

Plaintiffs also failed to meet their burden to show that Dr. Rodden used reliable methods to assess whether a limited subset of Arizona voters (not including anyone from Maricopa or Pima Counties) can receive mail at their home addresses. Dr. Rodden could not identify how frequently “Delivery Point Verification” (“DPV”) data misclassifies addresses as unable to receive mail service. (10/5 Trial Tr. 566:16-567:1). Nor could he identify any scholarship on that error rate, but instead testified that, to his knowledge, “there’s not really scholarly literature on mail service.” (10/5 Trial Tr. 567:2-12.)²

² Dr. Rodden’s mail analysis also relied on the Imai/Khanna algorithm, which adds another layer of unknown error to his analysis. (10/5 Trial Tr. 565:16-566:3.)

1 In response, Plaintiffs point to Dr. Rodden's subjective speculation that DPV
2 misclassifications are "a really trivial problem." (10/5 Trial Tr. 512:18-513:15.) But Dr.
3 Rodden has no actual objective data—such as a known error rate—to support this
4 conjecture. Dr. Rodden admitted at trial that DPV misclassifications can result from a
5 variety of factors, including: (1) transcription errors by election officials (10/5 Trial Tr.
6 571:3-6); (2) voters misspelling their own address or making a typographical error when
7 registering (10/5 Trial Tr. 570:23-571:2); (3) a lack of a directional prefix in a voter's
8 address (10/5 Trial Tr. 571:10-24); (4) new housing may not yet be added to the DPV data
9 (10/5 Trial Tr. 570:4-17); and (5) addresses for which the occupants could receive mail
10 service but, for whatever reason, have not yet requested it. (10/5 Trial Tr. 572:21-573:4.)
11 Dr. Rodden has not even attempted to quantify the number of Arizona voters in *any* of
12 these five categories. (10/5 Trial Tr. 570:13-17, 570:23-571:9, 571:21-24, 572:21-573:7.)

13 Plaintiffs further contend that Dr. Rodden's quantitative analysis has been
14 corroborated by non-quantitative, fact witness testimony concerning mail service on the
15 Navajo Nation. But again, the *Daubert* standard concerns the "soundness of [the expert's]
16 methodology," not the expert's ultimate conclusions. *Daubert II*, 43 F.3d at 1318.

17 Plaintiffs also rely on this Court's ruling at trial, based on partial testimony by Dr.
18 Rodden, concerning Dr. Rodden's qualifications to opine on the availability of home mail
19 service. But Defendants previously explained that Dr. Rodden's lack of qualifications not
20 only provides independent grounds for exclusion, but also interacts with the lack of a
21 known error rate to highlight Plaintiffs' failure to establish a reliable methodology. (Doc.
22 356 at 15.) Dr. Rodden's analysis of home mail service has no value if the underlying data
23 is not sufficiently reliable, and he performed no analysis and located no scholarship that
24 could possibly make up for his lack of experience on this topic.³ His testimony on the
25 availability of home mail service in some areas of Arizona should be excluded.

26
27
28 ³ Dr. Rodden testified that he relied on conversations with a graduate *student* for his
conclusion that the DPV data he used was reliable. (10/4 Trial Tr. 375:10-376:5.)

1 DATED this 13th day of October, 2017.

2 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the CM/ECF registrants.

Karen J. Hartman-Tellez

General Information

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