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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. ALLAN LICHTMAN

In their Trial Brief and Motion *in Limine*, Doc. 356 ("Defs.' Br."), Defendants argue that the Court should exclude Dr. Allan Lichtman's opinions regarding the intent with which HB 2023 was enacted, housing discrimination, and the link between discrimination and socioeconomic disparities. As set forth below, these arguments do not withstand scrutiny and should be rejected.

I. DISCRIMINATORY INTENT

Defendants' argument that Dr. Lichtman should not be able to offer an opinion on whether HB 2023 was enacted with discriminatory intent should be rejected. *See* Defs.' Br. 11-12.[1] While there is no question that the ultimate determination on discriminatory intent is a decision for the Court, Federal Rule of Evidence 704(a) makes clear that "[a]n opinion is not objectionable just because it embraces an ultimate issue."[2]

Here, Dr. Lichtman's opinion as to discriminatory intent assists the Court by offering a perspective, informed by an exhaustive review of the facts, as to how historians will likely view the purpose behind HB 2023. 10/10 Tr. 1095:24-1096:1 ("historians

[1] Although the Court excluded testimony on the ultimate question whether HB 2023 was enacted with discriminatory intent, Plaintiffs respectfully submit that the Court should consider the opinion on this issue included in Dr. Lichtman's expert reports.

[2] *See also Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, 2014 WL 12480146, at *3 (W.D. Tex. July 9, 2014) (rejecting argument that "experts should not be permitted to testify about what the Legislature may have intended when it enacted the plans being challenged" and recognizing that "[e]xperts in redistricting cases assist the trier of fact by using their knowledge and experience to piece this information together and put it in context for the court to consider" and that "[t]his necessarily includes any inferences or deductions that the expert may draw from the information he has reviewed and analyzed"; experts could "testify as to what they infer or deduce were the reasons behind the State's actions as long as they lay a proper foundation for such opinions"); *S.E.C. v. Johnson*, 525 F. Supp. 2d 70, 78 & n.8 (D.D.C. 2007) ("Although [a] particular factual conclusion is associated with one of the more significant disputes between the parties, that does not make it off limits for expert opinion."); Adv. Comm. Notes for Fed. R. Evid. 704, 1972 Proposed Rules ("The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule."); *id.* ("The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from 'usurping the province of the jury,' is aptly characterized as 'empty rhetoric.' 7 Wigmore § 1920, p. 17.").

analyze intent all the time" and, "[i]f you would shut down intent analysis, you might as well shut down much of history"); *see also* 10/10 Tr. 1096:3-5 (Dr. Lichtman was "not offering legal opinions here. [He was] offering evidence and analysis that includes considerable documentary research."). This perspective is particularly valuable from Dr. Lichtman, a noted historian who has served as an expert in "probably more than 90" voting-rights and redistricting cases, 10/10 Tr. 1089:25-1090:4; has testified about discriminatory intent "in quite a few cases," 10/10 Tr. 1090:20-22; *see also* 10/10 Tr. 1090:23-1091:14 (discussing cases in which Dr. Lichtman served as an intent expert); and has testified on behalf of both plaintiffs and defendants, Ex. 91-004 (Lichtman Rpt.).

In arguing to the contrary, Defendants rely on a decision—upholding several voting restrictions in North Carolina—in which the court did not consider Dr. Lichtman's ultimate conclusion on intent and cast doubt on whether such a conclusion was appropriate for expert testimony. Defs.' Br. 11-12.[3] But that decision was reversed by the Fourth Circuit *on the grounds that the provisions at issue were enacted with discriminatory intent*. *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 215 (4th Cir. 2016). While the Fourth Circuit did not discuss the trial court's findings regarding Dr. Lichtman's testimony, it is plain that considering—and giving serious weight to—Dr. Lichtman's conclusions as to intent would have assisted the district court in that case.

In addition, Plaintiffs note that Defendants do not appear to argue—and have not developed any argument—that the Court cannot consider Dr. Lichtman's opinions regarding intent aside from his ultimate conclusion that HB 2023 was enacted with discriminatory intent. *See generally* Defs.' Br. 11-12.[4] Defendants have thus waived any such argument. Regardless, the Court's conclusion that Dr. Lichtman is permitted to opine as to these matters, 10/10 Tr. 1100:13-15, is supported by ample case law and correct.[5]

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[3] Defendants point to cases finding that inferences about the intent or motives of parties are inappropriate for expert testimony, Defs.' Br. 11, but those cases did not involve the question whether a statute was enacted with discriminatory intent.

[4] For instance, Dr. Lichtman found that "the enactment of HB 2023 was marked by four procedural deviations and two substantive deviations." Ex. 91-012 (Lichtman Rpt.).

[5] *E.g.*, *Veasey v. Perry*, 71 F. Supp. 3d 627, 658 (S.D. Tex. 2014) (crediting Dr.

II. SCOPE OF EXPERTISE

Defendants' challenges to narrow aspects of Dr. Lichtman's analysis should also be rejected. In his work in this case, Dr. Lichtman pointed out that reports on housing in Maricopa County and the City of Phoenix provide evidence of ongoing housing discrimination. Ex. 94-025 (Lichtman 2d Reply). The reports find, among other things, that low-income minorities faced barriers to adequate housing, including predatory lending practices, zoning restrictions, lack of knowledge about fair housing rights, and lax enforcement of fair housing laws. *Id.* Dr. Lichtman also pointed to 2015 American Community Survey data showing that Hispanics were more likely than whites to have moved within the state in the past year. *Id.* at 26; *see also* 10/11 Tr. 1417:25-1418:12. In addition, Dr. Lichtman, citing several studies as examples, made the (seemingly indisputable) point that "[l]ongstanding discrimination in such areas as education and employment bears a direct relationship to the socio-economic standing of minorities relative to whites and is plainly reflected in the comparatively low levels of education and employment experienced by Arizona's minorities." Ex. 92-036 (Lichtman Reply).

Defendants assert that these points are outside the scope of Dr. Lichtman's expertise and should be excluded. Defs.' Br. 12-13. But that argument betrays a misunderstanding of quantitative historical analysis—which is interdisciplinary by nature and relies on numerous types of source material—and the purpose of Dr. Lichtman's analysis in this case, which was not to offer opinions as an expert in housing or sociology but rather to offer a broad-based quantitative historical analysis that (as is typical of quantitative historical analysis) draws on a variety of sources.

Lichtman's testimony, including testimony that the challenged bill's "sponsors' justifications for the bill" were disingenuous), *aff'd in part, vacated in part, rev'd in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *Johnson v. DeSoto Cty. Sch. Bd.*, 995 F. Supp. 1440, 1442 (M.D. Fla. 1998) (relying heavily on expert's testimony in opinion finding that "invidious discriminatory purpose was a motivating factor" in the enactment of challenged litigation); *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1075 (S.D. Ala. 1982) (holding based on "the testimony of plaintiffs' expert historian," among other things, that statute "was adopted with the invidious purpose of maintaining at-large general municipal elections, along with ward elections in the Democratic primaries, in order to foreclose the possibility of blacks being elected").

As Dr. Lichtman testified, he has "been writing on quantitative methodology and social science since 1978, when [he] published one of [his] first books." 10/10 Tr. 1087:12-13. His "publications are very interdisciplinary": he has "published in history journals, political science journals, forecasting journals, scientific journals, general social science journals, as well as completed about nine books." 10/10 Tr. 1087:5-8; *see also* 10/10 Tr. 1087:20-24 (Dr. Lichtman has "published numerous methodological pieces in quantitative analysis in journals such as the Proceedings of the United States National Academy of Sciences, the Journal of Interdisciplinary History, Social Science, History, and many others."). He has focused on "the application of historical and quantitative methodology to the study of American history, particularly modern American political history," and "published in this area in numerous journals including, for example, the 'American Historical Review,' the 'Journal of Social History,' among others." 10/10 Tr. 1088:4-13. He has also focused on "the application of these methodologies to social science and legal issues and social science in prediction." 10/10 Tr. 1088:14-16. He has "published articles specifically on the application of social science analysis to civil rights issues," including in such journals as *Journal of Law and Politics*, *La Raza Law Journal*, *Evaluation Review*, *Journal of Legal Studies*, and *National Law Journal*." Ex. 91-003 (Lichtman Rpt.). And, he has served as an expert in "probably more than 90" voting-rights and redistricting cases, "[e]ssentially[] all of" which involved expertise in qualitative and quantitative methods and research. 10/10 Tr. 1089:25-1090:4, 1090:10-12; *see also* 10/10 Tr. 1091:23-1092:6 (he has testified regarding the Senate Factors).

Dr. Lichtman is thus plainly qualified to determine that the sources upon which he relied in this case—including "surveys, scholarly studies, legislative histories, legislative records, census reports, statistical compilations, books, briefs, court opinions, government documents, organizational documents"—are "standard sources in the historical social science and quantitative methodology." 10/10 Tr. 1094:2-10; *accord* Ex. 91-004 (Lichtman Rpt.) (Dr. Lichtman's report "draws upon the sources standard in political and historical analysis," including, among many other things, "demographic and socio-

economic information" and "government and organizational documents"). Indeed, with respect to the Senate Factors, Dr. Lichtman "followed the same standard practices that [he has] looked at in other cases where [he has] examined" those factors. 10/10 Tr. 1096:11-16. He looked at "laws, rules, regulations, the justification for those laws, rules, and regulations"; "the history as it relates to discrimination"; "census data and other statistical materials on racial disparities"; "statistical material on voting to the extent it is polarized along racial lines"; "racial appeals that have emerged in Arizona politics"; "elected officials and their racial composition and comparing that to the demographic composition of the state"; and "various public polices and how they relate to minorities in the state and whether those public policies are soundly justified or tenuous." 10/10 Tr. 1096:16-1097:5.

This alone establishes that consideration of the types of sources at issue is part and parcel of what Dr. Lichtman does as a quantitative historian. In addition, Dr. Lichtman's testimony demonstrates that, in work he conducted prior to this case, he considered housing issues and work by sociologists in the context of broader analyses—just as he did here.[6] In short, Dr. Lichtman did the "[s]tandard thing [h]e do[es] … in quantitative history." 10/10 Tr. 1097:5-6. Defendants' arguments should be rejected.

[6] *Compare* 10/11 Tr. 1327:1-3 (he has, to an extent, studied the trends of public and private housing within Arizona), 10/11 Tr. 1329:10-13 (addresses housing discrimination, albeit in passing, in some of the scholarship he has written since 1990), *and* 10/11 Tr. 1322:2-3, 1323:10-12 (he "draw[s] all the time on work not done by historians" and has "published in … many political science journals"), *with* 10/11 Tr. 1327:20-1328:13 (in conducing analysis here, looked at materials analyzing housing discrimination in Maricopa County, the City of Phoenix, and Yuma County), 10/11 Tr. 1321:10-24 ("[m]aybe one or two" of studies regarding link between discrimination and socioeconomic disparities were done by historians, "but mostly they were done by public policy experts, experts in psychology and medicine, political scientists, urban scholars, and sociologists"), *and* 10/11 Tr. 1294:6-12 ("They are produced by scholars in a great variety of different disciplines and focus on many different aspects of the history of discrimination. And all of those studies draw a direct link between the history of discrimination, which in Arizona is not ancient history but … a lot of it is quite recent[,] and socioeconomic disparities."). *See also* 10/11 Tr. 1328:24-1329:1 (has studied equal access policy related to housing matters).

Dated: October 17, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 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

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]
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