**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al., Plaintiffs, v. LAUREL M. LEE, in her official capacity as the Secretary of State of Florida, et al., Defendants.	Case No. 4:21-cv-186-MW-MAF Consolidated for trial with Case No. 4:21-cv-201-MW-MJF Case No. 4:21-cv-187-MW-MAF Case No. 4:21-cv-242-MW-MAF

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' "SECOND LEVEL HEARSAY OBJECTIONS" TO PLAINTIFFS' EXPERT REPORTS

Pursuant to the Court's January 25, 2022, Order Requiring Supplemental Briefing (ECF 471), Plaintiffs submit this brief to address Defendants' footnote reservation of "all second-level hearsay objections" (ECF 467) in their stipulation to the admissibility of the parties' expert reports. Defendants' objections should be overruled for the following reasons:

1. Defendants waived any objection to the admission of Plaintiffs' expert reports, including objections based on second-level hearsay, when they assented in the Joint Pretrial Stipulation "to admissibility of the disclosed expert reports (and figures and tables therein) of expert witnesses who appear to testify at trial. The

Parties do not agree to the admission of attachments in or references cited in the expert reports." ECF No. 399 at 19 n.11; *see also* ECF No. 402 at 19 n.11 (same footnote in corrected Joint Pretrial Stipulation). That stipulation to admissibility contains no exception for materials in the expert reports themselves that Defendants contend constitute "second-level hearsay." Similarly, the Parties' Exhibit List does not reflect any objection to most of Plaintiffs' principal expert reports, and the objections raised to a select few expert reports were only to "[o]ppose admitting [report] exhibits [or "appendices"] for the truth of the matter asserted (hearsay within hearsay)." ECF No. 402-1 at 2-4.

Indeed, Defendants did not raise any "second-level hearsay" objection or issue regarding the contents of the expert reports until nearly a month after the parties entered the stipulation, in a January 19, 2021, email sent in connection with the preparation of an agreed upon exhibit list. When Defendants did raise their second-level hearsay objection, Plaintiffs explained that it was inconsistent with the Parties' stipulation. Defendants already stipulated to the "admissibility of the disclosed expert reports (and figures and tables therein)" without any reservation for supposed second-level hearsay. ECF No. 399 at 19 n.11. It is too late for them to object now.[1]

[1] Most of the expert reports at issue were served on September 1, 2021, and October 13, 2021. Defendants certainly could have, months ago, filed a motion raising these issues (e.g., a motion to strike, a motion in limine). Their failure to raise this issue until the eve of trial is inexplicable.

2. The Parties' stipulation to the admissibility of reports from testifying experts, and the lack of any exception for second-level hearsay within those reports, is consistent with this Court's approach in *Jacobson v. Lee*, No. 4:18-cv-262 (2019). In *Jacobson*, Plaintiffs proposed the same arrangement. *See* Tr. of Status Conference at 10:19-11:19 (Ex. 1 hereto). Counsel for the Secretary initially objected that there was "hearsay within hearsay of the literature review" of some of the reports that "we'd like to keep out." *Id.* at 13:8-12. But Plaintiffs maintained that "the text of the report, including the literature review," should be admitted, and the Court agreed, ruling, "I'm going to allow all the reports to come in," with no exception for second-level hearsay. *Id.* at 13:16-22. When the Parties to this case stipulated to the admissibility of reports from testifying experts, Plaintiffs' counsel had the Court's ruling from *Jacobson* in mind, and understood and intended that stipulation to lead to the same result as the Court's ruling in *Jacobson*: the full text of the reports would come into evidence, without any exception for second-level hearsay for sources cited within the reports.

3. Even if it had not been waived, Defendants' objection to second-level hearsay would be inadequate. Defendants' cryptic reservation of rights does not identify any particular expert reports, much less particular portions of those reports, that Defendants seek to exclude as second-level hearsay. While Plaintiffs have sought to confer this week with Defendants on the scope of their objection, and have

obtained some general understanding of the nature of Defendants' objections as covering material akin to a "literature review" as in *Jacobson*, Defendants still have not specifically identified which portions of which reports they would have the Court exclude.

This lack of particularity is prejudicial to Plaintiffs: there are many hundreds of pages of expert reports in this case, with numerous sources cited, discussed, and quoted. One of Plaintiffs' expert reports (Kousser) contains 300 footnotes identifying sources; another (Austin) has a 20-page appendix of sources cited. Other expert reports cite hundreds of additional sources in explaining the experts' opinions. Because Defendants have not timely identified *any* particular statements that they contend contain inadmissible hearsay, it is not possible for Plaintiffs to frame a full response.

4. Regardless, Defendants' position regarding the admissibility of expert evidence is wrong: any out-of-court statements contained within Plaintiffs' expert reports are admissible under Federal Rule of Evidence 703 and controlling case law. Rule 703 provides in pertinent part: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. *If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted*." (Emphasis added).

During discussions with defense counsel after the Court's January 25 order requiring supplemental briefing, Defendants advised that they principally intend to raise this issue in conjunction with the report of J. Morgan Kousser, Ph.D., a professor of history and social science, emeritus, at the California Institute of Technology. ECF 467-13 at ¶ 3. Professor Kousser's work has focused on minority voting rights, educational discrimination, race relations, the legal history of all of the foregoing subjects, political history, and quantitative methods. *Id.* Over his long career, Professor Kousser has testified as an expert in dozens of cases, including many involving allegations of discriminatory voting laws. In this case, Professor Kousser's 67-page expert report covers the history of voting laws in Florida, through the passage of SB 90 in 2021. The report is supported by 300 footnotes, which cite a wide array of sources, including court decisions, legislative transcripts, treatises, and articles published in law reviews, magazines and newspapers.

To be clear, much of what Professor Kousser cites would be admissible on its own: *e.g.*, statements of a party opponent, not offered for the truth of the matter asserted, or subject to one of the Rule 803 exceptions. But Rule 703 expressly permits experts to rely on facts and data that might otherwise be inadmissible hearsay, where "experts in the particular field would reasonably rely on those kinds of facts and data" in forming their opinions. And courts have routinely permitted such reliance. *See, e.g.*, *Dewit v. UPS Ground Freight, Inc.*, 2017 U.S. Dist. LEXIS 213728, *n. 4 (N.D. Fla. 2017) (citing "Fed. R. Evid. 703 (allowing experts to disclose information they relied on to the jury even if such information would otherwise be inadmissible"); *Shire ViroPharma Inc. v. CSL Behring LLC*, 2021 U.S. Dist. LEXIS 61551, n. 13 (D. Del. 2021) ("Federal Rule of Evidence 703 . . . 'permits experts to rely on hearsay so long as that hearsay is of the kind normally employed by experts in the field.' *In re TMI Litig.*, 193 F.3d 613, 697 (3d Cir. 1999)"); *Nooner v. Norris*, 2008 U.S. Dist. LEXIS 60136, n. 5 (E.D. Ark. 2008) ("Statements contained in newspaper articles used to prove the truth of the matter asserted are inadmissible hearsay, most likely double hearsay. However, an expert may rely upon otherwise inadmissible evidence in forming his opinion if the facts and data upon which he relies are of a type reasonably relied upon by experts in his field."). *See also* Fed. R. Evid. 803(18) (implying that statements in a treatise, periodical, or pamphlet may be "relied on by the expert on direct examination").

At trial, Professor Kousser is expected to testify that his report is predicated on evidence of the kind that is regularly relied on by historians. And Defendants are, of course, free to cross-examine him on that point, or about the evidence he cites. But they cannot exclude his opinion at the threshold with broad and unspecified objections about "second-level hearsay."

To the extent Defendants raise an issue regarding any of Plaintiffs' other experts, the same analysis applies. For example, Dr. Sharon Austin is a political scientist who focuses on political participation. Dr. Austin's 65-page report contains a 20-page list of cited sources, including court decisions, official government reports, treatises, and articles published in law reviews, magazines and newspapers. The same is true for Professor Traci R. Burch, Ph.D., a political scientist who focuses on race and ethnic politics, who, in the course of preparing her 66-page report, reviewed and cited hundreds of sources, including Florida legislative committee rules, legislative hearing proceedings, academic studies, survey reports, book chapters, and articles published in newspapers and academic journals. Professor Daniel A. Smith, Ph.D., political scientist and renowned expert on elections, cited or referenced more than 100 academic sources and publicly available voter files to reach his conclusions At trial, Professors Austin, Burch, and Smith will testify that their opinions and reports are supported by and predicated on evidence of the kind that is regularly relied on by political scientists. They will also be available for cross-examination by Defendants.

Other experts for the Plaintiffs similarly relied on materials to identify evidence in forming their opinions. And each of them relied on the type of information experts in their particular field would reasonably rely on. They are all available to be examined on these topics.

5. The Court's January 25, 2022, Order specifically requested that the Parties address any orders of Judge Hinkle concerning similar issues in *Jones v. DeSantis*, 4:19-cv-300-RH (N.D. Fla.). In *Jones*, the Parties "agreed to admission of each previously served expert report as trial evidence, thus waiving any objection that the report is inadmissible hearsay," but "did not waive any substantive objections to the content of the report." *Jones*, ECF No. 317, at 1 (Apr. 2, 2020) (Ex. 2 hereto). Based on that agreement, Judge Hinkle ordered that "[f]irst-level hearsay objections to previously served expert reports and previously filed declarations of the plaintiffs have been waived," but that those documents "are admitted into evidence subject to other objections." *Id*.

The parties' agreement in *Jones*, however, was different from the Parties' agreement in this case, where the Parties stipulated to the "admissibility of the disclosed expert reports (and figures and tables therein)" without any reservation for supposed second-level hearsay or other substantive objections. ECF No. 399 at 19 n.11. As explained above, it was also different from this Court's order in *Jacobson*, where the Court rejected an objection to second-level hearsay in expert reports in precisely this context. *See* Ex. 1 at 13:8-22.

6. Judge Hinkle's substantive decisions in *Jones* confirm that any objection to second-level hearsay in Plaintiffs' expert reports is without merit. In a March 31, 2020 Order on the Defendants' Motions *in Limine* concerning Professor

Kousser (who was also a witness in that case), Judge Hinkle said the following on the subject:

> The defendants say Dr. Kousser's testimony about such things as newspaper articles published prior to the Amendment 4 vote and a sponsoring legislator's statements prior to the enactment of SB7066 is inadmissible hearsay, but that is incorrect. Hearsay is an out-of-court statement that "a party offers in evidence *to prove the truth of the matter asserted in the statement*." Fed. R. Evid. 801(c)(2) (emphasis added). A newspaper article may show the information available to voters and thus may be relevant to gauging their understanding, regardless of whether the article is true. A legislator's statement may show the legislator's understanding or intent—and perhaps the understanding and thus the intent of other legislators—regardless of whether the statement is true. And in any event, a legislator's statement may show the legislator's then-existing state of mind. *See* Fed. R. Evid. 803(3). In sum, Dr. Kousser's testimony about history, events, and statements made while Amendment 4 and SB7066 were under consideration is admissible.

Jones, ECF No. 312, at 1-2 (Ex. 3 hereto). For the same reason, even if Defendants had preserved their second-level hearsay objection, the Court should overrule it.

CONCLUSION

For the foregoing reasons, Plaintiffs' expert reports should be admitted in their entirety over Defendants' blanket reservation of "all second-level hearsay objections."

Dated: January 28, 2022

/s/ Frederick S. Wermuth
Frederick S. Wermuth
Florida Bar No. 0184111
Thomas A. Zehnder
Florida Bar No. 0063274
King, Blackwell, Zehnder
& Wermuth, P.A.
P.O. Box 1631
Orlando, FL 32802-1631
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
fwermuth@kbzwlaw.com
tzehnder@kbzwlaw.com

Marc E. Elias
Elisabeth Frost
David R. Fox*
Lalitha D. Madduri*
Christina A. Ford
Francesca Gibson*
Elias Law Group LLP
10 G St. NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
melias@elias.law
efrost@elias.law
dfox@elias.law
lmadduri@elias.law
cford@elias.law
fgibson@elias.law

*Admitted *Pro Hac Vice*

Counsel for LWV Plaintiffs

/s/ Benjamin L. Cavataro
P. Benjamin Duke*
Shira M. Poliak*
Covington & Burling LLP
620 Eighth Avenue
New York, NY 10018
Telephone: 212-841-1270
pbduke@cov.com
spoliak@cov.com

Benjamin L. Cavataro
Florida Bar No. 113534
Morgan E. Saunders*
Michael A. Fletcher II*
Elizabeth T. Fouhey*
Cyrus Nasseri*
Covington & Burling LLP
850 Tenth Street, N.W.
Washington, DC 20001
Telephone: 202-662-5693
bcavataro@cov.com
msaunders@cov.com
mfletcher@cov.com
efouhey@cov.com
cnasseri@cov.com

Robert D. Fram*
Ellen Y. Choi*
Nia Joyner**
Covington & Burling LLP
415 Mission Street
San Francisco, CA 94105
Telephone: 415-591-7025
rfram@cov.com
echoi@cov.com
njoyner@cov.com

/s/ Kira Romer0-Craft
Kira Romero-Craft
Florida Bar No. 49927
Miranda Galindo *
LatinoJustice, PRLDEF
523 W Colonial Dr.
Orlando, FL 32804
Telephone: 321-418-6354
Kromero@latinojustice.org
Mgalindo@latinojustice.org

Brenda Wright *
DEMOS
80 Broad St, 4th Flr
New York, NY 10004
Telephone: 212-633-1405
bwright@demos.org

Judith B. Dianis *
Gilda R. Daniels
Jorge Vasquez *
Sabrina Khan *
Esperanza Segarra
Florida Bar No. 527211
Sharion Scott *
ADVANCEMENT PROJECT
1220 L Street, N.W., Suite 850
Washington, DC 20005
Telephone: 202-728-9557
Jbrowne@advancementproject.org
Gdaniels@advancementproject.org
Jvasquez@advancementproject.org
Skhan@advancementproject.org
Esegarra@advancementproject.org
Sscott@advancementproject.org

John A. Freedman*
Jeremy C. Karpatkin
Elisabeth S. Theodore*
Janine M. Lopez*

Michael Pernick*
Morenike Fajana*
Romane Paul*
NAACP Legal Defense & Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
Telephone: 212-965-2200
mfajana@naacpldf.org

Amia Trigg*
Mahogane D. Reed*
NAACP Legal Defense & Educational Fund, Inc.
700 14th Street NW, Ste. 600,
Washington, DC 20005
Telephone: 202-682-1300
atrigg@naacpldf.org

Nellie L. King
Fla. Bar No. 0099562
The Law Offices of Nellie L. King, P.A.
319 Clematis Street, Suite 107
West Palm Beach, FL 33401
Telephone: 561-833-1084
Nellie@CriminalDefenseFla.com

**Admitted pro hac vice*

Counsel for NAACP Plaintiffs

/s/ Michelle Kanter Cohen
Nancy G. Abudu
Florida Bar No. 111881
Jack Genberg
Caren. E. Short
Southern Poverty Law Center
P.O. Box 1287

Leslie C. Bailey*
Sam I. Ferenc*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, D.C. 20001-3743
Telephone: 202-942-5000
John.Freedman@arnoldporter.com
Jeremy.Karpatkin@arnoldporter.com
Elisabeth.Theodore@arnoldporter.com
Janine.Lopez@arnoldporter.com
Leslie.Bailey@arnoldporter.com
Sam.Ferenc@arnoldporter.com

Jeffrey A. Miller *
Arnold & Porter Kaye Scholer LLP
3000 El Camino Road
Five Palo Alto Square, Suite 500
Palo Alto, CA 94306-3807
Telephone: 650-319-4500
Jeffrey.Miller@arnoldporter.com

Aaron Stiefel*
Daniel R. Bernstein*
Ryan D. Buhdu*
Andrew R. Hirschel*
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: 212-836-8000
Aaron.Stiefel@arnoldporter.com
Daniel.Bernstein@arnoldporter.com
Ryan.Budhu@arnoldporter.com
Andrew.Hirshel@arnoldporter.com

**Admitted pro hac vice*

Counsel for Florida Rising Plaintiffs

Decatur, Ga 30031-1287
Telephone: 404-521-6700
Fax: 404-221-5857
nancy.abudu@splcenter.org
jack.genberg@splcenter.org
caren.short@splcenter.org

Michelle Kanter Cohen*
Jon Sherman*
Cecilia Aguilera*
Fair Elections Center
1825 K Street NW, Suite 450
Washington, DC 20006
Telephone: 202-331-0114
mkantercohen@fairelectionscenter.org
jsherman@fairelectionscenter.org
caguilera@fairelectionscenter.org

William Devaney*
Baker McKenzie LLP
452 Fifth Avenue
New York, NY 10018

**Admitted Pro Hac Vice*

Counsel for HTFF Plaintiff

LOCAL RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1(F), this memorandum contains 2,018 words, excluding the case style, signature blocks, and certificate of service.

s/ *Kira Romero-Craft*
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served on all counsel of record through the Court's CM/ECF system on the 28th day of January, 2022.

s/ *Kira Romero-Craft*
Attorney for Plaintiffs