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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGELIO MONTES and MATEO ARTEAGA,

Plaintiffs,

v.

CITY OF YAKIMA, MICAH CAWLEY, in his official capacity as Mayor of Yakima, and MAUREEN ADKISON, SARA BRISTOL, KATHY COFFEY, RICK ENSEY, DAVE ETTL, and BILL LOVER, in their official capacity as members of the Yakima City Council,

Defendants.

NO. 12-CV-3108 TOR

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE EXPERT TESTIMONY OF STEPHAN THERNSTROM

NOTED FOR HEARING:

August 20, 2014

Without Oral Argument

I. INTRODUCTION

Defendants bear the burden of establishing that Dr. Stephan Thernstrom's opinions are reliable and admissible. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). Instead of attempting to meet that burden squarely, Defendants seek to avoid it by arguing that exclusion of experts in a bench trial is improper and shifting focus away from Dr. Thernstrom to Plaintiffs' experts. But the flaws in Dr. Thernstrom's testimony are manifest.

Dr. Thernstrom assessed a small body of evidence, mainly consisting of Plaintiffs' expert reports and the evidence cited therein, and from this evidence drew the legal conclusion that Plaintiffs' evidence is insufficient to support a finding that the City of Yakima's electoral system violates Section 2 of the Voting Rights Act. In reaching his conclusions Dr. Thernstrom did not employ reasoned methodology—or in fact *any* methodology. This is not "expert" testimony.

II. ARGUMENT

A. *Daubert* and Rule 702 Apply in a Bench Trial.

Defendants first argue that it is "improper" to exclude Dr. Thernstrom's testimony because the Court will hold a bench trial. Regardless of whether a court or a jury sits as a trier of fact, however, expert testimony must still satisfy Rule 702 requirements. In a bench trial, "the *Daubert* standards of relevance and reliability for scientific evidence must nevertheless be met." *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002); *see also Beech Aircraft Corp. v. United States*, 51 F.3d 834, 842 (9th Cir. 1995) (trial court holding a bench trial properly excluded an expert opinion pursuant to Rule 702); *Attorney Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009) ("*Daubert's* standards must still be met" in a bench trial); *Schilder Dairy, LLC v. DeLaval, Inc.*,

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CV 09-531-REB, 2011 WL 2634251 (D. Idaho July 5, 2011) ("[T]he *Daubert* standards governing admissibility of expert testimony must still be met, even during a bench trial.").

The only case Defendants cite in support of their argument that exclusion of expert testimony in a bench trial is "generally improper," *Mabrey v. Wizard Fisheries, Inc.*, No. C05-1499RSL, 2008 WL 110500 (W.D. Wash. Jan. 8, 2008), is inapposite. *Mabrey* did not, in fact, address this topic but instead considered whether Rule 703 permitted an expert whose credentials were not at issue to rely on certain facts and data culled from a non-testifying expert. *Id.* at *3.

To be sure, because this will be a bench trial, there is no risk that a lay jury will be unduly influenced by Dr. Thernstrom's improper opinions. But unreliable and improper opinions offered by an expert not qualified to give them have no more place in front of the Court than they do in front of a jury. It thus remains the Court's responsibility to fulfill its "gatekeeping" function under *Daubert* to exclude unhelpful and unreliable testimony. *See Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010) (holding that district court erred in failing to perform a *Daubert* analysis) (internal quotation marks and citations omitted).

Simply put, the unreliability of Dr. Thernstrom's testimony is evidenced by the plain language of his expert reports. No sound justification exists for the Court to hold the gates to this testimony wide open simply because the Court is serving as trier of fact.

B. Dr. Thernstrom's Testimony Does Not Meet the Standards Set Out in *Daubert* and Rule 702.

The Court should preclude Dr. Thernstrom from providing his opinions in this case pursuant to *Daubert* and Rule 702 because his opinions are based on

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insufficient facts and data and are not the product of reliable principles and methods. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."); *see also Amorgianos v. Nat'l Railroad Passenger Corp*., 303 F.3d 256, 266-67 (2d Cir. 2002) (where "an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony"). As the court recognized in the *Large v. Fremont County* case discussed below, and which fact Defendants do not substantively dispute, the conclusions set out in Dr. Thernstrom's reports are not tethered to reasoned analysis, and that is because Dr. Thernstrom is not qualified to opine on the racial dynamics of a jurisdiction he knows nothing about.

1. *Fremont County* Rejected Dr. Thernstrom's Testimony Under Nearly Identical Circumstances.

In *Large v. Fremont County*, 709 F. Supp. 2d 1176, 1231 (D. Wyo. 2010), "the Court wholly reject[ed] the opinions [Dr. Thernstrom] proffered on the historic and present day experience of Native people and race relations in Fremont County, as it was apparent that Dr. Thernstrom was not only treading far outside of his narrow role in [the] litigation, but was also testifying about matters in which he had little experience or knowledge." The same is true here.

Defendants' attempt to distinguish *Fremont County* fails. There, as here, Dr. Thernstrom was retained to critique the work of one of the plaintiffs' experts. There, as here, Dr. Thernstrom used that role to offer opinions he was unqualified to give about matters about which he knew little-to-nothing. Defendants claim

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that, in *Fremont County*, Dr. Thernstrom did not benefit from the kind of historical evidence available to him here, including "newspaper stories, statistical data, or any other material commonly relied on in voting rights litigation." ECF No. 72 ("Response Br.") at 8; *see also* ECF No. 73 (Declaration of Stephan A. Thernstrom ("Thernstrom Decl.")), ¶ 3 ("In the Fremont County case, there were no newspaper articles and very little in the way of statistics, or other material commonly relied on in Voting Rights Act cases . . .").[1] Even a cursory review of the court's decision in *Fremont County* shows this to be false.

In *Fremont County* there was such a "wealth of information" presented to the court that the court found it "neither necessary nor possible" to memorialize it. 709 F. Supp. 2d at 1231. In addition to the opinions of Dr. Martha Hipp, which Dr. Thernstrom contends comprised most of the plaintiffs' evidence, Thernstrom Decl. ¶ 4, the plaintiffs in *Fremont County* in fact presented the opinions of *three* additional experts, 709 F. Supp. 2d at 1211-12, 1231. And these experts did not render their opinions in a vacuum. With respect to statistics, for example, the court considered and relied upon a set of "statistics demonstrating disparities between education level, home ownership, and income level." *Id*. at 1226. The court likewise cited the plaintiffs' expert's "invaluable project of conducting interviews and gathering first hand information from tribal members." *Id*. at 1231. If this were not enough, the court—and Dr. Thernstrom—had at their disposal an array of other data and information related to, for example, employment, employment history, poverty levels, and tribal self-identification. *See id*. at 1200-01& n.6.

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[1] Notably, despite Dr. Thernstrom's disparagement of the plaintiffs' evidence in *Fremont County*, the court in that case found a Section 2 violation.

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Dr. Thernstrom's claim that there was an "absence of written materials to analyze" is misleading at best. Thernstrom Decl. ¶ 5.

In *Fremont County* and in this case, Dr. Thernstrom sought to perform an identical function: he professed opinions related to the historic and present day experience of minority populations and race relations in locales in which he has no direct experience and as to which he had conducted little-to-no independent research. Contrary to Defendants' assertions, the court in *Fremont County* did not reject Dr. Thernstrom's opinions because of any purported dearth of documentary evidence. Response Br. at 8. Instead, it rejected Dr. Thernstrom's testimony[2] for the precise reason the Court should do so here: Dr. Thernstrom presents opinions regarding "matters in which he [has] little experience or knowledge" and supports these opinions purely with subjective inferences regarding what he believes Plaintiffs' body of evidence says. 709 F. Supp. 2d at 1231.

2. Defendants Do Not Dispute that Dr. Thernstrom's Analysis Is Unreliable and Unsupported.

As Plaintiffs established in their Motion, Dr. Thernstrom's profoundly flawed "methodology" fails to satisfy the requirements set forth in Rule 702. *See* ECF No. 62 at 4-8. Defendants' failure to substantively address this issue should be taken as a concession that Dr. Thernstrom's testimony, in whole or part, is inadmissible.

Plaintiffs set forth a number of specific areas in which Dr. Thernstrom's testimony is unreliable and unsupported. *See id*. These include the fact that Dr. Thernstrom (1) fails to provide an evidentiary basis for many assertions, such as,

[2] It does not appear that the plaintiffs in *Fremont County* formally moved to exclude Dr. Thernstrom's testimony under *Daubert* and Rule 702.

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for example, those related to the desirability of at-large elections, (2) repeatedly opines on Plaintiffs' experts' conclusions and beliefs without any basis in the historical record or the actual language of their reports, and (3) makes factual assertions that have no basis in the historical record or *in fact*. *Id*.

Defendants do not respond substantively to this, the heart of Plaintiffs' Motion, contending that the page limit allotted for their response bars any such "point-by-point" response. *See* Response Br. at 9. Instead, Defendants baldly characterize the many instances in which Dr. Thernstrom's analysis is unsupported or flat wrong as "small oversights or inaccuracies" and ask the Court to "assess the merits of [Plaintiffs'] criticisms by relying on trial testimony." *Id*. But Dr. Thernstrom's opinions will be no more admissible once they appear in the form of trial testimony as they are in his reports. Defendants' failure to dispute the fundamental failures in reasoning and foundation that render Dr. Thernstrom's testimony unreliable and valueless to the Court implicitly concedes the merits of this motion. *See Selliken v. Country Mut. Ins. Co*., 12-CV-0515-TOR, 2013 WL 4759083, at *3 (E.D. Wash. Sept. 4, 2013) (holding that opposing party "effectively concede[s]" issue by failing to respond to moving party's argument). Even for this reason standing alone, the Court should bar Dr. Thernstrom's testimony, or at least the specific aspects of his testimony identified in Plaintiffs' Motion as representing nothing other than unsupported conjecture.

In this regard, it is entirely telling that Defendants spend more time attacking Plaintiffs' experts than they do attempting to defend Dr. Thernstrom's actual testimony. *See* Response Br. at 1-3, 7, 9. This is all a red herring. Plaintiffs' experts are not at issue in this Motion. Instead, where a party objects to the admission of an expert witness's opinion and adequately explains why the opinion

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is unreliable, the "proponent of the opinion has the burden of establishing the ultimate fact of reliability" of that expert's testimony by a preponderance of the evidence. *U.S. v. Frazier*, 387 F.3d 1244, 1274 (11th Cir. 2004) (citing *Daubert*, 509 U.S. at 593 n. 10). Defendants' criticism of Plaintiffs' experts has *no bearing* upon this issue. Defendants chose not to file an independent motion to exclude directed toward Plaintiffs' experts. They are free to cross-examine Plaintiffs' experts at trial, but they cannot salvage Dr. Thernstrom's testimony by critiquing Plaintiffs' experts.[3] Because Defendants have not satisfied their burden to show the opinions of Dr. Thernstrom are reliable, his testimony must be excluded.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Exclude Expert Testimony of Dr. Thernstrom should be granted.

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[3] Given that Defendants' discussion of Plaintiffs' experts is immaterial to this Motion, Plaintiffs will not respond in detail here. Suffice to say, that discussion is in many ways inaccurate. For example, Defendants claim that "Dr. Fraga, has not conducted any research specifically into the City other than interviewing ten people chosen by the ACLU and driving around the City for a few hours." Response Br. at 7. To the contrary, in addition to visiting Yakima and meeting with Yakima residents (unlike Dr. Thernstrom), as Dr. Fraga's report shows, he conducted significant research into the City, including consideration of primary and secondary sources such as academic articles and books, documents produced in discovery, newspaper articles, letters to the editor, demographic data, and lawsuits against the City and County of Yakima. *See generally* ECF No. 74-2.

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CERTIFICATE OF SERVICE

I certify that on July 22, 2014, I electronically filed the foregoing Plaintiffs' Reply in Support of Plaintiffs' Motion to Exclude Expert Testimony with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorney(s) of record:

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I certify under penalty of perjury that the foregoing is true and correct.

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