UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LULAC, *et al.*, *Plaintiffs,* v. GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*, *Defendants.*	Case No.: 3:21-CV-00259-DCG-JES-JVB [Lead Case]
ROY CHARLES BROOKS, *et al.*, *Plaintiffs*, v. GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*, *Defendants.*	Case No.1-21-CV-00991-DCG-JES-JVB [Consolidated Case]

JOINT ADVISORY REGARDING BROOKS PLAINTIFFS' PRELIMINARY INJUNCTION HEARING

Pursuant to the Court's Order, ECF No. 126, the parties have conferred and believe that the 3.5 days the Judges have reserved (through mid-day January 28, 2022) should be sufficient for the hearing on Brooks Plaintiffs' motion for a preliminary injunction.

With respect to the division of that time, the parties have the following positions:

Plaintiffs' Position: As the party bearing the burden of proof, Brooks Plaintiffs do not believe a strict 50/50 split of time is appropriate, and may need more than 1.75 days to complete their presentation of evidence. Plaintiffs believe they could streamline their presentation through the admission of expert reports, with shorter direct examinations of experts focused on the key

conclusions. In that case, Plaintiffs believe they could complete their presentation of evidence in half the time allotted by the Court (with each party's examination time counting against their own portion of the time). With respect to Defendants' hearsay objection, the Fifth Circuit has held that "hearsay evidence," including sworn declarations like the expert reports in this case, are admissible at the preliminary injunction stage. *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1991). Moreover, expert reports are admissible under the Rule 807 residual exception. Plaintiffs propose the same approach the three-judge court adopted in *Perez v. Abbott*, in which the expert reports were admitted under Rule 807 subject to the expert's adoption of the report under oath and subject to cross examination. *See* Ex. 1 (Order, *Perez v. Abbott*, No. 11-CA-360-OLG-JES-XR (July 3, 2017)).

Defendants' Position: Defendants contend that equal time should be allotted to both sides, and the Court should impose equal time limitations per side. Although the Brooks Plaintiffs bear the burden of proof, that does not justify imposing unequal time limits. Defendants would be prejudiced in their defense if they are not allocated sufficient time to present their case. Moreover, Defendants cannot know exactly what evidence they must present (and therefore how long they may need) until Plaintiffs have presented all of their evidence and rested their case. Both sides should have equal opportunity, and equal responsibility, to present a streamlined and efficient case to the Court.

Defendants do not consent to the admission of expert reports, which are inadmissible hearsay and contain objectionable and impermissible material. *See, e.g.*, Fed. R. Civ. P. 43(a) (generally requiring that testimony must be taken in open court); *Sierra Club*, 992 F.2d at 551 (permitting, but not requiring, courts to admit hearsay evidence and issue preliminary injunctions "without an evidentiary hearing when the facts are not disputed"). Little efficiency will be gained

under Plaintiffs' proposal because they still intend to conduct live direct examinations of their experts at the hearing. *Cf.* Fed. R. Evid. 807(a)(2) (holding that the residual exception applies only where other evidence cannot be "obtain[ed] through reasonable efforts"). Conversely, under Plaintiffs' proposal, Defendants would be denied the opportunity to observe and, if necessary, object to expert testimony, and the Court would be denied the opportunity to hear Plaintiffs' experts explain their opinions under oath in front of the tribunal.

January 11, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that all counsel of record were served a copy of the foregoing this 11th day of January, 2022, via the Court's CM/ECF system.

/s/ Mark P. Gaber
Mark P. Gaber

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et. al.	)	
	)	CIVIL ACTION NO.
	)	**11-CA-360-OLG-JES-XR**
Plaintiffs	)	CONSOLIDATED ACTION
	)	[Lead case]
v.	)	
	)	
GREG ABBOTT, et. al.	)	
	)	
	)	
Defendants	)	

O R D E R

Pending before the Court is the parties' dispute regarding the admissibility of expert reports (docket nos. 1439, 1440, 1441, 1444). Defendants object to the admission of any expert reports into evidence. They contend the expert reports constitute inadmissible hearsay under Fed. R. Evid. 801(c) because they are out-of-court statements offered to prove their truth. Plaintiffs assert that expert reports are admissible under Fed. R. Evid. 807, the residual exception to the hearsay rule. Defendants claim the residual exception should only be applied in "exceptional circumstances."

The Court has considered the parties' arguments and the applicable law and finds that expert reports will not be pre-admitted or admitted in lieu of live expert testimony but the reports will be allowed subject to any further objections in open court if the expert testifies live or by trial deposition and adopts the statements in

the report while under oath and subject to cross examination. *See Bianco v. Globus Medical, Inc.*, 30 F. Supp. 3d 565, 570-71 (E.D. Tex. 2014) (pretrial expert report was inadmissible as out of court statement, but report offered into evidence through sworn declaration was admissible on issues to be determined by the judge); *see also Televisa, S.A. de C.V. v. Univision Communications, Inc.*, 635 F. Supp. 2d 1106, 1109-10 (C.D. Cal. 2009) (expert report admissible under Rule 807 because expert signed the report, adopted it as a true and correct copy, testified under oath, and was subject to cross examination). Allowing the admission of expert reports under these parameters should dispel any concerns about trustworthiness.

In bench trials, and in this case in particular, expert reports can greatly assist the trier of fact in understanding the basis for the expert's opinions and determining how much weight to give the expert's opinion. *Williams v. Illinois*, 567 U.S. 50, 77-78 (2012). If the basis evidence for the expert's opinion is hearsay, and nothing more, the Court can simply disregard that evidence when reaching its decision. Likewise, if some (but not all) of the basis evidence is irrelevant, the Court can disregard the irrelevant evidence when reaching a decision. But if the basis for the expert's opinion is relevant data from reliable sources, and the expert's analysis and methodology is sound, the Court will likely give the expert's findings more weight. The issues in this case are not simple, the data and methodology used by certain experts can be complex, and time is of the essence. Allowing the expert reports under Rule 807 will serve the general purpose of the rules and the interests of justice.

It is therefore ORDERED that expert reports will not be pre-admitted or admitted in lieu of live expert testimony but the reports will be allowed subject to any further objections in open court if the expert testifies live or by trial deposition and adopts the statements in the report while under oath and subject to cross examination.

SIGNED on this 3rd day of July, 2017.

_____/s/_____
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

_____/s/_____
ORLANDO L. GARCIA
CHIEF U.S. DISTRICT JUDGE

_____/s/_____
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE