IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:13-CV-00949

DAVID HARRIS and CHRISTINE BOWSER,

Plaintiffs,

v.

PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as the Chairman of the North Carolina State Board of Elections,

Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO EXCLUDE IN PART TESTIMONY OF DR. THOMAS HOFELLER

I. INTRODUCTION

Nothing in Defendants' short and half-hearted opposition provides any basis for the Court to admit Dr. Thomas Hofeller's legal opinions about the United States Supreme Court's redistricting jurisprudence and its application to this case. It is, indeed, telling that Defendants do not even discuss—let alone attempt to justify—any of the specific passages in Dr. Hofeller's report to which Plaintiffs object. Defendants' silence speaks volumes. Pursuant to Federal Rule of Evidence 702, the Court should strike the portions of Dr. Hofeller's reports identified in Plaintiffs' original motion and preclude Dr. Hofeller from offering similar testimony at trial.

II. ARGUMENT

A. Dr. Hofeller Cannot Offer Improper Legal Conclusions Merely Because This is a Bench Trial

Defendants first argue that the Court should not preclude Dr. Hofeller from offering legal conclusions because this is a bench trial. Defendants are correct that *Daubert* motions have little role to play in bench trials because the Court is capable of assigning expert testimony whatever weight it deserves. Thus, for example, where a party disputes the methodology used by an opposing expert, the Court can and should assess the expert's testimony at trial in the context of cross examination. *See generally* Dkt. 121, at 12-13 (collecting cases). This is one of the many reasons why the Court should deny Defendants' misguided motion to exclude the testimony of Plaintiffs' expert, Dr. Stephen Ansolabehere.

But the fact that cross examination is the preferred method of challenging an expert's substantive analysis in a bench trial does not mean that the Court must allow the record to be cluttered with—and scarce trial time wasted on—improper legal conclusions. Courts routinely exclude improper legal conclusions by expert witnesses in bench trials. *See, e.g.*, *Cyprus Amax Minerals Co. v. TCI Pac. Commc'ns, Inc.*, No. 11-CV-0252-CVE-PJC, 2014 WL 693328, at *9-10 (N.D. Okla. Feb. 21, 2014) (granting motion to exclude expert report consisting of "legal conclusions" in a bench trial); *Baldwin v. EMI Feist Catalog, Inc.*, 989 F. Supp. 2d 344, 352 (S.D.N.Y. 2013) ("Alter's testimony is inadmissible as a matter of law whether presented to a jury or to the Court because it does nothing other than express legal conclusions."); *CIT Grp./Bus. Credit, Inc. v. Graco Fishing & Rental Tools, Inc.*, 815 F. Supp. 2d 673, 678 (S.D.N.Y. 2011) (excluding expert testimony that "would constitute an impermissible opinion as to an ultimate legal conclusion in this case").

Statements by Dr. Hofeller such as "[t]he Supreme Court, in its remand of the *Cromartie* case (*Easley v. Cromartie*, 532 U.S. 234, 244 (2001)), agreed with this premise," First Report, ¶ 34, are neither helpful to the Court nor appropriate "expert" testimony. The mere fact that the Court is holding a bench trial is hardly a reason to allow plainly improper legal argument and conclusions to be introduced in the transparent guise of "expert testimony."

B. Dr. Hofeller Cannot Offer Improper Legal Conclusions in the Guise of Describing the Instructions He Received and Methodology He Used in Drawing the Congressional Plan

Defendants' other arguments in opposition to the present motion also badly miss the mark.

First, Defendants claim that as a "fact witness," Dr. Hofeller must be allowed to testify as to the "criteria he followed . . . given to him by the co-chairs of the General Assembly's Joint Restricting Committee, Senator Bob Rucho and Representative David Lewis." Dkt. 118, at 2. No one disputes that Dr. Hofeller is free to do so. He can testify to the specific instructions he received. If Rucho and Lewis conveyed to him their (mis)understanding of Supreme Court jurisprudence, he can so testify. And of course he is free to testify to what—factually—he did to draw the two districts challenged in this lawsuit in response to those instructions. What Dr. Hofeller *cannot* do is recite case law and then tell the Court how it applies to this case (i.e., how it justifies the districts he drew)—as he does repeatedly throughout his reports. *See* Dkt. 121, at 2-4. This kind of *legal argument* is flatly inappropriate from an expert.[1]

[1] The two cases Defendants cite in support of their claim that "fact witnesses" can opine freely on the meaning of the law did not consider pre-trial *Daubert* motions and are inapposite. *See United States v. Erickson*, 75 F.3d 470, 475-76 (9th Cir. 1996) (rejecting claim, on appeal, that regulation was unconstitutionally vague premised in part on assertion that trial court erred by allowing medical and billing professionals to "testif[y] as lay witnesses regarding industry practices and the common understanding of billing instructions"); *Janich Bros. v. Am. Distilling Co.*, 570 F.2d 848, 852 (9th Cir. 1977) (finding, on appeal, that the trial court sufficiently 'cured' testimony that arguably constituted a legal conclusion by "instruct[ing] the jury that it was not to accept the witness's statement as a correct description of the law, but only as a statement of the witness's understanding" and that "that if California law was applicable to any issue in the case, the court would give a statement of the law to the jury").

Defendants next contend that Dr. Hofeller should be allowed to offer his "understanding of the law" in the course of giving testimony "related to his criticisms of plaintiffs' experts." Dkt. 118, at 3-4. Defendants provide no explanation or illustration of how the specific testimony challenged by Plaintiffs is germane to this purpose—and they are simply wrong. Take one of the passages challenged by Plaintiffs as an example: "This is the same error that was identified by the Supreme Court in *Cromartie I*." First Report, ¶ 55, p. 19, ln. 4. Dr. Hofeller offers this legal conclusion in the course of setting out his views regarding the utility of voter registration data. *See id.* ¶ 55. By no stretch of the imagination is it either necessary to his analysis or appropriate for Dr. Hofeller—who *is not a lawyer*—to offer his opinion that Plaintiffs' experts committed an "error that was identified by the Supreme Court." The Court—not Dr. Hofeller—will determine what the law is and how it applies to the facts of this case.

Again, the cases Defendants cite are not to the contrary. Indeed, the *Snyder* case illustrates why the Court *should* exclude Dr. Hofeller's testimony. *Snyder v. Wells Fargo Bank, N.A.*, No. 11 CIV. 4496 SAS, 2012 WL 4876938, at *5 (S.D.N.Y. Oct. 15, 2012). In that case, the Southern District of New York determined that an expert's report fell "well outside the scope of permissible testimony" because it drew "numerous legal conclusions with regard to the specific facts of the case at hand." *Id.* The fundamental flaw with the expert's report was that—as here—the expert " usurp[ed] the role of this Court in explaining the law, and usurp[ed] the role of the jury in applying the law to the

facts of this case and evaluating the credibility and testimony of the witnesses." *Id.* at *4.[2]

C. The Court Should Reject Defendants' Patently Obvious Efforts to Draw a False Equivalency Between Dr. Hofeller's and Dr. Ansolabehere's Testimony

Finally, the Court should dismiss out of hand Defendants' "tit-for-tat" argument regarding Dr. Ansolabehere (Dkt. 118, at 4). Defendants filed their own 12-page motion regarding Dr. Ansolabehere's testimony in which they set out all their objections to Dr. Ansolabehere's testimony. Not once did they contend that any aspect of Dr. Ansolabehere's testimony amounted to an improper legal conclusion. And for good reason: There are no such legal opinions or conclusions in his proposed testimony.

Dr. Ansolabehere's reports set out analyses he performed within the scope of his expertise and offer his expert opinions on *facts* that are germane to this lawsuit—such as the relative compactness of the challenged districts and the relative strength of race and politics as factors explaining the composition of CD 1 and CD 12 in the enacted plan. By contrast, Dr. Hofeller recites long passages of Supreme Court cases and then purports to apply that jurisprudence to the specific facts of this case. Dr. Ansolabehere's testimony is highly probative and entirely proper. Dr. Hofeller's argumentative musings on Supreme Court case law are not.

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[2] Defendants' other two cases are similarly inapposite. In one, the court merely held that it was not improper for a damages expert in a patent case to "assume[] validity and infringement in order to assess damages." *See Static Control Components, Inc. v. Lexmark Int'l, Inc.*, No. CIVA5:02-571, 2007 WL 7083655, at *6 (E.D. Ky. May 12, 2007). This in no way supports Defendants' claim that Dr. Hofeller can opine about what the law is. In the other, the court accepted the non-moving party's representation that its experts would only offer opinions about "ultimate facts" and would not "purport[] to give expert opinions as to what the law is." *See Donnelly Corp. v. Gentex Corp.*, 918 F. Supp. 1126, 1137 (W.D. Mich. 1996). That is precisely the line that Dr. Hofeller crosses repeatedly and flagrantly.

III. CONCLUSION

For these reasons, and those set out in Plaintiffs' opening motion, Plaintiffs respectfully ask the Court to enter an order precluding Dr. Hofeller from offering legal conclusions at trial and striking the following passages of Dr. Hofeller's expert reports:

- First Report, ¶ 10, lns. 2-5; ¶ 19, lns. 19-24; ¶ 34; ¶ 41; ¶ 42, lns. 8-10; ¶ 49, p. 16, lns. 24-26 through p. 17, ln. 1; ¶ 55, p. 19, ln. 4; ¶ 65, lns. 1-8.
- Second Report, ¶ 25, lns. 12-15; ¶ 32, lns. 22-23.

Respectfully submitted, this the 7th day of October, 2015.

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Local Rule 83.1
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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO EXCLUDE IN PART TESTIMONY OF DR. THOMAS HOFELLER** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 7th day of October, 2015.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.