TERRY GODDARD
Attorney General
Firm Bar No. 14000
Mary O'Grady, No. 011434
Solicitor General
Steven A. LaMar, No. 004140
Senior Litigation Counsel
Carrie J. Brennan, No. 018250
Barbara A. Bailey, No. 018230
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Tel: (602) 542-3333
Fax: (602) 542-8308
Attorneys for Arizona Secretary of State
Janice Brewer

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MARIA M. GONZALEZ, et al.,

Plaintiffs,

v.

STATE OF ARIZONA, et al.

Defendants.

No. CV06-01268 PHX ROS
No. CV06-1362 PCT ROS (Cons)
No. CV06-1575 PCT ROS (Cons)

REPLY IN SUPPORT OF MOTION TO STRIKE PORTIONS OF ITCA PLAINTIFF FACTUAL SUBMISSION IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT BY DEFENDANT ARIZONA SECRETARY OF STATE

(Assigned to the Honorable Roslyn O. Silver)

The Court ordered briefing on whether Gonzalez plaintiffs' expert reports are unreliable under Fed. R. Evid. 703. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R. Evid. 703. "However, 'where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline."'" *Recreational Devs. of Phoenix, Inc. v. City of Phoenix*, 220 F. Supp. 2d 1054, 1059-60 (D. Ariz. 2002) (granting motion to strike expert witness reports and summary judgment because reports were "devoid of any reliable methodology") (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999)).

The reports of Drs. Lanier and Espino, each of which purports to address disparate impact on voter registration, are not reliable because the conclusions reached in those reports: (1) are not supported by the experts' own stated data; and (2) are not based upon reliable methodology.[1]

A. The Data Disclosed in the Reports of Drs. Lanier and Espino Do Not Support Their Conclusions of Disparate Impact.

Drs. Lanier and Espino disclosed in their reports data that they relied upon to conclude that there is a disparate impact in Latino voter registrations since January 2005, the date that Arizona's proof of citizenship requirement was implemented. [*See* Zax Decl., dkt. 802, ¶¶5-19] Defendants demonstrated—and it is not disputed—that Dr. Lanier's own data establish that the number of both Latino and non-Latino voter

[1] On summary judgment, Defendants did not submit evidence regarding § 2 factors of discrimination or racially polarized voting because plaintiffs cannot establish any disparate impact, which is essential to a § 2 claim. Accordingly, Defendants do not address the reliability of the reports of Gonzalez plaintiff experts Drs. Rosales, Engstrom and Chapa, for purposes of summary judgment. Defendants do not concede the reliability of the conclusions and opinions stated in those experts' opinions, however, and would demonstrate at trial that the testimony of those experts does not support plaintiffs' § 2 claim.

registrations have increased since January 2005 over the comparable points in the electoral cycle of the pre Prop 200 period. [*Id.* ¶¶ 5-9] In addition, Defendants demonstrated that Dr. Lanier's own data establish that the magnitude of the increase in Latino registrations was approximately the same as that of non-Latino registrations. [Id. ¶¶ 13-14] Nowhere in any of Dr. Lanier's reports does he dispute that his own raw numbers conclusively demonstrate those facts.

Instead, Dr. Lanier attempts to distinguish his raw numbers—which undisputedly show that voter registrations have increased significantly in the post Prop 200 period—by offering a "prediction" of what voter registrations "should" have been in absence of Prop 200. Dr. Lanier's "prediction" is the whole basis upon which he concludes that there is a disparate impact. Defendants came forward with admissible evidence from expert Dr. Jeffrey Zax, who demonstrated that Dr. Lanier's "predictions" were based on misspecified regression analyses. [*Id.* ¶ 11] Dr. Zax based his testimony upon Dr. Lanier's own specifications as disclosed in Dr. Lanier's report. [*Id.* ¶ 11]

Nowhere in any of Dr. Lanier's reports does he explain why Dr. Zax' critique of Dr. Lanier's regression analyses is incorrect. Nor does Dr. Lanier offer any testimony to the Court on summary judgment to that effect. Thus, although plaintiffs have the burden of showing a genuine issue of material fact, they have offered no evidence (admissible or otherwise) to rebut the fact that Dr. Lanier incorrectly specified his regressions in concluding that there is a disparate impact on Latino voter registrations.

Like Dr. Lanier's data, the data disclosed in Dr. Espino's reports demonstrate that the average proportion of Hispanics among all Arizona registrants was markedly higher in the post-Prop 200 period than in the comparable period prior to the implementation of Prop 200. [*Id.* ¶ 19] Plaintiffs have not disputed Dr. Espino's data that demonstrate that fact. Instead, Dr. Espino contends that if the spike in the proportion of registrants who are Latino immediately preceding the 2004 Presidential election is included in the calculation, then there has been a decrease in the average share of registrants who are Latino in the post Prop 200 period. Dr. Zax provided admissible evidence to the Court, however, that the failure to account for the unique characteristics associated with the 2004 Presidential election period renders Dr.

Espino's conclusions of disparate impact unreliable.

In addition, Dr. Espino's calculated differences in the numbers of registrations between the pre and post Prop 200 period among both Latinos and non-Latinos have no meaning because he did not test for the statistical significance of those numbers. [*See id*. ¶ 24; 2d Zax Decl. (filed herewith) ¶ 19] Neither Dr. Espino nor plaintiffs have ever disputed his failure to test for statistical significance. Accordingly, there is no genuine dispute about the lack of reliability of Dr. Espino's conclusions of disparate impact.

Moreover, as explained below, Dr. Espino's statistical regressions were not performed by using any scientifically accepted methodology. Accordingly, his conclusions of disparate impact (to the extent he makes such conclusions) are not reliable.[2]

B. The Conclusions of Drs. Lanier and Espino Are Not Based on Scientifically Reliable Methodology.

Expert testimony that is not based on reliable methodology is inadmissible. *Recreational Devs. of Phoenix, Inc.*, 220 F. Supp. 2d at 1061 (excluding expert report that made "statistical assertions that are not based on any identifiable study design or even basic sampling techniques"); *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1057 (D. Ariz. 1999) (expert report was inadmissible where the expert failed to offer evidence that the studies relied upon in the report were reliable under *Daubert*); *United States v. Scholl*, 959 F. Supp. 1189, 1195 (D. Ariz. 1997) (excluding expert testimony where the expert did not offer evidence of the scientific validity of his methodology

[2] Even Dr. Espino's conclusions of supposed disparate impact do not appear to be so. His first report (January 4, 2008) does not even offer a disparate impact opinion. His second report (March 7, 2008) concludes that there was a less than 1% difference in weekly registration declines between Latino and non-Latino registrants. Also, his second report concludes that in eight of Arizona's fifteen counties there was a *smaller* decline in registrations for Hispanics than for non-Hispanics. In addition, in his second report, he opines that Maricopa County comprises 60% of Arizona's population and shows a *smaller* decrease in registrations for Latinos than for non-Latinos. In his final report (May 22, 2008), Dr. Espino concludes that in 10 of 15 Arizona counties, Hispanic registrations either declined by less, or increased by more, than non-Hispanic registrations. Thus, even if Dr. Espino's conclusions were reliable, they plainly do not point to any statewide disparate impact, or even any disparate impact for more than a fraction of the State. [*See* 2d Zax Decl. (filed herewith) ¶¶ 18-20]

employed).

The conclusions asserted in the reports of Drs. Lanier and Espino are not reliable because they are based on methodologies that are not generally accepted in the scientific community, have not been subjected to peer review, have not been tested, and for which the potential rates of error are unknown. *See Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1316 (9th Cir. 1995). Gonzalez plaintiffs filed untimely declarations from Drs. Lanier and Espino in which they state in conclusory fashion that "[i]n preparing my reports, I relied upon accepted scientific methods and the analytical techniques commonly used in my field of expertise." Neither they nor their reports, however, offer any basis whatever for such assertion. This Court is not required to accept bare assertions that an expert's conclusions are based on scientifically acceptable methodology. Nowhere in any of the reports of Drs. Lanier or Espino do they provide any support for the notion that their methodology is accepted in the relevant discipline.

Defendants submit herewith a second declaration by Dr. Zax, which discusses the many errors in the methodologies employed by Drs. Lanier and Espino. In his written reports in the case, Dr. Zax has disclosed and discussed in detail each of those errors in Dr. Zax' two written reports served in this matter, and yet those methodological defects in plaintiffs' expert reports remain unaddressed.

With regard to Dr. Lanier's methodology, he has failed to perform scientifically valid regression analysis to reach his "predicted" number of registrations in the post-Prop 200 period in absence of Prop 200. [2nd Zax Decl. (filed herewith) ¶¶ 4-5] As pointed out by Dr. Zax, Dr. Lanier offers no support in the peer-reviewed literature for the specification of his regression analyses. [*Id.* ¶ 6] Moreover, Dr. Lanier's regression specification has no peer-review approval. [*Id.* ¶6] Dr. Lanier's regression specifications have not been tested and their potential rate of error is unknown. [*Id.* ¶ 7] There is no evidence (admissible or not) to the contrary.

In addition to Dr. Lanier's misspecified regressions, his tests of statistical significance do not conform to accepted scientific standards. [*Id.* ¶ 9] Dr. Lanier did not implement the standard formulas for those tests. [*Id.* ¶ 9] In addition, Dr. Lanier offers no support in the peer-reviewed literature for the construction of his tests of

statistical significance. [*Id.* ¶ 10] Dr. Lanier's purported tests for statistical significance have no peer-review approval, has not been tested and their potential rate of error is unknown. [*Id.* ¶¶ 10-11]

Dr. Lanier's own data also demonstrate that denials of voter registration had negligible impact on the composition of the Arizona electorate. [*Id.* ¶ 13] Based on his own data, Hispanics comprise approximately 13.7% of registered voters in Arizona. Had all of those individuals who, according to Dr. Lanier, were denied registration because of the requirements of Prop 200 been registered instead, Hispanics would comprise 13.8% of registered voters in Arizona. [*Id.* ¶ 13] Thus, again, Dr. Lanier's conclusion of disparate impact is not reliable.

Dr. Espino's methodology is also severely flawed. His regression specifications do not include intercept terms, which is contrary to standard scientific practice. [*Id.* ¶ 14] As a result, his regressions predict that the Hispanic share of registrations should be <u>zero</u> at the beginning of the period before the implementation of Prop 200 and <u>zero again</u> at the beginning of the period after the implementation of Prop 200 examined by Dr. Espino. [*Id.* ¶ 15] Those predictions are plainly false. [*Id.* ¶ 15] Dr. Espino offers no support in the peer-reviewed literature for the specification of his regression analyses and his specification has no peer-review approval. [*Id.* ¶ 16] His regression specifications have not been tested and the potential rate of error is unknown. [*Id.* ¶ 17]

The methodologies employed by Drs. Lanier and Espino have no support in the scientific community or peer reviewed literature, have not been tested, and the potential rate of error in those methodologies is unknown. Moreover, the very data relied upon for their opinions of disparate impact demonstrate the exact opposite. The Court is not required to blindly accept expert conclusions that belie the data upon which they are based and that result from unproven and unaccepted methodology.[3]

---

[3] Most of the remainder of the ITCA plaintiff exhibits that are the subject of Defendants' motion to strike are hearsay and should not be admitted for purposes of summary judgment. Plaintiffs argue that those items, including the report of Lisa Handley and various articles and out of court statements by plaintiffs (exs. 65-69) fall under hearsay exceptions. They have laid no foundation, however, to establish the criteria set forth in the rules of evidence for any hearsay exception to those items.

Relief Requested

For the reasons stated in Defendants' motion and this reply, the Court should strike from the record exhibits 15 (paragraphs 6(b), 7-8, 12-14, 17-19), 17, 21, 51-57, and 59-69, from the Declaration of Karen J. Hartman-Tellez, dkt. 810. In addition, the Court should strike plaintiffs' response to Defendant's fact 8 and plaintiffs' supplemental facts 2-4, 6-7, 9, 11, 13-17, 20-21, 32-33, 38, 54-55, 64, 67, and 69-73.

RESPECTFULLY SUBMITTED this 27th day of June, 2008.

TERRY GODDARD
Arizona Attorney General

s/ Barbara A. Bailey
Mary O'Grady, Solicitor General
Steven A. LaMar, Senior Litigation Counsel
Carrie J. Brennan, Assistant Attorney General
Barbara A. Bailey, Assistant Attorney General
Attorneys for Arizona Secretary of State
Janice Brewer

Moreover, plaintiffs do not dispute that they do not even cite to exhibits 65-69 in their statement of facts. Therefore, those items are irrelevant in addition to being inadmissible. Plaintiffs' argument that the report of Mr. Sissons was admitted at the preliminary injunction ignores the recognized distinction between evidentiary standards for preliminary injunction hearings and summary judgment. *See, e.g.*, Wright & Miller, Federal Practice and Procedure, vol. 11A, § 2949 at 215-216 (1995) (discussing the more lenient admissibility standards applied to evidence at preliminary injunction proceedings). Fed. R. Civ. P. 65(a)(2) applies only to evidence that "would be admissible at trial." With regard to the declaration of Linda Brown, Defendants seek to strike only those objectionable portions of that declaration, which are paragraphs 6(b), 7-8, 12-14, and 17-19. Plaintiffs have not meaningfully addressed the lack of personal knowledge and reliance on hearsay by Ms. Brown as is plainly evident from her declaration.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2008, 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 following ECF registrants:

David J. Bodney
Karen J. Hartman-Tellez
Steptoe & Johnson LLP
201 East Washington St., Ste. 1600
Phoenix, Arizona 85004-2382
dbodney@steptoe.com
khartman@steptoe.com

David B. Rosenbaum
Thomas L. Hudson
Sara S. Greene
Osborn Maledon, P.A.
2929 N. Central, 21st Floor
Phoenix, Arizona 85012-2793
drosenbaum@omlaw.com
thudson@omlaw.com
sgreene@omlaw.com

Jon Greenbaum
Benjamin Blustein
Lawyers' Committee For
Civil Rights Under Law
1401 New York Avenue, Ste. 400
Washington, D.C. 20005
jgreenbaum@lawyerscommittee.org

Neil Bradley
ACLU Southern Regional Office
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, Georgia 30303
nbradley@aclu.org

Elliot M. Mincberg
People for the American
Way Foundation
2600 M Street, NW, Ste. 400
Washington, DC 20036
emincberg@pfaw.org

Daniel B. Kohrman
AARP Foundation Litigation
601 E Street, N.W., Ste. A4-240
Washington, DC 20049
dkohrman@aarp.org

Joe P. Sparks
Susan B. Montgomery
Sparks, Tehan & Ryley PC
The Inter Tribal Council of Arizona, Inc.
7503 First Street
Scottsdale, Arizona 85251
joe-sparks@qwest.net

David J. Becker
People for the American Way Foundation
2000 M Street, NW, Suite 400
Washington, D.C. 20036
dbecker@pfaw.org

Daniel R. Ortega, Jr.
Roush McCracken Guerrero
Miller & Ortega
650 N. 3rd Avenue
Phoenix, Arizona 85003
danny@rmgmoinjurylaw.com

Nina Perales
Mexican American Legal Defense and Education Fund
110 Broadway, Ste. 300
San Antonio, Texas 78205
nperales@maldef.org

M. Colleen Connor
MCAO Division of County Counsel
222 N. Central Avenue, Ste. 1100
Phoenix, Arizona 85003
connorc@mcao.maricopa.gov

Dennis I. Wilenchik
Kathleen Rapp
Wilenchik and Bartness, P.C.
2810 N. Third Street
Phoenix, Arizona 85004
diw@wb-law.com
kathleenr@wb-law.com

Judith M. Dworkin
Marvin S. Cohen
Patricia Ferguson-Bohnee
SACKS TIERNEY P.A.
4250 N. Drinkwater Blvd. 4th
Scottsdale, Arizona 85251-3693
Judith.Dworkin@sackstierney.com

Criss E. Candelaria
Bradley Carlyon
Apache County Attorneys Office
PO Box 637
St. Johns, Arizona 86025
bcarlyon@apachelaw.net

Melvin R. Bowers, Jr.
Lance B. Payette
Navajo County Attorneys Office
PO Box 668
Holbrook, Arizona 86025
lance.payette@co.navajo.az.us

Brenna L. Clani
Navajo County Department of Justice
PO Box 2010
Window Rock, Arizona 86515
brennalclani@navajo.org

Jean E. Wilcox
Coconino County Attorney's Office
110 East Cherry Ave.
Flagstaff, Arizona 86001
jwilcox@coconino.az.gov

COPY served the 27th day of June, 2008, via U.S. mail, with Notice of Electronic Filing, on:

The Honorable Roslyn O. Silver
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 624
401 West Washington Street, SPC 59
Phoenix, AZ 85003-2158

/s Elizabeth Stark

234686