THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DYAMONE WHITE; DERRICK SIMMONS; TY PINKINS; CONSTANCE OLIVIA SLAUGHTER HARVEY-BURWELL — **PLAINTIFFS**

VS. — **CIVIL ACTION NO. 4:22-cv-00062-SA-JMV**

STATE BOARD OF ELECTION COMMISSIONERS; TATE REEVES ***in his official capacity as Governor of Mississippi*****; LYNN FITCH** ***in her official capacity as Attorney General of Mississippi*****; MICHAEL WATSON** ***in his official capacity as Secretary of State of Mississippi*** — **DEFENDANTS**

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO PARTIALLY EXCLUDE DR. DAVID A. SWANSON AS AN EXPERT [DKT. #164]

INTRODUCTION

Plaintiffs' *Daubert* motion to exclude portions of the expert testimony of David A. Swanson, Ph.D. ("Dr. Swanson") should be denied because (1) *Daubert* is not implicated in a bench trial, and judicial economy favors admitting relevant expert testimony and giving it such weight as the Court believes it deserves upon a full presentation of the evidence at trial; and (2) as an expert demographer, Dr. Swanson is qualified to offer the challenged testimony.

This is a § 2 Voting Rights Act case involving a challenge to Mississippi's Supreme Court electoral districts. This ACLU-backed lawsuit challenges—for the fourth time—MISS. CODE ANN. § 9-3-1, the 1987 statute that defines the three districts from which Mississippi elects its Supreme Court Justices, Public Service Commissioners, and Transportation Commissioners. In 1989, Judge

Davidson dismissed the first action without prejudice in *McCray v. Mississippi State Bd. of Election Comm'rs,* No. DC 84-131-GD-O (N.D. Miss. Oct. 5, 1989) [Dkt. #84-1]. In 1992, after a full trial, Judge Barbour upheld the legality of the lines in *Magnolia Bar Ass'n, Inc. v. Lee*, 793 F. Supp. 1386 (S.D. Miss. 1992), *aff'd,* 994 F.2d 1143 (5th Cir. 1993), *cert. denied,* 510 U.S. 994 (1993). Finally, after another full trial in 1999, Judge Lee upheld the lines once again in an action concentrating on their effect in elections for Public Service Commissioners and Transportation Commissioners in *N.A.A.C.P. v. Fordice,* No. J92-0250(L)(N) (S.D. Miss. July 7, 1999) [Dkt. #84-2], *aff'd*, 252 F.3d 361 (5th Cir. 2001).

The Court should decline to entertain, and should therefore deny, Plaintiffs' motion to exclude small portions of the proposed testimony of Dr. Swanson because it makes no sense for this Court to review hundreds of pages of exhibits to determine whether to shorten this bench trial by perhaps an hour. The first two times this case was tried, Judge Barbour and Judge Lee admitted the expert testimony offered by the parties and gave it such consideration as it was worth. *See Magnolia Bar Ass'n, Inc.*, and *Fordice*, *supra*, respectively. In the spirit of FED. R. CIV. P. 1, which seeks "to secure the just, speedy, and inexpensive determination of every action and proceeding," and FED. R. EVID. 102, which seeks to "eliminate unjustifiable expense and delay," this Court should do the same thing.

If the Court is nevertheless inclined to entertain Plaintiffs' motion, there are two particular reasons the Court should not exclude testimony by Dr. Swanson related to "electoral-map drawing." [Dkt. #164 at 1]. First, Dr. Swanson has not been offered as an expert on electoral-map drawing. However, as a skilled demographer, he can explain to the Court the nature and composition of the districts drawn by the Legislature and proposed by Plaintiffs. Second, there is no such thing as an expert on electoral-map drawing, at least where *judicial* districts are concerned.

As defense counsel explained in repeated objections to questions about map drawers during Dr. Swanson's deposition, "the only map drawer of Mississippi supreme court districts in the last 200 years is the legislature." Swanson dep. at 150 [Dkt. #164-1 at 151].

Finally, Dr. Swanson is not offered as an expert on King's Ecological Inference analysis ("King's EI"). The defendants' political science expert, Christopher Bonneau, Ph.D., will testify that while King's EI is an improvement over other methods for estimating voter turnout, it still relies on unproven assumptions. Dr. Swanson does not need to be an expert on King's EI to point out the irrefutable fact that Plaintiffs' expert, Traci Burch, Ph.D., included the wrong counties in her King's EI analysis of Supreme Court District 1. Likewise, he can point out that while Plaintiffs are asking this Court to impose a district increasing the number of persons who classify themselves on the census as any part black ("APB"), Dr. Burch chose not to analyze turnout for APB voters. Because Plaintiffs have the burden of proof, that failure is a serious defect in their case.

For these reasons and those set forth herein, the Court should deny Plaintiffs' *Daubert* motion and proceed to hear all relevant expert testimony at trial, giving it such consideration as it may be worth.

ARGUMENT

I. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE *DAUBERT* IS NOT IMPLICATED IN A BENCH TRIAL, AND JUDICIAL ECONOMY FAVORS ADMITTING RELEVANT EXPERT TESTIMONY AND GIVING IT SUCH WEIGHT AS IT DESERVES UPON A FULL PRESENTATION OF THE EVIDENCE AT TRIAL.

The purpose of *Daubert* is "to ensure that only reliable and relevant expert testimony is presented *to the jury*." *Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496, 506 (5th Cir. 1999) (emphasis added). "[T]he importance of the trial court's gatekeeper role is significantly diminished in bench trials . . . because, there being no jury, there is no risk of tainting the trial by exposing the jury to unreliable evidence." *Whitehouse Hotel Ltd. P'ship v. Comm'r*, 615 F.3d 321,

330 (5th Cir. 2010) (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) (noting that "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a judge sits as the trier of fact in place of a jury")). Put differently, "the procedural 'gatekeeping' aspects of *Daubert*, aimed as they are at preventing the jury from being tainted by unreliable evidence . . . do not fully translate to bench trials: in reaching a decision, a judge will only rely on evidence the judge deems reliable." *Palm Valley Health Care, Inc. v. Azar*, 947 F.3d 321, 329-30 (5th Cir. 2020). In the words of Judge Posner, sitting by designation, "*Daubert* requires a binary choice—admit or exclude—and a judge in a bench trial should have discretion to admit questionable technical evidence, though of course he must not give it more weight than it deserves." *SmithKline Beecham Corp. v. Apotex Corp.*, 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003).

"[E]xperience has demonstrated that in a trial or hearing where no jury is present, more time is ordinarily lost in listening to arguments as to the admissibility of evidence and considering offers of proof than would be consumed in taking the evidence proffered." *Cottier v. City of Martin*, Civ. No. 02-5021-KES, 2004 WL 6036041, at *4 (D.S.D. May 27, 2004) (quoting *Builders Steel Co. v. Comm'r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950)). Accordingly, in cases involving bench trials, "[d]istrict courts routinely take [the] approach" of denying *Daubert* motions, "which allows the evidence to be presented in the context of trial, where a full foundation, vigorous cross-examination, and the presentation of contrary evidence can more fully enlighten the Court with regard to the value of an expert's opinion." *Perez v. Texas*, Civil Action No. 11-CA-360-OLG-JES-XR, 2014 WL 12480146, at *1 (W.D. Tex. July 9, 2014) (internal quotation marks omitted).

These precepts have been applied to deny *Daubert* motions in § 2 Voting Rights Act cases, which "will be tried to the court rather than a jury," meaning "the objectives of *Daubert* are no

longer implicated." *See Harding v. County of Dallas, Tex.*, Civil Action No. 3:15-CV-0131-D, 2018 WL 1156561, at *2 (N.D. Tex. Mar. 5, 2018). *See also Kumar v. Frisco Indep. Sch. Dist.*, Civil Action No. 4:19-CV-00284, 2020 WL 1503270, at *3 (E.D. Tex. Mar. 27, 2020) (same). This Court has itself applied these precepts to deny a *Daubert* motion in a case to be tried to the bench. *See Estate of Manus v. Webster County, Miss.*, Civil Action No. 1:11-CV-00149-SA-DAS, 2014 WL 3866608, at *4-7 (N.D. Miss. Aug. 6, 2014) (citing *Whitehouse* and *Gibbs*, *supra*, and quoting Judge Posner, *supra*).

By their very nature, § 2 Voting Rights Act cases are factually complex. *See N.A.A.C.P. v. Fordice*, 252 F.3d 361, 369 (5th Cir. 2001) (reaffirming that "Section 2 [of the Voting Rights Act] presents very complex political and legal issues"). The governing legal standard invariably involves the presentation of expert testimony by both sides, and the court must ultimately engage in "a comprehensive canvassing of the relevant facts." *Rodriguez v. Harris County, Tex.*, 964 F. Supp. 2d 686, 700 (S.D. Tex. 2013). Consistent with these unique considerations of § 2 cases, when federal courts in Mississippi previously adjudicated the current district lines in the 1990s, they admitted the expert testimony offered by the parties and gave it such consideration as they deemed it was worth. *See Magnolia Bar Ass'n, Inc. v. Lee*, 793 F. Supp. 1386 (S.D. Miss. 1992), *aff'd,* 994 F.2d 1143 (5th Cir. 1993), *cert. denied,* 510 U.S. 994 (1993) (upholding legality of existing Mississippi Supreme Court district lines); *N.A.A.C.P. v. Fordice,* No. J92-0250(L)(N) (S.D. Miss. July 7, 1999), *aff'd*, 252 F.3d 361 (5th Cir. 2001) (upholding same lines in action focusing on their effect in elections for Public Service Commissioners and Transportation Commissioners).

In the case at bar, the Court should deny Plaintiffs' motion to partially exclude the expert testimony of Dr. Swanson because this case will be tried to the bench. Therefore, as a matter of

law, *Daubert* is not implicated, and judicial economy favors admitting the totality of Dr. Swanson's testimony and giving it such weight as the Court believes it deserves upon a full presentation of the evidence at trial.

By way of their instant motion [Dkt. #164], Plaintiffs seek to preclude Dr. Swanson from testifying regarding two subjects: (1) electoral-map drawing, in response to opinions offered by Plaintiffs' expert, William Cooper; and (2) ecological inference analysis (i.e., King's EI), in response to opinions offered by Plaintiffs' expert, Dr. Burch. [*See* Dkt. #165 at 5-7]. With regard to the former, Dr. Swanson's report sets out his analysis and opinions regarding core retention, compactness, and diversity relative to the existing Mississippi Supreme Court districts and Mr. Cooper's proposed "illustrative" and "least change" alternative plans. [*See, e.g.*, Dkt. #164-2 at 2-3 (Table of Contents)]. With regard to the latter, Dr. Swanson's surrebuttal report presents several criticisms of Dr. Burch's attempted use of King's EI to estimate voter turnout by race. [*See, e.g.*, Dkt. #164-3 at 15-16].

All of the challenged testimony implicates competing professional assessments of fact-intensive demographic analysis that are most efficiently evaluated at trial—once the proof is fully developed, the Court has heard all of the relevant expert testimony to be presented in this case, and the contours of dispositive factual and legal issues are clearly defined. Should a *Daubert* inquiry ensue at this juncture, this Court will be forced to expend significant judicial time and resources studying over 800 pages of motion exhibits (including voluminous expert witness reports and deposition transcripts) in a vacuum, without the benefit of context and unmoored from the ultimate framing of dispositive issues presented at trial. While this is the Court's burden to bear as the gatekeeper of expert testimony in a case proceeding to a jury trial, no such burden is imposed here. The proof presented at trial will narrow the relevant factual issues and inform this Court's

consideration of expert testimony. As a practical matter, it makes no sense for this Court to spend hours adjudicating a *Daubert* challenge that may shorten the bench trial by perhaps an hour—particularly where the fact-finder, *viz.*, this Court—will have already been privy to the challenged testimony in any event.

In the same vein, the Court must also consider that adjudicating Plaintiffs' *Daubert* motion will necessitate the Court's careful review of the seven hours of deposition testimony that Plaintiffs elicited from Dr. Swanson. That testimony produced a 324-page transcript and numerous defense objections to form and substance on which this Court must rule before it can decide Plaintiffs' instant *Daubert* motion. Judicial economy favors hearing the totality of Dr. Swanson's testimony at trial, and ruling at that time on what will likely be a far more manageable number of evidentiary objections to the far fewer questions likely to be asked at trial.

Consistent with the weight of Fifth Circuit authority applying *Daubert* in bench trial settings such as § 2 Voting Rights Act cases, and in keeping with the spirit of judicial economy espoused by FRCP 1 and FRE 102, see *supra*, the Court should deny Plaintiffs' *Daubert* motion to partially exclude the testimony of Dr. Swanson. The Court should instead proceed to hear all relevant expert testimony at trial, giving it such weight as the Court believes it deserves upon a full presentation of the evidence.

II. IF THE COURT IS INCLINED TO ENTERTAIN PLAINTIFFS' *DAUBERT* CHALLENGE, PLAINTIFFS' MOTION SHOULD STILL BE DENIED BECAUSE AS AN EXPERT DEMOGRAPHER, DR. SWANSON IS QUALIFIED TO OFFER THE CHALLENGED TESTIMONY.

A. Dr. Swanson is designated as an expert in applied demography, which qualifies him to analyze Mr. Cooper's proposed maps and opine regarding their demographic characteristics.

Plaintiffs do not dispute that "Dr. Swanson is an expert in demography." [Dkt. #165 at 5]. He explained in his deposition that demography is "a study of populations." Swanson dep. at 11

[Dkt. #164-1 at 12]. As the former chair of the sociology department at the University of Mississippi [Dkt. #119-6 at 35], Dr. Swanson has extensive knowledge of the population of this state. The opinions that Plaintiffs challenge have firm footing in Dr. Swanson's demographic expertise and skills.

One opinion that Plaintiffs do not challenge is Dr. Swanson's demonstration that District 1, the Central Supreme Court district, already has a black voting majority.[1] Plaintiffs' designated expert, William Cooper, uses the census term "any part black" ("APB"), being those reported as "single-race Black or more than one race and some part Black." Cooper declaration at 5 n.7 [Dkt. #164-4 at 5]. Because § 2 requires consideration of the *citizen* voting age population,[2] Dr. Swanson

[1] Over thirty years ago, the Fifth Circuit reiterated that it should be "increasingly difficult" for plaintiffs to prevail in a Voting Rights Act case of this nature "against an at-large electoral district where a minority-majority population exists." *Salas v. Sw. Tex. Jr. College Dist.*, 964 F.2d 1542, 1551 (5th Cir. 1992). Four years ago, the Fifth Circuit granted rehearing *en banc* to consider whether a black voting majority in a district can ever have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," within the meaning of § 2(b) of the Voting Rights Act, 52 U.S.C. § 10301(b). *Thomas v. Bryant*, 939 F.3d 629 (5th Cir. 2019). The plaintiffs in that case avoided resolution of the issue by agreeing at oral argument to have their judgment vacated and their complaint dismissed. *See Thomas v. Reeves*, 961 F.3d 800, 801 (5th Cir. 2020). Accordingly, this Court will now have to resolve that issue in the first instance, as have district courts in other circuits. *See Jeffers v. Beebe*, 895 F. Supp. 2d 920, 932 (E.D. Ark. 2012) (holding by three-judge panel that plaintiffs failed to establish claim for "vote dilution under § 2 because [the challenged electoral district] is *already* a majority-minority district . . . .") (emphasis in original).

[2] The Fifth Circuit has unequivocally held that "courts evaluating vote dilution claims under section 2 of the Voting Rights Act must consider the citizen voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district." *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997). *See also Reyes v. City of Farmers Branch, Tex.*, 586 F.3d 1019, 1021 (5th Cir. 2009) ("The Supreme Court has never explained what exactly constitutes a majority, but the Fifth Circuit has unequivocally held . . . that courts must consider the *citizen* voting-age population of the group challenging the electoral practice . . . .") (internal quotation marks omitted) (emphasis in original); *Chen v. City of Houston*, 206 F.3d 502, 515 n.7 (5th Cir. 2000) (reaffirming that "[c]itizen voting age population is the proper measure under section 2 of the Voting Rights Act"); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999) (reaffirming that "this court has already determined what factors limit the relevant population in the district: voting-age population and citizenship"); *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 372 (5th Cir. 1999) (noting that "[w]e have unequivocally held, however, that courts must consider the *citizen* voting-age population of the group challenging the electoral practice when

determined the percentage of APB citizens of voting age as compared to all District 1 citizens of voting age. He calculated that the voting age citizenry of District 1 is 51.0% APB. Swanson January Report at 26 [Dkt. #119-5 at 26]. Although Plaintiffs have the burden of proof, they have not bothered to present their own calculation of the APB percentage of the voting age citizenry. Thus, the allegation of Plaintiffs' amended complaint that "District 1 can readily be redrawn as majority-Black" [Dkt. #133 at 20, ¶49] is beside the point. Dr. Swanson has demonstrated that the eligible voting population of District 1 is already majority-black.

Dr. Swanson has not been offered as an expert in "electoral-map drawing" because there is no need to draw electoral maps where a black voting majority district already exists. Plaintiffs, however, intend to propose maps all the same, and Dr. Swanson, as a demographer, is fully capable of explaining the characteristics of the populations within the boundaries of those maps. While Plaintiffs challenge Dr. Swanson's qualifications to analyze their maps, they do not challenge the accuracy of the analysis that he actually performed.

For instance, Plaintiffs criticize Dr. Swanson's use of core retention, defined as "the principle that the core (population) of prior districts be maintained in a redistricting plan," as shown by "the *gross* changes in each population that was made to achieve the *net* change of the plan." Swanson January Report at 9 [Dkt. #119-5 at 9] (emphasis in original). Dr. Swanson calculated that Plaintiffs' Illustrative Plan 1 would move "25.7% of the population (585,817) to a different judiciary [district] in order to change the APB population in D1 by 54,908." *Id.* at 33. Dr. Swanson similarly analyzed each of Plaintiffs' plans to show how much of Mississippi's population would be transferred to new districts in order to achieve Plaintiffs' purposes. Whether the extent of such

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determining whether the minority group is sufficiently large and geographically compact to constitute a majority") (internal quotation marks omitted) (emphasis in original).

disruption is relevant is a matter of law for this Court, keeping in mind that Judges Jolly, Wingate, and Bramlette found it important to preserve the cores of existing congressional districts as much as possible. *See Smith v. Clark*, 189 F. Supp. 2d 512, 526 (S.D. Miss. 2002), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003). Plaintiffs do not challenge the accuracy of Dr. Swanson's opinions.

Similarly, Plaintiffs disparage Dr. Swanson's demonstration of diversity among Mississippi's counties without challenging the facts that he actually presents. Using the *Mississippi Health and Hunger Atlas* prepared in 2017 by the Center for Population Studies at the University of Mississippi, Swanson January Report at 87 [Dkt. #119-5 at 87], Dr. Swanson divided Mississippi counties into three groups. Comparing socioeconomic needs and resources, Group 1 exhibited high need and high resources, Group 2 exhibited medium need and medium resources, while Group 3 exhibited high need and low resources. An explanation and the corresponding map are found at pages 49-50 of Dr. Swanson's January report [Dkt. #119-5 at 49-50].

Plaintiffs do not claim that Dr. Swanson's analysis of any of the 82 counties is in any way faulty. They simply object that the analysis is not "related to any traditional districting criteria." [Dkt. #165 at 14]. To the contrary, Dr. Swanson explained that this analysis relates to the criterion of diversity as explained by Judge Barbour when he first tried this case over 30 years ago in *Magnolia Bar*. Swanson January Report at 46 [Dkt. #119-5 at 46]. Judge Barbour noted:

> [T]he east-west configuration of district lines fosters political and economic diversity. The lines, when initially configured in 1832, cut across the sharply divergent interests of the landed aristocracy in the west and the populists in the east.

Magnolia Bar, 793 F. Supp. at 1417. This sort of diversity is especially important in judicial elections:

> [T]he existing multimember, at-large districts, which have remained unchanged, for the most part, since the Mississippi Constitutional Convention of 1832, foster independence on the supreme court because individual justices

> are not beholden to the interests of a small geographic area. Under the existing system in which justices run for election from relatively large areas, a justice can theoretically render a decision that is unpopular in a particular area within his or her district without fearing retributive defeat in the next election.

Id. at 1411. Dr. Swanson's analysis of Mississippi counties directly addresses the sort of diversity that Judge Barbour found to be relevant to the composition of Mississippi's Supreme Court districts. Plaintiffs' quarrel is with Judge Barbour—not Dr. Swanson.

Finally, Plaintiffs complain that Dr. Swanson did not personally perform the geometric analysis of the compactness of various districts. Dr. Swanson's report candidly acknowledged that the calculations themselves were made by Bryan GeoDemographics on his behalf. Swanson January Report at 40 [Dkt. #119-5 at 40]. Plaintiffs have no basis for objecting to the delegation of some computational work when they do not contest the results. So far as the record reveals, the compactness scores for each of the various plans on each of the various measures are entirely correct. The parties can argue about what they mean, and this Court may resolve that argument, but there is no basis to ban them from the record because Dr. Swanson delegated the computation to another. *Cf. Rice v. Gordon Trucking, Inc.*, No. 3:08CV42, 2009 WL 2150474, at *2 (N.D. Miss. July 16, 2009) (holding that expert's testimony was not precluded where expert relied on information obtained by assistant, where there was no indication that such information was incorrect).

In short, Dr. Swanson has never claimed to be an expert in drawing maps. He is, however, an expert in understanding maps. His demographic analysis of the various maps potentially at issue in this case is accurate. Because this motion challenges only his expertise, and not the relevance of his opinions, the objection to his analysis should be overruled.

Indeed, it is likely that there is no such thing as an expert on electoral-map drawing in any event, at least where judicial districts are concerned. Maps are drawn in the first instance by

legislators, not academics. When necessary, they are drawn by judges. Federal courts in Mississippi have historically had no need of expert help in this regard. Judges Clark, Keady, and Senter drew their own congressional plan in 1982, and drew another after the Supreme Court vacated and remanded for the first trial ever conducted under amended § 2 of the Voting Rights Act. *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982), *vacated and remanded* sub nom. *Brooks v. Winter*, 461 U.S. 921 (1983), *on remand,* 604 F. Supp. 807 (N.D. Miss.), *aff'd,* 469 U.S. 1002 (1984). The Court in *Smith*, *supra*, drew its own congressional plan after the 2000 census, and it drew a new one when the Legislature again failed to act 10 years later. *Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011), *vacated by* 2022 WL 2168960 (S.D. Miss. May 23, 2022), *appeal dismissed sub nom. Buck v. Watson*, 143 S. Ct. 770 (2023). For over 40 years, Mississippi's federal courts have managed quite successfully in electoral-map drawing endeavors without expert assistance.

In redistricting litigation, then, it is courts and not experts that determine what districting principles to apply. Courts may, if they wish, give weight to principles announced by legislative bodies, such as the Mississippi Legislature has provided to guide its own districts. MISS. CODE ANN. § 5-3-101. But the Mississippi Legislature has adopted no principles to govern Supreme Court districts. It has simply chosen to change those districts slightly on a handful of occasions over the last 200 years. *See, e.g.*, MISS. CODE ANN. § 9-3-1.

Defendants have found no controlling cases adopting such principles in cases involving judicial districts. Certainly, Plaintiffs do not claim that Mr. Cooper has ever offered an expert opinion in any case involving judicial districts. Indeed, to this point there is little to no judicial guidance concerning the application of § 2 to *judicial* districts. In *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991), the Supreme Court held that § 2 applies to judicial

districts but declined to say how. The Court said that if a district was shaped as "an uncouth twenty-eight-sided figure," as in *Gomillion v. Lightfoot,* 364 U.S. 339, 340 (1960), "an inquiry into the totality of the circumstances would at least arguably be required." *Houston Lawyers*, 501 U.S. at 428 (internal quotation marks omitted). The Court did not discuss what that inquiry might entail, and it certainly never mentioned *Thornburg v. Gingles*, 478 U.S. 30 (1986), on which Plaintiffs rely. No definitive guidance has been forthcoming in the ensuing three decades from either the Supreme Court or the Fifth Circuit.[3]

Thus, it will be up to this Court to determine what redistricting principles ought to apply to this particular district for this particular office. As noted *supra*, Judge Barbour cogently concluded that diversity was an important principle supporting the existing lines, giving consideration to the special role played by judges. In *Smith*, the Court considered the roles played by Members of Congress in announcing the principles that determined its plan. *See Smith*, 189 F. Supp. 2d at 525-27. Those are all legal questions—not fact questions for experts.

That does not mean that Plaintiffs cannot introduce their proposed maps through Mr. Cooper. When the Supreme Court devised this form of action in *Gingles*, it required that Section 2 plaintiffs would have to propose a *map*, although the Court never suggested the need for an *expert*. Mr. Cooper can propose his maps, and Dr. Swanson can analyze them. Neither should be regarded as an expert on electoral-map drawing.

[3] As in *Magnolia Bar*, *supra*, the Fifth Circuit has repeatedly refused to find that a violation has been proven concerning judicial elections. *E.g.*, *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc); *Rangel v. Morales*, 8 F.3d 242 (5th Cir. 1993); *Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020). Discussions in those and other cases may shed some light on some of the issues this Court must resolve, but they certainly do not specify what redistricting principles may qualify as "traditional" in the context of judicial elections.

B. Dr. Swanson is qualified to point out the two qualitative flaws in the assumptions underpinning Dr. Burch's King's EI analysis.

Plaintiffs assert that Dr. Swanson should not be allowed to criticize the calculations performed by their expert, Dr. Burch, using King's EI because he lacks expertise in that method. Dr. Swanson, however, is not criticizing the mechanics of her use of King's EI. He simply points out—as anyone can—that her answers are not helpful because she is asking the wrong questions.

Dr. Burch purported to use King's EI to estimate voter turnout by race in District 1, but she did no such thing. The counties she analyzed are not the counties that compose District 1. She excluded Bolivar County, which is in District 1, and she added Adams County, which is in District 2. In short, she analyzed a district that does not exist. Her answer is of no help to this Court in analyzing District 1 as it actually exists. *See* MISS. CODE ANN. § 9-3-1.

Dr. Burch did a separate King's EI analysis of turnout on a statewide basis, but she did not analyze the turnout of the community that Plaintiffs identify as supposedly needing this Court's protection. Plaintiffs ask this Court to create a new district with an even greater APB voting majority. However, Dr. Burch did not analyze APB turnout. Her Figure 4 on page 11 of her rebuttal report analyzes white and non-white turnout—not APB turnout. Burch February Report at 11 [Dkt. #164-6 at 11]. Indeed, she does not claim to have analyzed APB turnout. Without a turnout number for the group that Plaintiffs ask this Court to protect, this Court cannot know whether they need protection.

The fact that Dr. Swanson does not criticize the mechanics of Dr. Burch's King's EI analysis does not mean that analysis is free from question. Dr. Bonneau in his surrebuttal report explains that King's EI operates on the basis of certain unproven assumptions. Bonneau Surrebuttal Report at 6-7 [Dkt. #166-3]. *See also* Bonneau dep. at 111-13 [Dkt. #164-7 at 30]. King's EI is an improvement over earlier methods, but it remains an estimate—not a fact.

The first time this case was tried, the plaintiffs used "regression analysis, which measures the strength of the correlation and linear relationship between the variables 'r' and 'r2' that represent the race of the voter and the candidate supported." *Magnolia Bar*, 793 F. Supp. at 1399. Plaintiffs' expert, Dr. Byron Orey, candidly admitted that ecological regression analysis is "premised on the notion that the percentages of Blacks that vote for a particular candidate or candidates are the same in every precinct, and likewise that the percentages of Whites that vote for a candidate or a set of candidates are the same in every precinct." Orey Report at 9 n.8 [Dkt. #164-8 at 9 n.8]. Dr. Bonneau properly asserts that this stereotypical assumption is untenable. Bonneau Surrebuttal Report 6, ¶13 [#166-3]. King's EI ameliorates this particular problem, but it continues to rely on unproven assumptions. *Id.* at ¶¶14-15.

This does not mean that the King's EI analyses that Plaintiffs intend to introduce are necessarily inadmissible. Dr. Bonneau acknowledges that these analyses are generally admitted because they are the best guesses available. Still, they are educated *guesses*—not hard facts. This Court should hear all the testimony concerning King's EI and determine whether Plaintiffs' guesses are likely to be sufficiently accurate to carry their burden of proof.

Thus, even if this Court decides to entertain Plaintiffs' *Daubert* challenge to small portions of Dr. Swanson's testimony, Plaintiffs' motion should be denied on the merits.

CONCLUSION

It makes no legal or practical sense for this Court to entertain Plaintiffs' partial *Daubert* challenge. Regardless, Dr. Swanson is eminently qualified as a demographer to testify about the demographic features of electoral maps and qualitative flaws in the assumptions underpinning Dr. Burch's King's EI analysis. For all these reasons, this Court should deny Plaintiffs' *Daubert* motion to exclude portions of the expert testimony of Dr. Swanson.

THIS the 30th day of November, 2023.

Respectfully submitted,

STATE BOARD OF ELECTION COMMISSIONERS, TATE REEVES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MISSISSIPPI, LYNN FITCH, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MISSISSIPPI, AND MICHAEL WATSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF MISSISSIPPI, DEFENDANTS

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MICHAEL WATSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF MISSISSIPPI

CERTIFICATE OF SERVICE

I, Rex M. Shannon III, Special Assistant Attorney General and one of the attorneys for the above-named State Defendants, do hereby certify that I have this date caused to be filed with the Clerk of the Court a true and correct copy of the above and foregoing via the Court's ECF filing system, which sent notification of such filing to all counsel of record.

THIS the 30th day of November, 2023.

s/Rex M. Shannon III
REX M. SHANNON III