

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

DR. DOROTHY NAIRNE, *et al.*,

Plaintiffs,

v.

R. KYLE ARDOIN, in his official capacity as
Secretary of State of Louisiana,

Defendant.

Civil Action No. 3:22-cv-00178-SDD-SDJ

Chief Judge Shelly D. Dick

Magistrate Judge Scott D. Johnson

JOINT MOTION TO STRIKE PLAINTIFFS' POST-TRIAL BRIEF

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and Local Civil Rule 7(g), Defendant R. Kyle Ardoin, in his official capacity as Secretary of State of Louisiana; Defendant Intervenor Patrick Page Cortez and Clay Schexnayder in their respective official capacities as President of the Louisiana Senate and Speaker of the Louisiana House of Representatives; and Intervenor-Defendant the State of Louisiana, through Louisiana Attorney General Jeff Landry (collectively, "Defendants"), hereby move this Court for an Order striking Plaintiffs' untimely and improper Post-Trial Brief, Rec. Doc. 207.

The bases of Defendants' Motion are set forth in the accompanying Memorandum, which is incorporated herein by Reference. For the reasons stated therein, this Motion should be granted.

WHEREFORE, for these reasons, Defendants move this Court for an Order striking Plaintiffs' untimely and improper Post-Trial Brief, Rec. Doc. 207, in its entirety. In the alternative, should the Court decline to strike Plaintiffs' entire Post-Trial Brief, Defendants request that at a minimum footnote 10 be struck and Defendants be permitted to file a short reply to Plaintiffs' Brief. Defendants further request the Court grant any further relief it deems just and proper, including attorneys' fees incurred in bringing this Motion.

Respectfully submitted, this the 20th day of December, 2023.

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**MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTION TO STRIKE
PLAINTIFFS' POST-TRIAL BRIEF**

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and Local Civil Rule 7(g), Defendant R. Kyle Ardoin, in his official capacity as Secretary of State of Louisiana; Defendant Intervenors Patrick Page Cortez and Clay Schexnayder in their respective official capacities as President of the Louisiana Senate and Speaker of the Louisiana House of Representatives; and Intervenor-Defendant the State of Louisiana, through Louisiana Attorney General Jeff Landry (collectively, "Defendants"), hereby submit this Memorandum in Support of Defendants' Joint Motion to Strike Plaintiffs' Post-Trial Brief, Rec. Doc. 207. Plaintiffs Post-Trial Brief should be struck for several reasons: (1) it is untimely, in violation of this Court's post-trial briefing Order, Rec. Doc. 203; (2) it exceeds the page limitation, in violation of the briefing Order and Local Civil Rule 7(g); and (3) it includes "scandalous," "malicious," and "impertinent" accusations against defense counsel that have no basis in the record.

I. Plaintiffs' Post-Trial Brief was Untimely.

This Court's Order, Rec. Doc 203, is clear. Parties were "to submit simultaneous briefs with citations, not to exceed 40 pages" which "shall be submitted by close of business on

12/19/2023.” Defendants complied with this order, submitting their brief, which complies with Local Civil Rule 7(g) on December 19, 2023 at 4:30 PM CST. [Rec. Doc. 206]. Over four hours later, and well after the close of business deadline, Plaintiffs filed their post-trial brief at 9:01 PM CST. [Rec. Doc. 207]. Even allowing some latitude on “close of business,” 9:01 PM is clearly past close of business for federal courts. Plaintiffs did not file for an extension of time. Plaintiffs did not notify Defendants that the brief would be late due to some technical error.

This Court repeatedly stated on the record that the parties were to file “simultaneous” post-trial briefs, which was memorialized in Rec. Doc. 203. *See* Rec. Doc. 206-8 at 115:13, 116:11, and 214:10–11. But Plaintiffs filing their Post-Trial Brief hours after the deadline is not “simultaneous” and defeats the purpose of the word and of the Court’s instruction.

Furthermore, the delay allowed Plaintiffs ample time to review Defendants’ post-trial brief and adjust any arguments contained in their own accordingly. In fact, Plaintiffs’ Brief shows that they, at a minimum, reviewed Defendants’ filings. *See* Rec. Doc. 207 at 7, n. 2 (citing to Defendants’ filings at Docs. 206-2 and 206-7). This, of course, is prejudicial to Defendants and puts Defendants at a disadvantage for complying with the Court’s order. For this reason alone, Plaintiffs’ Post-Trial Brief should be struck. *See Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 161 (5th Cir. 2006) (holding no abuse of discretion by district court refusing to consider the plaintiff’s untimely response to the defendant’s motion for summary judgment and granting the defendant’s motion as uncontested; noting delays in meeting court deadlines “are a particularly abhorrent feature of today’s trial practice,” that they increase litigation costs, “caus[e] disrespect for lawyers and the judicial process,” and that “[a]dherence to reasonable deadlines is critical to restoring integrity in court proceedings.”) (quotation omitted); *Nelson v. Star Enter.*, 220 F.3d 587

(5th Cir. 2000) (holding no abuse of discretion in district court treating defendants' motion for summary judgment as unopposed because plaintiff's opposition filing was untimely).

II. Plaintiffs' Post-Trial Brief Exceeds the Page Limitation.

Plaintiffs' Post-Trial Brief should also be struck for failure to comply with Local Civil Rule 7(g) which requires that "[s]ignature blocks must begin on or before the last page" of the brief. This Court's post-trial briefing Order clearly limits the length of the parties' briefs to 40 pages. Defendants complied with that Order and the Local Rules. *See* Rec. Doc. 206. Plaintiffs did not. *See* Rec. Doc. 207. As a result, Plaintiffs' Brief should be struck for failure to comply with this Court's Order and the Local Rules. *See Rodgers v. La. Bd. of Nursing*, 665 F. App'x 326, 328-29 (5th Cir. 2016) (holding no abuse of discretion in striking plaintiff's response to motion to dismiss as untimely and in excess of page limit established by the district court, and noting the plaintiff failed to timely request for an extension of time or to seek leave to exceed page limits before filing as required by local rules); *United States v. Ferrand*, 284 Fed. Appx. 177, 179 (5th Cir. 2008) (holding the district court did not err in striking the defendant's reply brief for exceeding the page limit, where the defendant did not file a motion for leave to file longer brief); *Blackboard, Inc. v. Desire2Learn, Inc.*, 521 F. Supp. 2d 575, 577 (E.D. Tex. 2007) (striking summary judgment motion that exceeded page limit set by the court's scheduling order).

III. Plaintiffs' Post-Trial Brief Includes Baseless Accusations Against Defense Counsel Unsupported by the Record.

Lastly, Plaintiffs' Post-Trial Brief should be struck pursuant to Fed. R. Civ. P. 12(f) because it includes "scandalous," "malicious," and "impertinent" accusations against defense counsel that have no basis in the record. Plaintiffs claim that "Mr. Farr misrepresented" a brief filed by the Harvard Election Law Clinic which discussed the use of simulations in racial gerrymandering cases under the Fourteenth Amendment. Rec. Doc. 207 at p. 22, n. 10.

Specifically, Plaintiffs claim the Amicus Brief “explicitly noted that the Supreme Court has ruled that simulations ‘have no place in racial-vote-dilution cases,’ and discussed the differences between the two claims.” *Id.* But Mr. Farr’s exact representation to the Court was as follows:

We’ve cited to a brief in our Findings of Fact at document 177, page 34, note 5, that was filed by Ms. Thomas’s organization, the Harvard Law Election School Clinic, with the United States Supreme Court in the South Carolina Case.

And I won’t quote it because we’ve cited it to you, but there’s a lengthy discussion in this case about why simulations are relevant evidence on the intent of the map drawer in a racial case where there’s a claim of racial gerrymandering.

Exhibit 1¹ at 17:6–15. Mr. Farr even offered to read the brief into the record for clarification, which he was told he did not need to do. Exhibit 1 at 18:15–19:2. Plaintiffs’ allegations against Mr. Farr miss the mark.²

Plaintiffs’ claims of “misrepresentation” by counsel is scandalous, malicious, and impertinent and, for those reasons, at a minimum footnote 10 in Plaintiffs’ Post-Trial Brief should be struck.

CONCLUSION

For these reasons, the Court should strike Plaintiffs’ Post-Trial Brief, Rec. Doc. 207, in its entirety. In the alternative, should the Court decline to strike Plaintiffs’ entire Post-Trial Brief, Defendants request that at a minimum footnote 10 be struck and Defendants be permitted to file a short reply to Plaintiffs’ Brief. Defendants further request the Court grant any further relief it deems just and proper, including attorneys’ fees incurred in bringing this Motion.

¹ Attached hereto as Exhibit 1 is the relevant portion of the certified copy of the trial transcript from the morning session of Day 6 when the Amicus was discussed. Defendants filed the rough version of Day 6 with their Post-Trial Brief, Rec. Doc. 206-7 because at the time of filing, to the best of Defendants’ knowledge, the full Day 6 transcript had not yet been completed.

² Furthermore, as explained by Justice Kavanaugh, “Computer simulations might help detect the presence or absence of intentional discrimination.” *Allen v. Milligan*, 599 U.S. 1, 44 (2023) (Kavanaugh, J., concurring).

Respectfully submitted, this the 20th day of December, 2023.

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Exhibit 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DOROTHY NAIRNE, ET AL * CIVIL ACTION
*
VERSUS * NO. 3:22-178-SDD
*
KYLE ARDOIN, ET AL * DECEMBER 4, 2023
*
* * * * * * * * * * * * * * * MORNING SESSION

DAY 6
BENCH TRIAL
BEFORE THE HONORABLE SHELLY D. DICK
UNITED STATES CHIEF DISTRICT JUDGE

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COMPUTER-AIDED TRANSCRIPTION SOFTWARE

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MICHAEL BARBER, PH.D.

09:19 1 WHO ARE HELD IN THE SAME DISTRICT FROM THE PREVIOUS MAP TO THE
2 NEW MAP DISTRICT BY DISTRICT.

3 Q. DID MR. COOPER DO A CORE RETENTION ANALYSIS FOR HIS
4 ILLUSTRATIVE MAPS?

5 A. HE HAS A REFERENCE TO CORE RETENTION, BUT IT'S IN
6 REFERENCE TO THE DEGREE TO WHICH THE ILLUSTRATIVE MAP RETAINS
7 THE ENACTED MAP, THE 2022 MAP.

8 I CALCULATE CORE RETENTION TO THE DEGREE TO WHICH THE
9 ENACTED MAP AND THE ILLUSTRATIVE MAP RETAIN THE 2011 MAP, WHICH
10 I THINK IS THE MORE APT COMPARISON SINCE THAT'S THE DISTRICTS
11 THAT THE VOTERS ARE COMING FROM IN THE PREVIOUS DECADE.

12 SO WE WOULD WANT TO KNOW WHETHER THE ENACTED MAP IS
13 THE ONE THAT GOES FORWARD OR THE ILLUSTRATIVE MAP IS
14 IMPLEMENTED. WE WOULD WANT TO KNOW THE DEGREE TO WHICH VOTERS
15 FROM THE PREVIOUS DECADE ARE RETAINED INTO THE DISTRICTS THAT
16 ARE GOING TO BE USED GOING FORWARD.

17 Q. OKAY. AND COULD CORE RETENTION BE AN EXPLANATION FOR WHY
18 MR. COOPER'S ILLUSTRATIVE MAPS CONTAIN MORE MAJORITY-BLACK
19 VOTING AGE POPULATION DISTRICTS THAN THE SIMULATIONS OR THE
20 ENACTED MAPS?

21 MR. NAIFEH: OBJECTION. THAT'S ASKING FOR MR.
22 COOPER'S INTENT AGAIN.

23 MR. FARR: MAY I BE HEARD ON THAT, YOUR HONOR?

24 THE COURT: YES, YOU MAY.

25 MR. FARR: I SHOULD HAVE SAID THIS EARLIER, YOUR

MICHAEL BARBER, PH.D.

09:20 1 HONOR, BUT I WANT TO MAKE THE POINT THAT THE PLAINTIFFS IN THIS
2 CASE FILED A *DAUBERT* MOTION ON DR. JOHNSON TESTIFYING ABOUT THE
3 SUBJECTIVE INTENT OF MR. COOPER. THEY DIDN'T FILE A *DAUBERT*
4 MOTION ON DR. BARBER.

5 I WILL SUGGEST TO YOU, YOUR HONOR, THE REASON
6 WHY THEY DIDN'T DO THAT IS -- WE'VE CITED TO A BRIEF IN OUR
7 FINDINGS OF FACT AT DOCUMENT 177, PAGE 34, NOTE 5, THAT WAS
8 FILED BY MS. THOMAS'S ORGANIZATION, THE HARVARD LAW ELECTION
9 SCHOOL CLINIC, WITH THE UNITED STATES SUPREME COURT IN THE
10 SOUTH CAROLINA CASE.

11 AND I WON'T QUOTE IT BECAUSE WE'VE CITED IT TO
12 YOU, BUT THERE'S A LENGTHY DISCUSSION IN THIS CASE ABOUT WHY
13 SIMULATIONS ARE RELEVANT EVIDENCE ON THE INTENT OF THE MAP
14 DRAWER IN A RACIAL CASE WHERE THERE'S A CLAIM OF RACIAL
15 GERRYMANDERING.

16 SO THEY WERE AWARE OF THIS BRIEF AT THE TIME
17 THAT THE *DAUBERT* MOTION WAS FILED. NO *DAUBERT* MOTION WAS
18 FILED. AND THEN AFTERWARDS, YOUR HONOR, THERE WAS A
19 STIPULATION ENTERED IN THIS CASE. AND I'LL TRY TO QUOTE IT THE
20 BEST I CAN. I THINK IT'S DOCUMENT 182. BUT THE STIPULATION
21 SAYS THAT THE EXPERT REPORTS OF ALL THE EXPERTS WOULD COME INTO
22 EVIDENCE WITHOUT ANY OBJECTION AS TO THE AUTHENTICITY OR THE
23 ADMISSIBILITY IF THE EXPERT APPEARED TO TESTIFY. THAT
24 STIPULATION DID NOT SAY IF THE EXPERT APPEARS TO TESTIFY AND
25 HE'S QUALIFIED AS AN EXPERT. IT DID NOT SAY THAT THE REPORT

MICHAEL BARBER, PH.D.

09:22 1 COMES INTO EVIDENCE SUBJECT TO SUBSEQUENT MOTIONS TO STRIKE
2 TESTIMONY IN THE REPORT. IT SAYS THE REPORTS IN EVIDENCE.

3 SO THE PLAINTIFFS HAVE, IN OUR VIEW, WAIVED ANY
4 RIGHT TO OBJECT TO THIS TESTIMONY BY DR. BARBER. IN ANY CASE,
5 AGAIN, THIS IS NOT TESTIMONY ABOUT MR. COOPER'S SUBJECTED
6 INTENT. HE'S NEVER MENTIONED MR. COOPER. HE'S NEVER -- UNLIKE
7 --

8 THE COURT: YOUR QUESTION MENTIONS MR. COOPER.

9 MR. FARR: WHAT'S THAT?

10 THE COURT: YOUR QUESTION MENTIONS MR. COOPER. AND
11 SO IF -- YOU ARE ONE STEP REMOVED, PERHAPS, FROM CALLING FOR
12 INTENT. YOUR QUESTION DOESN'T CALL FOR INTENT, BUT YOUR
13 QUESTION CALLS FOR WHAT IS THE CONCLUSION THAT YOU DRAW ABOUT
14 MR. COOPER'S MAPS.

15 MR. FARR: WELL, OKAY, YOUR HONOR, THEN I'M GOING TO
16 HAVE TO READ --

17 THE COURT: AND THAT QUESTION --

18 MR. FARR: -- THE REPORT OR THE BRIEF THAT WAS
19 SUBMITTED BY --

20 THE COURT: YOU DON'T NEED TO DO THAT.

21 MR. FARR: WELL, I NEED TO MAKE A RECORD, YOUR HONOR.
22 IT'S IMPORTANT FOR YOU TO UNDERSTAND THIS, IF I MAY HAVE YOUR
23 PERMISSION, BECAUSE IT EXPLAINS BETTER. THEY HAVE EXPLAINED
24 BETTER THAN I HAVE BEEN ABLE TO DO, WHY THIS IS RELEVANT
25 TESTIMONY.

MICHAEL BARBER, PH.D.

09:24 1 **THE COURT:** IT IS IN THE RECORD. THERE IS A RECORD.
2 I AM OVERRULING THE OBJECTION. ASK YOUR QUESTION AGAIN.

3 **BY MR. FARR:**

4 **Q.** ALL RIGHT, DR. BARBER. DID YOU COMPARE THE CORE RETENTION
5 FIGURES FOR MR. COOPER'S MAP AND FOR THE ENACTED PLAN?

6 **A.** YES.

7 **Q.** WHICH ONE OF THOSE PLANS PERFORMED BETTER?

8 **A.** THE ENACTED MAP.

9 **Q.** CAN YOU TURN TO PAGE 1 OF SECRETARY OF EXHIBIT -- OR
10 EXCUSE ME, PAGE 26 OF SECRETARY EXHIBIT 1, TABLE 5.

11 AND CAN YOU TELL THE COURT WHAT THAT TABLE IS,
12 PLEASE.

13 **A.** SO THIS TABLE SHOWS THE RESULTS OF THE CORE RETENTION
14 ANALYSIS. YOU CAN SEE, THE ROWS SHOW THE VARIOUS RANGES OF
15 CORE RETENTION: THE ENACTED MAP, AND THE NUMBER OF DISTRICTS
16 THAT FALL IN THOSE RANGES FOR THE SENATE; AND THE ILLUSTRATIVE
17 MAP, AND THE NUMBER OF DISTRICTS THAT FALL WITHIN THOSE RANGES.
18 AND THEN AT THE BOTTOM, THE AVERAGE CORE RETENTION IN EACH OF
19 THE MAPS.

20 **Q.** ALL RIGHT. NOW, LET'S TURN TO SECRETARY OF STATE'S
21 EXHIBIT 1, PAGE 65, TABLE 12.

22 AND CAN TELL YOU THE COURT WHAT THAT TABLE IS.

23 **A.** THIS TABLE SHOWS THE SAME ANALYSIS FOR THE HOUSE. SO WE
24 HAVE, AGAIN, CORE RETENTION AND THE VARIOUS RANGES FOR THE
25 ENACTED MAP AND THE ILLUSTRATIVE HOUSE MAP. AND AT THE BOTTOM

11:15 1 THE COURT IS AT RECESS.

2 (WHEREUPON, A PROFFER WAS MADE OUTSIDE THE PRESENCE OF THE
3 COURT. THE PROFFER IS FILED IN A SEPARATE TRANSCRIPT.)

4 * * *

5 CERTIFICATE

6 I, SHANNON THOMPSON, CCR, OFFICIAL COURT REPORTER FOR THE
7 UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA,
8 CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT, TO
9 THE BEST OF MY ABILITY AND UNDERSTANDING, FROM THE RECORD OF
10 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

11 *Shannon Thompson*

12
13 SHANNON THOMPSON, CCR

14 OFFICIAL COURT REPORTER
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