**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION**

DYAMONE WHITE, et al.,   **PLAINTIFFS**

VS.   **Civil Action No. 4:22-cv-00062-SA-JMV**

**STATE BOARD OF ELECTION
COMMISSIONERS, et al.,**   **DEFENDANTS**

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS'
MOTION TO STRIKE CERTAIN EXPERT DISCLOSURES**

COME NOW the Plaintiffs, Dyamone White, Derrick Simmons, Ty Pinkins, and Constance Olivia Slaughter Harvey-Burwell ("Plaintiffs"), by and through counsel, and file this response to Defendants' motion to strike certain expert disclosures, Dkt. #119, and in support thereof would show the Court the following:

1.   Defendants' motion to strike the February 6, 2023 report of Traci Burch, Ph.D. ("Dr. Burch") and the contested portion of the February 6, 2023 report of Byron D'Andra Orey, Ph.D. ("Dr. Orey") should be denied pursuant to Fed. R. Civ. P. 26(a)(2)(d)(ii), Fed. R. Civ. P. 26(e)(2) and L.U.R. Civ. 26(a)(2)(C) because (i) an expert should be allowed to correct an error, particularly when the error is uncovered early in the expert discovery process, prior to expert depositions, *Daubert* motions, or summary judgment proceedings; (ii) striking Dr. Burch's February 6 report would effectively bar Plaintiffs from introducing statistical evidence of relative voter turnout between Black and white voters, a significant issue in this case; and (iii) the three contested paragraphs of Dr. Orey's February 6 Report, analyzing the racially polarized voting patterns of three elections in response to Defendants' expert's contention that polarization in

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Mississippi is driven by party rather than race, are proper rebuttal with respect to an important issue in the case.

2.   Plaintiffs brought this action because the district boundaries for Mississippi Supreme Court elections dilute the voting strength of Black Mississippians, in violation of Section 2 of the Voting Rights Act. Expert testimony is important to Plaintiffs' claim. The parties agreed to an expedited expert discovery schedule, under which Plaintiffs' expert disclosures were filed on October 3, 2022, towards the beginning of the discovery period. Defendants' expert disclosures— following the parties' agreement to extend that deadline—were filed on January 6, 2023. The responsive reports at issue here were filed on February 6, 2023.

3.   Pursuant to the operative Case Management Order in this case, entered on July 19, 2022, discovery is scheduled to conclude on April 19, 2023, *see* Dkt. 47 at 4, ¶ 7(C); dispositive and *Daubert* motions are to be filed by June 1, 2023, *see id*. at 5, ¶ 8; the pretrial conference is scheduled for November 2, 2023, *see id*. at 4, ¶ 7(B); and trial is scheduled for December 4, 2023, *see id*. at 4, ¶ 7(A).

4.   Defendants' motion principally concerns the report submitted on February 6 by Dr. Traci Burch, who opined in her initial October 3 report that Black Mississippians have relatively lower rates of voter participation than white Mississippians, which correlates with Black Mississippians' relative lower levels of educational attainment.

5.   Dr. Burch's initial report included a calculation error. Defendants' expert Dr. David A. Swanson identified this error in his report dated January 6, 2023. However, the turnout results he presented, which corrected for Dr. Burch's calculation error, far exceeded official turnout data maintained by the Mississippi Secretary of State.

6.   This indicated to Dr. Burch that the dataset itself—which was based on self-reported survey responses—was unreliable. She thus conducted additional analyses of voter turnout by race using data sources that did not wholly rely on self-reported survey responses. The results of those analyses are reflected in Dr. Burch's February 6 Report, and support Dr. Burch's original conclusion—that Black voter turnout in Mississippi is lower than white voter turnout, which can be explained based on the two populations' relative levels of educational attainment.

7.   Regarding the three paragraphs in Dr. Orey's second report Defendants seek to strike, Defendants' expert Dr. Christopher Bonneau argued in his report dated January 2 that partisanship rather than race explains the respective voting patterns of Black and white Mississippians—i.e., Black Mississippians routinely vote for the Democratic party, while white Mississippians routinely vote for the Republican party.

8.   The three challenged paragraphs of Dr. Orey's report respond to these assertions. They contain Dr. Orey's analysis of three election contests beyond those contests analyzed in his initial report. One is the 2016 District 1 Supreme Court contest, a non-partisan race that nevertheless exhibited racially polarized voting. Another is a Democratic primary contest where Black and white voters in the same party exhibited polarized voting in a head-to-head contest between a Black candidate and a white one. The third is the 2015 Central District Public Service Commission contest.

9.   The Court should find that the portion of Plaintiffs' expert reports at issue constitute timely and proper rebuttal and supplementation. Alternatively, the applicable factors for assessing expert disclosures that go beyond what constitutes proper rebuttal or supplementation all weigh against the drastic and harsh remedy of excluding Plaintiffs' disclosures and precluding important expert testimony. Here, (i) neither Plaintiffs' nor Defendants' experts have been deposed; (ii) eight

months remain before the scheduled trial date, with the challenged February 6, 2023 disclosures having been served ten months before trial; (iii) discovery is still ongoing; and (iv) this case has been pending for less than a year, with no prior extensions of the schedule established by the governing Case Management Order having been sought or granted. In those circumstances, exclusion of the expert submissions at issue would be unjust and inconsistent with the case law and the Federal Rules, which favor resolution of disputes on the merits.

10.   Plaintiffs adopt and incorporate by reference the Memorandum of Law filed concurrently herewith.

11.   A good-faith mistake should not be fatal. Plaintiffs agree that Defendants should be permitted to serve a rebuttal to Dr. Burch's February 6 Report and properly probe Dr. Burch and Dr. Orey's analyses through deposition and cross-examination. Based on the grounds asserted herein and as further set forth in the aforementioned Memorandum of Law, Defendants' motion to strike certain expert disclosures should be denied.

12.   In further support of their response to Defendants' motion, Plaintiffs respectfully submit the following exhibits:

Exhibit 1   Declaration of Traci Burch, Ph.D.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that Defendants' motion to strike certain expert disclosures be denied, and that the Court grant such other and further relief as may be just and proper.

THIS the 24th day of March, 2023.

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Respectfully submitted,

/s/ Joshua Tom
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<u>CERTIFICATE OF SERVICE</u>

I, Joshua Tom, hereby certify that on March 24, 2023, I electronically filed the foregoing with the

Clerk of the Court using the ECF system which sent notification of such filing to all parties on file

with the Court.

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/s/ Joshua Tom

Joshua Tom

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

DYAMONE WHITE, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	) No. 4:22-cv-00062-SA-JMV
STATE BOARD OF ELECTION	)
COMMISSIONERS, et al.,	)
	)
Defendant.	)

DECLARATION OF DR. TRACI BURCH IN SUPPORT OF PLAINTIFFS'
RESPONSE TO DEFENDANTS' MOTION TO STRIKE

Pursuant to 28 U.S.C. § 1746, I, Traci Burch, make the following declaration based on personal knowledge:

1.   I was retained by the attorneys for the Plaintiffs to provide an expert opinion in this matter regarding racial disparities in Mississippi, including with respect to voter participation. I am a political scientist by training. My initial report was served on the Defendants on October 3, 2022. In response to the January 6, 2023 report of Dr. David Swanson, I subsequently prepared a second report on February 6, 2023 (the "February 6 Report"). In my second report, I offered additional analysis in support of my original conclusion regarding the disparity in voter participation between Black and White Mississippians.

2.   I offered this additional analysis because both my October 3 Report and Dr. Swanson's January 6 Report relied on voter participation data from the Current Population Survey ("CPS"). Dr. Swanson's Report alerted me to a calculation error in my October 3 Report resulting from the inadvertent inclusion of certain data from survey respondents below voting age. However, the analysis presented by Dr. Swanson, which corrected this error, yielded voter

turnout percentages well in excess of actual voter turnout as reflected in the records maintained by the Mississippi Secretary of State. *See* February 6 Report 2.

3.   I initially relied on the CPS dataset because I believed that the CPS turnout estimates, which are based on self-reported survey responses, were generally consistent with actual voter turnout numbers as reported by states government bodies. February 6 Report 4. In addition, the CPS dataset includes information about race, education, and other demographic variables of interest, making it a useful tool, if reliable. However, Dr. Swanson's analysis—by yielding voter turnout percentages clearly inconsistent with the voter turnout data contained in official state records—called into question the reliability of CPS data for purposes of this analysis. While in my past work using data from other states, I had encountered CPS estimates overstating voter turnout to a relatively small degree, I had not encountered the significant degree of overstatement that I saw in the Mississippi CPS data. This substantial overstatement of Mississippi voter turnout was not apparent to me when preparing my initial report as a result of the calculation error described above, which, by including populations who did not vote, lowered the total voter turnout percentages to a level that happened to be broadly in line with the turnout percentage reflected in official state records.

4.   In investigating this issue, I reviewed very recent, peer-reviewed scholarship which has found similar problems with the reliability of the CPS dataset and specifically urged scholars to "use caution when making inferences about variation in turnout rates by racial and ethnic groups" based on the self-reported survey responses reflected in the CPS dataset. Ansolabehere, Stephen, Bernard L. Fraga, and Brian F. Schaffner. "The Current Population Survey Voting and Registration Supplement Overstates Minority Turnout." *The Journal of Politics* 84.3 (2022): 1850:1855. This scholarship shows that the CPS dataset overreports voter participation by

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Black voters. *Id.*; *see also* February 6 Report 3-4 & nn. 6–8, 10–11.

5.   Accordingly, in the February 6 Report, I conducted additional analysis of voter participation using datasets other than the CPS. Specifically, and consistent with the approach taken by Ansolabehere, Fraga, and Schaffner, I analyzed voter participation by race using both the Cooperative Election Study ("CES") dataset (in which survey participants' reported participation is independently validated) and the turnout data contained in the State's own voter file. *See* February 6 Report 4–9 (CES dataset analysis); *id.* 9–12 (voter file analysis). However, unlike the states analyzed by Ansolabehere, Fraga, and Schaffner, Mississippi's voter file does not include information about the race of voters, so I used the ecological inference (EI) technique to analyze voter turnout in Mississippi based on the voter file. February 6 Report 9–12.

6.   In a declaration dated March 8, 2023 and submitted in support of the Defendants' motion to strike (the "Swanson Declaration"), Dr. Swanson suggests that it would take him "between 164 and 180 continuous person-hours" to examine and replicate the additional analysis in my February 6 Report. Swanson Decl. ¶¶ 16-17.

7.   As explained below, Dr. Swanson's Declaration contains certain inaccuracies regarding the analysis contained in the February 6 Report. As a result, Dr. Swanson significantly overestimates the amount of time it would reasonably take to respond to the February 6 Report.

8.   Dr. Swanson first addresses the analysis from the February 6 Report that I conducted using the CES dataset. Dr. Swanson states it will take "60 person-hours" to (1) "acquir[e] the data set," (2) "becom[e] familiar with it to replicate [Dr. Burch's] logistic models using the variables shown in Table 2 [of the February 6 Report]," and (3) "write up the results." Swanson

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Decl. ¶ 12.

9.   Dr. Swanson then states that it will take an additional 16 person-hours, for a total of "76 person-hours" to construct "alternative logit regression models" to compare to the analysis in the February 6 Report. Swanson Decl. ¶ 12.

10.   This significantly overestimates the amount of time it would reasonably take to examine and replicate my analysis of the CES dataset. As discussed below, my analysis took me approximately 10 hours.

11.   With respect to "acquiring the dataset," Swanson Decl. ¶ 12, the CES dataset is available for free from the Harvard-MIT Dataverse website (https://cces.gov.harvard.edu/) and can be downloaded (along with its codebook) in approximately five minutes. February 6 Report 4–5 & nn. 13–14.

12.   With respect to replicating my analysis of the CES dataset, the first part of this analysis (as summarized in Figure 1 of the February 6 Report) essentially reports voter turnout data from the CES dataset in the form of basic percentages (e.g., 46% Black turnout, 60% White turnout). February 6 Report 5–6. No regression analysis is required to confirm those results, such as the calculations of the percent of each race who overreported voting. For context, conducting this analysis, for which I used the data analytics software program SPSS, took me about 3 hours to complete.

13.   The second part of my analysis of the CES dataset examined the relationship between voter turnout, race, and education, in light of Dr. Swanson's suggestion in his January 6 Report (based on the CPS dataset) that Black voters participate more than White voters across all education levels. February 6 Report 7. Accordingly, I conducted a regression analysis using

the CES dataset to estimate the effects of race and education on voting. February 6 Report 7–8 & fig. 2. Conducting this analysis, for which I used both SPSS and a free open-source software environment called "R," took me 3 hours to complete.

14.   Dr. Swanson suggests that replicating my regression analysis will take much longer because I "did not provide the results of any residual and other important diagnostics in regard to either of her two logistic regression models." Swanson Decl. ¶ 12. As I understand it, the code I used to analyze the CES dataset was provided to Defendants on February 16, 2023. In any event, regression diagnostics are typically used to find out whether more variables can be included to make the model do a better job of predicting outcomes, in this case voting patterns.[1] Here, however, the goal of the CES analysis was not to determine all the predictors of voting. Rather, it was to determine the effect of particular explanatory variables—race and education— on voting. February 6 Report 7–8. Regression diagnostics are thus not necessary to replication or evaluation of my regression analysis. See King, Gary, et al. *Designing Social Inquiry : Scientific Inference in Qualitative Research*, Princeton University Press, 1994: 163, and "Post by Dr. Frank Harrell," https://stats.stackexchange.com/questions/45050/diagnostics-for-logistic-regression.[2] If a diagnostic of my regression analysis were relevant, however, I would

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[1] For binary dependent variables and independent observations, as we have here, there are no other assumptions that need to be checked. *See* Post of Dr. Frank Harrell, https://stats.stackexchange.com/questions/538403/when-are-diagnostics-not-required-for-logistic-regression.

[2] In stating that my regression analysis of the CES dataset "need[s] to be examined for adequacy" using "diagnostics," Dr. Swanson cites an online publication from the software provider NCSS titled "Logistic Regression," but that publication, while discussing regression diagnostics generally and at a high level, does not support the position that diagnostics are appropriate here. NCSS appears to be a statistical software package, but is not standard for any of the fields with which I am familiar (I code, manage, and analyze data in R, SPSS, Stata, Excel, and Access; I also use ArcGIS when working with geographic data). Corroborating this, the NCSS website lists publications that utilize NCSS software dating back to 2012, and none of the listed publications

estimate that, using an appropriate software program and my code that was provided to Defendants, it could be conducted in 1 hour.

15.   Dr. Swanson also suggests that he might also be required to spend 16 hours constructing "alternative logit regression models" in response to the February 6 Report's analysis of the CES dataset. Swanson Decl. ¶ 12. However, for similar reasons as those outlined above in Paragraph 14, there is no need for an "alternative logit regression model" here because my analysis was not designed to capture or model every variable that predicts voting behavior, but instead to specifically examine the relationship between voting, race, and education.

16.   Dr. Swanson next addresses the analysis from the February 6 Report that I conducted using the Mississippi voter file. Dr. Swanson states it will take "no less than 88 person-hours and possibly as many as 104 person-hours" to (1) assess "which CVAP [i.e., citizen voting age population] file" was used for the analysis, (2) "assess[] the allocation/assignment of the CES and voter turnout data to the same block groups," and (3) assess my "Bayesian analysis." Swanson Decl. ¶ 14.

17.   This significantly overestimates the amount of time it would reasonably take to examine and replicate my analysis of the voter file. As discussed below, my analysis took me approximately 35 hours.

18.   With respect to the source of the CVAP data, Dr. Swanson asserts that "the source of 'Citizen Voting Age Population by Race and Ethnicity' was a "broken link." Swanson Decl.

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appear in any peer-reviewed American social science journals. Use of NCSS, as opposed to software more commonly used in political science for quantitative research, could increase the amount of time involved in conducting the analyses described in the Swanson Declaration.

¶ 14. The link, to the U.S. Census Bureau's website (https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html), worked for me on January 20, and worked as recently as the date I signed this Declaration. February 6 Report 10 & n.29. Dr. Swanson also states that it is "not clear" whether I used the 2016-2020 or 2017-2021 CVAP data. Swanson Decl. ¶ 14. I used the 2016-2020 CVAP data, which was the most recent available file when I began my analysis; the 2017-2021 CVAP data was only released in February 2023. Dr. Swanson does not specify any particular amount of person-hours it would have taken to ascertain which of the files I used.

19.   In any event, if Dr. Swanson has any questions about my analysis, my datasets or other sources, or the software programs that I used, I will work with attorneys for Plaintiffs to provide clarifications and any further information that would facilitate Dr. Swanson's review of my work.

20.   With respect to replicating my analysis of the Mississippi voter file, I conducted an ecological inference analysis of the Mississippi voter file to estimate turnout by race, confirming that there is a substantial gap in turnout between Black and White voters. February 6 Report 9–10. EI is a well-established form of analysis for assessing voter turnout by race that has been developed and refined by political science scholars and accepted by courts in the Voting Rights Act context. The EI software package is available for free and runs using the R software environment. *See* King, Gary and Margaret Roberts. "EI: A(n R) Program for Ecological Inference." *Available from* https://github.com/iqss-research/eir. Accessed 22 Mar 2023. For a dataset, my analysis used only the Mississippi voter file (which contains voter turnout information) and the CVAP (i.e., demographic) data from the U.S. Census Bureau, which is available at the Census Block Group (i.e., sub-precinct) level. February 6 Report 9–10. To

prepare the data, I matched each voter in the voter file to their Census Block Group using "Censusxy," which is another R software package that accesses the Census Bureau's geographic data. *See* Prener, Christopher, Branson Fox and Christopher Kenny. "Censusxy: Access the U.S. Census Bureau's Geocoding API System." *Available from* https://chris-prener.github.io/censusxy. Accessed 22 Mar 2023. Once each voter in the voter file was matched to their block group, I aggregated those individual records to obtain data on the number of votes in each block group. I then merged these data on voter turnout by block group to the CVAP block group demographic data from the Census and then ran the merged data through the EI software to obtain estimates of voter turnout by race. February 6 Report 9–10. This process, including verifying the quality of the data, investigating any missing data, calculating confidence intervals, and writing up my results, took me about 29 hours to complete. Geocoding the voter file using R took several hours, but the process is automated and can be run overnight so that process is not included in my estimate. Once the data are ready, running the EI software package takes a matter of minutes.

21.   Dr. Swanson misapprehends the process set out above in several ways. First, he states that I "appl[ied] the CES data along with" demographic data from the Census and voter turnout data from the voter file. Swanson Decl. ¶ 13. He then states that I do not describe the "steps that were used to merge these data sets." Swanson Decl. ¶ 13. He suggests it will take considerable time to reconstruct my model based on my "three 'observational data' sets (CES, CVAP, and Voter Registration)." Swanson Decl. ¶ 13. However, and as just described, the CES data was not used at all in my analysis of the Mississippi voter file. This misunderstanding appears to result in a significant overestimation of the complexity of my analysis and the time and effort required to replicate it.

22.   In addition, Dr. Swanson states that I did not "describe the process involved in constructing [my] Bayesian model," that I did not describe the "prior distribution" I use for my analysis, or the "'posterior distribution" that I "presumably … use[] to generate [my] analysis." Swanson Decl. ¶ 13. Dr. Swanson states that this is a "major problem" because without this information it will take considerable time to recreate my analysis, and that "an assessment of the Bayesian approach in general is called for here." Swanson Decl. ¶ 13. Dr. Swanson misunderstands the nature of the model I used. As noted, the model I employed is the EI program, a software package that I did not construct and that political scientists frequently use to study voting behavior in particular. For inputs, the EI software package requires data on block group race, block group turnout, and total turnout. The other parameters, such as the posterior distributions, are set at the default values in the software package, which are readily available to any user of the software program. This misunderstanding also appears to result in a significant overestimation of the time and effort required to replicate my analysis, which would involve merely running the EI program, rather than constructing a new, bespoke statistical model.

23.   I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: March 24, 2023_

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Traci Burch

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