

**IN 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**

---

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' OBJECTIONS  
TO AND APPEAL OF MAGISTRATE JUDGE'S ORDER ON  
DEFENDANTS' MOTION FOR FEES [DKT. #178]**

---

Defendants, 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, (hereinafter collectively "Defendants") by and through counsel, file this their response in opposition to *Plaintiffs' Objections to and Appeal of Magistrate Judge's Order on Defendants' Motion for Fees [Dkt. #178]*, and in support thereof would show unto the Court the following:

1. Plaintiffs' objections to the Magistrate Judge's Order on Defendants' motion for fees should be overruled, and the Magistrate Judge's Order affirmed, because Plaintiffs fail to show that the Magistrate Judge's findings of fact or conclusions of law were clearly erroneous or contrary to law.

2. This is a § 2 Voting Rights Act (“VRA”) case involving a challenge to Mississippi’s Supreme Court electoral districts, and specifically to District 1 (Central District). 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).

3. Like all § 2 VRA cases, this case is expert intensive. Following the parties’ timely exchange of expert witness disclosures, Plaintiffs on February 6, 2023, served “rebuttal expert reports” from three of their six designated experts. One of Plaintiffs’ experts, Dr. Burch, sought to remedy deficiencies in her initial report by jettisoning her previous analysis on the grounds that her data were “unreliable,” adopting an entirely new data set, and bolstering her initial opinions with entirely new analyses predicated on the new data set. Another of Plaintiffs’ experts, Dr. Orey, sought to offer wholly-new economic inference and empirical analyses to bolster his initial opinions.

4. Defendants moved to strike the aforementioned rebuttal disclosures as improper for multiple reasons. Dkt. #119, #120, #135. Defendants estimated that if forced to respond to the improper rebuttal disclosures of Dr. Burch, one of Defendants’ two experts, Dr. Swanson, would

incur between 164 and 180 man-hours of additional work, in addition to the eight hours he had (by then) already spent reviewing Dr. Burch's rebuttal report. Dkt. #119-4 at 8, ¶ 16. Defendants' other expert, Dr. Bonneau, would also be required to perform additional work necessitated by the improper rebuttal disclosures of Dr. Orey.

5. On April 14, 2023, the Magistrate Judge entered her Order holding that Plaintiffs' rebuttal disclosures of Dr. Burch and Dr. Orey were untimely and improper. Dkt. #140. The Magistrate Judge gave Plaintiffs the option of either (a) having these improper rebuttal disclosures stricken; or (b) moving for a trial continuance and stipulating that Plaintiffs would "be responsible for the reasonable expert fees and costs actually incurred by Defendants in having their experts respond to the untimely rebuttal opinions of Drs. Burch and Orey." *Id.* at 13. Plaintiffs chose the latter option and stipulated "that they [would] be responsible for reasonable expert fees and costs actually incurred in preparing [Defendants' experts'] sur-rebuttal reports." Dkt. #143 at 2, ¶ 3.

6. Solely as a result of Plaintiffs' improper rebuttal disclosures, Defendants incurred actual expert and attorney's fees and expenses totaling \$120,449.27. This figure consisted of \$90,827.87 in total expert fees/expenses and \$29,621.40 in attorney's fees/expenses. Of the \$90,827.87 in expert fees/expenses incurred as a result of Plaintiffs' improper rebuttal disclosures, \$81,621.54 was attributable to the work of Dr. Swanson and his quantitative analyst, Tom Bryan, principal of BryanGeoDemographics, a data support contractor. The total number of hours spent by Dr. Swanson and his analyst in responding to Dr. Burch's improper rebuttal report was 182.70 hours, which was consistent with the estimate that Dr. Swanson provided to the Court and Plaintiffs at the outset. *See* Dkt. #119-4 at 8, ¶ 16.

7. The aforementioned expenditures will ultimately be paid out of pocket by the State of Mississippi and hence shouldered by Mississippi taxpayers. At the conclusion of the surrebuttal

expert work, Defendants filed a motion to recover the aforementioned expert and attorney's fees/expenses for the State on a dollar-for-dollar basis pursuant to Plaintiffs' aforementioned stipulation and FED. R. CIV. P. 37(c)(1)(A),(C) and 26(b)(4)(E)(i). Dkt. #166, #167, #176. In ruling on Defendants' motion, the Magistrate Judge disallowed any recovery of attorney's fees/expenses and a portion of the work performed by Dr. Swanson (i.e., deposition transcript review time), reducing recoverable fees and costs by \$31,713.40 and awarding Defendants the sum of \$88,735.87 (consisting solely of expert witness fees/expenses). Dkt. #177 at 9.

8. Plaintiffs now object to the Magistrate Judge's Order awarding fees for three reasons, none of which renders the Magistrate Judge's findings or legal conclusions clearly erroneous or contrary to law as required for reversal or modification. L.U.Civ.R. 72(a)(1)(B).

9. **First**, Plaintiffs presume that the Magistrate Judge did not consider the reasonableness of Defendants' request for reimbursement of expert fees/expenses. Plaintiffs fault the Magistrate Judge for what they characterize as "[t]he complete absence of discussion of any of the factors relevant for determining a reasonable expert fee" pursuant to *Duke v. Performance Food Group, Inc.*, Civil Action No. 1:11CV220-MPM-DAS, 2014 WL 370442, at \*6 (N.D. Miss. Feb. 3, 2014). Dkt. #178 at 11. But *Duke* only sets out factors that "a court *may* consider to determine the reasonableness of a fee." *Duke*, 2014 WL 370442 at \*6 (emphasis added). *Duke* does not mandate that the court consider certain factors, or that the court's analysis of such factors must be expressly set forth on the record in its order. Nor have Plaintiffs cited any controlling authority to that effect. Upon a fair reading of the Magistrate Judge's Order, it is apparent that she did in fact consider the reasonableness of the fees/expenses for which Defendants sought recovery. *See* Dkt. #177 at 6-8. Plaintiffs' self-serving presumption to the contrary fails to demonstrate that the Magistrate Judge's ruling was clearly erroneous.

10. **Second**, Plaintiffs assert that Dr. Swanson’s rate should be reduced for certain work performed in responding to Dr. Burch’s rebuttal report because he is “not qualified to analyze ecological inference methods,” Dkt. #178 at 12, and because—according to Plaintiffs—“he has effectively been withdrawn as an expert on that subject,” *id.* at 15. But in actuality, Dr. Swanson was never designated as an expert in “ecological inference methods.” Rather, he was designated as an expert in the field of applied demography. Ecological inference analysis is merely one tool that can be used for demography and other things.

11. Plaintiffs omit that Dr. Swanson has not been offered to criticize the mechanics of Dr. Burch’s use of ecological inference analysis. He simply points out that the counties that Dr. Burch used for the purpose of analyzing voter turnout by race in Mississippi Supreme Court District 1 were the wrong counties—i.e., she excluded Bolivar County (which is in District 1) and included 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. That observation was well within Dr. Swanson’s purview to make, as was his observation that she had conducted no analysis of turnout of any-part-black voters.

12. As set forth in detail in Defendants’ rebuttal in further support of their motion for fees, Dr. Swanson was engaged to respond to the opinions in Dr. Burch’s original report. But then she fundamentally changed the character of her voter turnout analysis by (1) substituting one dataset (“CPS,” i.e., U.S. Census Bureau data) with another dataset (“CES”); and (2) presenting a second method of estimating the racial gap in turnout—namely, a type of ecological inference analysis known as “King’s Ecological Inference,” or “King’s E.I.” for short.

13. Confronted with these new data and voter turnout analyses in Dr. Burch’s rebuttal report, Defendants had two choices. They could either (a) attempt to engage an entirely new expert

familiar with CES data and skilled in King’s E.I., yet unfamiliar with the instant litigation; or (b) rely on their existing experts to perform the work needed to address these newly-presented matters.

14. Hiring a new defense expert in midstream was not feasible. For one thing, any new expert would have been forced to get up to speed on this complicated, expert-driven VRA case from scratch, reviewing all of the reports and data that Dr. Swanson had, by then, already reviewed in detail. And any new expert would almost certainly not have had the familiarity that Dr. Swanson—having spent part of his professional career in Mississippi—already had with Mississippi’s relevant demographic features.

15. Additionally, from a practical standpoint, attempting to retain a new expert quickly would have been extremely challenging. The ACLU attorneys driving this litigation on the plaintiffs’ side have the benefit of a ready bench of “experts” who routinely testify in redistricting litigation across the country. No such stable of experts exists on the defense side of VRA litigation. Coupled with the typical reluctance of most academics to break ranks with peers and testify against the interests of the ACLU in favor of the State of Mississippi, this dearth of experts puts Defendants at a sizeable disadvantage in terms of speed and flexibility where expert review is concerned.

16. Weighing these considerations in the balance, the more efficient and pragmatic course was for Defendants to rely upon their existing experts to do the work necessary to address Dr. Burch’s improper rebuttal disclosures. Under the circumstances, Defendants did not act unreasonably in doing so.

17. With regard to expert costs incurred in connection with Dr. Burch’s newly-disclosed King’s E.I. analysis, Defendants asked both of their experts—Dr. Swanson and Dr. Bonneau—to review Dr. Burch’s King’s E.I. analysis. Defense counsel had no way of knowing which of Defendants’ experts ‘knew what’ or could ‘learn what’ relative to King’s E.I. until posing

the question to them both. Dr. Bonneau, a political scientist retained to rebut the opinions of Dr. Orey, is generally familiar with King's E.I. and its recognized limitations, see Dkt. #164-7 at 29-31 (depo. pp. 108-15); however, he has not conducted an ecological inference analysis himself since graduate school, *id.* at 5 (depo. p. 13), and does not consider himself "methodologically sophisticated enough to dig under the hood" where King's E.I. is concerned, see *id.* at 30 (depo. p. 112). However, he will testify that Kings E.I. operates on the basis of certain unproven assumptions, and it remains an estimate—not a fact. Bonneau Surrebuttal Report at 6-7, Dkt. #166-3; Bonneau depo. at 111-13, Dkt. #164-7 at 30.

18. Dr. Swanson, on the other hand, was retained for the purpose of rebutting Dr. Burch and had the requisite academic training as a demographer to get up to speed on King's E.I. with appropriate study. Accordingly, Defendants determined that the most reasonable course under the circumstances was to have Dr. Swanson educate himself on these new issues that Dr. Burch belatedly injected well after Plaintiffs' expert designation deadline. All of this work was reasonable and made necessary solely as a result of Dr. Burch's improper rebuttal disclosures, and the Magistrate Judge's finding to that effect was not clearly erroneous.

19. **Third**, Plaintiffs' assert that the Magistrate Judge committed "clear error" by mistakenly identifying Dr. Swanson's quantitative analyst, Tom Bryan, as Dr. Bonneau. But this error is not material to the Magistrate Judge's ruling. Dr. Swanson's initial report candidly acknowledged that calculations upon which Dr. Swanson offers opinions in this case were made by Bryan GeoDemographics, a data support contractor, on his behalf. *See* Dkt. #119-5 at 40. It is not atypical for demographers to employ quantitative analysts to provide data computations in connection with projects on which demographers have been engaged to offer their professional services. Plaintiffs offer no authority for the proposition that Defendants, who are responsible for

paying these expenses, should be prohibited from recovering them from Plaintiffs under the circumstances. Plaintiffs knew or reasonably should have known—when they allowed Dr. Burch to fundamentally alter her opinions in this case—that Defendants’ surrebuttal of those opinions would require additional work by Bryan GeoDemographics.

20. While Plaintiffs attack the credibility of opinion testimony offered in other cases by Tom Bryan, principal of Bryan GeoDemographics, neither Plaintiffs nor the courts in the cases they cite have attacked the reliability of his *calculations*. When it comes to factual, data-driven work product like that performed by Bryan GeoDemographics in this case, at least one federal district court recently found Mr. Bryan to be “an eminently believable witness” who “credibly testified” about his quantitative work product. *See Petteway v. Galveston County*, No. 3:22-cv-57, 2023 WL 6786025, at \*27 (S.D. Tex. Oct. 13, 2023).

21. Plaintiffs have no basis for objecting to Dr. Swanson’s delegation of some computational work when they do not contest the results. Nor should they be exempted from paying for this work. All of Mr. Bryan’s work in support of Dr. Swanson’s surrebuttal report was reasonable and made necessary solely as a result of Dr. Burch’s improper rebuttal disclosures. The Magistrate Judge’s award of fees/expenses incurred as a result of Mr. Bryan’s work was not clearly erroneous.

22. The issue of Defendants’ entitlement to the recovery of expert fees/expenses as a result of Plaintiffs’ improper rebuttal disclosures was fully briefed and thoroughly litigated before the Magistrate Judge. She ultimately awarded Defendants reasonable expert fees/expenses on par with original estimates—to the exclusion of any recovery of attorney’s fees/expenses sought by Defendants.



23. Defendants do not wish to belabor this Court further with this matter and hereby otherwise stand on the arguments and authorities presented in their previously-filed briefs.

**WHEREFORE, PREMISES CONSIDERED,** Defendants respectfully request that the Court make and enter its Order (1) overruling Plaintiffs' objections [Dkt. #178] to the Magistrate Judge's Order [Dkt. #177]; and (2) affirming the Magistrate Judge's Order [Dkt. #177] without modification.

THIS the 29th day of February, 2024.

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

By: LYNN FITCH, ATTORNEY GENERAL  
STATE OF MISSISSIPPI

By: s/Rex M. Shannon III  
REX M. SHANNON III (MSB #102974)  
Special Assistant Attorney General

REX M. SHANNON III (MSB #102974)  
GERALD L. KUCIA (MSB #8716)  
STATE OF MISSISSIPPI  
OFFICE OF THE ATTORNEY GENERAL  
CIVIL LITIGATION DIVISION  
Post Office Box 220  
Jackson, Mississippi 39205-0220  
Tel.: (601) 359-4184  
Fax: (601) 359-2003  
rex.shannon@ago.ms.gov  
gerald.kucia@ago.ms.gov

MICHAEL B. WALLACE (MSB #6904)  
WISE CARTER CHILD & CARAWAY, P.A.

Post Office Box 651  
Jackson, Mississippi 39205-0651  
Tel.: (601) 968-5500  
Fax: (601) 944-7738  
mbw@wisecarter.com

ATTORNEYS FOR DEFENDANTS 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

**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 29th day of February, 2024.

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