

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Martin Cowen, et al.,

Plaintiffs,

vs.

Brad Raffensperger, in his
official capacity as Secretary of
State of the State of Georgia,

Defendant.

Case No. 1:17-cv-04660-LMM

**Plaintiffs' Response in
Opposition to the
Defendant's Renewed
Motion to Exclude Expert
Testimony**

The plaintiffs respectfully submit this brief in opposition to the Secretary of State's renewed motion to exclude the testimony of the plaintiffs' expert historian, Darcy Richardson. ([ECF 137](#).) Mr. Richardson's testimony supports the plaintiffs' claim that Georgia's ballot-access scheme for independent and third-party candidates for U.S. Representative is unconstitutional because it was enacted with a discriminatory purpose. Mr. Richardson has concluded, based on his historical research, that "the Georgia General Assembly enacted the petition requirement in 1943 for the discriminatory purpose of

preventing Communist Party candidates from appearing on Georgia's ballots." (Richardson decl. ¶ 2, [ECF 69-20 at 1](#).)

The Secretary argues that the Court should exclude Mr. Richardson's testimony¹ under Rule 702 of the Federal Rules of Evidence for three reasons. First, the Secretary claims that Mr. Richardson is not qualified to render an opinion as an expert historian. Second, he argues that Mr. Richardson's opinion is not reliable. And, third, he argues that Mr. Richardson's opinion will not help the Court resolve the plaintiffs' claims. None of these arguments has any merit.

Background

The plaintiffs' complaint alleges that Georgia's five-percent petition requirement was enacted in 1943 "with the discriminatory purpose of preventing Communist Party candidates from appearing on Georgia's ballots." (Compl. ¶ 18, [ECF 1 at 6](#).) The complaint further alleges that "A contemporaneous article in the Atlanta Constitution indicated that the five-percent petition requirement 'sustained Secretary of State John B. Wilson in refusing a Communist candidate for president

¹ The plaintiffs have not relied on Mr. Richardson's testimony in support of their second motion for summary judgment, so the Court need only address this motion if it sets this case for trial.

a place on the Georgia ballot in the 1940 election.’ State Senate Receives New Election Bills, Atlanta Const., Feb. 18, 1943.” (*Id.* ¶ 19, [ECF 1 at 6](#).) In his answer, the Secretary of State responded that he lacked information sufficient to admit or deny the plaintiffs’ allegation regarding the purpose of the petition requirement, but he admitted the accuracy of the quoted newspaper article. (Answer ¶¶ 18-19, [ECF 14 at 4-5](#).)

During the course of discovery, the plaintiffs identified Darcy Richardson as an expert witness to testify on the matter. Mr. Richardson is an author and historian specializing in the history of independent candidates and third-party politics. (Richardson decl. ¶ 3, [ECF 69-20 at 2](#).) He has written more than a dozen books on American political history, including five well-regarded books on the history of third-party politics in the United States. (*Id.* ¶ 4, [ECF 69-20 at 2](#).) One of those books earned an Outstanding Academic Title award from Choice Magazine (a publication of the American Library Association) in 2005. (*Id.*) His work has been cited in Newsweek’s “What To Read” section, and he has been quoted as an expert on third-party politics in major publications such as

the Wall Street Journal, the Washington Times, and the Philadelphia Inquirer. (*Id.*)

Mr. Richardson prepared a report setting forth his opinions and analysis. In it, he discusses the anti-Communist and nativist sentiment that was prominent in both state and federal politics in the early 1940s. (*Id.* ¶¶ 10-11, [ECF 69-20 at 4-5](#).) He points out, for example, that Georgia's Secretary of State had unilaterally barred the Communist Party's presidential candidate from appearing on Georgia's ballots in 1940, a move that was supported by the state's attorney general, based purely on the Communist Party's political views. Mr. Richardson describes further anti-communist maneuvering by Georgia's politicians after the 1940 election, and, relying on several contemporaneous newspaper accounts of the ballot-access restriction adopted in 1943, he concludes that "one of the purposes, if not the primary purpose, of Georgia's five-percent petition requirement was to discriminate against the Communist Party by preventing its candidates from appearing on Georgia's ballots." (*Id.* ¶ 15, [ECF 69-20 at 6](#).)

The Secretary of State challenged Mr. Richardson's testimony in his first motion for summary judgment ([ECF 73-2 at 28-32](#)) and filed a

mostly-redundant motion to exclude Mr. Richardson's testimony for purposes of summary judgment and trial (ECF 109). This Court did not address the Secretary's argument or motion, however, because it concluded in its order granting summary judgment that "the issue of discriminatory intent is moot." (ECF 113 at 9 n. 5.)

Although neither the plaintiffs nor the defendant have raised the issue of intent in their second motions for summary judgment, the Secretary has renewed his motion to exclude Mr. Richardson's testimony for purposes of trial and summary judgment. (ECF 137 at 2-3.)

Legal Standard

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. That rule provides as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

[Fed. R. Evid 702](#).² The Supreme Court explained the rationale for this rule in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, [509 U.S. 579, 592](#) (1993). “Unlike an ordinary witness, *see* Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.” *Id.* But a jury may have difficulty evaluating an expert's opinion. *See id.* Accordingly, trial courts must act as gatekeepers to ensure that an expert witness’s testimony is not only relevant but also reliable. *Id.*

Following *Daubert*, the Eleventh Circuit has developed a three-part test for determining whether an expert’s testimony is admissible under Rule 702. A trial court must consider whether:

(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

² The Secretary quotes an outdated version of the rule in his brief. (ECF 137-1 at 3.) The current version, quoted above, was last amended in 2011.

United States v. Barton, 909 F.3d 1323, 1331 (11th Cir. 2018) (quoting *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc)).

The proponent of expert testimony bears the burden to show that its expert is qualified to testify competently regarding the matters the expert intends to address, the methodology by which the expert reached his or her conclusions is sufficiently reliable, and the testimony assists the trier of fact. *Frazier*, 387 F.3d at 1260.

However, “a district court’s gatekeeper role under Daubert is not intended to supplant the adversary system or the role of the jury.” *Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001) (cleaned up); accord *Daubert*, 509 U.S. at 596 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”); *Adams v. Lab. Corp. of Am.*, 760 F.3d 1322, 1334 (11th Cir. 2014) (holding that a risk of bias in an expert witness’s testimony “goes to the weight of her testimony, not its admissibility”). Rather, the objective of *Daubert*’s gatekeeping requirement “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of

intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); accord *Frazier*, 387 F.3d at 1260.

While *Daubert* and subsequent cases provide flexible guidelines for the admissibility of evidence under Rule 702, the district court has “substantial discretion in deciding how to test an expert’s reliability and whether the expert’s relevant testimony is reliable.” *United States v. Majors*, 196 F.3d 1206, 1215 (11th Cir. 1999). “[E]xpert testimony that does not meet all or most of the *Daubert* factors may sometimes be admissible” based on the particular circumstances of a specific case. *United States v. Brown*, 415 F.3d 1257, 1266–68 (11th Cir. 2005); see also *United States v. Scott*, 403 F. App’x 392, 397 (11th Cir. 2010) (finding that the *Daubert* factors are only general guidelines and the trial judge has “considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable”).

Discussion

I. Richardson is competent to testify as an expert.

The Secretary first argues that Richardson “does not have the academic credentials necessary to testify as an expert historian.” (ECF

137 at 5.) Without citation to any authority, he claims that “an expertise in history requires a rigorous academic study generally followed by a degree.” (*Id.* at 6.) But this is not the law.

Under Rule 702, a witness can be qualified to testify as an expert “by knowledge, skill, experience, training, or education.” [Fed. R. Evid. 702](#). Mr. Richardson obviously does not have the educational credentials that might alone qualify him as an expert, and he lacks certain academic credentials, such as publication in a peer-reviewed journal, that might signal a degree of knowledge, skill, experience, or training.³ But the lack of those academic credentials does not mean that Mr. Richardson lacks knowledge, skill, experience or training. A witness can be an expert without being an academic. *See, e.g., Hammond v. Int’l Harvester Co.*, [691 F.2d 646, 653](#) (3d Cir. 1982); *Ma v. Equifax Info. Servs. LLC.*, [288 F. Supp. 3d 1360, 1366](#) (N.D. Ga. 2018).

And that is certainly the case here. It is evident from Mr. Richardson’s work that he is qualified as an expert on the history of

³ The Secretary also attacks Mr. Richardson’s qualifications by pointing out that he is not “a member of any professional historical associations.” ([ECF 137 at 6](#).) While that was true at the time of his deposition in 2018, Mr. Richardson has been a member of the American Historical Association in the past and has been listed in its annual directory of historians. *See, e.g.,* Am. Historical Ass’n, *Directory of History Departments, Historical Organizations, and Historians* 1016 (30th. ed. 2004-2005).

third parties in the United States—a topic which encompasses his testimony here—by his knowledge, skill, and experience. He has written several well-regarded books on this topic and has been quoted as an expert in the media. He has a wealth of experience and knowledge that more than adequately qualifies him to testify under Rule 702.

In addition, Mr. Richardson’s competence is confirmed by the testimony of retired professor J. David Gillespie, who is himself widely regarded as an expert in third parties and independent candidates in the United States.⁴ According to Dr. Gillespie, Mr. Richardson’s books on the history of third parties are of “excellent quality” and “a significant contribution to the field.” (Ex. 46: Gillespie decl. ¶8, [ECF 100-1 at 2](#).) “It is apparent from that work that Mr. Richardson has extensive knowledge about the history of third-party politics in the United States and great skill and experience in conducting original historical research

⁴ The Secretary argues that the Court may not rely on Dr. Gillespie’s testimony because it was not disclosed by the time required under Rule 26(a)(2) of the Federal Rules of Civil Procedure ([ECF 137 at 7](#)), but that rule does not apply to Dr. Gillespie because he is not a witness whom the plaintiffs “may use at trial.” Fed. R. Civ. P. 26(a)(2)(A). His testimony is offered only in response to the Secretary’s attack on Mr. Richardson’s qualifications. It is worth noting, moreover, that the Secretary has not sought to depose Dr. Gillespie in the more than two years since his testimony was disclosed. Nor is Dr. Gillespie’s testimony inadmissible because he testifies as to Mr. Richardson’s qualifications. That testimony is plainly relevant to this motion. The case upon which the Secretary relies, *United States v. O’Keefe*, [825 F.2d 314, 319](#) (11th Cir. 1987), involved the exclusion of a vouching expert offered *at trial* on the ground that his testimony was cumulative. That is not the case here.

despite the fact that he lacks academic credentials as a political scientist or historian.” (*Id.* ¶9, [ECF 100-1 at 2](#).) Professor Gillespie concludes: “Mr. Richardson is undoubtedly qualified as an expert to offer his opinion about the original purpose or purposes of Georgia’s ballot-access laws.” (*Id.* ¶10, [ECF 100-1 at 2](#).) The Secretary’s attack on Mr. Richardson’s qualifications is thus ill founded.

II. Richardson’s testimony is reliable.

The Secretary of State next argues that Mr. Richardson’s testimony is unreliable “because it relies upon a fatally insufficient amount of data.” ([ECF 137 at 9](#).) The crux of his argument is that the Mr. Richardson based his opinion about the purpose of Georgia’s 1943 petition requirement on only four contemporaneous newspaper articles and only one scholarly work. (*Id.*) But this argument has no merit.

First, the Secretary of State asks this Court to reach a conclusion about the purpose of Georgia’s 1943 petition requirement based on even less information. He asserts as a matter of fact that there was a different purpose motivating the General Assembly when it enacted the petition requirement, and he bases that assertion on a single non-

contemporaneous attorney-general opinion. (ECF 97 at 10-11.) That speaks volumes about the quality and seriousness of his argument here.

In addition, in non-scientific cases such as this one, “the relevant reliability concerns may focus on an expert's personal knowledge or experience.” *Kumho*, 526 U.S. at 150. As discussed above, Mr. Richardson has a wealth of knowledge and experience on the history of third parties in America. The Court should therefore find that Mr. Richardson’s methods are sufficiently reliable, and that the Secretary of State’s argument, to the extent that it has any merit at all, goes more towards the weight of Mr. Richardson’s testimony than to its admissibility.

III. Richardson’s testimony can assist the trier of fact.

Finally, the Secretary of State argues that Mr. Richardson’s testimony will not assist the trier of fact because his testimony is irrelevant to the plaintiffs’ claims. (ECF 137 at 11.) His argument as to why Mr. Richardson’s testimony lacks relevance is, frankly, less than clear. He seems to suggest, without citation to any authority, that discrimination against the Communist Party would not be relevant to claims brought by the Libertarian Party. He also seems to suggest that

the plaintiffs' intent claim must fail "because the challenged ballot access statutes do not have a discriminatory effect." (*Id.*) Neither suggestion has any merit.

First, discriminatory purpose is undoubtedly relevant to the plaintiffs' claims. Under the balancing test applicable to the plaintiffs' First and Fourteenth Amendment claims, a court must apply strict scrutiny when the burdens imposed are discriminatory. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). As Justice O'Connor explained in *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring), heightened scrutiny under those circumstances "helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." See, e.g., *Green Party of Ark. v. Martin*, 649 F.3d 675, 684 (8th Cir. 2011) (recognizing the relevance of discriminatory purpose to ballot-access claims). Establishing that Georgia's petition requirement was enacted with the purpose of discriminating against the Communist Party would thus ensure the application of strict scrutiny and support an inference that the state's asserted interests are a pretext for exclusionary or anticompetitive restrictions.

As the Secretary acknowledges, moreover, a statute enacted with a discriminatory purpose can also violate the Equal Protection Clause. (ECF 137 at 11 (citing *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188-89 (11th Cir. 1999).) See generally *United States v. Fordice*, 505 U.S. 717, 729 (1992); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020). Purpose is thus plainly relevant to the plaintiffs' claim under the Equal Protection Clause.

The Secretary's suggestion that the challenged statutes lack a discriminatory effect likewise has no merit. The record is bursting with evidence of the effect of Georgia's petition requirement on independent and third-party candidates, political bodies, and the voters. For example, the record establishes that, despite many attempts, no third-party candidate for U.S. Representative has appeared on Georgia's ballots since the petition requirement was enacted in 1943. The record also established, moreover, that America's third-largest political party, which has fielded candidates for U.S. Representative in every other state, has been unable to do so in Georgia despite several attempts. The evidence of effect is essentially the same as evidence of the burden imposed by Georgia law, and evidence of that burden here is quite robust.

Mr. Richardson's testimony regarding the purpose of Georgia's petition requirement would obviously assist the Court in resolving the plaintiffs' claims here—particularly because there may be a dispute of fact regarding that purpose. Without his expertise to contextualize the parties' arguably conflicting evidence regarding that purpose, the job of expert historian would be up to the Court.

Conclusion

The Court should deny the Secretary of State's motion to exclude.

Respectfully submitted this 21st day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I electronically filed the foregoing PLAINTIFFS' RESPONSE IN OPPOSITION TO THE DEFENDANT'S RENEWED MOTION TO EXCLUDE EXPERT TESTIMONY with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing PLAINTIFFS' RESPONSE IN
OPPOSITION TO THE DEFENDANT'S RENEWED MOTION TO
EXCLUDE EXPERT TESTIMONY was prepared in 13-point Century
Schoolbook in compliance with Local Rules 5.1(C) and 7.1(D).

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