

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

MARTIN COWEN, ALLEN	*	
BUCKLEY, AARON GILMER, JOHN	*	
MONDS, and the LIBERTARIAN	*	
PARTY OF GEORGIA, INC., a	*	
Georgia nonprofit corporation,	*	CASE NO.: 1:17cv04660-LMM
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	
BRAD RAFFENSPERGER, Georgia	*	
Secretary of State,	*	
	*	
Defendant.	*	

**REPLY BRIEF IN SUPPORT OF DEFENDANT’S RENEWED MOTION
TO EXCLUDE EXPERT TESTIMONY**

In their response to Defendant’s motion to exclude, Plaintiffs fail to meet their burden to establish that Darcy Richardson’s testimony as a purported expert historian meets the requirements of (1) qualification, (2) reliability, and (3) helpfulness. *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). His testimony should therefore be excluded by the Court at summary judgment and at trial.¹

¹ Plaintiffs have stated their intent to rely on Mr. Richardson’s opinions in support of their equal protection claim, which Plaintiffs have divided into two arguments: (1) that Georgia’s petition requirements creates impermissible classifications; and (2) that Georgia’s petition requirements were enacted with a discriminatory purpose.

1. Mr. Richardson is an advocate for third-party ballot access, not a qualified historian.

Plaintiffs acknowledge that Mr. Richardson lacks the academic credentials of a historian. [Doc. 138, at 9.] This cannot seriously be disputed, as Mr. Richardson’s academic credentials are limited to two years of undergraduate study in business administration. Nevertheless, Plaintiffs attempt to qualify him as an “expert on the history of third parties in the United States” based on his “knowledge, skill, and experience,” rather than academic or professional credentials. [*Id.* at 10.] The only basis for this knowledge, skill, and experience Plaintiffs can point to, however, is “several well-regarded books on this topic” and having been “quoted as an expert in the media.” [*Id.*] Plaintiffs do not provide any further details about these purported qualifications, but Mr. Richardson described his publications in his deposition as:

- A sports book about the Loyola Chicago University basketball team;
- A political biography of Norman Thomas, a socialist party candidate for president between 1928 and 1948;
- A political biography of Senator Bernie Sanders; and

Plaintiffs rely on Mr. Richardson’s opinions for the latter discriminatory purpose argument, and have not moved for summary judgment on that claim. However, the Secretary has moved for summary judgment on the entirety of Plaintiffs’ equal protection claim (as well as all counts of Plaintiffs’ Complaint). [Doc. 135.]

- A series covering the history of independent and third-party politics in the United States. [Doc. 77-1 at 8:2 – 11:3.]

All of these books are self-published, and only two of them could reasonably be described as relating to the history of third parties in the United States. None of Mr. Richardson's publications have been subjected to academic peer review or any type of evaluation by other historians, which is critical for validating the accuracy of his work. This type of experience is simply insufficient to overcome his lack of academic credentials.

In addition to lacking academic credentials, Mr. Anderson is a self-described advocate for third-party ballot access, having run for office as a third-party candidate numerous times. [Doc. 77-1 at 30:25 – 31:2.] Therefore, Mr. Anderson's opinions are offered not from the perspective of an objective and neutral historian, but as an advocate against state ballot access laws. This biased perspective casts further doubt on his objectivity and the reliability of his opinions.

2. *Mr. Richardson's opinions are not reliable because they are not based upon any recognized methodology.*

Plaintiffs concede that Mr. Richardson's opinions are based solely upon his review of four newspaper articles and one scholarly work. [Doc. 138, at 11.] This

type of cursory review does not rise to the level of serious historical analysis that has any reliability.

While qualified historians can at times provide helpful historical context to legal issues, their opinions must be based upon recognized academic methodology. A “professional historian’s goal is to portray, whether in writing, in the classroom, or in the courtroom, an objective historical interpretation.” Alvaro Hasani, *Putting History on the Stand: A Closer Look at the Legitimacy of Criticisms Levied Against Historians Who Testify as Expert Witnesses*, 34 WHITTIER L. REV. 343, 355 (2013). Additionally, “historians must ‘consider the conditions under which a source’ originated and whether there were any intentions that motivated its production.” *Id.* (citations omitted). “Furthermore, for purposes of objectivity and clarity, historians are required to disclose to their audience whether their factual assertions are derivative of the actual source or the historian’s own interpretation of that source.” *Id.* See also *Burton v. Am. Cyanamid*, No. 07-CV-0303, 2018 U.S. Dist. LEXIS 139727, *19 (E.D. Wis. Aug. 16, 2018) (“Proper historical work involves surveying the full array of available sources, evaluating the reliability of the sources, and thus providing a basis for a reliable narrative about that past.”).

Reliance on a recognized methodology is particularly important where, as here, the witness is relying on experience as the sole source of his expertise. That an

expert “may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express.” *Frazier*, 387 F.3d at 1261. As the Committee Note to the 2000 Amendments of Rule 702 states, “if the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’” *Id.* (citing FED. R. EVID. 702 (advisory committee’s note (2000 amends.))).

Mr. Anderson’s analysis in this case does not meet any of the characteristics of proper historical work. Even if Mr. Richardson were a qualified historian (he is not), his opinions must draw from and be based upon his special knowledge and expertise. Here, his opinions are based off of a simple search of a few newspaper databases—something any student with a library card can do. His purported expertise does not add any historical context or specialized analysis to his read of the news articles, and therefore he is “at best offering a gratuitous opinion, and at worst is exerting undue influence” on the trier of fact. *U.S. v. Hall*, 93 F.3d 1337, 1343 (7th Cir. 1996). His testimony is unreliable, and should not be admitted.

3. *Mr. Richardson's opinion does not aid the trial of fact in determining any issue in this case.*

The final element of the Eleventh Circuit's three-prong test—helpfulness—turns on whether the proffered testimony assists the trier of fact. *Frazier*, 387 F.3d at 1262. To be helpful, the testimony must “concern matters that are beyond the understanding of the average lay person.” *Id.* Moreover, a “fit” must exist between the offered opinion and the facts of the case. *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004) (citing *Daubert*, 509 U.S. at 591). There “is no fit where a large analytical leap must be made between the facts and the opinion.” *Id.*

The expert opinions offered by Mr. Anderson are not helpful here because they are not beyond the understanding of the average lay person. The handful of news articles on which his opinions are based can easily be read and understood by the trier of fact without expert testimony. An expert's opinion is only helpful when “the expert draws on some special skill, knowledge, or experience” to formulate his opinion.” *Hall*, 93 at 1343. In other words, “the opinion must be an *expert* opinion (that is, an opinion informed by the witness's expertise) rather than simply an opinion broached by a purported expert.” *Id.* Mr. Anderson's testimony does not offer any specialized knowledge or context other than what is in the published articles.

Moreover, there is a tenuous “fit” between the news articles reviewed by Mr. Anderson and the opinions he drew. The articles from the early 1940s concerned Georgia’s efforts to keep member of the Communist Party off of the ballot. But they all preceded the enactment of Georgia’s petition requirements, which were passed into law in 1943. None of the articles relied upon by Mr. Anderson discuss the actual statute challenged in this case. Therefore, even if Plaintiffs are alleging that the petition requirements were enacted in part to discriminate against the Communist Party, it is quite a leap to then argue that this is evidence the requirements discriminate against the Libertarian Party in Georgia.

In sum, Plaintiffs’ expert is not a historian qualified to render an opinion on the legislative purpose behind Georgia’s petition requirements, his opinions are not based on reliable methodology, and his opinions will not assist the trier of fact. For these reasons, Defendant’s motion to exclude his testimony should be granted.

Respectfully submitted, this 5th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing has been formatted using Times New Roman font in 14-point type in compliance with Local Rule 7.1(D).

/s/Charlene S. McGowan
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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **REPLY BRIEF IN SUPPORT OF DEFENDANT'S RENEWED MOTION TO EXCLUDE EXPERT TESTIMONY** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel for Plaintiffs via electronic notification:

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Dated: October 5, 2020.

/s/ Charlene S. McGowan
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