No. 16-3400

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARIA MUNIZ-MUNIZ, et al.,

Plaintiffs,

and

OHIO IMMIGRANT WORKER PROJECT;
FARM LABOR ORGANIZING COMMITTEE; AFL-CIO,

Plaintiffs-Appellants

v.

UNITED STATES BORDER PATROL,
Customs and Border Protection,
Department of Homeland Security,

Defendants-Appellees

RANDY GALLEGOS, *et al.*,

Defendant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF OHIO No. 3:09-CV-02865-JZ
Judge Jack Zouhary

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DISCLOSURE OF CORPORATE AFFILIATIONS

Appellees are agencies and officers of the United States sued in their official capacities and are therefore not required to make these disclosures under 6 Cir. R. 26.1(a).

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument on this matter would not be particularly helpful in the development of this Court's jurisprudence. The legal and evidentiary standards for demonstrating Equal Protection violations based on purported racial profiling by law enforcement officers are well-established. Additionally, the issues raised in this appeal are subject to the abuse of discretion and clearly erroneous standards of review, and Appellants fail to show that either standard merits the reversal of the trial court's decision on any finding.

STATEMENT OF JURISDICTION

The trial court entered its memorandum opinion and judgment in this case on February 24, 2016. Appellants' notice of appeal, filed on April 19, 2016, was timely. Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Where the trial court's factual findings do not support the factual conclusion that a police agency is employing explicit racial classifications, must the trial court nevertheless apply strict scrutiny?
2. Where a trial court finds that an expert witness's testimony is not reliable, is it an abuse of discretion for the trial court to not consider, or only give minimal weight to, that evidence in its findings?
3. Where a trial court finds that an expert witness's testimony is not reliable, must the opposing party nevertheless rebut the unreliable statistical evidence to show that the claimed overrepresentation is due to constitutional law enforcement activity?
4. Where the trial court makes specific findings concerning eight encounters between individuals and Border Patrol agents, and Border Patrol practices generally, and makes specific findings concerning the reliability of expert witness testimony, may this Court permissibly re-weigh this evidence on appeal absent a showing that the trial court's decisions were clearly erroneous and an abuse of discretion?

STATEMENT OF THE CASE

This appeal is an attempt to relitigate facts that Plaintiffs-Appellants failed to prove at trial. Appellants promised the trial court, in their opening statement, that the evidence would show that the Border Patrol, "is an organization that has not only tolerated, but fostered systematic racism." Transcript, RE 236, 7:22-8:1. They also promised the trial court that they would "prove statistically that the Border Patrol was basically going out and hunting people of brown skin." *Id.* 12:7-9. The evidence at trial, however, fell appallingly short of demonstrating either claim. In fact, the evidence at trial showed that Border Patrol agents from the Sandusky Bay Station encountered the individuals who testified for Appellants at trial through various, routine lawful enforcement activities that had nothing to do with the race or appearance of those individuals. The evidence at trial also demonstrated that Plaintiffs cannot show that their alleged injuries resulted from *unconstitutional* conduct by Border Patrol agents, as opposed to the increased immigration enforcement that naturally occurred after the Border Patrol opened the Sandusky Bay Station in 2009, bringing more immigration enforcement agents into the area. Finally, the evidence at trial failed to show that Appellants were harmed by any policy, custom, or practice of the Sandusky Bay Station.

Unable to overcome the clearly erroneous standard of review that applies to the trial court's factual findings, or to demonstrate that the trial court abused its

discretion in finding that the statistical evidence they provided at trial was unreliable, Appellants attempt to re-cast the trial court's factual findings as issues of law, and to limit its findings concerning the expert witnesses. The trial record does not support Appellants' arguments, and this Court should affirm the trial court's judgment.

1. **Procedural History**

Appellants, Farm Labor Organizing Committee ("FLOC") and Ohio Immigrant Worker Project ("IWP"), along with 12 individual plaintiffs, filed their first complaint in this case on December 10, 2009. Complaint, RE 1, PageID #1-39. In their initial complaint, Appellants sued the Chief of the Border Patrol's Detroit Sector—which oversees the Sandusky Bay Station ("SBY Station")—as well as 15 "John Doe" Border Patrol agents, all in their individual and official capacities. *Id.* at PageID #8. Appellants also sued three chiefs of police of local law enforcement agencies in Northern Ohio, as well as seven police officers from those agencies. *Id.* at PageID #9. In their complaint, Appellants alleged that the SBY Station has a pattern of practice of making unjustified stops, and a pattern and practice of unlawfully profiling Hispanics. The complaint also included allegations that SBY agents conspired with local police agencies to further their unlawful activities. Appellants sought equitable relief against the SBY Station and its agents, as well as money damages against the individual agents under *Bivens* for alleged

violations of the Fourth and Fifth Amendments, and conspiracy claims under 42 U.S.C. §§ 1983, 1985, and 1986. *Id.* at PageID #27-39. Finally, the complaint included class allegations. *Id.* at PageID #23.

To better manage this case, which involved numerous claims against 4 government entities and 28 individuals, the district court suggested to Appellants that they voluntarily dismiss all claims except for the equitable claims against the Border Patrol. Order, RE 80, PageID #854-55. Appellants were given leave to refile these claims after they had the opportunity to conduct discovery against the Border Patrol. *Id.* Appellants agreed, voluntarily dismissed these claims, and conducted broad discovery from the SBY Station, including e-discovery of the Border Patrol's e-mail databases.

Appellants then filed a second amended complaint that included additional factual allegations against the SBY Station and its agents, and brought the municipalities and local police officers back into the case as defendants. Second Amended Complaint, RE 143.[1] Appellants did not, however, reassert their *Bivens* claims against the individual Border Patrol agents. *See id*. A month later, Appellants sought leave to file a third amended complaint, which included for the first time claims against the United States under the Federal Tort Claims Act.

[1] This pleadings was filed under seal. Accordingly, the PageID is not available.

Motion for Leave, RE 155.[2] The Border Patrol opposed further amendment because discovery was almost closed, the trial court had set a trial date which at that point was fast approaching, and Appellants should have included their FTCA claims in any of the earlier iterations of the complaint. Opposition, RE 158, PageID #2019-24. The trial court agreed, and denied Appellants' motion. Order, RE 161, PageID #4844.[3] The parties later settled the claims involving the local municipalities and law enforcement officers, and they were dismissed from the case.

The Border Patrol filed a motion to dismiss, or in the alternative for summary judgment, arguing that sovereign immunity barred Appellants' claims, and that, even after discovery, Appellants could not demonstrate that they had standing to sue for equitable relief. Motion to Dismiss, RE 170.[4] In the alternative,

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[2] This motion was filed under seal. Accordingly, the PageID is not available.

[3] Three of the individual plaintiffs, Vasquez-Palafox, Saucedo-Carrillo, and Carrillo-Vasquez, then pursued their individual FTCA claims, arising out of the same incidents set forth in the complaint in this case, in district court. The district court granted summary judgment for the United States in both cases. All three plaintiffs appealed. Vasquez-Palafox later abandoned his appeal, and this Court affirmed the decision on appeal in the case of Saucedo-Carrillo and Carrillo-Vasquez. *See Vasquez-Palafox v. United States*, No. 3:12 CV 2380, 2013 WL 1500472, at *7 (N.D. Ohio Apr. 10, 2013) (granting summary judgment for defendant on all claims), *appeal dismissed* on February 24, 2014 (6th Cir. 13-3599); *see also Saucedo-Carrillo v. United States*, No. 13-4502, 635 F. App'x 197, 204 (6th Cir. 2015) (Aug. 13, 2015) (affirming district court's grant on summary judgment for defendant on all counts).

[4] This motion was filed under seal. Accordingly, the PageID is not available.

the Border Patrol argued that it is entitled to summary judgment, because Appellants failed to show that their alleged injuries resulted from a Border Patrol policy or custom. *Id.* at 39-40. The trial court agreed with the Border Patrol that sovereign immunity barred Appellants' claims, and dismissed the case. Order, RE 195, PageID #4842-53.

On appeal, this Court reversed, holding that as a matter of first impression, the waiver of sovereign immunity under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, applied to all non-monetary claims against federal agencies. *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 674 (6th Cir. 2013). This case was then remanded to the trial court for further proceedings.

Following the remand, the trial court allowed the parties to supplement their briefing regarding the arguments in defendants' motion to dismiss and for summary judgment that had not been addressed by this Court on appeal. Order, RE 207, PageID #4909. Following a hearing, the trial court denied the motion to dismiss, and ordered the parties to complete discovery. Orders, RE 216, PageID #4938-39, RE 220, PageID # 4950-51. When discovery was complete, the trial court set a trial date. Trial Order, RE 225, PageID #4964-69. Throughout these proceedings, Plaintiffs never moved to certify a class.

2. Trial

During the two-week trial held from June 16-25, 2015, the trial court was asked to decide three contested issues: (1) whether the organizational plaintiffs, FLOC and IWP, have standing to pursue their claims in this case; (2) whether the admissible evidence demonstrates that the SBY Station has a policy and practice of racial profiling in violation of the Fifth Amendment, and conducting unreasonable seizures under the Fourth Amendment; and (3) whether injunctive relief is warranted. Joint Trial Brief, RE 232, PageID #5809-13.

At the beginning of the trial, Plaintiffs stated that they were voluntarily abandoning all claims by the individual plaintiffs, and proceeding only through the claims brought by FLOC and IWP. *See* Order, RE 246, PageID #7347. Plaintiffs also abandoned all claims against the individual Border Patrol agents, choosing to seek injunctive relief against the SBY Station only. *Id.* Accordingly, the trial court dismissed both the individual plaintiffs and defendants from the case under Rule 41 of the Federal Rules of Civil Procedure. *Id.*

FLOC's[5] explicit theory of the case was the Border Patrol "is an organization that has not only tolerated, but fostered systematic racism." Transcript, RE 236, 7:22-8:1. FLOC promised that it would "prove statistically that

[5] For convenience in this brief, Appellees will hereafter refer to Appellants simply as "FLOC" since the claims of both organizations were, for most purposes, the same at trial. To the extent that any part of the discussion pertains to only one of the two organizations, this brief will make that point clear.

the Border Patrol was basically going out and hunting people of brown skin." *Id.* 12:7-9. On their Fifth Amendment claim, FLOC contended that they would show through a combination of statistical evidence, anecdotal evidence presented by the individual witnesses, and racially charged language that the SBY Station's enforcement activity "had a discriminatory effect and that it was motivated by a discriminatory purpose." Joint Trial Brief, RE 232 at PageID #5810 (quoting *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533-53 (6th Cir. 2002)). On FLOC's Fourth Amendment claim, FLOC's theory was that the SBY agents "sometimes begin [consensual encounters] by immediately interrogating individuals about their immigration status, after which point a suspect is not free to leave unless they answer satisfactorily." *Id.* at PageID #5812. FLOC also contended that "routine stops initiated by local law enforcement agencies are extended for the sole purpose of summoning SBY agents to the scene to investigate immigration status in violation of the Fourth Amendment." *Id.*

The Border Patrol proved, as it indicated in the trial brief, that the law enforcement activities of the Border Patrol agents assigned to the station are conducted with the requisite legal authority. Joint Trial Brief, RE 232 at PageID #5800. And specifically for the issues relevant to the trial, the Border Patrol demonstrated that FLOC could not prove by a preponderance of admissible evidence that the station had a pattern and practice of constitutional violations

against persons of Hispanic descent, or the Plaintiffs are entitled to prospective injunctive relief, or any relief at all. *Id.* Further, the Border Patrol accurately forecast that its expert rebuttal witness, Dr. Brian Withrow, a Professor of Criminal Justice at Texas State University, would demonstrate that the statistical analysis conducted by FLOC's expert was unreliable. *Id.* at PageID #5807.

At trial, FLOC sought to prove its claims, by a preponderance of the evidence, through: (1) documentary evidence; (2) trial testimony of SBY agents, individuals who had had encounters with SBY agents, and the representatives of FLOC and IWP; and, (3) expert witness testimony by Kara Joyner, a Professor of Sociology at Bowling Green State University, who had conducted a statistical analysis of the SBY Station's apprehension log.[6] By the end of the trial, 20 lay witness had testified, as well as two expert witnesses.

[6] Despite several late disclosures by FLOC, the trial court excluded very little of its trial evidence. For example, FLOC proffered two witnesses on the eve of trial who it had not previously disclosed. Rather than denying FLOC the opportunity to offer their testimony, the trial court permitted defendants the opportunity for a mid-trial deposition. Transcript, RE 238, 773:24-776:17. FLOC also added a supplemental expert report to the exhibit list, without prior notice to defendants' counsel, long after the deadline for expert reports had passed, and the trial court allowed FLOC to introduce it into evidence. Transcript, RE 239, 892:8-21. And, as third example of the trial court giving FLOC ample opportunities to prove its claim, the trial court recognized Dr. Joyner as an expert *sua sponte*, RE 251, PageID #7414, despite the fact that FLOC had never tendered her as an expert, and defendants had raised the issue before the close of FLOC's case, when FLOC had the opportunity to remedy the situation, but opted not do so. Transcript, RE 239, 890:8-891:2.

Aside from the testimony that FLOC elicited in an attempt to demonstrate that the two organizations had standing, and FLOC's questioning of Border Patrol agents in an attempt to establish custom, policy, and culture, the lay witness testimony focused on eight encounters between Hispanic individuals and Border Patrol agents. Order, RE 251, PageID #7404. After hearing the testimony concerning both sides of each encounter, and assessing the credibility of the witnesses, the trial court found that the eight encounters failed to show that the SBY Station has a practice of racially profiling Hispanics. *Id.* at PageID #7421. Likewise, the trial court found that the evidence *did not show* that Border Patrol agents had advanced consensual encounters into immigration interrogations or seizures without the requisite level of reasonable suspicion or probable cause. *Id.* at PageID #7428. Further, the trial court found that FLOC had failed to show that Border Patrol agents encouraged local law enforcement officers to detain anyone, let alone to prolong anyone's detention. *Id.* at PageID #7429.

Specifically, the trial court found that three of the encounters were Other Law Enforcement Agency ("OA") stops,[7] where the Border Patrol agent was responding to assist a local law enforcement agency with identification and translation. *Id.* The trial court recognized that Border Patrol agents have a statutory

[7] Such as, for example, a local police department, a sheriff's department, or the Ohio State Highway Patrol.

obligation to respond to these OA calls for assistance, and that FLOC had not shown that SBY maintains a policy or custom of only responding to OA calls involving Hispanic motorists. *Id.* The trial court also credited the testimony of SBY agents that they generally do not have much or particularized information about the nature of the assistance requested when they are dispatched to provide assistance. *Id.* Further, the trial court noted that even FLOC's expert witness, Dr. Joyner, agreed that OA stops should not be included in her analysis of the apprehension log because the Border Patrol agents are not involved in making the initial decision of who to stop. *Id.* at PageID #7422.

Similarly, on the Fourth Amendment claim, the trial court found that FLOC failed to demonstrate through the three OA stops that Border Patrol agents encouraged local officers to detain anyone, let alone to prolong detentions. *Id.* at PageID #7429. One individual was involved in two OA stops with Border Patrol agents. *Id.* PageID #7430. In the first encounter, the Border Patrol agent was called to assist an Ohio Highway Patrol trooper in identifying and translating at the scene of an automobile accident. *Id.* The individual asserted that he was an Ohio resident, but he had a New Mexico driver's license, and was driving a car with Wisconsin license plates. *Id.* The trial court found that, under these circumstances, it was reasonable for the Border Patrol agent to ask some preliminary questions. *Id.* And once the Border Patrol agent determined through questioning that the individual

was illegally present in the United States, he had probable cause for an arrest. *Id.* In the second encounter with this individual, a police officer from the Huron Police Department contacted the SBY Station, at the scene of another accident, for the same reason, because he was unfamiliar with the document that the individual presented as identification, which was an employment authorization document or "EAD card," which is issued by U.S. Citizenship and Immigration Services.[8] Transcript, RE 238, 697:5-15. Once the SBY Agent arrived at the scene to assist, and was able to verify that the identification was valid, the individual was told he was free to go. On the third OA encounter presented at trial, a local police officer had stopped a vehicle for speeding. None of the occupants would provide their names, had any identification, or appeared to speak English. *Id.* When the SBY agent arrived, two of the occupants refused to answer his questions. *Id.* One of the occupants, however, immediately admitted that he was unlawfully present, as did a second occupant, which, the trial court found, gave the SBY agent probable cause to arrest them. *Id.*

On appeal, FLOC has not identified any factual basis suggesting—much less demonstrating—that the trial court's findings were clearly erroneous concerning

[8] An Employment Authorization Document provides a nonimmigrant in the United States authorization to work temporarily. *See https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document* (last visited September 5, 2016).

the factual bases for these encounters, or that the trial court improperly applied the correct test under the Fourth Amendment. Thus, FLOC has waived any issue on appeal as to these encounters.[9]

Concerning the five remaining stops, the trial court similarly found that FLOC had not demonstrated a violation of the Equal Protection clause, because the encounters were initiated "based on factors unrelated to racial or ethnic appearances." *Id.* at PageID #7422. On appeal, FLOC only challenges the trial court's findings on four of the stops. FLOC's Brief at 29-34. The trial court's factual findings on these encounters are set forth in its order. Order, RE 251 at PageID #7406-7412, #7422-23. FLOC's main contention on appeal is: despite the testimony of the Border Patrol agents that they did not see the individuals closely enough to determine whether they were Hispanic before they initiated the encounters, their explanations are implausible because three of the encounters took place in daylight, and the fourth encounter took place in a well-lit rest stop on the Ohio Turnpike. FLOC's Brief at 29.

The trial court also heard testimony from FLOC's expert witness, Dr. Joyner, as well as the SBY Station's rebuttal expert witness, Dr. Withrow, and

[9] See *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 462 (6th Cir. 2003) ("According to the Federal Rules of Appellate Procedure, an appellant's brief must contain ... a statement of the issues presented for review and an argument on each issue presented. Fed. R.App. P. 28(a). An appellant waives an issue when he fails to present it in his initial briefs before this court.")

admitted their expert reports into evidence. Order, RE 251, PageID #7414-18. The trial court's discussion of the expert testimony, and its findings as to reliability, are set forth in detail in the Order on pages 15-19. *Id.* FLOC offered Dr. Joyner's statistical analysis in an attempt to demonstrate that the enforcement practices of the SBY Station had a disparate impact on Hispanics. FLOC also argued that Dr. Joyner's findings were so extreme, that it suggested that the Station's practices were motivated by racial bias. Dr. Joyner's basic approach was to take the SBY Station's apprehension log to determine the presumed ethnicity of those individuals based on nationality (although neither ethnicity nor race are recorded on the logs). She then attempted to calculate the population at risk of being encountered by SBY agents (or "benchmark")—namely, unlawfully present individuals, broken down by ethnicity, in Northern Ohio, using various methods and population estimates, as her denominator, and compared those numbers in a regression analysis. *Id*. at PageID #7414-15. Based on her analysis, Dr. Joyner testified that Hispanics were overrepresented on the SBY apprehension logs to such a great extent that it "must be a consequence of targeting on the basis of Hispanic appearance." *Id*. at PageID #7415. This case was Dr. Joyner's first attempt at conducting a racial profiling analysis. Transcript, RE 238, 634:5-18.

The SBY Station offered the rebuttal expert testimony of Dr. Withrow, who had been involved in conducting numerous racial profiling studies over the years.

Transcript, RE 240, 1058:12-1059:25. The trial court recognized Dr. Withrow as an expert in racial profiling, police systems and practices, and social research and methods. *Id*. at PageID #7418. At trial, and in his expert reports that were submitted into evidence, Dr. Withrow detailed the numerous problems with the methodology of Dr. Joyner's statistical analysis, which made it unreliable in determining whether racial profiling was occurring. In its decision, the trial court discusses many of the most significant issues Dr. Withrow identified. *Id*. at PageID #7416-17.

After considering the testimony and reports of both experts, the trial court found that the statistical analysis provided by Dr. Joyner was unreliable. *Id*. at PageID #7417-18, #7423-24. One point that the trial court found particularly troubling was Dr. Joyner's ultimate conclusion that that SBY agents must have been targeting individuals based on Hispanic appearance. *Id.* At PageID #7417. Even if one could assume that nationality is a reasonable proxy for ethnicity (which Appellees *do not concede*, at least not without some assurance that it would be accurate to draw inferences about disparate impact—which Dr. Joyner did not provide), Dr. Joyner not only had to assume that everyone from certain countries on the Apprehension log would be Hispanic, she also had to assume that they had all had a "Hispanic appearance," despite the fact that even Dr. Joyner could not even articulate what that appearance would include—since Hispanics can, of

course, be of any race[10]—because she admitted on cross-examination that she did not have any data about what people on the apprehension log looked like. *Id.* at PageID #7417.

Based on its factual findings, the trial court made the following conclusions of law: (1) that FLOC and IWP had standing to pursue their claims; (2) that neither the anecdotal testimony of the witnesses, nor the statistical evidence offered by Dr. Joyner, demonstrated that the SBY Station had a practice of racially profiling Hispanics; (3) that the evidence at trial did not support the conclusion that the SBY Station had a policy or practice of escalating consensual encounters through immigration interrogations or encouraging local law enforcement officers to unconstitutionally prolong their investigations. *Id.* at PageID #7418-31.

SUMMARY OF THE ARGUMENT

Following a two-week trial in this case, where the trial court heard testimony from lay and expert witnesses, and considered documentary evidence and argument by counsel, the trial court found that FLOC had failed to show that the SBY Station had a policy, practice, or custom of profiling Hispanics. The trial court also found that FLOC had failed to show a policy, practice, or custom of Fourth Amendment violations, or that injunctive relief was warranted on any of

[10] *See, e.g*, http://census.gov/topics/population/race/about.html (last visited September 2, 2016).

FLOC's claims. In this appeal, FLOC alleges essentially three assignments of error, none of which merit reversal of the trial court's opinion and judgment.

First, FLOC argues that the trial court erred by not applying strict scrutiny to FLOC's equal protection claim, because FLOC contends that the trial evidence showed that SBY agents use explicit racial classifications in their enforcement decisions. FLOC's Brief at 3, 8-9, 38-50. The trial evidence, however, does not support FLOC's argument, and does not provide any basis for this Court to reverse the trial court's finding that racial or ethnic appearance played no role in the encounters presented at trial. Accordingly, because there was no factual basis for finding that Border Patrol agents were using explicit racial classifications, there was no basis for applying strict scrutiny.

Second, FLOC argues that the trial court erred in finding that the testimony and methodology of FLOC's expert witness, Kara Joyner, who proffered a statistical analysis of the SBY Station's apprehension log, was not reliable, and thus erred by not considering her statistical analysis as evidence of discriminatory impact. FLOC's Brief at 3-4, 22-23, 58-66. FLOC, however, fails to demonstrate that the trial court abused its discretion in finding that Dr. Joyner's analysis was unreliable. The trial court addressed numerous problems with Dr. Joyner's report, which FLOC does not meaningfully challenge. Moreover, contrary to what FLOC argues, the Border Patrol's expert, Brian Withrow, cited numerous problems with

Dr. Joyner's analysis which were anything but "narrow." Finally, FLOC's argument that the trial court did not consider Dr. Joyner's statistical analysis as evidence of discriminatory impact is meritless. The trial court specifically found that not only was the statistical analysis unreliable in general, it was unreliable to show discriminatory impact, for the reasons stated in the trial court's decision.

Third, FLOC argues that the trial court erred in finding that the evidence did not support its claim that the SBY Station had a policy and practice of equal protection violations, in light of the "cumulative evidence" presented at trial. FLOC's Brief at 3, 51-57. FLOC's catch-all argument, however, is essentially a request to re-weigh the evidence that was presented at trial. FLOC, however, cannot show that any of the trial court's findings are clearly erroneous, or that it abused its discretion in finding that Dr. Joyner's analysis was unreliable.

Because FLOC has failed to demonstrate any reversible error—or any error whatsoever—in the order following the two-week trial in this case, this Court should affirm the trial court's decision.

ARGUMENT

I. Standard of Review

FLOC challenges the trial court's ruling that racial and ethnic appearance played no role in the encounters presented at trial, and that FLOC failed to show that the SBY Station had a policy or practice of racial profiling. This Court reviews these factual findings of the trial court following a bench trial under the clearly

erroneous standard. *Calloway v. Caraco Pharm. Labs., Ltd.*, 800 F.3d 244, 251 (6th Cir. 2015). "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). "We cannot find that the district court committed clear error where there are two permissible views of the evidence, even if we would have weighed the evidence differently." *Calloway*, 800 F.3d at 251 (internal quotation omitted). Simply put, to be clearly erroneous, "a decision must strike us more than just maybe or probably wrong; **it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish.**" *United States v. Perry*, 908 F.2d 56, 58 (6th Cir.1990) (quoting *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir.1988) (emphasis supplied)).

FLOC also challenges the trial court's ruling that the analysis of its expert witness, Kara Joyner, is unreliable. This Court reviews the trial court's ruling on this point under the abuse of discretion standard. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (". . . a court of appeals is to apply an abuse of discretion standard when it reviews a trial court's decision to admit or exclude expert testimony. . .That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion.") (internal citation omitted). "An abuse of discretion exists when the reviewing court is firmly convinced that a

mistake has been made . . . . A court abuses its discretion when it relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard." *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995).

II. The trial court did not abuse its discretion in finding that FLOC had not shown that the SBY Station had a policy or practice of initiating encounters based on racial or ethnic appearance. Accordingly, the trial court did not err by not applying strict scrutiny in its analysis.

FLOC's opening brief purports to state as a factual finding exactly what they failed to prove at trial—that Border Patrol agents made enforcement decisions based on Hispanic appearance. In an attempted repackaging of the trial court's factual findings, FLOC alleges that the "primary enforcement strategy" of Border Patrol agents on patrol is "selecting members of the public, approaching them and questioning them about their immigration status based on their Hispanic appearance." FLOC's Brief at 8. FLOC then immediately moves from this failed theory to the trial court's finding, blurring the lines between the two: FLOC states it is challenging the trial court's conclusion that "SBY agents may permissibly use race" in selecting individuals for consensual encounters. Notably, FLOC does not—and cannot—cite any part of the Memorandum Opinion for this "conclusion" because the trial court never made that finding. Instead, the trial court specifically recognized that, "[c]onsensual encounters may violate the Equal Protection Clause when they are initiated solely based on racial considerations." Opinion, RE 251, PageID #7422 (citing *United States v. Travis*, 62 F.3d 170, 173–74 (6th Cir. 1995),

and *United States v. Jennings*, 985 F.2d 562 (6th Cir. 1993)). Then, after hearing the testimony of the specific encounters that FLOC hand-selected to present at trial, presumably because FLOC believed that these incidents provided its best evidence of racial profiling, and assessing the credibility of the witnesses on both sides of the encounters, the trial court found the Border Patrol agents "initiated these encounters based on factors ***unrelated to*** racial or ethnic appearances." *Id.* at PageID #7422 (emphasis supplied). Accordingly, because the trial court never based its rulings in this case on the basis that racial or ethnic appearance could be a factor, that issue is not properly before this Court in this appeal.

Unable to connect their theory to any of the actual encounters presented as evidence at trial, FLOC then moves on to repackaging the testimony of the Border Patrol agents. Specifically, FLOC contends that "SBY agents admit that race often plays a role" in determining who they may suspect is in the country unlawfully. FLOC's Brief at 9. Notably, however, FLOC cannot site to a single Border Patrol agent who testified that this is a factor that they "often" use as an articulable factor in their enforcement decisions.

Nevertheless, FLOC argues that the trial court erred by not applying the strict scrutiny test in considering the evidence of the SBY Station's enforcement activities presented at trial. Specifically, FLOC contends that because three Border Patrol agents testified that racial or ethnic appearance could be considered as a

factor in determining whether to initiate a consensual encounter or a *Terry* stop, the SBY Station—as a policy and practice—was applying an express, racial classification, and strict scrutiny is the appropriate test. FLOC's Brief at 40.[11] If FLOC had in fact demonstrated that the SBY Station had a policy or practice of initiating investigations or stops based solely on racial or ethnic appearance (without more), or otherwise employed explicit racial criteria in decision-making, strict scrutiny may indeed have been appropriate. *See Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 534 at n.4 (6th Cir. 2002) ("We note that the record contains no indication that the OSHP employs explicit racial criteria or admits to racially-motivated decision making. If such a showing could be made, the plaintiffs would not need to establish the existence of a similarly situated class that was not investigated."); *see also United States v. Avery*, 137 F.3d 343, 355 (6th Cir.1997) ("If law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause

[11] FLOC considerably misstates the evidence at trial in stating that "Multiple SBY supervisors and agents testified that they use race as a factor," in making enforcement decisions. *See* FLOC's Brief at 21-22, 52. Upon closer inspection of trial testimony—as discussed below—only two Border Patrol agents testified that racial or ethnic appearance *could* be a factor in making enforcement decisions, but neither testified that it was routine and, more importantly, both were clear that appearance could never be the sole factor in such a decision. *See* (discussion *infra* at 30-31). And only one of those two Border Patrol agents was actually a supervisor. Transcript, RE 240, 935:20-24.

has occurred."). Absent a showing that the SBY Station utilized explicit racial criteria in enforcement decisions through admissible evidence at trial, however, the trial court did not err by applying the well-established test for Equal Protection claims, which required FLOC to demonstrate, "by a preponderance of the evidence that SBY maintains a policy or custom that had a discriminatory effect on Hispanics, and was motivated by a discriminatory purpose." Order, RE 251 at PageID #7420-21 (*citing Bennett v. City of Eastpointe*, 410 F.3d 810, 818 (6th Cir. 2005)).

At the outset, it is import to note that FLOC does not contend that the SBY Station has any written policies that constitute racial classifications for enforcement decisions. In fact, as the trial court recognized, the Department of Homeland Security has adopted the Department of Justice's "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," which was issued in June 2003. Order, RE 251 at 27.[12] As the trial court recognized, this policy explicitly "prohibit[s] the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional instances, as defined in the DOJ

[12] FLOC argues that the SBY Station "belatedly" adopted this policy. FLOC's Brief at 52. In fact, the undisputed evidence at trial was that DHS—which both CBP and the Border Patrol are components of—adopted this policy on June 1, 2004, and there is no evidence that the SBY Station was not governed by this policy when it opened in 2009. See DHS Commitment to Race Neutrality, TR. EX. 126.

Guidance," and permits personnel to "use race or ethnicity only when a compelling governmental interest is present" Order, RE 251 at 27; *see also* TR. EXs. 125-28. The policy, however, also provides more specific guidance to federal law enforcement officers, including the Border Patrol, charged with protecting the integrity of the Nation's borders. *See* TR. EX. 127 at 10. The policy states:

> . . . because enforcement of the laws protecting the Nation's borders may necessarily involve a consideration of a person's alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory and constitutional standards. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975). This policy will honor the rule of law and promote vigorous protection of our national security.

Id. The trial court also found that the evidence at trial demonstrated that SBY agents received racial profiling training, and in its Order cited the trial testimony of the Chief of the Detroit Sector at the time, Mario Martinez, who testified that he "does not tolerate racial profiling and would not permit any agent to initiate a consensual encounter based solely on a person's race." *Id.*[13]

[13] To the extent that FLOC disputes the trial court's factual finding on training in its Merits Brief, it should be noted that FLOC's citations to trial testimony do not support its argument. Specifically, FLOC claims that "[m]ultiple agents were not able to recall the last time that they were trained (or recalled training in the distant past) about [Fourth and Fifth Amendment] issues or even recall reviewing relevant official policies." FLOC's Brief at 28. For example, a fair reading of the questioning of both the trial court and FLOC's counsel of Corey Bammer, the former Patrol Agent in Charge of the SBY Station, demonstrates that he testified not only as to Fourth Amendment training that an agent would receive at the Border Patrol Academy, but also recent training with the Detroit Sector (within two months of when he testified at trial), as well as legal trainings provided by the

Further, FLOC did not introduce any documentary evidence at trial that even suggests—much less demonstrates—that the SBY Station was targeting Hispanics, or any other protected class. To the extent that FLOC points to its expert witness's analysis of the SBY Station's apprehension log as evidence, the trial court rejected that analysis as unreliable, and did not abuse its discretion in doing so (*see* further discussion of this ruling in Section III). Likewise, to the extent that FLOC argues that certain e-mail messages demonstrate racial or ethnic animus (*see* FLOC's Brief at 24, citing Trial Exs. 10-16)—a point the SBY Station vigorously contested at trial—FLOC cannot plausibly argue that the messages demonstrate that the SBY Station was utilizing express racial classifications:

CBP Office of Chief Counsel and the United States Attorney's Office. Transcript, RE 237, 402:16-405:21. Agent Chavez, also cited by FLOC, testified that he had received training at the Academy, then follow up training at SBY about every year and half, the most recent having been within a few months of his trial testimony. Transcript, RE 241, 1200:4-1201:24. Agent Shaver was only asked one question about training, which was when he had last received training on consensual encounters. Transcript, RE 238, 725:10-726:6. He testified that he had not had any follow-up training on the topic since transferring from the Buffalo Station in 2007—but at trial he was not questioned extensively on training. *Id*. FLOC also contends that "Chief Martinez acknowledged that the Border Patrol does little to ensure that official communications and policies regarding racial profiling actually reach agents in the field." FLOC's Brief at 29. But his testimony cannot fairly be read to support that or, more importantly, to suggest that the trial court abused its discretion in any way. Chief Martinez simply testified that he was not familiar with the specifics on how the Border Patrol documents the fact that every agent receives training on racial profiling, but it is his understanding that all agents receive this training. Transcript, RE 242, 1351:13-1352:23, 1361:1-25. He never "acknowledged," as FLOC claims, that the Border Patrol did little to ensure that policies concerning racial profiling actually reach agents in the field.

- Trial Exhibit 10 is an e-mail chain which starts with intelligence that is being provided to the SBY Station from two other Border Patrol Stations, and a confidential informant, about possible human smuggling and the illegal purchase of Ohio driver's licenses from an "inside source." The discussion then turns to whether the FBI and the Joint Terrorism Task Force should be informed. The messages do not direct any SBY agent to take enforcement action based on express racial classifications.
- Trial Exhibit 11 is an e-mail discussing joint patrols with local law enforcement as part of the Operation Stone Garden grant, which is a program where DHS provides funds to assist the Border Patrol with patrolling border areas. Transcript, RE 237, 297:1-298:1. In this exchange between the two lead supervisors at SBY Station, which occurred shortly after the SBY Station opened, the Patrol Agent in Charge testified that his concern that the local law enforcement agencies may not yet be aware that the Border Patrol has specific priorities—namely people involved in smuggling and those who are "in furtherance" of their entry in to the United States—and that Border Patrol agents are not there to make mass arrests of people

without legal status. *Id.* The messages do not direct any SBY agent to take enforcement action based on express racial classifications.

- Trial Exhibit 12 is an e-mail chain discussing attendance at a "2009 U.S. Border and Anti-Gang Summit" and, more specifically, whether it will cover gangs relevant to the Northern Border. The chain discusses the presence of Asian and Hispanic gangs that have a nexus to the Northern Border, including references to evidence of the MS13 ("Mara Salvatrucha") and Sur13 ("Surenos") gang tags in Huron County, Ohio. The messages do not direct any SBY agent to take enforcement action based on express racial classifications.
- Trial Exhibit 13 is an e-mail chain, which in pertinent part, states that the SBY Station had been called by the Cedar Point Amusement Park Police Department to investigate individuals who had used fraudulent identification for employment applications. The messages do not direct any SBY agent to take enforcement action based on express racial classifications.
- Trial Exhibit14 is an e-mail reporting that a local police department had arrested an individual for operating a vehicle while intoxicated and for driving without a license, and had called the SBY Station because the individual didn't speak English and claimed to be from

Mexico. The SBY agent explains that he placed a detainer on the individual so that the Border Patrol could determine alienage once the individual—who was being held on local charges—was sober. This message does not direct any SBY agent to take enforcement action based on express racial classifications.

- Finally, Trial Exhibits 15 and 16 is an e-mail discussion between two SBY agents concerning the complaint of an individual who had paid a bond on a local misdemeanor criminal complaint, only to realize that he would forfeit that bond because he had agreed to a stipulated removal from the United States, presumably because he was unlawfully present. This message does not direct any SBY agent to take enforcement action based on express racial classifications.

Accordingly, there was no documentary evidence submitted at trial that the SBY Station targeted *any* protected class based on express racial classifications and, therefore, the trial court was not clearly erroneous in finding that FLOC had failed to demonstrate that the SBY Station had a practice of racially profiling Hispanics. Order, RE 251 at PageID #7421.

Instead, FLOC relies solely on the trial testimony of three Border Patrol agents concerning when racial or ethnic appearance could be used as "a factor" in the decision to initiate a consensual encounter or a *Terry* stop. This evidence falls

well short of demonstrating any policy or practice of profiling by the SBY Station, and the trial court's decision, therefore, is not clearly erroneous.

First, FLOC cites the trial testimony of Agent Alexander Chavez as evidence that the SBY station was using express racial classifications. FLOC's Brief at 10. This argument is puzzling, at best, considering the trial testimony FLOC cites in its brief:

[FLOC's Counsel] Q. What is the Department of Homeland Security's definition of racial profiling?

[Agent Chavez] A. It means targeting someone just for the way they look, for their ethnic background, things like that.

Transcript, RE 241, 1201:25-1202:3.

The parties may disagree as to whether the answer completely describes DHS's definition of racial profiling, but there is no plausible argument that Agent Chavez's testimony, cited to this Court by FLOC, demonstrates that the SBY Station was making express racial classifications.

Second, FLOC cites the testimony of two former SBY Station agents, York and Richardson,[14] who testified that Hispanic appearance could be one of many articulable facts in forming reasonable suspicion for a stop or in initiating a

[14] By the time of trial, Agent York was the Patrol Agent in Charge of the Gibraltar Station, Transcript, RE 237, 406:15-20, and Agent Richardson had moved onto the Drug Enforcement Agency. Transcript, RE 240, 1030:19-20.

consensual encounter. FLOC's Brief at 10. Neither agent testified, however, that they had ever targeted anyone based on racial or ethnic appearance. Instead, they testified that their understanding of the law is that appearance could be one factor, among many, in deciding whether they had reasonable suspicion to make a stop. Transcript, RE 237, 443:20-444:6; RE 240, 942:5-12. Their understanding is consistent with Supreme Court precedent.

In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Supreme Court held that Border Patrol officers on roving patrol could stop vehicles only if they were aware of "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." 422 at U.S. 884. In explaining its holding, the Court stated that the Border Patrol officer in that case had violated the Fourth Amendment because he relied on a single factor—the apparent Mexican appearance of the vehicle's occupants. *Id.* at 885-86. The Court explained further, however, that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens." *Id.* at 886-87. The relative weight that appearance may play will undoubtedly depend on other factors, including the geographic location of the encounter, as well as any intelligence information available to the agent. And it may be that presumed

ethnicity would play such an insignificant role in diverse communities that appearance could not be accepted by a court as an articulable fact in a reasonable suspicion analysis under the Fourth Amendment. But absent evidence that the SBY Station had a practice of targeting specific racial or ethnic groups or of stopping individuals on that basis alone (and no such evidence was presented at trial), the trial court did not err by not applying strict scrutiny, because there was not a factual predicate for applying that standard.

FLOC attempts to create a legal issue on appeal by arguing that the trial court misunderstood the standard for a Fifth Amendment Equal Protection Claim. Specifically, FLOC argues that the trial court accepted a "fundamentally erroneous formulation of the interaction between search and seizure law and Equal Protection: as long as an individual encounter remains 'consensual' within the meaning of the 'Fourth Amendment,' the [trial court] believed it was compelled to accept almost any justification for an encounter, even if race played a significant role in the agent's decision." FLOC's Brief at 44. FLOC also argues that the trial court erred by citing this Court's decisions in *United States v. Travis*, 62 F.3d 170, 173-74 (6th Cir. 1995), *United States v. Jennings*, 985 F.2d 562 (6th Cir. 1993), and *Avery*¸ for the alleged proposition that a consensual encounter could be based on race, as long as it is not the "sole motive" for the encounter. *Id.* At 57-60. This argument is specious for at least two reasons.

First, and most notable, FLOC's argument that the trial court believed that it was compelled to accept any proffered justification for a consensual encounter, "even if race played a significant role in the agent's decision," is completely unsupported anywhere in the opinion, but more importantly—in FLOC's specific citation to the opinion, RE 251, PageID 7422-23. On the same page FLOC cites for this erroneous proposition, the trial court specifically found that, "the evidence demonstrates the apprehending agents initiated these encounters *based on factors unrelated to racial or ethnic appearances.*" *Id.* PageID 7422 (emphasis supplied).

Second, to the extent the FLOC argues that the trial court either overstated, or misunderstood, this Court's decisions in *Travis*, *Jennings*, and *Avery*, FLOC's Brief at 45-46, which Appellees do not concede, this argument is a red herring for the same reason stated above—the trial court's clear, unequivocal factual finding that racial or ethnic appearance played no role in the encounters presented at trial. Put differently, the trial court did not rely on the "sole motive" formulation, as FLOC contends. Rather, the trial court found that factors leading to the encounters were "unrelated" to racial or ethnic appearance. Thus, it is pure, unsupported speculation for FLOC to contend that the trial court was under any illusion that it had to accept "all proffered justification for an encounter" as long as it was consensual, when the trial court's clear explicit factual finding was that racial or ethnic appearances played no role.

Additionally, the cases FLOC cites in support of its argument that the trial court should have applied strict scrutiny are readily distinguishable from the facts presented at trial. In *Floyd v. City of New York,* for example, a case challenging the stop-and-frisk practices of the New York City Police Department, there was evidence that officers were directed to target "male blacks 14 to 21" based on crime suspect data, and the City defended that position throughout the case. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013). Further, a police chief expressly conceded that that the police department targeted young blacks and Hispanics under the policy. *Id.* Based on those findings, the court in *Floyd* ruled that the policy depended on express racial classifications, and that the policy was subject to strict scrutiny. *Id*. Similarly, in *Melendres v. Arpaio,* there was evidence that the police task force had specifically targeted Hispanic day laborers, and thus expressly incorporated racial bias. *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 900-02 (D.Ariz. 2013). Accordingly, the court in *Melendres* also applied strict scrutiny. The trial court's factual findings in this case, however, do not even remotely suggest that the SBY Station employed the type of racial classifications (or any classifications at all, for the matter) in its enforcement policies that the courts in *Floyd* and *Melendres* found merited strict scrutiny. Thus, neither *Flores* nor *Melendres* provides any support for FLOC's claim that strict scrutiny should apply in this case.

To the extent that FLOC challenges the trial court's factual finding that the factors leading to the encounters in this case were unrelated to racial or ethnic appearance as "implausible," and even if this Court were to disagree with the trial court's finding, that is nevertheless an insufficient basis for reversal under the clearly erroneous standard. *See Calloway*, 800 F.3d at 251. And, because based on the findings at trial that there is no factual basis for FLOC's assertion that the SBY Station was employing express racial classifications, FLOC's argument that the trial court should have applied strict scrutiny must fail.

III. The trial court did not abuse its discretion in finding FLOC's expert witness's testimony was unreliable, where her assumptions were unsupported, her statistical model contained numerous errors, and she admitted to having to make "a little bit of leap" to reach her conclusion that Border Patrol agents were racially profiling based on Hispanic appearance—because, in fact, she didn't consider *any* evidence concerning the appearance of *anyone* in her statistical model.

The trial court found that the statistical analysis of the SBY apprehension log conducted by FLOC's expert, Kara Joyner, was unreliable. Order, RE 251, PageID #7417-18, #7423-24. The trial court's order discusses Dr. Joyner's analysis, and its reasons for finding that it was unreliable, in significant detail. *Id.* Because trial courts are given significant leeway in determining the admissibility and reliability of expert testimony, the trial court's determination that Joyner's statistical analysis was unreliable is subject to the abuse of discretion standard of review. *Kumho Tire*, 526 U.S. at 152. Accordingly, this Court must be firmly

convinced that a mistake has been made, and that the trial court relied on clearly erroneous findings of fact, improperly applied the law, or used an erroneous legal standard before reversing. *Romstadt*, 59 F.3d at 615.

On appeal, FLOC argues that the trial court erred by failing to consider Joyner's statistical evidence as evidence of discriminatory impact, suggesting that the trial court limited its ruling to finding that her analysis was unreliable only to the intentional discrimination prong of the Equal Protection test. *See* FLOC's Brief at 58. FLOC's argument fails to demonstrate that the trial court abused its discretion for at least two reasons.

First, contrary to what FLOC argues, the trial court specifically considered, and rejected, Joyner's analysis to show discriminatory effect: "Plaintiffs do not provide evidence of discriminatory effect through Joyner's analysis of the SBY Apprehension Logs." Order, RE 251, at PageID #7423.

Second, in addition to the trial court's statement above, nothing in its opinion suggests that it limited its finding concerning the unreliability of Dr. Joyner's methodology to her conclusion that SBY agents must be targeting individuals for stops based on Hispanic appearance. There were numerous problems with her methodology which are identified in the opinion. Most significant to the discriminatory impact prong of the Equal Protection test is the method that she used to calculate her benchmark. Without an accurate picture of

the population at risk of ending up on the SBY Station's apprehension log, (which in this case are individuals unlawfully present in the United States within the geographic areas patrolled by SBY agents), the fact that 90 percent of the people ultimately apprehended by SBY agents are from countries that may predominately be ethnically Hispanic does not have any real meaning: one need's to have a relatively accurate picture of that population to determine if 90 percent even appears disproportionate.

Contrary to FLOC's argument that Dr. Withrow's criticism of Dr. Joyner's benchmarks is narrow, and that his attacks on the Pew and DHS data "lacked a specific basis in data or fact," FLOC's Brief at 21, nothing could be further from the truth. At the most basic level, on direct questioning by the trial court and FLOC's counsel, Dr. Withrow criticized Dr. Joyner's use of the Pew Hispanic Report and the American Community Survey, which are both national estimates, to develop her benchmark of calculating the unauthorized population in Northern Ohio, which is roughly the area patrolled by the SBY Station. TR. EXs. 78 at 25; TR. EX. 79. The problem, specifically, is that when one takes national statistics and drills down to a small geographic area like Northern Ohio, the analysis is infused with risk of error. Transcript, RE 241, 1172:12-14. He also provided pointed criticism of the Pew Hispanic Report,[15] due to the fact that the

[15] Withrow admitted that the Pew Hispanic Report was the best data available, but

methodology used to compile it leads to additive error, which grows even larger when you try to drill down to a small area—like Northern Ohio. Transcript, RE 241, 1179:11-1180:22. Finally, he testified if that he had been asked to conduct a study, he would not have relied on the Pew and Census data as the basis his evaluation—for the numerous reasons that he listed in his report at trial—but he would have gathered data at a much more local level (including school districts, housing records, and other locally-produced economic data) to get a sense of what the population at risk might be, so that he would have an accurate benchmark. Transcript, RE 241, 1182:15-22.

In addition, FLOC continues to cite the "3000 apprehensions" as evidence of Border Patrol enforcement activity, but even a cursory review of the apprehension logs shows that a significant number of those apprehensions are OA stops. *See* TR. EXs. 25-27. As even Dr. Joyner admitted, she should not have included them in her analysis, because in those encounters the Border Patrol was not the police agency initiating the encounter. Order, RE 251 at PageID #7461. FLOC attempts to rehabilitate Dr. Joyner on this point by showing that she did segregate OA stops in one chart (of many) in one of the three expert reports that she submitted, but that

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his statement wasn't an endorsement that it was the proper basis for developing the benchmark. What he said is that "[i]t is probably the best data that we have, but that's because it is the *only* data that we have." Transcript, RE 241, 1180:20-22 (emphasis supplied).

does not explain why she included this admittedly irrelevant data at all—even if Dr. Joyner concluded that it did not make a difference in her analysis. Transcript, RE 238, 649:12-654:12. This point is even more significant given Dr. Joyner's additional point that, of the encounter types she analyzed, OA stops were the most likely to include a Hispanic or Mexican individual. Transcript, RE 238 at 654:13-655:7.

In short, there were numerous problems identified at trial with Joyner's analysis, and there is no indication in the order that the trial court found that her methodology and testimony was reliable to show discriminatory impact or discriminatory intent—or anything else for that matter.

In its brief, FLOC makes several additional criticisms of the trial court's ruling that Joyner's methodology and testimony were unreliable, but none of these arguments demonstrate that the trial court abused its discretion. For example, FLOC contends that the trial court found that Joyner was unreliable based, in part, on two of Dr. Withrow's criticisms that were inconsistent with his own testimony. FLOC's Brief at 22.

First, FLOC contends that trial court found that Joyner was unreliable in part because of her conclusion that nationality—which is recorded on the SBY Station's apprehension log—is a reasonable proxy for ethnicity, which the SBY Station does not record on the log. FLOC argues that Dr. Withrow's testimony

persuaded the trial court that this was an important issue, despite the fact that he had minimized its importance in his own testimony. Specifically, FLOC claims that Dr. Withrow testified that his criticism of Dr. Joyner for using nationality as a proxy *for race* was minor. FLOC's Brief at 23. In fact, what Dr. Withrow said is that nationality was a reasonable proxy *for ethnicity*. RE 240, 1111:25-1112:2. This is an important distinction, because just as all nationals of a country would not have the same racial appearance, Hispanics can be of any race. Accordingly, the trial court's criticism, properly considered, wasn't that Dr. Joyner was assuming that all Mexicans would be Hispanic, for example, but it was that all Hispanics would have a particular appearance that would be readily identifiable by Border Patrol agents. One example of the fallacy of this point was made clear at trial during the testimony of FLOC's president, Baldemar Velasquez. He testified that he believed that he had never been racially profiled because he was a "guero," which he said is a "very light-skinned Mexican." Transcript, RE 236, at 164:16-23. Dr. Joyner admitted that she did not have any data concerning the appearances of the people on the apprehension log, and could not even provide her definition of what a Hispanic appearance would include. Transcript, RE 238, 634:21-636:4. Nevertheless, Dr. Joyner concluded that SBY agents were profiling on that basis, and admitted that she was "making a little bit of jump" to get to that conclusion.

RE 251 at PageID # 7417. That, among other reasons, is what led the trial court to find that Dr. Joyner's analysis unreliable.

Second, FLOC cites Dr. Withrow's acknowledgment that based on Joyner's calculations, she was at the third standard deviation. FLOC's Brief at 21. Yet, at the very same place in his testimony, Dr. Withrow was clear that he disagreed with Joyner's benchmark, or that she was even measuring the SBY Station's enforcement activity in the correct place. Transcript, RE 240, 1114:9-1115:19. Accordingly, Dr. Withrow's testimony cannot be plausibly construed as an endorsement of Joyner's methodology that the trial court should have considered.

Finally, FLOC also argues that the SBY Station had the burden of offering testimony to rebut Dr. Joyner's methodology and, specifically, her findings as to the purported overrepresentations of the SBY Station logs. FLOC's Brief at 61. Specifically, FLOC contends that the only way permissible way of demonstrating that Dr. Joyner's analysis was unreliable was for Dr. Withrow to somehow quantify how each one of the numerous problems that he identified impacted her results. FLOC, however, cites no authority for the proposition that the trial court's discretion in considering the reliability and admissibility of expert testimony is so limited. FLOC cites several employment discrimination cases for the basic principle that a court cannot reject a statistical analysis simply because it does not

include all pertinent variables,[16] but those cases are inapposite, because in this case the trial court found that Dr. Joyner's entire methodology was unreliable.

In his reports and at trial, Dr. Withrow identified at least five major problems with Dr. Joyner's methodology. *See* Trial Exhibit 78 at 20-35; *see also* Trial Exhibit 79. The trial court questioned Dr. Withrow on his major criticisms of Dr. Joyner's report, RE 241, 1166:21-1173:14, and many of those criticisms are identified in the trial court's opinion. Order, RE 251, PageID #7416-18. Moreover, those criticisms are not limited to whether Dr. Joyner was using the correct numbers (although Dr. Withrow is clear that he disagrees with both the numerator and denominator that Dr. Joyner used), but also include the many assumptions that she made, and the fact that she was measuring the Border Patrol's enforcement activity in the wrong place. Given all of these issues, many of which the trial court found were "well taken," *id.* at PageID #7423, FLOC cannot plausibly argue that the trial abused its discretion because Dr. Withrow did not specifically quantify how each of these issues impacted Dr. Joyner's analysis.

[16] *See Bazemore v. Friday*, 478 U.S. 385, 401 (1986) (holding that court of appeals erred by excluding regression analysis in Title VII case that included major variables, but not all variables. The Supreme Court held that the issue went to weight, not admissibility); *see also Phillips v. Cohen*, 400 F.3d 388, 400-01 (6th Cir. 2005) (same). Even if these cases were applicable to the statistical analysis in this case, and they are not, the trial court here was also the finder of fact, and it was well within its discretion to disregard it as unpersuasive given the numerous flaws in the methodology.

Because none of the FLOC's challenges to the trial court's finding that Dr. Joyner's statistical analysis and testimony was unreliable demonstrate that the trial court abused its discretion, it should not be reversed.

IV. FLOC cannot demonstrate that the trial court's weighing of the evidence submitted at trial was clearly erroneous.

FLOC's final, catch-all issue on appeal is that the trial court erred by focusing "narrowly" on circumstances surrounding the eight encounters between FLOC's trial witnesses and SBY agents, "while omitting cumulative evidence of systemic racial profiling," including: (1) admissions by agents themselves; (2) statistical evidence of stark overrepresentation of Hispanics on the SBY apprehension logs; (3) "voluminous evidence of poor training and record-keeping; and (4) a command-culture of animus to Hispanics. FLOC's Brief at 3, 29-30. In fact, the trial court considered *all* of this purportedly "cumulative" evidence, and made specific findings. Accordingly, FLOC's argument is that this Court should re-weigh the evidence admitted at trial and reverse the district court's factual findings. This argument is meritless, because the clearly erroneous standard does not permit this Court to reverse the trial court's findings on this basis. *See Calloway*, 800 F.3d at 251 ("We cannot find that the district court committed clear error where there are two permissible views of the evidence, even if we would have weighed the evidence differently"). Put another way, unless the trial court's findings strike this Court "as wrong with the force of a five-week-old

unrefrigerated dead fish," *Perry*, 908 F.2d 56 at 58 (quotation omitted), they should not be reversed. Because FLOC has failed to make this showing, the trial court's decision should be affirmed.

First, FLOC suggests that the trial court did not properly weigh the admissions of Border Patrol agents concerning their use of racial or ethnic appearance in enforcement. This issue is addressed in detail in Section II, *supra*. There is no indication that the trial court omitted this evidence in considering whether the SBY Station had a policy or practice of racial profiling. Contrary to FLOC's argument on appeal, there was no evidence at trial that Border Patrol agents commonly used appearance as an articulable fact. In fact, every Border Patrol agent testified that in practice they did not target Hispanics—or any other ethnic group—for enforcement. Further, after hearing testimony from both sides of each of the eight encounters selected by FLOC as it best direct evidence of racial profiling, the trial court specifically found that racial or ethnic appearance played no role in the decisions to initiate these encounters. Order, RE 251, PageID #7422.

Second, FLOC suggests that the trial court somehow erred in how it weighed the statistical evidence in finding that FLOC had failed to demonstrate that the SBY Station had a policy and practice of profiling Hispanics. The trial court, however, specifically found that Dr. Joyner's statistical analysis was unreliable. Order, RE 251, PageID #7418, #7423-24. This finding is addressed in detail in

Section III. In light of the trial court's determination that Dr. Joyner's statistical analysis was unreliable, however, FLOC cannot plausibly argue that the trial court was nevertheless required to weigh the alleged overrepresentation in determining whether the SBY Station has a pattern and practice of racial profiling.

Third, FLOC argues that there was evidence of poor training and record-keeping. The trial considered this argument, and made specific factual findings on both points. Specifically, the trial court found that Border Patrol agents receive both training on racial profiling, as well as training on protocols for stops and seizures. Order, RE 251 at PageID #7426. To the extent that FLOC disputes these findings, FLOC's citations to trial testimony do not support its argument. Specifically, FLOC claims that "[m]ultiple agents were not able to recall the last time that they were trained (or recalled training in the distant past) about [Fourth and Fifth Amendment] issues or even recall reviewing relevant official policies." FLOC's Brief at 28. However, a fair reading of the questioning of both the trial court and FLOC's counsel of Corey Bammer, the former Patrol Agent in Charge of the SBY Station, demonstrates that he testified not only as to Fourth Amendment training that an agent would receive at the Border Patrol Academy, but also recent training with the Detroit Sector (within two months of when he testified at trial), as well as legal trainings provided by the CBP Office of Chief Counsel and the United States Attorney's Office. Transcript, RE 237, 402:16-405:21. Agent

Chavez, also cited by FLOC, testified that he had received training at the Academy, then follow up training at SBY about every year and half, the most recent having been within a few months of his trial testimony. Transcript, RE 241, 1200:4-1201:24. Agent Shaver was only asked one question about training, which was when he had last received training on consensual encounters. Transcript, RE 238, 725:10-726:6. He testified that he had not had any follow-up training on the topic since transferring from the Buffalo Station in 2007—but at trial he was not questioned extensively on training. *Id.*, 725:10-726:6.

FLOC also contends that "Chief Martinez acknowledged that the Border Patrol does little to ensure that official communications and policies regarding racial profiling actually reach agents in the field." FLOC's Brief at 28-29. But his testimony cannot fairly be read to support that or, more importantly, to suggest that the trial court's factual findings are clearly erroneous. Chief Martinez simply testified that he was not familiar with the specifics on how the Border Patrol documents the fact that every agent receives training on racial profiling, but it is his understanding that all agents receive this training. Transcript, RE 242, 1351:13-1352:23, 1361:1-25. He never "acknowledged," as FLOC claims, that the Border Patrol did little to ensure that policies concerning racial profiling actually reach agents in the field. FLOC's Brief at 28-29. Accordingly, FLOC's arguments concerning the adequacy of training are meritless. More important, they fail to

demonstrate the trial court's findings on the adequacy of training are clearly erroneous. Order, RE 251, PageID # 7426.

FLOC also suggests that there is something nefarious about the fact that the SBY Station does not document all encounters that do not lead to either an arrest, seizure, or a detainer. FLOC's Brief at 13. As the trial court aptly put it, however, "[t]he absence of data regarding the full extent of SBY's enforcement activities is not affirmative evidence of racial profiling." Nevertheless, FLOC's brief makes several misstatements about SBY's record-keeping. FLOC states that the "District Court recognized, SBY does not record data on encounters unless they ripen into arrests." FLOC's Brief at 20. To the contrary, as the trial court recognized, if a stop or encounter does not result in an apprehension, detainer or seizure, but does involve a vehicle, CBP will document the stop in a Vehicle Stop Memorandum. Order, RE 251, PageID #7403 (citing Trial Ex. 132).

Similarly, in an attempt to add validity to the unproven theory of its case that the SBY Station is targeting Hispanics, FLOC contends that there is no record of the encounter between witness Jose Montez-Ramirez and Border Patrol Agent Thomas Payne, "because Payne determined that Ramirez was a U.S. citizen and sent him on his way." *Id.* at 14. In fact, Agent Payne testified that the reason he didn't complete a Form I-44 for this stop was because, in his view, he didn't initiate the stop, and because he only questioned Montez-Ramirez briefly.

Transcript, RE 241, 1267:13-1268:21. In other words, FLOC's statement that Agent Payne didn't complete the form because he had determined that Montez-Ramierez is a citizen is completely unsupported by the trial evidence.

FLOC also cites the SBY Station's expert witness, Dr. Withrow, in an attempt to show that he agreed that the SBY Station's record-keeping was inadequate. FLOC's Brief at 19. In fact, what Dr. Withrow was testifying about is the type of information that he would like to see, as a researcher, if he was conducting his own racial profiling analysis (which he was not asked to do in this case). And although some states collect significantly more data on stops than the Border Patrol collects, Dr. Withrow testified that, "[n]one of it, in my view, rises to the level that I would consider to be useful for studying racial profiling." Transcript, RE 240, 1092:22-1095:17.

Finally, FLOC contends that the trial court failed to properly weigh evidence of the "command culture" at the SBY Station in making its factual findings. To the contrary, after hearing the testimony of Border Patrol agents and FLOC's witnesses, and reviewing the documentary evidence presented at trial, the trial court made specific findings about the use of certain derogatory terms by Border Patrol agents. Order, RE 251, at PageID #7425-26. FLOC may disagree with the trial court's factual findings, but it has not provided any basis for this Court to determine that those findings were clearly erroneous. Further, to the extent FLOC

argues that the evidence of such language would have been more pervasive had they been given the opportunity to search additional e-mail accounts, that contention is entirely speculative, and not part of the trial evidence before this Court.[17] Most important, however, is the lack of any evidentiary connection between language used by some Border Patrol agents and the encounters at issue in this case. Without this connection, there was no basis for the trial court to find that the SBY station's decisions were motivated by racial or ethnic considerations.

In sum, the trial court made specific factual findings concerning each of the categories of "cumulative evidence" identified by FLOC. FLOC may disagree with those factual findings, but it has not demonstrated that they are clearly erroneous.

Likewise, turning to each of the four encounters that FLOC has highlighted in this appeal, FLOC has not demonstrated how, based on the evidence admitted at trial, the trial court's findings are erroneous:

- **José Montes-Ramirez**. The trial court's findings on this encounter are set forth in the order. Order, RE 251, PageID #7406-07, #4722. FLOC's main contention with the trial court's finding that this encounter was not based on Hispanic appearance is that Montes-Ramierez testified that the driver and

[17] Likewise, there was no foundation laid at trial or testimony for FLOC's contention that there was a "100% hit rate for racial slurs when searched for terms such as 'Hispanic' or 'Latino.' FLOC's Brief at 24. It is not clear what that statement means, and this Court should disregard it as outside of the trial evidence.

passenger side windows were rolled down that day, and that the front windshield is not tinted. FLOC's Brief at 31. According, FLOC's presumption is that Agent Payne actually recognized Montes-Ramierez's Hispanic appearance, and decided to initiate the encounter on that basis. FLOC's presumption, however, is not supported by the record. Further, FLOC questions why Payne did not follow up on the human trafficking suspicion after encountering Montes-Ramirez. *Id.* At trial, however, Agent Payne provided a reason for not following up on this suspicion – because the suspected victim was not present by the time he made contact with the van, and that despite his efforts to find the woman after seeing the van driving with the door open, he was unable to locate her. Transcript, RE 241, 1283:1-22. Accordingly, FLOC has not shown that the trial court's findings on this encounter were cleary erroneous.

- **Rocío Anani Saucedo-Carrillo and Rosa Carrillo-Vasquez**. The trial court's findings on this encounter are set forth in the order. Order, RE 251, PageID #7409-10, #7423. FLOC's main argument that this was motivated by Hispanic appearance is that Rocio Saucedo-Carrillo testified that she made eye contact with Agent Shaver as he was driving by, then he turned on his turn signal, turned into the store, and blocked her vehicle. (Saucedo-Carrillo, RE 239, 856:19-857:18). FLOC's Brief at 31. The trial court's

factual finding that the stop was not motivated by racial or ethnic appearance is based on Agent Shaver's testimony that it was Saucedo-Carrillo's truck that drew his attention. Order, RE 251, PageID #7409. Specifically, it was a pickup truck with large flares, tinted, windows, and a decal with two scorpions on it and the words "Durango Durango." *Id.* Given his knowledge about the vehicles used for drug trafficking, its location near the Ohio Turnpike, which is known as a drug corridor, and the scorpion decal—which some drug trafficking organizations use as logos, Agent Shaver decided he wanted to speak with the driver, without knowing if it was anyone of Hispanic nationality. *Id.* FLOC may give greater weight to Saucedo-Carrillo's testimony than to Agent Shaver's, but that is not a grounds for finding that the trial court's finding was clearly erroneous.

- **Isaias Sanchez-Montejo.** FLOC does not dispute the trial court's factual findings concerning SBY Agent Payne's encounter with Sanchez-Montejo. Order, RE 251 at PageID #7407-9. On the trial court's specific finding that the stop was not motivated by Sanchez-Montejo's Hispanic appearance, the Court found: "Agent Payne began his investigation of Sanchez-Montejo because of the condition of the vehicle, not because of the passengers' Hispanic appearance. While Sanchez-Montejo testified he "exchanged eye contact" with the agents at the intersection, he admitted that he "was wearing

sunglasses, so I don't know if he was looking at me or not." Transcript, RE 238, 730:15-731:3. Further, Agent Payne testified he could not see what the passengers looked like because they slumped down in their seats and turned their bodies away. Transcript, RE 241, 1248:15-22. Agent Payne initiated the consensual encounter with Sanchez-Montejo only after confirming the vehicle was hot-plated,[18] which in his experience suggested it was involved in criminal activity." Transcript, RE 241, 1252:6-24. FLOC's only attempt to dispute this finding is that Agent Payne testified that the weather was clear and it was daytime. Even if the weather was clear, and it was daytime, that does not mean that Agent Payne necessarily observed Sanchez-Montejo's Hispanic appearance or, more important, that his appearance played any role in Agent Payne's decision to run the license plate. Accordingly, FLOC has not shown that the trial court's findings on this encounter were cleary erroneous.

- **Aboytes-Bermudez.** Finally, FLOC does not meaningfully dispute the trial court's factual findings concerning the encounter between Rolando Aboytes-Bermudez and SBY Agent Chavez. Order, RE 251, PageID #7411-12. Agent

[18] "Hot-plated" means that the registration associated with the license plate does not match the make and model of the vehicle that the plate is on, suggesting that either the car or the plates, or both, may be stolen. Order, RE 251, PageID #7407-8.

Chavez did not investigate Aboytes and his friends based on their Hispanic appearance. He first noticed their suspicious behavior when he passed them near the restroom, and later connected them to the large SUV that caught his attention because of its size, tinted windows, temporary tags, emptiness, and location near a route known for smuggling. Transcript, RE 241, 1189:1-1190:12; Order, RE 251, PageID #7423. At best, the only factual criticism of the trial court's finding is that despite the fact that Agent Chavez had suspicions about smuggling, he never asked the men if they were being smuggled. FLOC's Brief at 33-34. This falls well short of demonstrating that the trial court's factual finding on this encounter was clearly erroneous.

FLOC has not demonstrated that the trial court failed to weigh any of claimed "cumulative" evidence submitted at trial. And, even if the trial court had done so, FLOC does not demonstrate how it made any of the trial court's decisions erroneous. Instead, FLOC is essentially asking this Court to re-weigh the trial evidence. This argument is meritless, because the clearly erroneous standard does not permit this Court to reverse the trial court's findings on this basis. *See Calloway*, 800 F.3d at 251.

CONCLUSION

Because FLOC cannot demonstrate that any of the trial court's factual findings were clearly erroneous, or that its decision to strike FLOC's expert

witness was an abuse of discretion, or any error at all, this Court should affirm the trial court's judgment.

Respectfully submitted,

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Dated: September 15, 2016

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and 6 Cir. R. 32, the attached Corrected Appellee's Brief has been prepared using fourteen-point, proportionally-spaced, Times New Roman typeface, and it contains fewer than 14,000 words. This brief was prepared using Microsoft Word. The undersigned understands a material misrepresentation in completing this certificate of the FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a) may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of September, 2016, I electronically filed the foregoing CORRECTED APPELLEES' BRIEF with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Muniz, et al., v. United States Border Patrol, et al.,

Northern District of Ohio, Case No. 09-cv-2865-JZ

Record Entry No.	PageID #	Date Filed	Description
1	1-39	12/10/2009	Complaint
80	854-55	10/19/2010	Status Conference Order
143		4/23/2012	SEALED Revised Second Amended Complaint
155		5/31/2012	SEALED Motion for Leave to File Third Amended Complaint
158	2019-24	6/13/2012	Response to Motion for Leave to Amend
161	2032-35	6/15/2012	Order Denying Motion for Leave to Amend
170		7/16/2012	SEALED Motion to Dismiss and/or for Summary Judgment
195	4842-53	10/19/2012	Memorandum Opinion Granting Motion to Dismiss
207	4909	3/24/2014	Order Following Remand
216	4938-38	5/28/2014	Order Denying Motion to Dismiss
220	4950-51	7/30/2014	Order re Parties and Discovery
225	4964-69	4/10/2015	Trial Order
232	5800-13	6/8/2/015	Joint Trial Brief
236	7:22-8:1; 12:7-9; 164:16-23	7/8/2015	Transcript of Bench Trial, Volume 1
237	297:1-298:1; 402:16-405:21;	7/10/2015	Transcript of Bench Trial, Volume 2

	406:15-20; 443:20-444:6		
238	634:5-18; 649:12-654:12; 654:13-655:7; 697:5-15; 725:10-726:6; 730:15-731:3; 773:24-776:17;	7/10/2015	Transcript of Bench Trial, Volume 3
239	856:19-857:18; 890:8-891:2; 892:8-21	7/10/2015	Transcript of Bench Trial, Volume 4
240	935:20-24; 942:5-12; 1030:19-20; 1058:12-1059:25; 1092:22-1095:17; 1111:25-1112:2; 1114:9-1115:19	7/10/2015	Transcript of Bench Trial, Volume 5
241	1166:21-1173:14; 1267:13-1268:21; 1172:12-14; 1180:20-22; 1182:15-22; 1200:4-1201:24; 1201:25-1202:3; 1248:15-22; 1252:6-24; 1283:1-22	7/12/2015	Transcript of Bench Trial, Volume 6
242	1351:13-1352:23; 1361:1-25	7/20/2015	Transcript of Bench Trial, Volume 7
246	7347	9/18/2015	Order and Notice of Party Dismissal
251	7400-31	2/24/2016	Memorandum Opinion and Order