STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF WAKE	
	CASE NO. 18 CVS 15292
JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, AND PAUL KEARNEY, SR.,	
PLAINTIFFS,	
vs.	**LEGISLATIVE DEFENDANTS' MOTION IN LIMINE TO EXCLUDE REPORTS AND TESTIMONY OF PLAINTIFFS' EXPERT WITNESSES**
TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives;* PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate;* DAVID R. LEWIS,[1] *in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session;* RALPH E. HISE, *in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session;* THE STATE OF NORTH CAROLINA; *and* THE NORTH CAROLINA STATE BOARD OF ELECTIONS,	
DEFENDANTS.	

[1] David Lewis is no longer a member of the General Assembly.

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Defendants Timothy K. Moore, Philip E. Berger, and Ralph E. Hise ("Legislative Defendants") move *in limine* to exclude, in whole or in part, the anticipated testimony of Plaintiffs' proffered experts Ariel White, Kevin Quinn, James Leloudis, Carol Anderson, and Sabra Faires. Plaintiffs have proffered these witnesses to opine on various facets of S.B. 824 in an effort to prove Plaintiffs' lone remaining claim: that the General Assembly enacted S.B. 824 with an intentional, racially discriminatory purpose. It is readily apparent from these experts' reports and depositions, however, that they do not meet the standards of Rule 702 of the North Carolina Rules of Evidence. Whether because their testimony is irrelevant to the sole remaining claim before the Court, unhelpful to the Court's resolution of that claim, ultimately unreliable, or all of the above, their reports and testimony should be excluded.

BACKGROUND

On November 6, 2018, a majority of North Carolina voters adopted an amendment to the North Carolina Constitution requiring that "[v]oters offering to vote in person shall present photographic identification before voting" and that the General Assembly "enact general laws governing the requirements of such photographic identification, which may include exceptions." N.C. CONST. art. VI, § 2, cl. 4; *see also id.* § 3, cl. 2 (same). Compelled by this mandate, the General Assembly enacted S.B. 824 over the Governor's veto in December 2018.

The General Assembly carefully crafted S.B. 824 both to fulfill the constitutional mandate and to protect voter participation. Under S.B. 824, any of the following types of ID that are unexpired or have been expired for one year or less qualify for voting use: (1) a North Carolina driver's license; (2) a Division of Motor Vehicles-issued ID for non-drivers; (3) a United States passport; (4) a North Carolina voter identification card issued by a county board of elections; (5) a qualifying student identification card; (6) a qualifying government employee identification card;

and (7) an out-of-state drivers' license or nonoperators' ID if the voter's registration was within ninety days of the election. N.C. GEN. STAT. § 163-166.16(a)(1). Military and veterans' identification cards and tribal enrollment cards issued by a State or federally recognized tribe qualify, even if the card has no date or has been expired for over a year. *Id.* § 163-166.16(a)(2). And if a voter is sixty-five or older, an otherwise qualified but expired ID will suffice if it was unexpired on the voter's sixty-fifth birthday. *Id.* § 163-166.16(a)(3). Since enacting S.B. 824, the General Assembly has passed, and the Governor has signed: S.B. 214, which postponed enforcement of the voter-ID requirement until the 2020 elections while requiring educational efforts about that requirement to continue; H.B. 646, which relaxed the approval requirements for student and government-employee IDs and increased the time for those IDs to be approved for voting use; and H.B. 1169, which added public-assistance IDs (with or without an expiration date) to the list of qualifying voter IDs, *see* § 163-166.16(a)(2)(d).

S.B. 824 also makes IDs readily available and enables voters who appear at the polls without ID to cast a ballot. Both the Division of Motor Vehicles ("DMV") and county boards of elections must issue free IDs that may be used to vote. *Id.* §§ 163-82.8A, 20-37.7(d). The county boards must issue these IDs during early voting, *id*. § 163-82.8A(d)(2), which allows voters who lack compliant ID to obtain one and immediately vote with it. And eligible voters who still lack compliant ID may cast a provisional ballot accompanied by an affidavit describing the "reasonable impediment" that prevented them from presenting a compliant ID. *Id*. § 163-166.16(d)(2). S.B. 824 requires the State Board of Elections to "adopt a reasonable impediment declaration form that, at a minimum, includes the following as separate boxes that a registered voter may check to identify the registered voter's reasonable impediment:" inability to obtain qualifying ID due to lack of transportation, disability or illness, lack of required documentation, work schedule, or

family responsibilities; lost or stolen ID; ID "applied for but not yet received"; and any "[o]ther reasonable impediment," which requires only a "brief written identification of the reasonable impediment," "including the opinion to indicate that State or federal law prohibits listing the impediment." *Id*. § 163-166.16(e). If a voter completes the provided form when casting a provisional ballot, "the county board of elections shall find that the provisional ballot is valid unless the county board has grounds to believe the affidavit is false." *Id*. § 163-166.16(f).

As the Fourth Circuit recently held, these provisions render S.B. 824—which "enjoyed bipartisan support"—"more protective of the right to vote than other state's voter-ID laws that courts have approved." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 306, 310 (4th Cir. 2020). And it is specifically more protective than the State's prior voter-ID law, H.B. 589, which the Fourth Circuit struck down and which had a smaller list of qualifying IDs, was not initially passed with a reasonable-impediment provision, did not have S.B. 824's free-ID provision, and (unlike S.B. 824) was accompanied by an array of other voting changes that, the court found, "target[ed]" minority voters. *Id*. at 299 (quoting *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016)). Although the constitutional voter-ID amendment was "an independent intervening event" that severed any discriminatory intent found in H.B. 589 from S.B. 824, *id*. at 305, the General Assembly still sought to improve upon the prior law and "mitigate any hardships" of the constitutionally mandated voter-ID requirement, *id*. at 300.

Plaintiffs nevertheless challenged S.B. 824 on numerous grounds shortly after its enactment. There is now only one claim left in this case: Plaintiffs' allegation that the General Assembly enacted S.B. 824 with an intentional, racially discriminatory purpose in violation of the Equal Protection Clause of the North Carolina Constitution. To prove that a facially neutral law like S.B. 824 violates equal protection, Plaintiffs need "[p]roof of racially discriminatory intent or

purpose." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). The United States Supreme Court has provided a non-exhaustive list of factors used to determine intent: the disparate impact on a certain race; the historical background of the challenged law; the specific sequence of events leading up to the challenged statute, including departures from normal procedures; and the legislative history. *Id.* at 266–68. The North Carolina Supreme Court's "analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009). This is particularly true in the area of voting rights and access. *See Libertarian Party of N.C. v. State*, 365 N.C. 41, 42, 707 S.E.2d 199, 200 (2011) (adopting the U.S. Supreme Court's analysis for determining the constitutionality of ballot access provisions under the North Carolina Constitution's Equal Protection Clause).

Plaintiffs have submitted reports from several purported expert witnesses that opine on various aspects of S.B. 824 and the *Arlington Heights* factors. As relevant to this motion, Plaintiffs have proffered: Dr. Ariel White to opine on the implementation of S.B. 824 and its alleged racially disparate impact, Expert Report of Ariel White, Ph.D. (Dec. 14, 2020), Moss Ex. 1 ("White Report"); Professor Kevin Quinn, Ph.D., to opine on the rates of ID possession of North Carolina voters and alleged racial disparities, Expert Report of Kevin Quinn, Ph.D. (Dec. 14, 2020), Moss Ex. 2 ("Quinn Report"); Drs. James Leloudis and Carol Anderson to offer largely the same testimony about the historical background of S.B. 824, Expert Report of James L. Leloudis II (Dec. 14, 2020), Moss Ex. 3 ("Leloudis Report"); Expert Report of Dr. Carol Anderson (Dec. 14, 2020), Moss Ex. 4 ("Anderson Report"); and Sabra Faires to express an opinion on the process by which S.B. 824 was enacted, Expert Report of Sabra Faires (Dec. 14, 2020), Moss Ex. 5 ("Faires Report").

All of these proffered testimonies, however, are inadmissible because they fail to meet the standards of North Carolina Rule of Evidence 702.

ARGUMENT

I. Admissibility Standard

Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony. As amended in 2011, the Rule provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise," as long as "(1) [t]he testimony is based upon sufficient facts or data," "(2) [t]he testimony is the product of reliable principles and methods," and (3) "[t]he witness has applied the principles and methods reliably to the facts of the case." N.C. R. EVID. 702(a).

As the North Carolina Supreme Court recognized in *State v. McGrady*, this Rule "incorporates the standard from the *Daubert* line of cases," 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016), meaning the U.S. Supreme Court's construction of federal Rule 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). "[T]hese three cases established 'exacting standards of reliability' for the admission of expert testimony." *McGrady*, 368 N.C. at 885, 787 S.E.2d at 6 (quoting *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000)). In adopting this standard, therefore, the General Assembly displaced the "decidedly less rigorous" standard that North Carolina courts had previously applied. *Id*. at 892, 787 S.E.2d at 10 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 464, 597 S.E.2d 674, 690 (2004) (cleaned up)).

This amendment "did not change the basic structure of the inquiry" that courts had performed under Rule 702. *Id*. Thus, cases predating the new Rule's adoption "are still good law if they do not conflict with the *Daubert* standard." *Id*. at 888, 787 S.E.2d at 8. Similarly, "[f]ederal case law" that "refine[s] the *Daubert* standard may, of course, be helpful" even if it postdates North Carolina's adoption of that standard. *Id*. At the same time, the Rule "did change the level of rigor that [North Carolina] courts must use to scrutinize expert testimony before admitting it . . . since the testimony 'can be both powerful and quite misleading . . . because of the difficulty in evaluating it.'" *Id*. at 892, 787 S.E.2d at 10 (quoting *Daubert*, 509 U.S. at 595); *see also State v. Corbett*, 269 N.C. App. 509, 559, 839 S.E.2d 361, 399 (2020) ("[I]t is important to note that North Carolina's 2011 amendment to Rule 702 substantially changed the level of rigor that our courts must use[.]" (cleaned up)).

The *Daubert* standard, as incorporated by Rule 702, has three requirements. *First*, the expert testimony must be relevant. Of course, the testimony must have a "tendency" to make the existence of a material fact "more probable or less probable," as is required for any piece of evidence to be admitted. N.C. R. EVID. 401. But expert testimony needs more: it must "assist the trier of fact to understand the evidence or to determine a fact." N.C. R. EVID. 702(a). To do so, expert testimony "must provide insight beyond the conclusions that [factfinders] can readily draw from their ordinary experience." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8.

Expert testimony does not satisfy this requirement if it merely "invite[s] the [factfinder] to 'substitute the expert's judgment of the meaning of the facts of the case' for its own." *Id*. (quoting *Burrell v. Sparkkles Reconstr. Co.*, 189 N.C. App. 104, 114, 657 S.E.2d 712, 719 (2008) (cleaned up)). Although expert testimony may "embrac[e] an ultimate issue to be decided by the trier of fact," N.C. R. EVID. 704, it may not invade the province of the factfinder. "[O]pinions which would

merely tell the [factfinder] what result to reach" are thus not helpful in the way the Rule contemplates. *Id*. (Advisory Committee's Note). "Put another way, an expert's opinion 'must be an 'expert' opinion (that is, an opinion informed by the witness' expertise) rather than simply an opinion broached by a purported expert.'" *Textron Inc. By & Through Homelite Div. v. Barber-Colman Co.*, 903 F. Supp. 1546, 1552 (W.D.N.C. 1995) (quoting *U.S. v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991)).

Second, an expert witness must be "sufficiently qualified to testify in th[e] field." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. Legislative Defendants do not dispute the education and experience that Plaintiffs' experts claim. But "[a] witness's qualifications alone do not make the witness an expert witness." *State v. Armstrong*, 203 N.C. App. 399, 414, 691 S.E.2d 433, 443 (2010). The essential question is whether "the witness ha[s] enough expertise to be in a *better position* than the trier of fact to have an opinion on *the subject*" of his testimony. *McGrady*, 368 N.C. at 889, 787 S.E.2d at 9 (emphasis added). If a purported expert is not "better qualified than the [factfinder] to form an opinion as to the subject matter to which his testimony applies," *State v. Phifer*, 290 N.C. 203, 213, 225 S.E.2d 786, 793 (1976), his testimony is not relevant. *See Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991). That testimony would be simply an opinion broached by a purported expert. *See, e.g.*, *Textron*, 903 F. Supp. at 1553 ("The vast majority of the 'expert' testimony offered to the Court concerns nothing more than inferences to be drawn from the record, or some arguably lay opinion testimony based on experience that is not 'expert' in any meaningful sense."); *United States v. Johnson*, 54 F.3d 1150, 1157 (4th Cir. 1995) (expert may not "simply summariz[e] the testimony of others without first relating that testimony to some 'specialized knowledge' on the expert's part as required under [Federal] Rule 702[.]").

Third, the testimony must be reliable. Expert testimony is reliable only if it has the three features quoted above: it must be founded on (1) "sufficient facts or data" and (2) "reliable principles and methods," and the expert must (3) "reliably" apply those principles and methods to the facts or data. N.C. R. EVID. 702(a)(1)–(3). "Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *State v. Ward*, 364 N.C. 133, 140, 694 S.E.2d 738, 743 (2010). Relevant state and federal precedent gives useful guidance for all three reliability factors.

As to the sufficiency of facts or data, precedent confirms the obvious: an expert's conclusion will not be "based upon sufficient facts or data," N.C. R. EVID. 702(a)(1), if no facts are offered or if the facts offered are provably false. "Once the trial court determines that the expert testimony will not mislead the trier of fact," questions about the expert's underlying facts will go to weight rather than admissibility. *Federal Paper Bd. Co. v. Kamyr, Inc.*, 101 N.C. App. 329, 334, 399 S.E.2d 411, 415 (1991). But expert testimony will be misleading—and inadmissible—if its factual basis does not exist. "Expert opinion derives its probative force from the facts on which it is predicated," and "[e]xpert testimony on a state of facts not supported by the evidence is inadmissible." *Hubbard v. Quality Oil Co. of Statesville*, 268 N.C. 489, 494, 151 S.E.2d 71, 76 (1966) (internal quotation marks omitted); *see also, e.g.*, *Sparks v. Gilley Trucking Co.*, 992 F.2d 50, 54 (4th Cir. 1993) ("[A] court may refuse to allow a generally qualified expert to testify if his factual assumptions are not supported by the evidence."); *Lea Co. v. N.C. Bd. of Transp.*, 57 N.C. App. 392, 401, 291 S.E.2d 844, 850 (1982) (upholding exclusion of expert testimony "[b]ecause the witness was unable to state with certainty the basis of his calculations").

Relatedly, an expert cannot offer mere speculation. After all, "the word 'knowledge,'" as used in Rule 702, "connotes more than . . . unsupported speculation." *Daubert*, 509 U.S. at 590.

"The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.'" *Id*. (quoting Webster's Third New International Dictionary 1252 (1986)). And "baseless speculation can never 'assist' the jury under Rule 702." *Cherry v. Harrell*, 84 N.C. App. 598, 605, 353 S.E.2d 433, 438 (1987). Thus, "[a]n expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record." *Tyger Const. Co. v. Pensacola Const. Co.*, 29 F.3d 137, 142 (4th Cir. 1994).

As for principles and methods, precedent requires more than general reliability. An expert's methodology must be shown to generate reliable conclusions about the specific subject of his testimony. In *Kumho*, for example, "the specific issue . . . was not the reasonableness *in general* of a tire expert's use" of a particular methodology to study the cause of a tire defect. 526 U.S. at 153 (emphasis in original). "Rather, it was the reasonableness of using such an approach, along with [the expert's] particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*." *Id*. at 154 (emphasis in original). Just as the question there "was whether the expert could reliably determine the cause of *this* tire's separation," *id*. (emphasis in original), the question here is whether a purported expert can reliably reach a conclusion relevant to *this* voter-ID law.

Precedent further establishes that mere assertion is not an acceptable methodology for an expert. "[N]othing in either *Daubert* or" Rule 702 requires courts "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146. To the contrary, such testimony is neither reliable nor relevant under Rule 702. "[T]he word 'knowledge'" also "connotes more than subjective belief." *Daubert*, 509 U.S. at 590. An expert thus cannot "unjustifiably extrapolat[e] from an accepted premise to an unfounded conclusion," and must "adequately accoun[t] for obvious alternative explanations." *McGrady*, 368 N.C. at 891, 787

S.E.2d at 10 (quoting Advisory Committee's note to 2000 amendment to FED. R. EVID. 702). Allowing a witness to offer a subjective belief in the guise of expertise simply invites the factfinder to supplant the witness's personal judgment for its own. *See Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 421 (4th Cir. 1993) ("[W]e are unprepared to agree that it is so if an expert says it is so." (internal quotation marks omitted)).

Precedent has also established certain indicia of expert testimony that is reliable. These are overlapping but generally fit into three categories. The first are indicia that the expert has used a methodology that is established in the field and that thus has standards to ensure reliability. *See McGrady*, 368 N.C. at 891, 787 S.E.2d at 9–10 ("whether the theory or technique has achieved general acceptance in the field"; "the existence and maintenance of standards controlling the technique's operation"; the expert's "use of established techniques" (internal quotation marks omitted)). The second are indicia that the methodology has been or can be tested and thus that its reliability can be confirmed. *See id*. at 890–91, 787 S.E.2d at 9–10 ("whether a theory or technique can be (and has been) tested"; "whether the theory or technique has been subjected to peer review"; "the theory or technique's known potential rate of error"; "[w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give"; "use of visual aids to help the jury evaluate the expert's opinions" (cleaned up)). The third are indicia that the expert has conducted similar studies outside the context of litigation. *See id*. at 891, 787 S.E.2d at 10 ("expert's professional background in the field" and "independent research conducted by the expert"; "[w]hether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation"; "[w]hether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting").

Although this list is "nonexhaustive," *id*. at 890, 787 S.E.2d at 9, the absence of any such indicia signals that an expert's testimony will have the flaws outlined above. If the expert's methodology is idiosyncratic, it is less likely to have adequate safeguards of reliability. *See Kumho*, 526 U.S. at 157. If the expert made no effort to test the methodology, it will not adequately account for alternative explanations, and the expert's conclusions will amount to mere *ipse dixit*. And if the expert devised the methodology "expressly for purposes of testifying," *McGrady*, 368 N.C. at 891, 787 S.E.2d at 10, its conclusions are more likely to amount to mere subjective beliefs.

II. Ariel White

Plaintiffs offer the opinions and testimony of Dr. Ariel White to support their claim that the implementation of S.B. 824 will have a racially disparate impact. In her report, Dr. White "examine[s] whether and how human biases could lead to racial disparities in the application or effects of North Carolina's Voter ID law, SB 824." White Report ¶ 1. Dr. White opines, on the basis of her analysis, that there is "evidence of confusion and mistakes on the part of polling place workers, as well as local variation and discretionary decisionmaking in the application of the reasonable-impediment process" for North Carolina's previous voter ID law, H.B. 589. *Id.* at ¶ 7. She further opines that "it appears that the implementation of SB 824 is susceptible to similar pitfalls of human discretion and biased decisionmaking." *Id.*

Dr. White's testimony, however, fails to satisfy each of the three factors this Court must examine for the admission of expert witness testimony set forth in North Carolina Rules of Evidence 702(a), and, therefore, must be excluded. First, Dr. White's testimony is irrelevant to Plaintiffs' challenge to S.B. 824. The sole remaining claim in this case concerns the North Carolina General Assembly's intent in passing S.B. 824, and Dr. White's speculation regarding how implicit bias might affect the implementation of a voter ID law—which the North Carolina Constitution

requires to exist in some form, *see* N.C. CONST. art. VI, § 2, cl. 4; *id.* art. VI, § 3—sheds no light on that question. Second, Dr. White brings no particular expertise to examining two of the three sources of data that form the core basis for her opinions regarding biased implementation of voter ID laws: four individual voter affidavits explaining anecdotal experiences of voting during the North Carolina 2016 primary election and North Carolina's records of provisional ballots cast during the 2016 primary election (the "Provisional File"). Third, Dr. White's testimony is not the product of reliable methodology. She admitted during her deposition that she could not extrapolate from two of the three sources of evidence underpinning her analysis to conclusions about how S.B. 824 would be implemented at "scale," *see, e.g.*, Deposition of Ariel R. White, Ph.D. at 131:19–132:3, 137:21–138:5 (Jan. 27, 2021), Moss Ex. 6 ("White Dep. Tr."); her conclusion that implicit bias exists in discretionary government functions is based on a review of the literature in which she misrepresents at least one of the studies upon which she relies; and her conclusions based on the Provisional File are speculative.

Dr. White's testimony should thus be excluded in its entirety, but to the extent the Court disagrees, it should nevertheless exclude it to the extent it relies on an undisclosed coding analysis that Dr. White conducted and relied on in forming the conclusions in her report, in violation of the parties' witness stipulation.

a. Dr. White's Testimony Is Irrelevant To Plaintiffs' Challenge To S.B. 824.

The only claim remaining in this case is that S.B. 824 is unconstitutional because it discriminates against voters of color. *See* Verified Compl. at 45 (Dec. 19, 2018), Moss Ex. 7. Dr. White's testimony regarding "whether and how human biases could lead to racial disparities in the application or effects of . . . SB 824," White Report ¶ 1, is not relevant to Plaintiffs' burden to proffer "[p]roof of racially discriminatory intent or purpose" in the General Assembly's passing

S.B. 824, *Arlington Heights*, 429 U.S. at 265. Though a law's disproportionate impact on a certain race is a factor that courts may use to determine intent, Dr. White's testimony does not speak to *S.B. 824*'s disproportionate impact, but only to how *implementation errors* of S.B. 824 may have a disproportionate impact. Implementation errors are, by definition, however, departures from a statute's design and are thus irrelevant to determining the legislature's intent in passing a law. *See id.* at 266 (explaining that one factor a court may examine to determine whether racially discriminatory intent existed is the discriminatory "impact of the *official action*" (emphasis added)). Dr. White's testimony speaks to a potential discriminatory impact caused by *implementation errors*, not to a potential discriminatory impact of the General Assembly's *official action*—the text of S.B. 824 as written and properly implemented. Furthermore, any argument that implementation errors are endemic and thus would have necessarily been foreseen by the General Assembly, thereby constituting a part of the legislative intent, proves too much. There is no voter ID law conceivable that would not have this sort of endemic disparate impact.

Furthermore, the focus of much of Dr. White's report and testimony is the preliminary steps that must exist for the effective implementation of any election-integrity measure, such as educating the public about the existence of the law or training poll workers to enforce the law. *See, e.g.*, White Report ¶¶ 20–32. But, again, deficiencies in these preliminary steps, to the extent that Dr. White is able to identify any, have little logical connection to a potential discriminatory impact caused by the text of S.B. 824 as written and properly implemented. Even if Dr. White were to identify a failure in North Carolina's efforts to educate the public about the requirements of its previous voter ID law, H.B. 589—and she does not—it would have no bearing on the ID requirements of H.B. 589 itself and no bearing on the General Assembly's intent in passing S.B. 824. Moreover, Dr. White's broad pronouncements about "decentralized efforts" in North Carolina

during the 2014 and 2015 elections to educate voters about H.B. 589's identification requirement, *see* White Report ¶ 24, have no relation to whether S.B. 824's identification requirement will have a disparate impact on minority voters—particularly when S.B. 824 itself prescribes an "aggressive voter education program" that the State Board of Elections is required to undertake. *See* 2018 Sess. Law. 144 § 1.5.(a).

Because North Carolina has been forced by court orders to halt implementation of S.B. 824, Dr. White's conclusions about that hypothetical implementation are based largely on the State's experience with its previous voter ID law, H.B. 589. S.B. 824, however, is materially different than H.B. 589 in several critical respects, and therefore, her conclusions drawn from H.B. 589 are merely speculative as applied to S.B. 824 and do not provide evidentiary support for the assertion that S.B. 824 will have a racially disparate impact. First, S.B. 824 expanded the types of acceptable forms of voter identification, including accepting certain student ID cards, 2018 Sess. Law 144 § 1.2.(a)(g)—a change that Kimberly Westbrook Strach, the former chief election official in North Carolina, described as "significant" and that would potentially allow many voters who had completed provisional ballots with a reasonable impediment declaration that were not counted for a reason related to the photo identification requirement in the March 2016 primary election to now show acceptable photo ID. Affidavit of Kimberly Westbrook Strach ¶ 27 (Jan. 20, 2021), Moss Ex. 8 ("Strach Aff."). Second, S.B. 824 includes the addition of a voter photo identification card able to be produced by each of the 100 county boards of elections that can be obtained at the same time as voting during one-stop early voting. *See* 2018 Sess. Law 144 § 1.1.(a). Third, S.B. 824 altered the reasonable impediment procedure and no longer requires voters who complete the reasonable impediment form to either provide their date of birth and last four digits of their social security number or a current utility bill, bank statement, government check, paycheck, other

government document, or voter registration card. *See* 2018 Sess. Law 144 § 1.2.(a)(d)(3), (d1). Moreover, unlike the regulations at the time of H.B. 589, regulations promulgated under S.B. 824 allow a county board to reject a provisional ballot only if the five members agree that the reasonable impediment declaration is factually false. 08 NCAC 17.0101(b)(3). Though Dr. White acknowledges these differences in her report, she gives them little weight, referring to them as "small." White Report ¶ 71.

b. Dr. White Brings No Particular Expertise To Examining The Individual Voter Affidavits And Provisional File On Which She Relies.

Dr. White's testimony must be excluded because she is in no better position than a factfinder to examine the individual voter affidavits and Provisional File on which she relies. (And as explained below, Dr. White's conclusions based on the third source on which she relies—Survey of the Performance of American Elections voter surveys ("SPAE surveys")—are inadmissible under the parties' witness stipulation.) First, Dr. White is a political scientist by training and a professor by occupation, but she has never administered an election in any capacity, either in North Carolina or in any other state. *See, e.g.*, White Report ¶¶ 2–3; White Dep. Tr. at 11:6–12. She has never volunteered as a poll worker, been involved in the administration of an election, worked at a state secretary of state's office, worked for a state or local board of elections, observed vote counting in person, or, to the best of her recollection, attended a local board of elections meeting where the board considered provisional ballots. White Dep. Tr. at 15:4–22.

Second, Dr. White's training in political science grants her no special expertise to analyze the individual voter affidavits and Provisional File to draw conclusions about a potentially racially disparate impact of S.B. 824 from them, and she is no more qualified than this Court to do so. The manner in which Dr. White examined these sources demonstrates that she is in no better position than a factfinder to perform her analyses. In examining the individual voter affidavits, Dr. White's

analysis consists of reading the affidavits, accepting their anecdotal accounts as true, and opining that similar occurrences could happen to other voters under S.B. 824. *See, e.g.*, White Report ¶ 41 (examining four individual voter affidavits submitted in this case and recounting what each "describes").

Similarly, in examining the Provisional File, Dr. White's analysis consists chiefly of recounting the comments related to provisional ballots verbatim and speculating about what their meaning might be. *See, e.g.*, *id.* at ¶¶ 44, 46–47. She speculates about why a voter might cast a provisional ballot due to lack of identification, but not sign a reasonable impediment declaration, *see id.* at ¶ 45, but her theories do not evince any specific expertise, *see id.* ("One possibility is that [voters] were not given adequate information by poll workers, and thus did not know they needed to fill out and sign the [reasonable impediment] declaration."). Indeed, Dr. White acknowledged during her deposition that she could not rule out other explanations aside from misinformation constituting implementation error for why a voter could have cast a provisional ballot due to lack of ID without also completing a reasonable impediment declaration. *See* White Dep. Tr. at 171:18–172:1 ("Q: And then you looked separately at the group of uncounted provisional ballots. And these could include individuals who were misinformed, but could also include individuals whose ballots were not counted for other reasons? . . . A: It could also include individuals who did not file reasonable impediment forms for other reasons, certainly."). For example, just as likely as Dr. White's speculative theories is that a voter might have left her ID at home, cast a provisional ballot, planned to return with her ID at a later time to have her vote counted, but ultimately did not do so for her own personal reasons. *See* White Report ¶ 45. Additionally, even if a poll worker fully and properly explained the reasonable impediment process to a voter, that voter could have decided that she did not have a reasonable impediment to obtaining ID and decided not to fill out a

reasonable impediment form. Dr. White brings no specific expertise to being able to distinguish between whether any of these explanations accounted for why a specific voter cast a provisional ballot due to lack of identification but did not sign a reasonable impediment declaration.

Moreover, Dr. White's interpretations of the various comments contained in the Provisional File demonstrates no special knowledge—a factfinder could readily interpret the comments in the same manner. *See, e.g.*, *id.* at ¶ 47 (explaining that the comment "NO ID PROVIDED; SHOULD HAVE BEEN OFFERED REASONALBE*[sic]* IMPEDIMENT FORM; ID EXPIRED IN 1995" suggests that a poll worker "may not have given [the] voter[] adequate information to cast a ballot that would be counted").

Dr. White does perform some statistical analyses of the Provisional File, but prefaces this section with the admission that "[g]iven apparent variation in counties' record-keeping practices and the sparsity of comments on these records, it is impossible to know exactly how many of these voters were given incomplete information at their polling places" and that "[t]hese data limitations make it similarly challenging to statistically assess whether voters from minority groups were overrepresented among poorly-advised voters." *Id.* at ¶¶ 50–51. Nevertheless, despite these limitations, Dr. White performs a statistical analysis, concluding that the group of voters in the Provisional File who cast ultimately uncounted provisional ballots due to lack of ID, with no reasonable impediment declaration, had a higher share of Blacks than the primary electorate as a whole. *Id.* at ¶¶ 51–52. This "statistical analysis," however, can support no finding of fact due to its admitted limitations.

Accordingly, this Court should exclude Dr. White's testimony because she is in no better position than a factfinder to examine the individual voter affidavits and the Provisional File on which she relies.

c. Dr. White's Testimony Is Not The Product Of Reliable Methodology.

Dr. White's testimony must be excluded because it is not the product of reliable methodology. First, Dr. White admits, both in her report and in her deposition testimony, that she cannot extrapolate larger trends about biased implementation of voter ID laws in North Carolina from the majority of the sources on which she relied. For the individual voter affidavits, she concedes that they "cannot be used to systematically measure racial or ethnic discrimination by election workers in implementing" S.B. 824's processes. White Report ¶ 42. For the Provisional File, she admits that it "does not allow us to systematically examine racial disparities in which voters were given incomplete information." *Id.* at ¶ 43. Although Dr. White insisted that her evidence of North Carolina's implementation of H.B. 589 was informative or consistent with an explanation of implicitly biased implementation, she does not have systematic data that would allow her to make generalizations about the prevalence of implicitly biased implementation in the State. *See, e.g.*, White Dep. Tr. at 129:19–130:3 ("Q: Do you have systematic evidence of biased implementation at the steps that you describe in paragraph 34? A: I don't have evidence that allows me to – to pin down the exact scale on which some of these processes took place because, as I mentioned, we don't have particularly thorough records from the state or from the systematic observation at the time the election took place.").[1]

[1] *See also, e.g.*, *id.* at 132:4–11 ("Q: I'm asking you whether there is systematic data concerning implementation at any of these five decision points? A: And I – I guess I would again say that I think we have useful and informative data about these decision points even as we do not have the complete array of observations that I would ideally like to use to assess what happened at each of these points."); *id.* at 137:21–138:5 ("Q: So your point is that [affidavits that are collected for a lawsuit challenging a voter identification law are] not systematic in the sense that [their] results can be extrapolated to other voters; is that correct? A: It doesn't, as – as I said a few minutes ago, it doesn't give us a way of – of generalizing to get a sense of scale. It demonstrates that something's happened, but it is hard to know how to view it – to use that. We cannot use that to calculate some share of voters that have this experience."); *id.* at 145:19–146:12 ("Q: My question for you is whatever you mean by systematic data, do we have evidence that meets your definition of systematic data at Decision Point B? A: In the context of whether the state collected systematically, meaning in a consistent way across the implementation process, whether they collected full records of what happened at these stages, we don't have that. And I don't have, I think, any other source of, as I've mentioned, characterizing fully what voters across the state experienced at each of these points, including Decision Point B. We have, I think, information about specific experiences, but – that help us understand what could happen and what happened in some

Second, Dr. White's conclusion that implicit bias exists in discretionary government functions and that training may not eliminate it is based on a literature review in which she misrepresents or fails to account for inadequacies in at least one of the studies upon which she relies. Dr. White relies on a 2010 study by Cobb, Greiner, and Quinn for its finding that "non-white voters were substantially more likely to be asked for identification than white voters, even when accounting for a variety of other possible differences across voters" and "even at polling places where poll workers had been assigned to a special new training program intended to prevent unnecessary identification requests." White Report ¶ 15. She concludes that this finding "raise[s] doubts about whether even very targeted training programs can eliminate bias in poll worker behavior." *Id.* But she conceded in her deposition that Cobb et al. "were not able to include a variable for whether someone reported" being a first-time or inactive voter who would lawfully be required to show an ID before voting. White Dep. Tr. at 93:16–18. Consequently, by not controlling for the variable of being a first-time or inactive voter who would lawfully be required to show an ID before voting, it is possible that the differences Cobb et al. found were caused by that variable, not bias in poll worker behavior. As Cobb et al. acknowledged, President Obama's first campaign for president in the 2008 general election—the election that they studied—"may have prompted some minority citizens to vote for the first time" and the results that Cobb et al. found could have been "the result of inactive or first time black and Hispanic voters who are legally required to have been asked for identification." Rachael V. Cobb et al., *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Boston in 2008*, 7 Q. J. OF

cases, but as I've mentioned, it's hard to get a sense of scale from these things. And so in that sense, there are limitations to the available data. In that sense we may not describe it as systematic."); *id.* at 147:4–11 ("Q: Does that also accurately characterize the evidence that you have looked at and the data that you have an access to regardless of whether it comes from the state? A: Yes. I would say that we can see things that happened for specific voters, but as I – I think I mentioned in my report, there are limits to the sense of scale we can draw from that.").

POL. SCI. 1, 24 (2012), https://bit.ly/3e0uIGN; *see also* Lorraine C. Minnite, PROJECT VOTE, *First-Time Voters in the 2008 Election* (Apr. 2011) (explaining that, in the 2008 general election, "[n]ew voters [were] disproportionately non-white compared to the national electorate as a whole"), https://bit.ly/3bPZAY8. Although Cobb et al. performed a "sensitivity analysis" to determine what level of disparity in first-time or inactive voter participation between whites and non-whites would explain the differential in individuals in those groups being asked for identification, neither Cobb et al. nor Dr. White performed research or analysis to assess the plausibility of the results of that sensitivity analysis. *See* White Dep. Tr. at 99:3–15. Dr. White's reliance on this study despite its flaws and without acknowledging its shortcomings undermines the conclusions she draws from it.

Moreover, with one exception (discussed below), none of the articles that Dr. White reviewed as part of her literature review studied implementation of voter ID laws or whether implicit bias exists in discretionary government functions in North Carolina. *See* White Report ¶¶ 8–15. She made no effort to examine the features of the voter ID laws or training programs studied in these articles that may have led to poll worker implementation errors or compared those laws and programs to S.B. 824. *See* White Dep. Tr. at 30:8–11 ("Q: Have you compared the features of the Indiana law that the article highlights with the features of S.B. 824? A: No, I have not in detail."); *id.* at 90:9–15 ("Q: At the time that you looked at the details [of the Massachusetts' poll worker training program], did you consider how they compared to training in North Carolina? A: In terms in which they are described in the paper, yes, although, as I said, I did not seek out additional information about the content of those – those trainings.").

The one article that arguably studied whether implicit bias exists in discretionary government functions in North Carolina was Dr. White's own study in which she and her co-authors "randomly assigned offices in 48 states to be sent a simple question about voting" from

"email addresses and signatures . . . randomized to include either a name indicating Latino identity . . . or a non-Latino-sounding name." White Report ¶ 13. North Carolina was one of the 48 states studied in the article. *See* Ariel R. White et al., *What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials*, 109 AM. POL. SCI. REV. 129 (2015), Moss Ex. 35. But Dr. White's expert report does not discuss or cite her state-level findings in North Carolina, *see* White Report ¶ 13, and she was unable to speak to those findings with any particularity during her deposition, White Dep. Tr. at 70:8–72:17. Furthermore, although some state-level supplemental findings and the raw, underlying data are available in an online appendix to Dr. White's study, she has not disclosed the North Carolina-specific analyses that she performed as part of her study. Consequently, any testimony that Dr. White would offer about North Carolina in particular based on her article must be excluded because it would violate the parties' witness stipulation. Stipulation Governing Witness Disclosures and Exhibits (Dec. 21, 2020), Moss Ex. 9 ("Witness Stipulation") (requiring each expert report to include "[a] list of the documents, data, and other information on which the Expert relied in forming the opinions reflected in the Expert Report," *id.* at 2).

Third, the anecdotal experiences from the individual voter affidavits on which Dr. White relies are of limited value. In Paul Kearney's affidavit, he recounts not being told how to cure his provisional ballot in March 2016 when he failed to bring his ID to the polls. Affidavit of Paul Kearney ¶¶ 8–9 (Feb. 28, 2019), Moss Ex. 10. In Daniel Smith's affidavit, he recounts poll worker confusion about how to handle the fact that he had lost his ID and had only a temporary license. Affidavit of Daniel Smith ¶¶ 7–9 (Mar. 1, 2019), Moss Ex. 11. But theorizing that these discrete instances of poll-worker error will be replicated is pure speculation. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983). As for Mina Ezikpe, she was not even registered to vote when she

showed up to the polls and did not bring the documents necessary to same-day register, Deposition of Mina Ezikpe at 34:20–35:1, 39:20–40:3, 46:2–7 (May 29, 2019), Moss Ex. 12; thus, to the extent her case shows any implementation errors, they are with the same-day registration process and not with voter ID. And for Noah Van Hook, though he recalls little about his March 2016 voting experience, he was given a provisional ballot but did not return to cure it. *See* Deposition of Noah Van Hook at 42:11–12, 47:3–6 (May 22, 2019), Moss Ex. 13. His vague recollections offer no evidence of any general error in the reasonable impediment process. *See id.* at 68:23–24 (describing his own experience as "particular").

Fourth, Dr. White is unable to link ultimately uncounted provisional ballots due to lack of ID in the Provisional File to racial disparate impact caused by differential implementation of H.B. 589 and implicit bias, so her finding that this group is "substantially less white than that of primary voters as a whole" has little to say about S.B. 824's effects. White Report ¶ 51. Dr. White even acknowledges that given the "sparsity of comments on these records, it is impossible to know exactly how many of these voters were given incomplete information at their polling places," *id.* at ¶ 50, and that the Provisional file "does not allow us to systematically examine racial disparities in which voters were given incomplete information," *id.* at ¶ 43. Given these limitations, any conclusions about a racially disparate impact that Dr. White draws from the Provisional File is merely speculative.

Fifth, Dr. White's claims about potential bias displayed by the county boards of elections in deciding whether ultimately to count provisional ballots is also speculative. She again concedes that "the notes maintained on the provisional ballot file are sparse," *id.* at ¶ 66, thereby preventing her from reaching definite conclusions about the root causes of why a provisional ballot may have been counted. Dr. White acknowledges that the counting of votes by a county board of elections

is different from polling-place decisionmaking, but appears not to have examined how these differentiating factors could affect how the county boards implement voter ID laws, instead just speculating that these differences "may make disparate treatment somewhat less likely than in a polling-place setting." *Id.* at ¶ 68. Her speculation that variations in vote counting could lead to disparate racial outcomes because of "the uneven distribution of different racial groups across counties" is entirely devoid of supporting evidence, and Dr. White does not specify which counties account for any purported differences. *Id.* at ¶ 66.

Dr. White's claims are even more speculative as applied to opportunities for potential bias by county boards in the provisional ballot counting process under S.B. 824. As discussed above, unlike the regulations in effect at the time of H.B. 589, regulations currently in effect allow a county board to reject a provisional ballot only if the five members agree that the reasonable impediment declaration is factually false. 08 NCAC 17.0101(b). And Dr. White fails to account for the fact that the State Board of Elections audited the provisional ballot decisions made by the county boards of elections in the 2016 general election, informing the county boards of any errors so that they could recanvass their vote tallies, Strach Aff. ¶¶ 24–25, thereby further diminishing opportunities for potential bias by county boards.

Sixth, in considering whether and to what extent human biases may lead to racial disparities in the implementation of S.B. 824, Dr. White analyzed two SPAE surveys—surveys conducted by Professor Charles Stewart III and funded by the Pew Charitable Trusts whereby the survey team interviews registered voters in each state and asks them a series of questions about their voting experience. White Report ¶ 54. Dr. White examined the 2016 SPAE survey, which interviewed 200 registered voters in each state, and the 2014 SPAE survey, which interviewed 200 registered voters in 40 states and 1000 registered voters in 10 states, including North Carolina. *Id.* Based on

these surveys, Dr. White concludes that some voters in 2016 were "wrongly asked for identification by poll workers, suggesting that at least some poll workers struggled to comprehend and follow the state's election law procedures," *id.* at ¶ 57; that "some poll workers were already mistakenly asking voters for identification" in 2014—when North Carolina did not have a voter ID requirement in place—thereby "rais[ing] doubts about poll workers' ability to accurately and fairly implement a voter identification requirement in the state," *id.* at ¶ 59; and that "[m]inority voters were more likely than white voters to report being asked for photo identification in 2014," thereby "call[ing] into question the ability of poll workers to consistently apply a voter identification requirement and to help all voters satisfy the requirement," *id.* at ¶ 60.

Even if Dr. White's conclusions based on the SPAE surveys were admissible—and, as explained below, they are not—the surveys themselves suffer from critical flaws in question design that undermine the conclusions Dr. White draws from them. One question asked, "Was this your first time voting or have you voted in elections before?" White Dep. Tr. at 192:13–15. To the extent that Dr. White relied on the survey respondents' answers to this question to determine which voters should not have been required to show ID before voting, *see id.* at 192:17–20, she acknowledged that it was possible that respondents that answered the question by saying "I have voted in elections before" would nevertheless be subject to a requirement to show ID before voting under the Help America Vote Act, *see id.* at 193:4–13. Another question asked, "When you first checked in at the polling place to vote, which of the following statements most closely describes how you were asked to identify yourself?" The answers included choices phrased as, for example, "I gave" X or "I showed" Y. *Id.* at 198:7–20. Though the question is phrased in terms of how the respondent was "asked to identify" himself, the answers are phrased in terms of what the respondent did. Consequently, it is possible that respondents could answer the question with "I

showed a photo ID" even though they were not asked to identify themselves by showing a photo ID by a poll worker, a possibility that Dr. White acknowledged. *See id.* at 198–201, 210–11. Indeed, given how the question and answers are structured, there is no correct way to answer the question if the voter was asked to give her name and address and responded by presenting her ID. *See* Charles Stewart, *2016 Survey of the Performance of American Elections* at 10, *available at* https://bit.ly/3bPsDuC (last visited Feb. 28, 2021), Moss Ex. 14; *see also* Charles Stewart, *2014 Survey of the Performance of American Elections* at 20, *available at* https://bit.ly/3q2BxtO (last visited Feb. 28, 2021), Moss Ex. 15. Even ignoring these fatal defects in the SPAE surveys, Dr. White ultimately concludes that biased behavior by poll workers is a "plausible" explanation for her finding based on the 2014 SPAE survey that white in-person voters were less likely to report showing photo identification at their polling place than were members of other groups in North Carolina and could not be certain that the difference would "persist until today." *See* White Report ¶ 60. Indeed, she testified that she considers biased behavior by poll workers to be a *more* plausible explanation for her finding than other potential explanations—such as a voter misunderstanding the poll workers' requests, poll worker error, sampling error, misunderstanding the survey questions, or a voter misremembering whether they were asked to show ID—yet she revealed no basis for assigning weights to the different explanations. *See* White Dep. Tr. at 193:23–198:2.

Accordingly, Dr. White's testimony suffers from numerous flaws that render it not the product of reliable methodology, and this Court should exclude it.

d. Alternatively, This Court Should Exclude Dr. White's Testimony To The Extent It Relies On An Undisclosed Coding Analysis.

For the reasons stated above, Dr. White's testimony should be excluded in its entirety, but to the extent this Court disagrees, it should nevertheless exclude the testimony to the extent it relies on undisclosed "statistical code used to analyze the [SPAE survey] datasets" that was used "[t]o

create the specific numbers described in the features of the SPAE," White Dep. Tr. at 203:24–204:6—an analysis that Dr. White conducted and relied on in forming the conclusions in her report, in violation of the parties' Witness Stipulation.

The Witness Stipulation requires each expert report to include "[a] list of the documents, data, and other information on which the Expert relied in forming the opinions reflected in the Expert Report." Witness Stipulation at 2. In Section V.C.iii of her report, Dr. White analyzes two SPAE surveys, concluding that "[a]cross two general elections without voter identification laws in place (2014 and 2016), it appears that poll workers in North Carolina were nevertheless asking some voters for photo identification inappropriately, and that voters of color were more likely to be asked for such identification." White Report ¶ 53. She notes that this finding highlights "concerns about how poll workers use discretion at the polling place and how they might implement an identification requirement." *Id.* She further concludes that the surveys "suggest that poll workers in the state are inconsistent in their application of election policies, and raise concerns that they could implement SB 824 in biased or uneven ways." *Id.* at ¶ 61.

During Dr. White's deposition, it became clear that in reaching these conclusions, she relied on undisclosed statistical analyses that she performed that were not explained in her report. She explained that, in analyzing the SPAE surveys, she examined the surveys' data in both weighted and unweighted form "to make sure the results didn't rely on the use or non-use of surveys weights," an analysis that she did not "remember whether [her] report mentions" (it does not). White Dep. Tr. at 182:16–23; *see also id.* at 203:10–15. She answered that she "relied on" her undisclosed "statistical code" "[t]o create the specific numbers described in the features of the SPAE." *Id.* at 204:2–6. But Dr. White was unable to recall many of the details of that statistical code during her deposition. When asked if she had "perform[ed] a comparison of the racial makeup

of the individuals who responded to the [2014] survey compared to the racial makeup of registered voters in 2014," she responded that she believed she had done a "rough comparison," though she did not remember "whether [she] pulled the sole 2014 registered voter file for that or whether [she] looked at either similar statistics or statistics from similar years, or nearby years." *Id.* at 205:12–20. She also could not remember "whether [she] ha[d] anything in the scripts that [she] wrote in the code that makes this exact comparison." *Id.* at 206:1–6. She stated that she "believe[d] [she] did look at a number of dimension[s] on which the [survey] samples might correspond to the population of interest," but she did not "remember the exact details of those comparisons" nor the "conclusions [she] reached based on those comparisons." *Id.* at 207:1–10. Dr. White explained that she "like[s] to make sure that [she] understand[s] the dataset that [she is] routing [sic] in, and so would generally look at a variety of descriptive statistics to make sure that [she] understand[s] the features of that datasets and also that it – it looks as one would expect it to look if it were measuring the things we expect it to measure," but she could not "remember the exact details of the checks in this case." *Id.* at 207:11–22.

These undisclosed statistical analyses were not tangential, they were critical to, Dr. White's report. As revealed during Dr. White's deposition, she "relied on this statistical code to create the analysis that was presented in [her] expert report," "[t]o create the specific numbers described in the features of the SPAE." *Id.* at 204:2–6. Consequently, Legislative Defendants are unable to concretely assess Dr. White's conclusions or examine the methodology by which she reached them because they do not have access to the underlying code and an explanation of the statistical analyses that Dr. White conducted. By Dr. White's not disclosing the statistical analyses on which she relies for her conclusions, especially in Section V.C.iii of her report, her report violates the parties' Witness Stipulation.

Accordingly, the Court should at a minimum exclude Dr. White's testimony concerning the SPAE surveys.

III. Kevin Quinn

Plaintiffs have proffered Professor Kevin Quinn, Ph.D., to opine on the rates that North Carolinians possess forms of photo identification that comply with S.B. 824 (a "Qualifying ID") and to assess if there is a racial disparity in possession of Qualifying ID between white North Carolinians and black North Carolinians. Legislative Defendants expect Quinn to testify at trial, as he did in his December 14, 2020 report and in February 2, 2021 deposition, that "7.61% of African American voters lack one of the forms of Qualifying ID" he analyzed and "5.47% of white voters lack these same forms of Qualifying ID." Quinn Report ¶17; Deposition of Kevin M. Quinn at 30:6–31:5 (Feb. 2, 2021), Moss Ex. 16 ("Quinn Dep. Tr."). Quinn additionally calculated a ratio of the difference between these percentages to come up with a dispossession ratio: "African American voters are 1.39 times more likely to lack these forms of Qualifying ID than are white voters." Quinn Report ¶17. As Quinn agreed in his deposition, his results can also be expressed in a possession ratio: white North Carolinians are only 1.023 times more likely to have qualifying ID than black North Carolinians. *See* Quinn Dep. Tr. at 98:8–12.

Quinn's conclusions stem from a matching analysis. During preliminary injunction proceedings in this litigation, Quinn's affidavit relied upon an earlier analysis of North Carolina voters in 2015. That 2015 matching analysis was designed by Professor Charles Stewart. Quinn Dep. Tr. at 145:1–3. The analysis in his December 14, 2020 report, however, was designed by Quinn himself. This would be the first time that Quinn designed and implemented a matching analysis of voter registration records used in litigation. *See* Quinn Dep. Tr. at 19:23–20:3. And he has never performed a matching analysis of voter registration records *outside* the context of litigation. *Id*.

Quinn's matching analysis "attempts to link each individual currently in the North Carolina voter registration file with current records of individuals from databases related to the various forms of Qualifying ID." Quinn Report ¶13. This is record linkage: a "process of finding records in one file (an ID file) that refer to the same entity (a voter) in another file (the voter registration file)." Quinn Report ¶74. In order to perform this record linkage, Quinn began with a list of registered North Carolina voters, dated October 17, 2020. He then acquired files from the North Carolina's Division of Motor Vehicles (dated September 20, 2020), North Carolina State Board of Elections Free IDs (dated October 11, 2020), universities, and state government agencies. *Id.* at ¶¶ 42, 43, 58, 59. Quinn did not access databases with potential information about individuals with other forms of Qualifying ID: U.S. passports, U.S. military ID, U.S. veteran ID, tribal IDs, out-of-state IDs, or public assistance IDs. *Id.* at ¶¶ 47, 54, 70. For the databases that Quinn did select, they offer only a snapshot of North Carolina as of the date that Quinn acquired them. *See* Quinn Dep. Tr. at 17:11–15. Quinn did not access or make real-time updates to the databases underpinning his analysis.

Quinn attempted to match individuals on the North Carolina voter list with individuals in the Qualifying ID databases. In order to match these individuals, Quinn created what he termed "composite match fields." Quinn Report ¶83. He began with eight matching fields. These are eight individual pieces of information that were often in the North Carolina voter file and also in various other ID databases that Quinn accessed. *Id.* at ¶88; *but see Id.* at ¶ 106 & Table 5 (noting the absence of varying match fields in some of the non-DMV databases). These eight matching fields were: (1) North Carolina driver's license number, (2) First name, (3) Last name, (4) A phonetic coding of the last name using the Soundex algorithm, (5) Last four digits of the Social Security number, (6) Birth date, (7) ZIP code, and (8) House number. *Id.* at ¶89. He then combined these

eight matching fields to form eleven *composite* matching fields, for example Match Field 2 is First Name, Last Name, and SSN4 combined, and Match Field 3 is First Name, Last Name, and Birth Date. *See id.* at ¶91.

Using these eleven composite matching fields, Quinn attempted to see if he could get a match in the ID files that he accessed. For example, if a voter file had a driver's license number, and that driver's license number corresponded to a valid driver's license in the DMV database, that would be considered a match. Or if the First Name, Last Name, and SSN4 of a voter corresponded to DMV-ID record or student ID record, that would be considered a match as well. But if after doing this matching for his eleven composite match fields, Quinn could not find a corresponding ID record, that would be considered a no-match. In other words, Quinn concluded that individual likely did not have a Qualifying ID of the type he analyzed.

The match/no match analysis is the core of Quinn's findings. When Quinn concludes that 6.65% of North Carolinian registered voters lack Qualifying ID, Quinn is really asserting that he was unable to match 6.65% of voters using the composite match fields that he designed and within the databases he was able to access. His conclusions depend on the reliability of his matching. Quinn concedes as much in both his report and deposition by noting that the percentage of matches, *i.e.*, those confirmed to have Qualifying ID, will change if the analysis searched other ID databases. *See, e.g., id.* at ¶118. Nevertheless, Quinn had "confidence" in his "finding of racial disparity" because of the results of what he described as a "sensitivity analysis." *Id.* at ¶143. In Quinn's "sensitivity analysis," he purported to "evaluate the plausibility of various hypotheticals regarding rates of ID possession among African American voters and white voters" for those types of IDs that Quinn did not include in his matching analysis, *e.g.,* U.S. passports. Based on this analysis,

Quinn concluded that even if he had done matching for those other IDs, it was "extremely unlikely to erase the racial disparity in ID possession." *Id.* at ¶¶ 131, 157.

Despite Quinn's assertions, his matching analysis is not reliable and should not be admitted under Rule 702. First, Quinn has no training and no experience outside of litigation, in designing and performing the matching analysis that he employs here. Second, Quinn does not apply a principled methodology in his matching analysis. The foundational piece of Quinn's matching analysis is his selection of composite matching fields, but Quinn provided no objective principle for why he limited his matching to the fields he chose. Nor did Quinn take the same steps in the methodology that he employed in earlier litigation, despite seeking to examine a substantially identical question. Third, Quinn failed to take reasonable steps to assess either the quality of the underlying data with which he performed his matching or the results of his matching analysis. Fourth, according to Quinn's own statements in his rebuttal report, his sensitivity analysis is unreliable because the information he uses is answering the wrong question. It thus can hardly give the confidence in his results that Quinn attests. Because Quinn's opinion lacks reliability, Legislative Defendants respectfully request his testimony be excluded.

a. Quinn's Analysis Is Unreliable Because He Has No Experience With Designing And Implementing Voter Registration Record Linkage Outside Of Litigation.

Among the indicia of reliability that the North Carolina Supreme Court has adopted is "whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *McGrady*, 368 N.C. at 891, 787 S.E.2d at 10 (quoting FED. R. EVID. 702 advisory committee's note to 2000 amendment). If the opinion has only been crafted only for purposes of litigation, then it is less reliable. *See id.* Although Quinn researches political methodology, applied statistics, and empirical legal studies, Quinn has only

ever performed record linkage of voter registration files with other databases within the context of litigation. And his report in this case would be the *first time* a record linkage analysis designed by Quinn was actually used in litigation.

During his deposition, Quinn conceded his lack of experience. While he believed his training "in applied statistics and political methodology encompasse[d] the issue of record linkage or data set merging," he conceded he has never published papers "on the methodology of engaging in record linkage." Quinn Dep. at Tr. 18:12-14; *Id.* at 19:4–9. Quinn stated that he "has not linked outside of litigation, I know I've . . . I've not linked a voter file to a DMV database or some other form of ID database. I cannot think of an example where I've linked a voter files to some other database." Quinn Dep. Tr. at 19:23–20:3. When "testimony proffered by an expert is based directly on legitimate, preexisting research unrelated to the litigation" that "provides the most persuasive basis" in determining its reliability. *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 43 F.3d 1311, 1317 (9th Cir. 1995) ("*Daubert II*"). Quinn can point to no such preexisting record linkage outside of litigation.

And even though Quinn has been involved in other litigation relating to Voter ID, this is the first time that he himself has designed and implemented voter record linkage that would actually be used in litigation. For instance, Quinn's earlier affidavit in this case was based on an analysis from the *Currie* litigation. The matching protocol in that case, where Quinn submitted an expert report, was not independently designed by him but rather by Professor Charles Stewart. *See* Quinn Dep. Tr. at 20:13–19; *see also id.* at 145:3–9 ("I believe Dr. Stewart designed the match fields that were used for matching the voter file to the DMV file."). And while he attested he performed a matching analysis in voter ID litigation in South Carolina, "those results were ultimately not used in the litigation." Quinn Dep. Tr. at 20:11–12. This lack of experience raises

deep reliability concerns about the choices that Quinn made in designing his analysis. After all, central to his conclusions is his determination that no-matches correspond to a likelihood that those voters lack Qualifying IDs. If he has never designed such analysis in his academic work and never before has it been used by a court, then the reliability of the choices he made to determine whether those no-matches are, in fact, no matches is called into question. *Daubert II*, 43 F.3d at 1317 (noting a "significant fact to be considered" is whether an expert would be testifying "about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."); *accord McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 1008 (4th Cir. 2020).

Quinn's litigation-centric experience is all the more troubling because Quinn readily discussed how he made a number of litigation-focused choices in designing and performing his analysis. For instance, there are different kinds of approaches to record linkage. As Quinn explained, there is what is called "deterministic record linkage" and then "probabilistic record linkage." Quinn Dep. Tr. at 25:7–17.[2] Quinn said that he chose to do a deterministic record linkage "in part because [he] had experience with this in earlier litigation. It was also the case that given the sort of time frame that we were working with, deterministic methods would be much faster, I believe more accurate." Quinn Dep. Tr. at 25:21–25. He added that the deterministic record linkage would only be more accurate because of the "time frame involved" and "the constraints of this litigation." Quinn Dep. Tr. at 26:10–17. He also added that a probabilistic record linkage approach

[2] In general, deterministic record linkage begins with a record in a file and then a search is done for records in another file for an *exact* match. If there is an exact match, it is assumed to be a match. By contrast, in probabilistic record linkage, all the records in the other file are scanned "and probabilistic assessments are made about the likelihood" of various fields being matches or not. *See* Quinn Dep. Tr. at 25:7–17. When various probabilities are assigned, non-exact matches may be counted as matches by a researcher based on the varying probability thresholds he chooses. *See, e.g.,* A. Sayers, et. al., *Probabilistic record linkage*, 45 INT'L J. OF EPIDEMIOLOGY 954 (2016), available at https://bit.ly/37UA82m.

would require "a good deal of diagnostic checking," presumably to ensure the validity of the results. Quinn Dep. Tr. at 26:14. Quinn similarly rejected any type of manual checking of the results from the deterministic record linkage, in part because "[t]here's not enough time in the day to . . . to get that done, certainly for purposes of litigation." Quinn Dep. Tr. at 157:3–5. He further rejected any kind of manual sampling or taking a fraction of "say, 10,000 records" to doublecheck his results because it would be "extremely time-consuming." Quinn Dep. Tr. at 158:21. This, despite the fact Legislative Defendants' proffered expert, Janet R. Thornton, Ph.D., has shown how a manual sample of just a few of Quinn's results cast doubt on his matching. *See, e.g.*, Rebuttal Expert Report of Janet R. Thornton, Ph.D. ¶¶ 69–71 (Jan. 20, 2021), Moss Ex. 17. In all events, a central premise of expert testimony is that the expert will supply the same level of rigor and expertise that they would outside of court as they do inside the court. *Cf. Kumho Tire Co.,* , 526 U.S. at 152 ("The objective of [the Rule 702] requirement is to . . . make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."). Quinn's litigation-based decisions show he has not done so.

Expert opinions that make analytical choices based on litigation, rather than on expertise are often found unreliable. *See id.* at 157 (finding unreliable an expert who did not attest he "would have concluded in a report to his employer that a similar tire was similarly defective on grounds identical to those upon which he rested his conclusion [in court]"); *Cooper v. Smith & Nephew, Inc*., 259 F.3d 194, 203 (4th Cir. 2001) ("The fact that Dr. Mitchell did not employ in the courtroom the same methods that he employs in his own practice provides further support for the district court's ultimate conclusion that his testimony was unreliable."). Since Quinn has no experience designing and implementing a voter record linkage outside of litigation and he has conceded he

made a number of analytical decisions because of the constraints of litigation his opinion should be excluded as unreliable.

b. Quinn's Opinion Lacks Reliability Because His Matching Lacks A Principled Methodology.

Quinn does not apply a principled methodology in his matching analysis. Quinn does not provide the basis for limiting the selection of composite matching strings to eleven and his own analysis is inconsistent with the analysis that Quinn invoked earlier in this litigation. Thus, the record linkage Quinn performed in this case is unreliable and his opinion should be excluded.

First, the foundational element of Quinn's matching analysis is the composite match strings that he developed to link individual records in the North Carolina voter registration file and the various ID files that he accessed. As discussed above, Quinn went through the databases and sought to try to match records using eleven different composite match strings (so long as the databases had sufficient information fields). If, after testing the eleven composite match strings no match was found, then Quinn concluded there was no match. This raises the question, why did Quinn not choose a twelfth match string or a thirteenth match string? Quinn had no principled answer to this question. He was asked if he considered "other fields common to the two databases" to build additional matching strings. Quinn "recall[ed] having a conversation with [his] research assistant," but he did not remember the "content" of that conversation. Quinn Dep. Tr. at 135:4–17. Quinn just said the fields he chose were "the best fields to use." Quinn Dep. Tr. at 135:17. Why were they the best fields? He did not "recall the exact content" of that decision but he "believed" that including additional fields "wasn't going to do very much work over and above" the fields he already chose. Quinn Dep. Tr. at 135:19–25. He did say that it was "possible there was some data used for this. But ultimately, it was my judgment that these were going to be the most reliable components of the various match fields." Quinn Dep. Tr. at 136:18–21. Quinn further

explained that he did not test to see if there were additional matching strings that could be used out of the eight match fields he did choose. Quinn Dep. Tr. at 137:17–20.

This subjective and unsubstantiated approach to the foundational element of Quinn's analysis renders it unreliable. He provides no objective metric by which he chose the match fields that he selected nor did his involvement in the decision include data. *See Daubert II*, 43 F.3d at 1319 ("[E]xperts must explain precisely how they went about reaching their conclusions and point to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like . . . ."); *accord Wehling v. Sandoz Pharmaceuticals Corp*., 162 F.3d 1158 (4th Cir. 1998) (table). With respect to the composite match strings themselves, Quinn similarly provides no objective metric nor explains why he selected those that he did. This is particularly inexcusable because Quinn readily provides data that could have been used to select additional composite match strings: what he calls "% Unique." Quinn Report ¶ 100 Table 3. This measures the uniqueness of a composite match string and it is one metric for ensuring that a composite match string does not increase the number of false positives, *i.e.*, matches of two records that do not correspond to the same person, but instead to different individuals. Despite having a ready metric to test and evaluate whether to add additional composite matching strings, Quinn declined to test if there were other composite match strings of a similar or better % Unique available. Quinn Dep. Tr. at 138:5–8; 144:11–14. With nary a citation to the literature or generally accepted practices in his field, Quinn simply concluded that these eleven match strings were the ones to choose. *See McGrady*, 368 N.C. at 891, 787 S.E.2d at 9–10. Mere reliance on the unsubstantiated "simple say-so" of a witness is quintessentially unreliable under Rule 702. *Varlen Corp. v. Liberty Mut. Ins. Co.*, 924 F.3d 456, 460 (7th Cir. 2019).

Second, Quinn's selection of match fields and composite match strings is not only unsubstantiated but is also inconsistent with the analysis that he relied upon earlier *in this case*. In his earlier affidavit, Quinn relied on the matching performed in the *Currie* litigation and this matching included match strings with a voter's first initial. *See* Affidavit of Kevin Quinn, Ph.D., Appendix B (May 13, 2019), Moss Ex. 18 ("May 13, 2019 Quinn Affidavit"). One of the benefits of attempting to find matches in this way is that it would account for and possibly find an ID match for a voter having his first name be spelled differently in two different databases, *i.e.*, a voter named Thomas in one database but Tom in another. In the *Currie* litigation, Match fields 10, 11, and 12 included match strings with first initial. These accounted for over 40,000 matches. *See* May 13, 2019 Quinn Affidavit, Appendix B at 40, Table 14. While the number of additional matches may differ had Quinn included such a composite match string in this litigation, Quinn did not "know how many new matches would come in if that [string] were used." Quinn Dep. Tr. at 151:18–20. Quinn does not know because he did not check. This, despite the fact that the first initial strings in *Currie* had a % Unique of at least 99.94% and Quinn had no basis to think that the % Unique would be any different had he used this string again. *See* Quinn Dep. Tr. at 149:16–17; May 13, 2019 Quinn Affidavit, Appendix B at 38, Table 13. Quinn does not explain the absence of these matching strings in his current analysis. This is all the more surprising since Quinn asserted that the *Currie* analysis "allowed [him] to construct accurate estimates." May 13, 2019 Quinn Affidavit at 6. Quinn does not explain why he included such matching strings in his "accurate" 2019 analysis, but he was unwilling to include them in his more recent report. Presumably, the decision emanated from the same subjective, unsubstantiated, and data-free analysis that led to his selection of the first eleven matching strings. Yet an expert's testimony

must be based on "more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590.

Since Quinn fails to substantiate his decisions in the selection of composite matching strings—the foundation of his analysis—and the choices he did make are inconsistent with an analysis he already represented to this court as "accurate," Quinn's malleable and subjective opinion should be excluded as unreliable.

c. Quinn Failed to Take Basic Steps to Ensure The Accuracy of his Findings.

Quinn's report further lacks reliability because he failed to do any quality control to ensure the accuracy of his findings. He did not perform basic checks on the voter information in the voter registration lists or otherwise doublecheck the quality of the databases with which he did his matching analysis. And despite asserting that he made decisions, in part, to reduce false negatives and false positives, Quinn has provided no data or metrics by which he ensured that his decisions actually produced such a result. By failing to do basic steps to ensure the quality of his analysis, Quinn has rendered a flawed and ultimately unreliable opinion. It should be excluded.

First, Quinn failed to take basic steps to ensure the quality of the databases, which are the core inputs underpinning his entire analysis. In particular, Quinn did not effectively screen out ineligible voters on the voter registration list. Quinn implicitly recognized that the voter registration list would contain voters that are ineligible to vote in North Carolina. That is, after all, why he sought to remove deceased voters from his analysis. *See* Quinn Report ¶ 101. But the presence of ineligible voters on the voter registration list goes beyond deceased voters. As Plaintiffs' own proffered rebuttal expert Professor Eitan Hersh, Ph.D. has previously written, there is often "deadwood" or obsolete records in state voter registration lists. Stephen Ansolabehere & Eitan D. Hersh, "Voter Registration: The Process and Quality of Lists," THE MEASURE OF AMERICAN ELECTIONS 68 (Eds. Barry C. Burden and Charles Stewart III, 2014), Moss Ex. 36.

Hersh and his co-author estimated that, at the time of their study, 4–6% of North Carolina's voter registration list was comprised of "obsolete records." *Id.* at 80. Quinn did not account for this fact or any false negatives that this produced, *i.e.*, individuals who failed to match because they no longer were eligible to vote in North Carolina. Quinn did not design any metric to ensure that his results were not affected by the presence of between 4–6% obsolete records. Quinn does not offer a reasoned basis for failing to take any steps to account for the presence of obsolete records that the published work of Plaintiffs' own proffered rebuttal expert indicates is a significant issue.

Second, Quinn failed to provide any data or metrics to ensure that his analytical decisions actually balanced false positives and false negatives. If false positives and false negatives are not balanced, then the results of an analysis are skewed, and its reliability is undermined. As Quinn himself stated, "it's important to balance the trade-off between false positives . . . and false negatives." Quinn Dep. Tr. at 21:21–24. Yet Quinn did nothing to quantify either the false positives or the false negatives. For instance, Quinn did not estimate the number of false positives in his analysis or perform a manual check for false positives—despite doing such a check in his earlier *Currie* analysis. *See* Quinn Dep. Tr. at 197:20–21; 198:8-12.

Based on what is possible to deduce from Quinn's analysis, there is no reasoned basis to conclude that the false positives and false negatives in his analysis are balanced. Based on the % Unique measure of Quinn's matching strings, there is reason to believe that the false positives are low. *See* Quinn Dep. Tr. at 198:24–199:4. Yet based on all of the missing ID data in his analysis, it is also clear that the number of false negatives swamps, if not overwhelms, the number of false positives. Quinn's analysis is missing federal IDs, which accounted for more than 180,000 independent matches in his *Currie* analysis. *See* Quinn Report ¶ 149. This is an obvious source of false negatives, *i.e.*, people with passports have Qualifying ID but may show up as a no-matches

in Quinn's analysis. The same goes for people that would have matched had Quinn used the three additional strings from his *Currie* analysis that produced over 40,000 new matches. *See* May 13, 2019 Quinn Affidavit, Appendix B at 40, Table 14. Further, several of the ID sources, such as school and government employee IDs, were missing data fields that did not allow Quinn to match some or even *any* composite match fields. *See* Quinn Report ¶ 106, Table 5. But Quinn did nothing to quantify the potential number of false negatives from these sources. For instance, Quinn could have estimated how many matches may have been provided by those IDs by determining how many new matches were produced by the missing fields in the ID databases that had full or more complete data fields. Yet Quinn documents no such effort in his report.

There were also additional reasonable steps to evaluate whether the no-matches Quinn found were actually false negatives. For instance, Plaintiffs' proffered rebuttal expert witness Hersh offers a method that Quinn failed to account for. In a co-authored article, Hersh explained that there is a data-driven method to estimate false negatives in voter registration matching analyses. *See* Stephen Ansolabehere & Eitan D. Hersh, *ADGN: An Algorithm for Record Linkage Using Address, Date of Birth, Gender, and Name*, 4 STATISTICS & PUBLIC POL'Y 1, 7 (2017), https://bit.ly/3bXg8gy. Using this method, Quinn could have used his North Carolina driver's license data as a source of "true matches." *Id.* (performing this analysis with nine-digit social security numbers). Quinn then could have checked the extent to which those voters, who matched or did not match on driver's licenses, also matched or did not match on other fields. The result of the analysis could have provided an "estimated rate" of false positives and false negatives. *Id.* It also would have provided a sense of the quality of Quinn's underlying data. But Quinn did not pursue this or any other method to test for false negatives.

Further, Quinn could have assessed false negatives using driver's license numbers by evaluating those voters that had driver's license numbers in the voter registration list but that ultimately were no-matches. In fact, over 50% of the no-matches that Quinn found fall into this category. *See* Quinn Dep. Tr. at 162–63. Quinn surmised that this was because these voters had expired or otherwise ineligible IDs. *See* Quinn Dep. Tr. at 163:16–21. But Quinn did not attest that he had done any analysis to check. *See* Quinn Dep. Tr. at 164:9–12. Moreover, it is possible that the reason those licenses are invalid or expired is because that individual has moved out of state and is thus no longer eligible to vote. In fact, as Brian Neesby informed the *Currie* court and Quinn in 2015, the DMV has information in its possession about drivers who transfer their licenses out of state. *See* Affidavit of Brian Neesby ¶69, *Currie, et al. v. State of North Carolina et al.*, No. 13-CVS-1419 (June 8, 2015 Orange Cnty. Sup. Ct.), Moss Ex. 19 (Neesby Affidavit"). But Quinn did not recall accessing that file. *See* Quinn Dep. Tr. at 208:10. Quinn simply did not evaluate what potentially could have been a significant source of false negatives. The failure to consider an "obvious alternative" explanation for his no matches or do any data-driven check of his no matches undercuts the reliability of Quinn's analysis. *McGrady*, 368 N.C. at 891, 787 S.E.2d at 10.

d. Quinn's Analysis Is Not Made Reliable By His Faulty Sensitivity Analysis.

Another reason that Quinn's analysis is wholly unreliable is that his "sensitivity analysis" failed to consider the type of information that Quinn himself identified as most relevant. As Quinn concedes, his conclusions from his matching analysis are based on incomplete data. He either did not analyze or did not have access to sources of information covering tens of thousands of Qualifying IDs. Specifically, Quinn did not match the North Carolina voter registration list with databases containing U.S. passports, U.S. military ID, U.S. veteran ID, tribal IDs, out-of-state IDs, or public assistance IDs. Quinn Report ¶¶ 47, 54, 70. In order to assure "confidence" in his

conclusions about a racial disparity in ID possession overall, Quinn conducted what he called a "sensitivity analysis." This "sensitivity analysis" was how Quinn purportedly determined whether missing (and unknown) ID information would change his overall conclusions. But this "sensitivity analysis" is fundamentally flawed and cannot provide confidence in his conclusions because it analyzes the wrong question—according to Quinn himself. In this case, Plaintiffs also submitted a report authored by Quinn to respond to Professor Keegan Callanan, Ph.D. In his report, Quinn identified what he considered to be the operative question in the analysis of possession of Qualifying IDs. *See* Rebuttal Expert Report of Kevin Quinn, Ph.D. (Jan. 20, 2021), Moss Ex. 20 ("Quinn Rebuttal Report"). Quinn stated, "The relevant question for each form of ID is the percentage of African American voters who have that form of ID—but no other form of Qualifying ID." Quinn Rebuttal Report ¶ 11. Quinn's own sensitivity analysis does not address nor try to address what Quinn considered to be the relevant "empirical inquiry." *Id.*

The shortcomings of Quinn's "sensitivity analysis" are laid bare by his specific approach to assessing where federal Qualifying IDs would have altered the results of his analysis. In Quinn's earlier *Currie* analysis, three kinds of federal identification—U.S. passports, U.S. military IDs, and U.S. veteran IDs—provided 184,205 matches, the largest source of potential matches in North Carolina outside of the DMV records. *See* Quinn Report ¶ 149. Quinn did not have access to databases with information on federal ID holders for his analysis in this case. But this "inability to access some Qualifying ID databases does not alter [his] confidence in [his] finding of a racial disparity in Qualifying ID possession." Quinn Report ¶ 143. For federal IDs, he remained confident because of a sole piece of data: a 2016 survey by the American National Election Study of 148 North Carolinians. Quinn Report ¶ 150; Quinn Dep. Tr. at 82:6–7 ("That's the only information that I – that I have in this report, yes.").

But the American National Election Study that Quinn cites does not answer Quinn's relevant question. After all, Quinn opined that the relevant question is "the percentage of African American voters who have that form of ID—but no other form of Qualifying ID." Quinn Rebuttal Report ¶ 11. But the American National Election Study says nothing about that. The Study only indicates what percentage of white and black North Carolinians have U.S. passports *in general*, not whether they only have a passport and not a driver's license or other form of identification. It thus is not clear how the Study can provide Quinn the certainty he alleges it does because it fails to address the question that he claims to be answering. What is more is that Quinn explained that the goal of the American National Election Study is to "present a representative picture of the U.S.," thus Quinn "would not necessarily think that its self-reported measure of driver's license possession would necessarily map onto the actual numbers that we see in North Carolina." Quinn Dep. Tr. at 76:11–16. If the results of the Study would not map onto the actual on-the-ground reality in North Carolina for driver's licenses, Quinn does not explain how it would match the reality of passport possession. Thus, the "only information" Quinn has— to explain why the most important additional source of ID matches would not change his conclusion—is a survey that (1) answers the wrong question, and (2) is not necessarily a representative picture of North Carolina. What Quinn does provide is his assurance that that survey is enough, but his mere assurance is insufficient for Rule 702 reliability. See *Alevromagiros*, 993 F.2d at 421 (excluding testimony as unreliable because the court was "unprepared to agree that it is so if an expert says it is so." (internal quotation marks omitted)); *Varlen Corp.*, 924 F.3d at 460.

The lack of reliability in Quinn's "sensitivity analysis" goes beyond the issues with just one survey because Quinn's "sensitivity analysis" is woefully incomplete. On Quinn's no-match list, 15.55% of voters are identified as "Unknown" race. *See* Quinn Report ¶ 117 Table 7. But

Quinn does not consider any "background knowledge" about who these voters may be in his "sensitivity analysis" nor how such a gap in his data may alter the racial disparity he finds. Quinn Report ¶ 131. This severely undermines the validity of Quinn's conclusions on racial disparity because 15.55% of his data set is missing racial information. Quinn further fails to consider "background knowledge" on other forms of ID, like U.S. military IDs or U.S. veteran IDs. Quinn Report ¶ 131. These were the source of tens of thousands of matches in the *Currie* litigation, but Quinn is silent about them with respect to his sensitivity analysis. Consequently, here too Quinn fails to answer his "relevant question." After all, one cannot assess "the percentage of African American voters who have that form of ID—but no other form of Qualifying ID," if one does not even consider that ID at all.

Further, Quinn does not consider the potential effect of free IDs being made available by S.B. 824 in future elections. Quinn limits his analysis to the 2,337 free IDs that were issued prior to S.B. 824 being enjoined. Quinn Report ¶ 43. The free ID data indicates that, prior to the law being enjoined, free IDs were disproportionately issued to African American voters who did not otherwise have a matching ID in Quinn's analysis. *See* Quinn Dep. Tr. at 110:2–113:23 (discussing the racial breakdown and ratio of voters that benefitted from free IDs). Yet Quinn does not analyze the effect free IDs may have on the Qualifying ID disparity if they are again allowed to be issued. To remedy this gap in his sensitivity analysis, Quinn could have considered the comparative experience in other states of free voter IDs and extrapolated from that experience to answer his relevant question. But, here too, Quinn did no such analysis. Expert testimony should be excluded "[w]hen the assumptions made by [the] expert are not based on fact." *Tyger Constr. Co*, 29 F.3d at 144.

Accordingly, for the foregoing reasons, Legislative Defendants respectfully request that Quinn's testimony be excluded.

IV. James Leloudis And Carol Anderson

Plaintiffs intend to call two historians, James Leloudis and Carol Anderson, to offer largely the same testimony about S.B. 824's "historical background." *Arlington Heights*, 429 U.S. at 267. Their reports offer the same account of racial discrimination in North Carolina's past; indeed, Anderson's account is based in large part on Leloudis's. And both reach the same conclusion: that S.B. 824 will continue this discrimination because voter-ID requirements are discriminatory, as they both take largely for granted.

Although history can be "one evidentiary source" of legislative intent, *id*., the limits of its relevance are well-established. When applying the *Arlington Heights* factors, a court "*must* afford the state legislature a 'presumption' of good faith." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)) (emphasis in original). Even "a finding of past discrimination" cannot "remov[e]" this presumption or "shif[t] the allocation of [Plaintiffs'] burden" to prove that the law at issue was passed with discriminatory intent. *Id*. (internal quotation marks omitted). In other words, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 138 S. Ct. at 2324 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality) (cleaned up)).

As a result, history can help Plaintiffs meet their burden of proof only if it contains recent, "official" acts of discrimination by the General Assembly. *Arlington Heights*, 429 U.S. at 267. In *Arlington Heights* itself, the Supreme Court made clear that "historical background" is relevant "particularly if it reveals a series of official actions taken for invidious purposes." *Id*. The Court then cited a string of cases where the relevant State actor had recently taken other discriminatory

actions, usually related to the discrimination being challenged. *Id*. (citing *Lane v. Wilson*, 307 U.S. 268 (1939); *Griffin v. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *see Lane*, 307 U.S. at 274 ("The theory of the plaintiff's action is that the defendants, acting under color of Section 5654, did discriminate against him because that Section inherently operates discriminatorily."); *Griffin*, 377 U.S. at 226 ("[T]hese new transactions were alleged to have occurred as a part of continued, persistent efforts to circumvent our 1955 holding that Prince Edward County could not continue to operate [segregated schools] . . . . The amended complaint thus was not a new cause of action but merely part of the same old cause of action."); *Davis*, 81 F. Supp. at 878–880 ("The history of the period *immediately preceding* the adoption of" Alabama's literacy test showed "that its main object was to restrict voting on a basis of race or color" (emphasis added)); *Keyes*, 413 U.S. at 205–06 ("On the question of segregative intent, petitioners presented evidence tending to show that the Board, through its actions over a period of years, intentionally created and maintained the segregated character of the core city schools" that existed at the time of trial).

Since then, the Court has made this limitation even clearer. In *Abbott*, the Texas Legislature passed a redistricting plan in 2011 with allegedly discriminatory intent and then passed a new plan in 2013. But it did not simply "reenact" the earlier plan; it enacted a plan that had been modified "so as 'not to incorporate any legal defects.'" 138 S. Ct. at 2316, 2325 (quoting *Perry v. Perez*, 565 U.S. 388, 394 (2012) (cleaned up)). "Under these circumstances," the Court said, "there can be no doubt about what matters: It is the intent of *the 2013 Legislature*. And it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that *the 2013 Legislature* acted with invidious intent." *Id*. at 2325 (emphases added).

"[T]his case is much like *Abbott*." *Raymond*, 981 F.3d at 304. Under these controlling standards, therefore, Leloudis and Anderson's testimony is relevant only to the extent that it will help the Court determine the intent of the General Assembly that enacted S.B. 824, the "fact in issue." N.C. R. EVID. 702(a). Their testimony can assist the Court with that determination only to the extent that it reveals recent, official acts of discrimination by the General Assembly. And in light of the measures that the General Assembly took in S.B. 824 to cure the discrimination found in H.B. 589, that earlier finding does not impugn S.B. 824. It is the intent of the later General Assembly that matters. According to their own expert reports, neither Leloudis nor Anderson would provide reliable evidence relevant to that subject.

a. Leloudis' Testimony Has Already Been Found Irrelevant And Unreliable

The report of Plaintiffs' first historian, Leloudis, contains a lengthy discussion of historical discrimination in North Carolina, focused mainly on the post-Reconstruction and Jim Crow eras. Only five of the report's seventy-eight pages concern S.B. 824 itself. *See* Leloudis Report at 73–78. Nevertheless, Leloudis concludes that S.B. 824 "recapitulates a shameful history of racial discrimination." *Id*. at 78. That conclusion is all that makes his historical analysis potentially relevant here. As will be seen, he has no basis for it.

Leloudis offered similar testimony in the federal litigation against North Carolina's prior voter-ID law, H.B. 589. The district court "credit[ed] [his] historical account up to the introduction of the voting laws at issue." *N.C. State Conf. of NAACP v. McCrory*, 182 F. Supp. 3d 320, 428 (M.D.N.C.), *rev'd & remanded*, 831 F.3d 204 (4th Cir. 2016). "But from there," the court said, "he carries little credibility because his findings ignore or cursorily discount relevant facts inconsistent with his opinions and are not based on 'sufficient facts.'" *Id*. (quoting FED. R. EVID. 702(b)). Specifically, he had failed to "catalog any official discrimination after the 1980s," when

"African Americans were making significant headway in political strength." *Id*. He had "contradictor[ily]" asserted that certain voting reforms increased voter turnout while "refus[ing] to answer" similar questions about others. *Id*. And when it came to "the challenged provisions of" H.B. 589 itself,

> his opinions lost their moorings in history and became part advocacy. For example, he failed to consider the entirety of [H.B. 589], did not meaningfully consider the justifications for the provisions, and noted that while it was possible that partisans can have policy differences without being racist, his "preponderance of associations" led him to conclude otherwise.

Id. As relevant to H.B. 589, therefore, his opinions were "less those of a detached expert and more those of an advocate." *Id*. "Indeed," the court noted, "when pressed at trial, [Leloudis] was unable to articulate anything the General Assembly needed to do to be more responsive to the needs of minorities, other than a generalized statement of equitable inclusion in the political process." *Id*. at 440 (internal quotation marks omitted). Although the Fourth Circuit reversed the district court's ultimate conclusions about H.B. 589, it did not express any disagreement with the district court's analysis of Leloudis' testimony. The Fourth Circuit did not even mention Leloudis, just as it did not mention the report that he has also submitted in the federal litigation against S.B. 824 when it recently held that the plaintiffs there were unlikely to succeed in showing that the law was passed with discriminatory intent. *See Raymond*, 981 F.3d at 310–11.

The Court can expect no greater objectivity from Leloudis here. In his report, he repeatedly characterizes H.B. 589 as S.B. 824's "predecessor," suggesting that the laws share an alleged animus despite their significant differences. Leloudis Report at 3, 5, 78. Accordingly, his report on S.B. 824 tracks the analysis and conclusions from his report on H.B. 589. Indeed, he admittedly applied the same methodology to S.B. 824 as he did to H.B. 589. *See* Deposition of James L. Leloudis II, Ph.D. at 15:5–15 (Feb. 2, 2021), Moss Ex. 21 ("Leloudis Dep. Tr."). And he did

nothing to account for the district court's criticisms of his earlier report, because he thinks the district court was simply wrong. *See id*. at 22:17–23:7. By his own admission, therefore, his testimony related to S.B. 824—the only part of his testimony that could be relevant—will suffer the same flaws as his testimony about H.B. 589.

In fact, Leloudis has already revealed himself to be acting once again as a mere "advocate" for Plaintiffs' side. *McCrory*, 182 F. Supp. 3d at 428. He has turned his expert report into a book that shares the main title of his report: *Fragile Democracy*. *See* JAMES L. LELOUDIS & ROBERT R. KORSTAD, FRAGILE DEMOCRACY: THE STRUGGLE OVER RACE AND VOTING RIGHTS IN NORTH CAROLINA (2020), Moss Ex. 37 ("FRAGILE DEMOCRACY"); *see also* Leloudis Dep. Tr. at 11:13–20. In that book—which appears to copy pages' worth of material directly from the report, *compare* FRAGILE DEMOCRACY at 96–122, *with* Leloudis Report at 57–73—he argues that "[t]he contest over the photo ID amendment is the latest chapter in North Carolina's long and cyclical history of struggle over minority voting rights." FRAGILE DEMOCRACY at 123. On the one side are "[m]odern Republican lawmakers" who, in his telling, "are opposed" to the "extension" of democracy to minorities. *Id*. On the other side are the Plaintiffs in this very case. *See id*. at 121–22. He even quotes a Twitter post from Plaintiffs' counsel calling S.B. 824 "a 'racially discriminatory' effort to suppress the black vote." *Id*. at 122. In the next sentence, he notes ominously that "the challenges to SB 824 are yet to be resolved—as is the future of North Carolina's fragile democracy." *Id*. "Will we walk toward democracy," he asks, "or satisfy ourselves with continuing to live in the shadow of slavery and Jim Crow? This is *our* time for choosing." *Id*. at 124 (emphasis in original).

This case is not Leloudis's time for expressing his personal views. *See Daubert*, 509 U.S. at 590. Ultimately, though, that is all his report does. His conclusion that S.B. 824 "recapitulates"

prior discrimination, Leloudis Report at 78, is premised entirely on the assumption that S.B. 824 will have a racially discriminatory impact. But he does not claim to be an expert in voter behavior, and he conducted no analysis of how S.B. 824 might affect voters of any race. He has no knowledge of the numbers of voters of any race who lack a form of ID that qualifies for voting use under S.B. 824, including the many types of ID that S.B. 824 and later amendments have added to H.B. 589's list of qualifying IDs. *See* Leloudis Dep. Tr. at 36:6–23. Nor did he attempt to measure the impact of the S.B. 824 provisions enabling voters to vote even if they currently lack a listed form of ID, namely the reasonable-impediment process and the free-ID provision. *See id*. at 37:11–14. And as seen, neither of Plaintiffs' experts who did attempt to study S.B. 824's racially disparate impact was able to show that it will have any.

Leloudis thus leaps "unjustifiably" from "an accepted premise," that North Carolina has seen racial discrimination in its past, to "an unfounded conclusion," that S.B. 824 will recapitulate the past because it too will cause discrimination. *McGrady*, 368 N.C. at 891, 787 S.E.2d at 10. This leap renders his conclusion largely untestable. Indeed, though the crux of his conclusion is that S.B. 824 passes some "threshold" of discriminatory impact, he admittedly applied no "threshold" in his analysis. Leloudis Dep. Tr. at 131:22–132:16. He takes the discrimination as given. Such *ipse dixit* is, of course, not enough to resolve one of the primary questions in this case.

To the extent his conclusion can be tested, it is provably wrong. Leloudis cites just one source for the proposition that, "over time, voter photo ID laws will significantly restrict minority voters' participation in democratic governance," which is the closest thing to a basis offered for the conclusion that S.B. 824 will have that effect. Leloudis Report at 77. That source studied the effect of "the *strictest* forms voter ID" laws. Z. Hajnal, N. Lajevardi, & L. Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 363 (2017) ("Hajnal

Study") (emphasis added), https://bit.ly/3bSp5b1. The source defined strict photo ID laws as those that require voters to present an ID in order to have their vote count without exception, and the authors sought to isolate the effect of these laws because "States that have nonstrict laws still allow people to vote if they do not have ID, so these laws might have little impact." *Id.* at 365. S.B. 824, of course, is nonstrict under this definition—voters without ID can fill out a reasonable impediment form and have their vote count without ever showing ID—and thus the Hajnal study says nothing at all about how it would affect turnout. As proof, the study did not include South Carolina's voter-ID law, which contained a similar reasonable-impediment process. *See* Hajnal Study at 363 n.1; *see also South Carolina v. United States*, 898 F. Supp. 2d 30, 34 (D.D.C. 2012). In any event, the study does not support Leloudis' categorical view that "[t]he effects of voter ID laws" are to "reduce the influence of racial minorities." Leloudis Report at 77. Even under "strict" voter-ID laws, the study found *no* statistically significant impact on African American turnout, and in the end the authors "remain[ed] uncertain as to exactly how these laws work to skew turnout." Hajnal Study at 368, 377. Moreover, several other studies have found "little convincing evidence that voter identification laws influence turnout substantially." B. Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149, 150 (2017), https://bit.ly/3kAX9wt. And a review of the very study on which Leloudis relies—authored by (among others) Eitan Hersh, whom Plaintiffs also have employed as a rebuttal expert—found the study "fraught with measurement error." J. Grimmer et al., *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, 80 J. POL. 1045, 1046 (2018), https://bit.ly/3rdbcdW. After correcting the study's several errors, the reviewers found "no consistent relationship between voter ID laws and turnout." *Id*.

Leloudis did not review or account for any of this other literature. *See* Leloudis Dep. Tr. at 74:23–75:7. And as a historian, he is in no "better position" than the Court to draw conclusions

from these statistical studies in the first place, as his flawed reliance on a lone study underscores. *McGrady*, 368 N.C. at 889, 787 S.E.2d at 9. His discussion of that study is therefore not just unreliable, but irrelevant. Since this study is his only proffered evidence that S.B. 824 will have a disparate impact, and thus that it will repeat North Carolina's "cyclical history" of discrimination, Leloudis Report at 78, his testimony cannot help the Court determine whether that is true.

His report also contains all the specific problems that the district court identified in his report about H.B. 589. First, the district court found that he failed to "catalog any official discrimination after the 1980s." *McCrory*, 182 F. Supp. 3d at 428. Here as well, his report spends most of its time in the relatively distant past. By his own account, however, S.B. 824 lacks the traits of past discrimination. He emphasizes the explicit racial appeals that accompanied prior, discriminatory measures, while admitting that S.B. 824 was accompanied by none. *See, e.g.*, Leloudis Report at 21, 51; Leloudis Dep. Tr. at 62:19–63:2, 119:18–120:6. And though he characterizes the proposal of a voter-ID amendment as a "new old strategy" of discrimination akin to the 1900 amendment establishing a poll tax and literacy test, Leloudis Report at 70, these bear no comparison. Per Leloudis, excluding African American voters was these measures' well-understood point. *Id*. at 21. The administrators of the literacy test also had "limitless authority to decide who would pass," *id*., and the General Assembly concurrently passed several other measures, such as "order[ing] an entirely new registration," to restrict the African American vote, *id*. at 19–20 (internal quotation marks omitted). At the same time, the amendment effectively grandfathered in white voters who could not pass the literacy test. *Id*. at 19. By contrast, none of S.B. 824's ameliorative provisions are exclusive to white voters; elections officials have no discretion to reject only African American votes, including those cast through the reasonable-impediment process; and S.B. 824 contains no other provisions that expressly target African

American voters. If anything, then, Leloudis's report shows that S.B. 824 *breaks* from historical modes of discrimination.

Granted, though Leloudis paid no heed to the district court's analysis of his H.B. 589 report, he appears to have recognized the problems himself. Thus, he attempts to offer evidence of more recent discrimination, *see* Leloudis Report at 58–73, but the attempts fail. Much of his purported evidence of "retrenchment," *id*. at 58–63, has nothing to do with any actions of the General Assembly. Likewise irrelevant are his long discussions of H.B. 589, *id*. at 63–66, 69–70, and the constitutional voter-ID amendment, *id*. at 70–73. As just seen, the amendment bears no likeness to discriminatory measures of North Carolina's past. Moreover, the intent of the people who made that amendment law—*i.e.*, the majority of North Carolina voters who voted for it—is not at issue. And whatever the intent of the General Assembly that passed H.B. 589, as a legal matter it cannot determine the intent of the General Assembly that complied with its new constitutional mandate by passing a significantly different voter-ID law. *See Abbott*, 138 S. Ct. at 2325.

That leaves Leloudis with just two examples: the 2013 repeal of the State's Racial Justice Act, which had added a procedure for challenging the imposition of the death penalty as motivated by race, and school-funding decisions. *See* Leloudis Report at 66–68. Leloudis is not an expert on criminal justice, public spending, or modern education policy. *See* Leloudis Dep. Tr. at 107:2–16. He thus is in no "better position" than the Court to determine whether the General Assembly acted with invidious purpose in steering through these fraught political issues. *McGrady*, 368 N.C. at 889, 787 S.E.2d at 9. And though he clearly disagrees with the General Assembly's decisions, these two examples—which are entirely unrelated to voting—constitute no "series" of discrimination, certainly not against black voters. *Arlington Heights*, 429 U.S. at 267. As with S.B. 824, Leloudis does not even try to draw parallels between these acts and the historical acts that, by

his own account, were expressly discriminatory and explicitly written to discriminate. He simply records other commentary and analyses of these measures, without accounting for, *e.g.*, race-neutral justifications for repealing the Racial Justice Act, which was an outlier among the states and which district attorneys widely agreed had created unnecessary burdens in the administration of justice;[3] the feasibility of any alternative solutions to the State's budget crisis and their own potential costs to minorities; the benefits of the educational programs that "Republican lawmakers" supported in place of public-school funding; and the support for such measures beyond Republicans, who are his stand-ins for the racists of old. Leloudis Report at 67. In short, he offers policy disagreements, not objective, expert analysis.

Second, the district court found that Leloudis "failed to consider the entirety" of H.B. 589. *McCrory*, 182 F. Supp. 3d at 428. Here, he argues that disparate poverty rates will be the cause of S.B. 824's disparate impact. *See* Leloudis Report at 73. As he recognizes, poverty can increase "the usual burdens of voting" even without a voter-ID requirement. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality op.); *see* Leloudis Report at 74. Yet he fails to account for the provisions that remove any burden of that requirement in S.B. 824. The failure might not be quite as complete as before: he argues that obtaining a free voter ID "actually entails considerable expense," that the reasonable-impediment process is actually "a form of soft intimidation," and thus that these provisions will not ameliorate any impact of the voter-ID requirement. Leloudis Report at 77. Of course, this argument is relevant only to the extent that the requirement will have *any* disparate impact. And again, Leloudis does not know how many voters of any race or financial status would even need to avail themselves of one of these provisions because they lack one of the many forms of ID that now qualify for voting use.

[3] *See, e.g.*, J. Hunt, *North Carolina's 'Racial Justice Act,'* CIVITAS INST. (Nov. 16, 2010), https://bit.ly/37U6gTC.

At any rate, his analysis of these provisions betrays an unfamiliarity with the processes and the facts on the ground. In his view, the expense of obtaining an ID includes the fees for obtaining "a birth certificate, certified school record, or court decree," as well as the "cost of legal counsel" if assistance is needed to obtain these documents. *Id*. at 76–77. None of these documents, and none of these expenses, are required for a free voter ID from a county board of elections, which a voter can obtain by providing his name, date of birth, and the last four digits of his social-security number. N.C. GEN. STAT. § 163-82.8A(d)(1). Leloudis also fails to show that any voter who currently lacks a qualifying ID will be unable to travel to a DMV or County Board of Elections to obtain one. His report provides a map of DMV locations, Leloudis Report at 75, but contains no data about voter population. One cannot know from his report how far any voter—let alone any voter who lacks a qualifying ID or, more relevantly, any African American voter who lacks a qualifying ID—must travel to a DMV. And that says nothing of county boards of elections, where voters can obtain free voter IDs *and then immediately use it to vote during one-stop early voting*.

In his rebuttal report, Leloudis claims without evidence that county boards of elections are often "situated in the same location" as DMVs. Rebuttal Expert Report of James L. Leloudis II at 2 (Jan. 20, 2021), Moss Ex. 22 ("Leloudis Rebuttal Report"). Even if true, the question remains how far any voter who might need a free voter ID would need to travel to get one. And despite his seemingly random searches on Google Maps, Leloudis still cannot say. He searched the distances that residents of Aulander and Ivanhoe would need to travel to their "county seat." *Id*. Once again, though, he did not study the racial composition of the registered voters in those towns or the number of registered voters of any race who might need to make the trip. Nor did he factor in the population densities by race in urban areas, where registered voters are likely to live closer to government offices and to have better access to public transportation.

As for the reasonable-impediment process, Leloudis offers only speculation that any voter will be turned away by "soft intimidation." Leloudis Report at 77. And not just speculation, but speculation founded on a misunderstanding of the process, which Leloudis seems to think requires voters to announce themselves as too poor to obtain an ID, *see id*., rather than merely check a box on a pre-prepared form indicating one of many recognized impediments. *See* N.C. GEN. STAT. § 163-166.16(e)(1), (4) (lack of transportation, disability or illness, lack of underlying documents, work schedule, family responsibilities, or "[o]ther reasonable impediment" with a "brief" explanation). Why this procedure would exclude any voter, particularly any minority voter, Leloudis again cannot say in any reliable way.

Nor can he help the Court put these provisions in any historical context, the asserted goal of his testimony. As he admits, the discriminatory requirements of the 1900 amendment did not contain exceptions enabling African Americans voters to vote *even if they could not meet the requirements*, as S.B. 824 does. Leloudis Dep. Tr. at 59:22–60:1. Nevertheless, he considers S.B. 824 the historical spawn of the 1900 amendment. Why? His unshakable and unfalsifiable view that S.B. 824 will cause discrimination.

Third, the district court found that Leloudis "did not meaningfully consider the justifications for" H.B. 589. *McCrory*, 182 F. Supp. 3d at 428. Just so here. Given his view that "widespread voter fraud [i]s simply a myth," Leloudis Report at 71, Leloudis does not consider the voter-ID amendment or any implementing legislation necessary to ensure election integrity. *See* Leloudis Dep. Tr. at 91:10–15. His report therefore does not address other conclusions, such as the report from the Carter-Baker Commission,[4] that voter-ID laws not only preserve trust in the electoral process but prevent fraud from affecting the outcome of a close election—as occurred in

[4] *See* COMM'N ON FED. ELECTION REFORM, *Building Confidence in U.S. Elections* 18 (Sept. 2005), https://bit.ly/3uH73Bn (last visited Mar. 2, 2021).

the 2018 election for U.S. Representative of North Carolina's Ninth Congressional District. These goals are "obvious alternative[s]" to racial animus as "explanations" of the General Assembly's intent in passing S.B. 824, as is the constitutional imperative to pass a voter-ID law. *McGrady*, 368 N.C. at 891, 787 S.E.2d at 10. Yet as in his prior advocacy against voter ID, Leloudis has refused to "articulate anything the General Assembly needed to do to," other than what it has already done, to comply with that mandate without discriminating against minority voters. *McCrory*, 182 F. Supp. 3d at 440. He simply thinks the General Assembly should not have complied with that mandate.

Finally, the district court found that Leloudis did not really believe "that partisans can have policy differences without being racist." *McCrory*, 182 F. Supp. 3d at 428. This bias renders his opinion unreliable because, unless the Court is prepared to accept that every registered Republican who supported either the voter-ID amendment or S.B. 824 necessarily did so in the hope of discriminating against minority voters, party affiliation says nothing about S.B. 824's underlying intent. Leloudis agrees, claiming that he does not seek to impugn anyone's motives based on party affiliation and affirming that he has no evidence of anyone's intent. Leloudis Dep. Tr. at 106:13–16.

Nevertheless, much of his report reads like a broadside against the Republican platform—a pillar of which, he says, is "a restricted franchise" in service of "white voters' anger" at the election of Barack Obama. Leloudis Report at 58, 60. His conclusions about S.B. 824 thus are inescapably, and openly, colored by its support from Republicans. *See, e.g.*, Leloudis Report at 68 (comparing Republicans, including Legislative Defendant Moore, to the "white-rule Democrats" of 1900). This bias leads him to the same "contradictory" claim from his prior testimony, *McCrory*, 182 F. Supp. 3d at 428, that "Democratic" reforms increase and "Republican" reforms decrease

voter turnout even though he has not studied the causal relationship of either. Leloudis Report at 57. Biases are difficult to change, and Leloudis has not changed his, leading him to conclusions based on facts that are irrelevant on his own terms.

In sum, Leloudis has no reliable basis, or any basis at all, for his conclusion that S.B. 824 will disenfranchise African American voters, which is the only link he offers between his historical account and this case. The real conclusion of his analysis is, therefore, that *any* voter-ID law would be stained by North Carolina's discriminatory past. That conclusion is not only legally irrelevant, *see Abbott* 138 S. Ct. at 2324, it is distinctly unhelpful in a reality where, as here, some form of voter-ID law is constitutionally required to exist. His reports and testimony should thus be excluded in their entirety. With no evidence of any "series" of official, discriminatory acts in which S.B. 824 plays a part, his testimony about North Carolina history is irrelevant and at best will serve only to unfairly prejudice S.B. 824 by association. *Arlington Heights*, 429 U.S. at 267; *see* N.C. R. EVID. 403. At the very least, the Court should exclude any part of his testimony and reports (including the entirety of his rebuttal report) related to S.B. 824 and admit only his testimony related to other North Carolina history, the only part of his testimony that any other court has seen fit to credit.

b. Anderson's Redundant Testimony Is Even Less Relevant Or Reliable

However the Court rules on Leloudis, the Court should exclude the reports and testimony of Plaintiffs' other historian, Carol Anderson. If Leloudis' opinions are excluded, Anderson's must also be excluded because they share the same flaws. If Leloudis' opinions are admitted, Anderson's should still be excluded because they are redundant and even less reliable.

Like Leloudis, Anderson purports to have examined the extent to which S.B. 824 "fits" within a "historical pattern" of discrimination in North Carolina. Anderson Report at 2. The entire

first half of her report is facially irrelevant to that question. Instead, it examines historical discrimination in *other states*, focusing on the post-Reconstruction and Jim Crow eras. *See id*. at 4–26. Of course, proof of discrimination in North Carolina requires evidence from North Carolina; if the General Assembly cannot be forever condemned by its own "original sin," *Abbott*, 138 S. Ct. at 2324, it certainly cannot be condemned by that of other states. And Anderson does not even attempt to show that any past discriminatory acts in any other states motivated any past acts by the General Assembly, let alone by the General Assembly whose intent is actually at issue. Again, then, this testimony would serve only to prejudice S.B. 824 by association and would be excludable even if it had any probative value, which it does not. *See* N.C. R. EVID. 403.

Once the report reaches North Carolina, Anderson relies almost entirely on other scholars' research and conclusions, including Leloudis's *Fragile Democracy*, which she cites frequently. *See* Anderson Report at 26–43. As both she and Leloudis confirmed, however, primary sources are necessary to state any historical conclusion with certainty. *See* Leloudis Dep. Tr. 16:7–14; Deposition of Dr. Carol Anderson at 18:10–19 (Jan. 28, 2021), Moss Ex. 23 ("Anderson Dep. Tr."). To be sure, secondary sources can give useful context, and they are not objectionable if used to "fulfil[l] the historian's role of surveying a daunting amount of historical sources" and "evaluating their reliability." *United States v. Kantengwa*, 781 F.3d 545, 562 (1st Cir. 2015) (internal quotation marks omitted). But the dearth of original material in Anderson's account, and the apparently unquestioning acceptance of the secondary accounts she chose to include, show that she is not fulfilling that role here.

Consider, for example, her discussion of North Carolina's poll tax. She notes, citing a law review article, that "[a]n amendment to the [State] Constitution in 1920 limited the amount of the poll tax." Anderson Report at 36. But she does not note, because she was not aware, that a

constitutional amendment in the same year eliminated the poll tax as a condition to voting. And though she claims not to have encountered *any* evidence that contradicted the conclusions in her report, Anderson Dep. Tr. at 22:6–17, she concedes that this relatively early elimination of the poll tax would have deserved mention had she known about it, *id*. at 72:15–73:1. As Anderson herself agrees, historical research is "incomplete if it fail[s] to discuss all relevant available information." *Id*. at 21:8–13.

Similarly incomplete is her discussion of North Carolina's experience under the former preclearance process of the Voting Rights Act. She notes, citing the Fourth Circuit's decision in *McCrory*, that "the U.S. Department of Justice issued over fifty objection letters to proposed election law changes in North Carolina, including several since 2000," and that twenty-seven of those letters related to laws passed or approved by the General Assembly. Anderson Report at 40. This, she concludes, constitutes "evidence of official discrimination in North Carolina . . . from 1980 onward." *Id*. But she made no effort to verify that conclusion. She was not aware while writing her report exactly how many of those fifty objection letters post-dated 2000—just six—or how many of the letters after 2000 were addressed to the General Assembly: zero.[5] *See* Anderson Dep. Tr. at 31:7–17, 33:16–21. Nor does she offer any context for those fifty objection letters, which constituted a small fraction of the more than 550,000 voting changes from covered jurisdictions that the Department of Justice reviewed while the preclearance process was in effect.[6]

Aside from these objection letters, Anderson offers just one recent example of official discrimination: H.B. 589. As discussed, any discriminatory intent behind that materially different law does not reflect the intent behind S.B. 824. *See Abbott*, 138 S. Ct. at 2324. The General

[5] *See* DEP'T OF JUSTICE, *Voting Determination Letters for North Carolina* (last updated Aug. 7, 2015), https://bit.ly/37XCQEd.
[6] *See* DEP'T OF JUSTICE, *Section 5 Changes by Type and Year* (last updated Aug. 6, 2015), https://bit.ly/3q115aN.

Assembly cannot be "penalized . . . because of who they were, instead of what they did." *Raymond*, 981 F.3d at 304. Nevertheless, like Leloudis, Anderson considers S.B. 824 to be "borne out of" H.B. 589. Anderson Dep. Tr. at 73:9-10. Yet like Leloudis, she did nothing to measure or otherwise to account for the differences between S.B. 824 and H.B. 589 or the ameliorative effects those differences will have. She did not even review H.B. 589 in preparing her report. *Id*. at 110:1–8.

The Court thus cannot rely on Anderson's historical account, especially not as it might pertain to the General Assembly of 2018. On her own terms, her report does not reflect "the same level of intellectual rigor that characterizes the practice of an expert" in the field. *Kumho*, 526 U.S. at 152. And reliability aside, the Court will find little help in this account. The Court is equally equipped to review the secondary literature that Anderson relays. The Court is also equipped to review other court opinions, which comprise most of the rest of her historical evidence about North Carolina, and to compare the provisions of S.B. 824 and H.B. 589, which Anderson did not do.

The flaws in Anderson's methodology come to a head in the section of her report on S.B. 824 itself. Like Leloudis, her conclusion that S.B. 824 fits within a pattern of past discrimination is premised on the contention that S.B. 824 will have a discriminatory impact. To this central contention she devotes less than two pages of text. *See* Anderson Report at 43–45. A large chunk of that text is a block quote from an organization called VoteRiders, whose mission statement describes voter-ID laws as a "crisis in our democracy" that "prevent or intimidate millions of eligible Americans from casting their ballot."[7] Not only is the quote taken from a biased source—which Anderson masks by referring to VoteRiders as merely "an organization that provides information to voters," *id*. at 43—the quote is outdated. The author claims that the General Assembly chose "[w]hich IDs were included or excluded (*like public assistance cards*)" based on

[7] VOTERIDERS, *Our Mission*, https://www.voteriders.org/mission/ (last visited Feb. 28, 2021).

"which IDs Black voters were least likely to have." *Id*. at 44 (emphasis added). Putting aside that the author does not support the bald assertion that the General Assembly excluded any IDs because African American voters might disproportionately have them, and putting aside that Anderson did not study possession rates of public-assistance IDs or any other form of ID, public-assistance cards were included in the list of qualifying IDs months before Anderson signed her report. *See* N.C. GEN. STAT. § 163-166.16(a)(2)(d); *see also* Anderson Dep. Tr. at 80:24–81:2.

This addition does not change Anderson's opinion about the voter-ID requirement's allegedly discriminatory nature. *See* Anderson Dep. Tr. at 80:9–18. Neither do all S.B. 824's other ameliorative provisions. Ironically enough, these are her other piece of evidence *of* the General Assembly's discriminatory intent. According to her, these are nothing more than "'just so' tweaks" that the General Assembly has used "to disguise" its intent "to disenfranchise voters," like when the General Assembly curbed elections officials' discretion in administering the literacy test while leaving the test itself in place. Anderson Report at 35–36, 44–45. This specific comparison is plainly inapt: S.B. 824's ameliorative provisions cannot "tweak" a requirement that did not exist before S.B. 824, and no provision of S.B. 824 gives elections officials discretion to reject ballots based on a voter's race. More generally, a provision can be a "just so" tweak under this theory only if the underlying requirement is itself discriminatory. And like Leloudis, Anderson has not conducted any analysis of registered voters of any race who lack a form of ID listed in S.B. 824 or who might for some reason be unable to avail themselves of its ameliorative provisions—*i.e.*, any analysis of S.B. 824's impact. *See* Anderson Dep. Tr. at 76:16–19.

Anderson's analysis is thus a self-fulfilling prophecy: even the General Assembly's efforts to enable more voters to vote reveal the General Assembly's invidious intent. And this prophecy lacks real-world confirmation. It is so because Anderson says so. Indeed, like Leloudis, Anderson

thinks the General Assembly could have done nothing—except spurn its constitutional mandate to pass a voter-ID law—to remove the alleged discriminatory impact and hence the "original sin" from S.B. 824. *Abbott*, 138 S. Ct. at 2324; *see* Anderson Dep. Tr. at 116:19–22. As discussed, that view is legally relevant and distinctly unhelpful here.

It is also contradicted by Anderson's own sources. In perhaps the most misleading part of her report, she depicts all voter-ID laws as "modern tools of disenfranchisement." Anderson Report at 21. As examples, she discusses voter-ID laws from Indiana, Georgia, and Texas. *Id*. at 21–23, 25–26. What she fails to mention is that all three of these laws were ultimately upheld by the courts—including, in Indiana's case, by the United States Supreme Court. *See Crawford*, 553 U.S. at 204 (plurality op.); *id*. at 209 (op. of Scalia, J.); *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1355 (11th Cir. 2009) (Georgia's law); *Veasey v. Abbott*, 888 F.3d 792, 802 (5th Cir. 2018) (Texas's law). One of these omissions was knowing; the others were failures of research. *See* Anderson Dep. Tr. at 48:13–22, 55:20–23, 57:17–58:1 (admitting knowledge of the Indiana decision but not of the Texas and Georgia decisions). Also omitted are decisions upholding other voter-ID laws based on provisions similar to, if not less ameliorative than, S.B. 824's. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016) (Virginia law enabling voters to "obtain a free voter ID with which to cure the provisional ballot"); *South Carolina*, 898 F. Supp. 2d at 32 (South Carolina law with a reasonable-impediment provision); *see also* Anderson Dep. Tr. at 114:9–16, 114:23–115:4 (admitting unawareness of these decisions). Anderson was aware that Alabama's voter-ID law has also been upheld—even in the absence of a reasonable-impediment provision—but her report omits that fact, too. *See* Anderson Dep. Tr. at 114:21–22; *Greater Birmingham Ministries v. Sec'y of State for Alabama*, 966 F.3d 1202, 1231 (11th Cir. 2020). And though Anderson highlights language from the introduction of Judge Motz's "biting"

majority opinion about H.B. 589, Anderson Report at 43, she does not note—because she does not recall even reading—Judge Motz's partial dissent in the same case arguing that, "by its terms," the reasonable-impediment process "*totally excuses* the discriminatory photo ID requirement" and thus that the law should not be struck down before that process could be reviewed. *McCrory*, 831 F.3d at 243 (Motz, J., dissenting as to Part V.B) (emphasis added); Anderson Dep. Tr. at 113:1–8. Thus, to the extent that Anderson's views about voter-ID requirements are not mere *ipse dixit*, they rest on incomplete information.

Finally, the Court should not overlook the strong bias that Anderson will bring to this case. Anderson is the author of a book called *White Rage*, in which she argues about voter-ID laws that

> [p]rotecting the integrity of the ballot box . . . is not nor has it ever been the issue. Rather, the goal has been to intimidate and harass key populations to keep them away from the polls. It is a bit more sophisticated than in the days of Mississippi senator Theodore Bilbo's 1946 call to arms to get a rope and a match to keep blacks away from the voting booth, but *the intent is the same*.

CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 143 (2016) (emphasis added), Moss Ex. 38. Like Leloudis, then, Anderson cannot be expected to "meaningfully consider the justifications for" S.B. 824. *McCrory*, 182 F. Supp. 3d at 428. She too thinks that voter fraud is simply a "myth," Anderson Report at 23, and that "the language of election integrity" is simply code for discrimination, Anderson Dep. Tr. at 108:1–2. One of S.B. 824's primary sponsors, Senator Joel Ford, is African American. Anderson is unaware of any African American primary sponsors for the past discriminatory laws she has reviewed. *See id.* at 122:24–123:3. But Senator Ford does not affect her conclusion about S.B. 824's intent. *See id*. at 122:5–7. According to her, even African American support for voter-ID laws can be a sign of "white rage." *See id*. at 121:2–20.

In sum, Anderson offers no relevant, reliable evidence for her conclusion that S.B. 824 fits within a historical pattern of discrimination against African American voters. S.B. 824 bears none of the explicit racial animus or explicit racial tailoring that, in both Anderson and Leloudis's accounts, marked the discriminatory laws of North Carolina's past. Anderson offers no relevant evidence of more recent official discrimination; her analysis of S.B. 824 is scant, largely secondhand, and provably incorrect; and she admittedly performed no analysis of its potential impact. She omits details that contradict her conclusions, and she fails to review the full context for details she does include, as any expert must do and as she herself says is critical to historical analysis. *See id*. 21:14–22:5. Her report and testimony should be excluded.

V. Sabra Faires

Plaintiffs have proffered Sabra Faires to opine on the legislative process by which the General Assembly enacted S.B. 824. Legislative Defendants expect Faires to testify at trial, as she did in her December 14, 2020 report and January 21, 2021 deposition, that "the enactment of S.B. 824 was aberrational compared to the general practices of the General Assembly." Faires Report ¶ 2. Faires concedes that the General Assembly did not violate any rules of legislative procedure in enacting S.B. 824. *See* Deposition of Sabra Faires at 43:15–17 (Jan. 21, 2021), Moss Ex. 24 ("Faires Dep. Tr.") ("It was not inconsistent with their procedural rules that applied during the lame duck session."). Since the General Assembly abided by its rules, Faires bases her opinion on "[s]everal observations," Faires Report ¶ 2, of what she considers to be departures from unwritten norms and practices of the General Assembly.

Faires groups her observations around three aspects of the enactment of S.B. 824. First, she makes a variety of observations about the 2018 lame duck session in which S.B. 824 was introduced, debated, and enacted. She opines that this session itself was "aberrational" because this session was the:

> only regular session in North Carolina history that was reconvened (1) after a November general election; (2) after an election for seats in legislative districts that had been newly drawn to replace existing districts determined to be racial gerrymanders; (3) by a joint resolution that did not limit the matters to be considered; or (4) by a joint resolution adopted without amending or acknowledging a previously adopted joint resolution requiring the short session to adjourn *sine die* (permanently).

Faires Report ¶ 3. Second, Faires makes observations about the General Assembly's consideration of S.B. 824. She opines that S.B. 824 "violated historical legislative norms and was atypical of prior bills implementing constitutional amendments." Faires states that "S.B. 824 was passed in only eight legislative days, is the only legislation implementing a constitutional amendment ever to be enacted in a post-election lame duck session, and is the only legislation implementing a constitutional amendment ever vetoed by the Governor." Faires Report ¶ 4. Third, Faires makes observations about the process for enacting H.B. 1092, the bill that submitted the voter ID constitutional amendment to North Carolina voters. Faires Report ¶ 5.

Despite asserting that these "[s]everal observations" are the basis of her opinion that the General Assembly acted in an "aberrational" manner to enact S.B. 824, Faires fails to provide any reliable methodology or principles to justify linking these observations to her conclusions. Instead, Faires only offers the *ipse dixit* of her own opinion and vague allusions to her experience working for the General Assembly. She fails to provide any justification based on academic training, published or peer-reviewed literature, or any analysis of the actions of other state legislatures or the United States Congress. Consequently, her opinion fails to meet the minimum threshold of reliability required to be admissible under Rule 702. Further, beyond her *ipse dixit*, Faires' opinion merely recites basic historical facts and does not provide any analysis that would "assist" the Court in assessing the legislative enactment of S.B. 824, as required by Rule 702. Instead, her testimony would provide only these historical facts under the guise of expertise. Because Faires' opinion

lacks reliability and would not assist the Court, Legislative Defendants respectfully request her testimony be excluded.

a. Faires' Opinion Fails To Meet The Minimum Threshold Of Reliability Required Under Rule 702.

Faires' testimony should be excluded because her opinion fails to meet the minimum threshold of reliability required under North Carolina Rule of Evidence 702. Faires fails to apply any principled methodology in her analysis, Faires fails to provide operative definitions of "general practice" or "aberrational" by which to objectively analyze legislative actions, and Faires fails to provide a reasonable basis for her opinions based on her experience. Faires' opinion is not reliable and should be excluded.

i. Faires' Analysis Lacks A Principled Methodology.

First, Faires' analysis consists mainly of describing past actions of the General Assembly and then claiming those past practices can be used to interpret what would or would not have been aberrational for the General Assembly to do in 2018. But Faires applies no principled methodology to establish that these observations should be the baseline by which to analyze to actions of the General Assembly in enacting S.B. 824. "Proposed testimony must be supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known." *Daubert*, 509 U.S. at 590; FED. R. EVID. 702, Advisory Committee Notes (2000 Amendment) (noting expert opinion "must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded."). But Faires provides no grounds for her approach. This is fatal to any claim about the reliability of her analysis.

Simply looking at the past actions of the General Assembly is an unreliable metric for determining whether the General Assembly acted in an "aberrational" manner in the 2018 lame duck session because the General Assembly faced a set of circumstances unprecedented in North

Carolina history. As Faires conceded in her deposition, the election of 2018 was the *first time* in North Carolina history in which a party lost supermajority control of the General Assembly while the governorship was held by a member of the opposing party. *See* Faires Dep. Tr. at 24:19–22. Thus, the 2018 lame duck session held after that election was the first time that legislation implementing a constitutional amendment was considered under those circumstances in North Carolina history. Given the unique and unprecedented circumstances presented to the General Assembly, the practices of altogether different situations fail to offer a meaningful and reliable guide for how the General Assembly should or should not be expected to act. After all, the General Assembly had never been presented with the situation before. *Cf. Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999) (noting an expert opinion is unreliable when "it depend[s] on an imperfect syllogism constructed from unsupported suppositions.").

Under Rule 702, it is the Plaintiffs' burden to demonstrate how Faires' methodology of comparing altogether different legislative circumstances with the unique circumstances faced by the General Assembly in 2018 is a reliable metric. *See State v. Gray*, 259 N.C. App. 351, 355, 815 S.E.2d 736, 740 (2018). Yet nothing in Faires' report or deposition can aid Plaintiffs in meeting their burden. Faires has not asserted academic training in the analysis of assessment of legislative activity that supports her approach. *See McGrady*, 368 N.C. at 891, 787 S.E.2d at 10 (noting court should consider "professional background"). Faires has not reviewed or cited any literature suggesting that the norms and practices of a legislative body in one set of circumstances are a reliable means of determining the norms and practices the General Assembly should be expected to follow in unique circumstances. *Id.* at 890–91 (noting court should consider whether "the theory or technique has been subjected to peer review and publication"); *Kumho Tire Co.* , 526 U.S. at 156 (noting lack of reference "to any articles or papers that validate[d] [the expert's] approach").

Faires did not review the actions of other state legislatures or the United States Congress to otherwise explain her approach. Nor for that matter does Faires rely upon her past experience working for the North Carolina General Assembly—the ostensible source of her expertise—to provide a basis for her means of analysis. *See Kumho Tire Co.,* 526 U.S. at 156 (holding that courts must "decide whether this particular expert had sufficient specialized knowledge"). With no justification at all, she simply says that this is the way analysis should be done. "Trained experts commonly extrapolate from existing data. But nothing . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146, 118 S. Ct. at 519, 139 L. Ed. 2d 508.

Even granting that looking at past practices can provide a meaningful analysis of unique and unprecedented circumstances, Faires fails to explain why the past practices she highlights are reliable in assessing the enactment of S.B. 824. *Cf. State v. Babich*, 252 N.C. App. 165, 168, 797 S.E.2d 359, 362 (2017) ("[E]ven if expert scientific testimony might be reliable in the abstract . . . the trial court must assess whether that reasoning or methodology properly can be applied to the facts in issue." (cleaned up)). For example, Faires opines that S.B. 824 was "aberrational" because the General Assembly did not enact S.B. 824 at the same time that it also proposed the voter ID constitutional amendment. In her report, Faires stated, "Until 2018 when the text of a proposed constitutional amendment to the 1971 constitution required the General Assembly to enact laws on the topic of the amendment, the General Assembly enacted the proposed amendment and the implementing laws in the same session and sometimes in the same bill." Faires Report ¶ 71. Thus, Faires states that this past practice established a norm that the General Assembly allegedly departed from by enacting S.B. 824 after the people of North Carolina approved the voter ID constitutional amendment.

But Faires' so-called "norm" does not withstand the slightest scrutiny. The "norm" Faires identifies stems from two instances, both in 1971, when the General Assembly proposed an amendment and enacted implementing legislation at the same time. Faires Dep. Tr. at 100:10–16. It is hard to imagine isolated events from 1971 guiding or binding the actions of any legislature a half-century later. It is harder still to accept this comparison as a reliable methodology since Faires provides no justification for this methodological approach—not from academic training, published research, comparative analyses, or her own experience. *McGrady*, 368 N.C. at 891, 787 S.E.2d at 10.

Faires further fails to demonstrate that her approach is reliable, rather than merely an ad-hoc selection of past actions, by the fact that the enactment of S.B. 824 was *fully consistent* with the General Assembly's approach to the other constitutional amendments in 2018. In fact, Faires agreed in her deposition that "other amendments [were] proposed in the 2018 short session calling for implementing legislation, but the General Assembly did not pass implementing laws in that session for those amendments either." Faires Dep. Tr. at 100:17–22. Thus, the "norm" in 2018 was to propose a constitutional amendment without implementing legislation. Faires provides no justification for searching back five decades for a "norm" rather than the contemporaneous actions of the General Assembly. This failure to consider or address these "obvious alternative" legislative actions further undermines any reliability in Faires' opinion. *McGrady*, 368 N.C. at 891, 787 S.E.2d at 10.

ii. Faires Fails To Provide Definitions Of "General Practice" Or "Aberrational" By Which To Objectively Analyze Legislative Actions.

The lack of reliability readily apparent in Faires' opinion is underscored by the lack of operational definitions of "general practice" or "aberrational" by which she conducts her analysis

of legislative actions. This is a fundamental flaw of her analysis, rendering it wholly unreliable under Rule 702.

In her report and deposition, Faires refers interchangeably to the General Assembly's alleged "norms," "practices," or "general practices." Assuming that the different terms that she uses refer to the same concept, Faires fails to offer her operative definition for that concept or the means by which she determined which legislative actions merited demarcation as a "general practice." As is a common feature of Faires' analysis, she provides no reference to academic training, published articles, comparative studies, or her own experience in the General Assembly to provide an operative definition that is reliable. Nevertheless, Faires was asked at her deposition about what it would take for the General Assembly to establish a general practice, specifically with in this instance, extra legislative sessions.

> Q: Okay. So once you have two of something, that's sufficient to establish the usual. Is that your testimony?
>
> A: In this case, I would say yes.
>
> Q: Is there anything special about this case, why would you say yes here and not in another case?
>
> A: No.

Faires Dep. Tr. at 84:4–11. Under this testimony then, twice is sufficient to establish a "general practice" for the General Assembly, according to Faires. Yet the "two-is-enough" baseline for the establishment of a "general practice" offered by Faires is again unsupported by anything but her own assertion that it is sufficient.

Faires similarly has an apparent lack of an operative definition of "aberrational." Faires stated that her "common understanding" of the word "aberrational" meant "unprecedented" or "unusual." Faires Dep. Tr. at 16:17–22. But that is a question-begging definition. What does Faires

mean by "unprecedented" or "unusual"? Here too Faires relies on a seemingly numerical observation. While a "general practice" is established if the General Assembly does something *twice*, if the General Assembly has only done it *once,* then it has acted in an "aberrational" manner—so long as that one instance is "inconsistent with what has happened before." Faires Dep. Tr. at 82:10–13. It would thus appear that Faires considers the fact the General Assembly did something for the first time to be the *sine qua non* of "aberrational." But not always. Sometimes, the General Assembly will do something under a set of circumstances, and then the next time it faces those same set of circumstances, it would do something different. Under this scenario, Faires explained when the General Assembly did something differently for the first time then, it would not necessarily be aberrational. *See* Faires Dep. Tr. at 82:18–20. Sometimes the first time is not "aberrational." Faires did not provide an analysis of when this exception would apply or why it did not apply to the 2018 lame duck session.

In her deposition, Faires was asked about applying this "for-the-first-time" standard of "aberrational." Specifically, Faires was asked about whether the Governor's veto of S.B. 824 would also be considered "aberrational" in her view. After all, the Governor's veto of S.B. 824 was the *first time* in North Carolina history that a governor vetoed legislation implementing a constitutional amendment. Yet Faires said, "No, the veto was not aberrational." Faires Dep. Tr. at 52:22. Faires came to this conclusion despite the fact she conceded that "the general practice of governors in North Carolina is to not veto bills implementing constitutional amendments." Faires Dep. Tr. at 53:8–11. Thus, according to Faires, if the General Assembly does something different from her defined norms and practices for the first time, then the General Assembly has acted in a manner she terms "aberrational." But if the Governor does something different from the "general practice" for the first time, then the Governor has not acted in an aberrational manner. *See* Faires

Dep. Tr. at 52:22. Faires provides no reason for such inconsistent results of her analysis or inconsistent application of her proposed definition of "aberrational." The only reason appears to be based on her own subjective and unsupported judgment. That is inadmissible. After all, the word "knowledge," as used in Rule 702, "connotes more than subjective belief." *Daubert*, 509 U.S. at 590. But subjective belief is all Faires appears to offer.

iii. Faires Does Not Justify Her Results Based On Her Experience.

As the North Carolina Supreme Court has explained, "[e]xpertise can come from practical experience as much as from academic training." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 9. But when a putative expert witness uses her experience as the basis of her expertise, 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." FED. R. EVID. 702 advisory committee's note to the 2000 amendments. After all, "[t]he court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Id.*

But Faires' report does nothing more than ask the Court to take her word for it about the relationship between her experience and the conclusions she reaches. She does not explain how her experience working in and around the General Assembly allowed her to develop an expertise in what is a "general practice" or what is "aberrational" for a legislature to do. She fails to explain why the specific roles she had would provide a sufficient basis to so opine on those topics. And she provides nothing from her experience working in and around the General Assembly that would suggest that her ad-hoc, subjective judgment constitutes a reliable methodology for evaluating the actions of a legislature. By failing to justify her opinion with her experience, Faires testimony should be excluded. *See Alevromagiros*, 993 F.2d at 421 (excluding testimony as unreliable because the court was "unprepared to agree that it is so if an expert says it is so." (internal quotation

marks omitted)); *see also Hendrix ex rel. G.P. v. Evenflo Co.,* 609 F.3d 1183, 1201 (11th Cir. 2010) ("Merely demonstrating that an expert has experience, however, does not automatically render every opinion and statement by that expert reliable.").

Since Faires fails to apply a principled methodology in her analysis, fails to provide operative definitions of "general practice" or "aberrational," and fails to provide a reasonable basis for her opinions based on her experience, her opinion is unreliable under Rule 702. Accordingly, the Court should exclude her testimony.

b. Faires' Opinion Would Fail To "Assist the Trier Of Fact" As Required Under Rule 702.

Faires' opinion should be excluded on the independent ground that her opinion would not "assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. R. Evid. 702(a). Faires' written report is largely a collection of historical facts about what the General Assembly did and when they did it. But as discussed, Faires is not doing much in the way of analysis to interpret those facts or provide perspective based on her own experience as an employee of the General Assembly. Instead, her report merely says that the General Assembly took certain actions in the past, the General Assembly took certain actions in 2018 when it enacted S.B. 824, and Faires believes that means the General Assembly in an aberrational manner. This is nothing more than an invitation "to 'substitute [Faires'] judgment of the meaning of the facts of the case'" for the Court's. *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (quoting *Burrell v. Sparkkles Reconstr. Co.*, 189 N.C. App. 104, 114, 657 S.E.2d 712, 719, *disc. rev. denied*, 362 N.C. 469, 665 S.E.2d 738 (2008)).

Even if Faires' methodology of counting certain past actions of the General Assembly could be considered reliable, her interpretation provides no assistance to the Court as the Court is well-equipped to similarly survey the history of the General Assembly. It is true that expert

testimony may "embrac[e] an ultimate issue to be decided by the trier of fact," N.C. R. EVID. 704, and Faires appears to be opining with respect to one of the *Arlington Heights* factors. But her opinion is not admissible; instead, her opinion invades the province of the Court. After all, Faires relies almost exclusively on a survey of publicly available compilations of law and fact: the North Carolina Constitution, North Carolina statutes, General Assembly resolutions, the General Assembly's online archive of legislative history, and case law. Faires simply observes historical facts from these sources and draws unsupported conclusions based on them. But the Court is left "in as good a position as" Faires "to determine" the import of these historical facts. *Braswell*, 330 N.C. at 377, 410 S.E.2d at 905. The Court too can compare the past actions of the General Assembly or read the text of General Assembly resolutions. In other words, Faires' "testimony is properly excludable because it is not helpful"—the Court is well-equipped on its own to observe historical facts and draw conclusions therefrom. *Id.*; *see also United States v. Frazier*, 387 F.3d 1244, 1262–63 (11th Cir. 2004) ("Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments.").

CONCLUSION

For the foregoing reasons, Legislative Defendants' motion *in limine* to exclude the testimony of Plaintiffs' experts should be granted.

Dated: March 2, 2021

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 2nd day of March, 2021, served a copy of the foregoing Legislative Defendants' Motion in Limine to Exclude Reports and Testimony of Plaintiffs' Expert Witnesses, by electronic mail, to counsel for Plaintiffs and Defendants at the following addresses:

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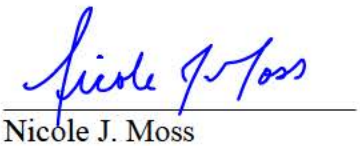

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