

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
REBUTTAL REPORT AND
TESTIMONY OF DR. EITAN HERSH**

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. LEWIS¹,
*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”) respectfully file this motion in limine to exclude Dr. Eitan Hersh’s expert rebuttal report and testimony.

I. Introduction

Plaintiffs produced a rebuttal expert report of Dr. Eitan Hersh to address an expert report Legislative Defendants produced by Ken Block. Under the heading Statement of Inquiry, Dr. Hersh described the scope of his work as follows:

Defendants’ witness, Mr. Ken Block, has conducted an analysis in which he estimates the incidence of duplicative voting in the 2016 general election. Specifically, he estimates the number of cases in which it *appears* that an individual cast a ballot in North Carolina as well as in another state in the 2016 general election. **I have been asked by Plaintiffs’ counsel to assess Mr. Block’s claims.**

Rebuttal Report of Eitan Hersh, Ph.D. ¶ 13 (Jan. 25, 2021) (emphasis added), Moss Ex. 33 (“Hersh Rebuttal”). On February 23, 2021, Legislative Defendants notified Plaintiffs that they were withdrawing Mr. Block as a witness in this case. Consequently, there is no longer any basis for Dr. Hersh’s rebuttal report and testimony—the expert testimony to which Dr. Hersh was responding is no longer being offered as evidence. Plaintiffs, however, have continued to maintain that they may call Dr. Hersh at trial, requiring Legislative Defendants to file this motion to exclude his testimony.

II. Legal Standards

The North Carolina Rules of Civil Procedure define a rebuttal expert as one who presents evidence “intended solely to contradict or rebut evidence on the same subject matter identified by another party.” N.C. R. CIV. P. 26(b)(4)(f)(2); *see also State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). Rebuttal evidence is defined as “[e]vidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party.” BLACK’S LAW DICTIONARY 1267 (6th ed. 1990).

III. Argument

First, Dr. Hersh's rebuttal report and testimony must be excluded because they no longer qualify as admissible rebuttal evidence. Dr. Hersh's rebuttal report and testimony assessed specifically Mr. Block's analysis of duplicative voting. Hersh Rebuttal ¶¶ 13–14. Indeed, he described what he was asked to do as “assess Mr. Block's claims,” nothing more, nothing less. *Id.* ¶ 13. And his report proceeded to do just that. Because Legislative Defendants have withdrawn Mr. Block as an expert witness in this case and will no longer be offering his expert report as evidence, the specific basis of Dr. Hersh's rebuttal report—Mr. Block's duplicative voting analysis—is no longer at issue in this case, thus removing the predicate for Dr. Hersh's testimony. Accordingly, Dr. Hersh's testimony no longer qualifies as rebuttal evidence under Rule 26 of the North Carolina Rules of Civil Procedure, and therefore must be excluded.

Second, and relatedly, Plaintiffs cannot use Dr. Hersh as an expert witness on duplicative voting generally because he was not offered as an expert on that topic. Again, his rebuttal report and testimony are directed specifically at critiquing Mr. Block's duplicative voting analysis. Indeed, Plaintiffs' counsel confirmed the fact that Dr. Hersh's testimony was limited to responding to Mr. Block's report in objecting to questions asked during Dr. Hersh's deposition that counsel believed to be outside the scope of Dr. Hersh's report. *See, e.g.*, Deposition of Eitan D. Hersh, Ph.D. at 176:16–19 (Feb. 1, 2021), Moss Ex. 34 (describing Dr. Hersh's expert report as being “limited to responding to Mr. Block”); *id.* at 182:18–22 (“I just want to object and say this is outside the scope of [Dr. Hersh's] report, which was simply critiquing Block. [Dr. Hersh is] not doing – he is not purported to do an analysis of duplicative voting in North Carolina.”); *id.* at 96:3–4 (stating that Dr. Hersh “is not testifying as an expert in this case about election fraud generally”); *id.* at 96:24–97:2. Consequently, this Court should exclude Dr. Hersh's rebuttal report and

testimony and prevent Plaintiffs from offering Dr. Hersh's testimony at trial.

IV. Conclusion

For the foregoing reasons, Legislative Defendants respectfully request that the Court exclude Dr. Hersh's rebuttal report and testimony.

Dated: March 2, 2021

Respectfully submitted,

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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 Rebuttal Report and Testimony of Dr. Eitan Hersh, by electronic mail, to counsel for Plaintiffs and Defendants at the following addresses:

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This 2nd day of March, 2021.



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