STATE OF NORTH CAROLINA COUNTY OF WAKE JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, AND PAUL KEARNEY, SR., PLAINTIFFS, vs. 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.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CASE NO. 18 CVS 15292 **LEGISLATIVE DEFENDANTS' MOTION IN LIMINE TO EXCLUDE HEARSAY REPORT AND CERTAIN NON-EXPERT WITNESS TESTIMONY**

[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 (1) the *From the Voter's View: Lessons from the 2016 Election* report, (2) the entirety of Isela Gutiérrez's testimony, and (3) the testimony of county board of elections officials Plaintiffs have identified on their witness list.

I. Introduction

Plaintiffs offer the opinions and testimony of Ms. Gutiérrez as evidence that "[i]f Senate Bill 824 is ultimately found unconstitutional and enjoined after its implementation, . . . there is a high likelihood that many poll-workers will face the same confusion over which requirements to enforce" as Ms. Gutiérrez opines poll workers faced during the 2016 general election. Affidavit of Isela Gutiérrez ¶ 19 (May 9, 2019), Moss Ex. 25 ("Ms. Gutiérrez Affidavit"). As the basis for her affidavit and testimony, Ms. Gutiérrez relies on qualitative data—incident reports, "polling place checklists," exit surveys, and calls to Democracy North Carolina's Election Protection Hotline—that Democracy North Carolina collected during the 2016 general election and a report that she authored titled *From the Voter's View: Lessons from the 2016 Election* "inform[ed]" by that data. *See id.* ¶¶ 9–11.

Ms. Gutiérrez's testimony, however, must be excluded. First, the *From the Voter's View* report that Plaintiffs attempt to admit into evidence through Ms. Gutiérrez is inadmissible hearsay—namely, a collection of out-of-court statements by third parties offered for the truth of the matters asserted therein. The data on which the report is based are third-party, anecdotal voter stories collected by lay poll monitors, legal poll monitors, and Election Protection Hotline operators that Ms. Gutiérrez "culled and analyzed" to author the report. *Id.* ¶ 11. Second, Ms. Gutiérrez's testimony is irrelevant to Plaintiffs' challenge to SB 824. The sole remaining claim in this case concerns the North Carolina General Assembly's intent in passing SB 824, and Ms.

Gutiérrez's speculation regarding potential poll worker confusion in the event that SB 824 is ultimately found unconstitutional and enjoined after its implementation sheds no light on that question. Third, Ms. Gutiérrez's testimony fails to satisfy the factors that this Court must examine for the admission of lay witness and expert witness testimony set forth in North Carolina Rules of Evidence 701 and 702(a). Plaintiffs have not offered Ms. Gutiérrez as an expert witness, *see, e.g.*, Plaintiffs' Preliminary Trial Witness List at 2–3 (Feb. 5, 2021), Moss Ex. 26 (listing Ms. Gutiérrez as a non-party witness, not as an expert witness), but her supposed lay witness testimony is not based on her first-hand observations, in violation of Rule 701. Instead, her testimony analyzing the data Democracy North Carolina collected during the 2016 general election and explaining what that data means could only possibly be admissible as expert testimony. But Ms. Gutiérrez is not qualified as an expert in any relevant field, such as data analysis, voter ID laws, election administration, or election research, and her conclusions are not based on a reliable methodology. Fourth, even if Ms. Gutiérrez were to qualify as an expert—again, in direct contravention to Plaintiffs' assertion that she is not being offered as an expert witness—she has not disclosed the underlying information that she relied on for *From the Voter's View* and her testimony, in violation of the parties' witness stipulation.

Plaintiffs have also indicated that they will seek to introduce evidence at trial regarding alleged difficulties county boards of elections encountered in implementing SB 824 before the March 2020 primary election. Plaintiffs "may call" as witnesses Courtney Patterson, John "Jake" Quinn, Noah Read, and Greg Flynn. *Id.* These county board of elections officials' affidavits are also listed on Plaintiffs' preliminary trial exhibit list. But these county board of elections officials' testimony is irrelevant to Plaintiffs' only remaining claim—that SB 824 was enacted with discriminatory intent—and therefore, must be excluded. These witnesses focus exclusively on

logistical concerns with distributing free ID cards immediately following the passage of SB 824. The fact-specific issues of budgeting, training, and the like that county boards faced in 2019, however, have no bearing on whether the General Assembly enacted SB 824 with discriminatory intent a year prior. Even if this Court disagrees, it should nevertheless exclude the testimony because its probative value is substantially outweighed by considerations of judicial efficiency and preventing a waste of time and resources. *See* N.C. R. EVID. 403. These witnesses discuss fact-specific issues unrelated to the sole legal issue in this case, so it would conserve judicial resources to exclude their testimony before trial.

Accordingly, this Court should exclude *From the Voter's View*, Ms. Gutiérrez's testimony in its entirety, and the testimony from the county board of elections officials Plaintiffs have included on their witness list.

II. Legal Standards

Under the North Carolina Rules of Evidence, "[e]vidence which is not relevant is not admissible." N.C. R. EVID. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. EVID. 401. In other words, relevant evidence "must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Royster*, 237 N.C. App. 64, 68–69, 763 S.E.2d 577, 580 (2014) (internal quotation marks omitted). Even if evidence is potentially relevant, the court may nevertheless exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues, or . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. EVID. 403; *see also, e.g.*, *State v. Collins*,

345 N.C. 170, 174, 478 S.E.2d 191, 194 (1996) (affirming trial court's exclusion of evidence that would have been "cumulative and a needless waste of time").

The North Carolina Rules of Evidence differentiate between two types of witness testimony: expert witness testimony and lay witness testimony. Under Rule 702(a), North Carolina courts examine three factors in considering the admission of expert witness testimony. First, the testimony must be based on "scientific, technical or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." *State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 8 (2016) (quoting N.C. R. EVID. 702(a)). Second, "the witness must be qualified as an expert by knowledge, skill, experience, training, or education." *Id.* (internal quotation marks omitted). Third, the testimony must satisfy a three-pronged reliability test: "(1) [t]he testimony must be based upon sufficient facts or data[;] (2) [t]he testimony must be the product of reliable principles and methods[;] [and] (3) [t]he witness must have applied the principles and methods reliably to the facts of the case." *Id.* at 890 (internal quotation marks and alterations omitted).

By contrast, lay testimony must be "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. R. EVID. 701. Lay witnesses may state "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, *derived from observation of a variety of facts presented to the senses at one and the same time.*" *State v. Broyhill*, 254 N.C. App. 478, 485, 803 S.E.2d 832, 838 (2017) (quoting *State v. Leak*, 156 N.C. 643, 647 (1911)). But when a witness "moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment 'to assist' the jury based on his 'specialized knowledge,' he is rendering an expert opinion." *State v. Davis*, 368 N.C. 794, 798, 785 S.E.2d 312, 315 (2016). In

Davis, the Supreme Court found the testimony of two witnesses to be expert testimony because the testimony went "beyond the facts of the case and relie[d] on inferences by the experts to reach the conclusion" that they did. *Id.* at 801. Opinion evidence of a non-expert witness is typically inadmissible. *See State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980).

"[D]etermining what constitutes expert opinion testimony requires a case-by-case inquiry in which the trial court (or a reviewing court) must look at the testimony as a whole and in context." *Davis*, 368 N.C. at 798, 785 S.E.2d at 315. This inquiry is guided by the principle that "while an expert relies on scientific, technical, or other specialized knowledge, lay testimony is based solely on the perception of the witness[;] [a]pplication of specialized knowledge from whatever source would bring the testimony within the sphere of expertise." *Broyhill*, 254 N.C. App. at 485, 803 S.E.2d at 839 (quoting David P. Leonard, *The New Wigmore: Expert Evidence* § 2.6 (2009) (footnote and internal quotation marks omitted)). In *Duncan v. Cuna Mutual Insurance Society*, 171 N.C. App. 403, 408, 614 S.E.2d 592, 596 (2005), the Court of Appeals held that a study by the American Medical Association and a press release from the North Carolina Department of Health and Human Services were not admissible in connection with a summary judgment motion because they were attached only to a lay witness's affidavit and were not relied upon for purposes of an expert opinion.

"As a general rule, hearsay evidence is not admissible." *State v. Valentine*, 357 N.C. 512, 515, 591 S.E.2d 846, 851 (2003); *see also* N.C. R. EVID. 802. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. EVID. 801(c). For example, a witness's testimony about what she had heard from others regarding a fact, but not what she knew directly, was properly excluded as inadmissible hearsay. *State v. Ziglar*, 308 N.C. 747, 756, 304 S.E.2d 206, 213 (1983); *see also*

State v. Wood, 306 N.C. 510, 514–17, 294 S.E.2d 310, 312–14 (1982) (holding that witness's testimony about "someone else's observation of a fact in order to prove as substantive evidence the truth of that fact" was inadmissible hearsay).

III. Argument

A. *From the Voter's View* Is Inadmissible Hearsay.

The *From the Voter's View* report must be excluded because it is inadmissible hearsay that does not qualify under any exemption to the hearsay rule. The report is based on personal stories from voters who called in to Democracy North Carolina's Election Protection Hotline during the 2016 general election, incident reports filled out by either the voters themselves or by Democracy North Carolina's poll monitors, or precinct checklists filled out by the poll monitors. *See* Deposition of Isela Gutierrez at 53:8–24 (May 31, 2019 & June 7, 2019), Moss Ex. 27 ("Dep. Tr."). Ms. Gutiérrez agreed that "the majority of the stories that were collected that [her] report relies on were not collected by [her]," *id.* at 63:20–23, but she could not recall with any clarity exactly who she had personally spoken with, *see, e.g.*, *id.* at 64:15–21 ("Q: [Y]ou don't recall contacting any voters about their stories in relation to this report? A: I don't, but I know that I talked to some of the voters on the phone. Some of these stories came to me as the captain of the Election Protection Hotline."); *id.* at 66:22–25 ("Q: "So is it fair to say in summary that you talked to a number of these voters, but not all of them directly? A: Yep."). Instead, she "used the materials that were returned to [Democracy North Carolina] by the lay monitors" as the basis for the report. *Id.* at 54:12–16. Ms. Gutiérrez also relied on information that legal field monitors called in to the Election Protection Hotline in writing *From the Voter's View*. *Id.* at 57:7–21.

As Ms. Gutiérrez's own explanation of the data sources on which *From the Voter's View* is based and repeated references to the report as relating "stories" from voters makes clear, *see,*

e.g., *id.* at 64:19–21 ("Some of these stories came to me as the captain of the Election Protection hotline."); *id.* at 65:19–20 ("I didn't talk – I talked to the voter on page 18, the second story about Pitt County."); *id.* at 72:7–8 ("We chose to include certain voter stories."), the report is inadmissible hearsay. In fact, the report is inadmissible double hearsay. *See State v. Sisk*, 123 N.C. App. 361, 369, 473 S.E.2d 348, 353–54 (1996) ("Statements made by a person other than the person(s) compiling the [report] which are recorded within the [report] are double hearsay, or compound hearsay, and may only be admitted if an exception to the hearsay rule is found for that statement."). The report and its conclusions are based entirely on anecdotal evidence gathered from third-party voters who are not being called as witnesses in this case, which was then relayed to Ms. Gutiérrez, and it is being offered as evidence to prove the truth of the matters asserted (*e.g.*, that poll workers were confused about HB 589's requirements during the 2016 general election).

From the Voter's View does not qualify under any of the exceptions to the hearsay rule. The closest match is the "business records exception," under which a

> memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation

is admissible even if hearsay. N.C. R. EVID. 803(6). But unlike hospital records, *see, e.g.*, *State v. Miller*, 80 N.C. App. 425, 428–30, 342 S.E.2d 553, 555–57 (1986), police accident reports, *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 39, 365 S.E.2d 198, 201 (1988), or deposit slips, *State v. Frierson*, 153 N.C. App. 242, 246–48, 569 S.E.2d 687, 689–91 (2002), it is not the regular practice of Democracy North Carolina to make the *From the Voter's View* report. Instead, the report is a one-off analysis of anecdotal evidence gathered from third-party voters. Moreover, the report was not produced contemporaneously with the events it discusses—the report was not released until 2018,

more than a year after the 2016 general election ended. Therefore, the report does not qualify under the business records exception. *See, e.g.*, *Ray D. Lowder, Inc. v. N.C. State Highway Comm'n*, 26 N.C. App. 622, 650–51, 217 S.E.2d 682, 699–700 (1975) (explaining that a damages report did not qualify under the business records exception because "it was made neither in the regular course of business nor contemporaneously with the events recorded").

Accordingly, this Court should exclude *From the Voter's View* as inadmissible hearsay.

B. Ms. Gutiérrez's Testimony Is Irrelevant To Plaintiffs' Challenge To SB 824.

The only claim remaining in this case is that SB 824 is unconstitutional because it discriminates against voters of color. *See* Verified Compl. at 45 (Dec. 19, 2018), Moss Ex. 7. The North Carolina Equal Protection Clause provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. CONST. art. I, § 19. 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, 200–01 (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).

To prove that a facially neutral law like SB 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 historic background of the challenged law, the specific sequence of events leading up to the challenged statute, departures from normal

procedural sequence, the legislative history, and the disproportionate impact on a certain race. *Id.* at 266–68.

Ms. Gutiérrez's testimony is not relevant to the question of legislative intent. Again, her testimony's focus is on the potential for confusion if a voter ID law is allowed to go into effect and then enjoined. *See* Ms. Gutiérrez Affidavit ¶ 19. This testimony is not relevant to Plaintiffs' burden to proffer "[p]roof of racially discriminatory intent or purpose" in the General Assembly's passing SB 824, *Arlington Heights*, 429 U.S. at 265. Indeed, this is shown by Plaintiffs' preliminary injunction brief. In the argument section of Plaintiffs' brief, the only time Ms. Gutiérrez's testimony was cited was in support of Plaintiffs' argument that a preliminary injunction was needed to avoid irreparable harm. *See* Pls.' Mem. of Law in Support of Pls.' Mot. for Prelim. Inj. at 56 (May 15, 2019), Moss Ex. 28. It was not cited in the merits section of Plaintiffs' brief at all.

Plaintiffs' decision not to rely on Ms. Gutiérrez's testimony on the merits was correct. How poll workers will react to a court's enjoining SB 824 has no logical tendency to prove whether the General Assembly had a racially discriminatory intent or purpose in passing SB 824. A poll worker's hypothetical confusion as a result of a court's independent intervention by enjoining the law can in no way be imputed back to the General Assembly's intent in passing that law. Furthermore, to the extent that Ms. Gutiérrez's testimony can be taken to be about poll workers' implementation errors of SB 824, implementation errors are by definition departures from a statute's design and thus are irrelevant to determining the legislature's intent in passing a law. *See Arlington Heights*, 429 U.S. at 266 (explaining that one factor a court may examine to determine whether racially discriminatory intent existed is the "impact of the *official action*" (emphasis added)). Ms. Gutiérrez's testimony may arguably speak to effects caused by *poll worker*

implementation errors, but it does not speak to the impact of the General Assembly's *official action*—the text of SB 824 as written and properly implemented.

Accordingly, because Ms. Gutiérrez's testimony is irrelevant to Plaintiffs' challenge to SB 824, this Court should exclude it in its entirety.

C. Ms. Gutiérrez Offers Improper Expert Testimony In The Guise Of Lay Witness Testimony.

Ms. Gutiérrez's testimony must be excluded because it fails to satisfy the factors that this Court must examine for the admission of lay witness and expert witness testimony set forth in North Carolina Rules of Evidence 701 and 702(a). Plaintiffs have not offered Ms. Gutiérrez as an expert witness, but instead, offer her as a lay witness. *See, e.g.*, Plaintiffs' Preliminary Trial Witness List at 2–3; Dep. Tr. at 35:3–5 ("Q: You're obviously not an expert witness in this case; right? A: I am not."); *id.* at 162:22–24 ("Q: So are you testifying as an expert witness in this case? A: I am not."); *id.* at 162:25–163:2 ("Q: Are you testifying in your personal capacity in this case? A: Yes, I am."). Consequently, Ms. Gutiérrez's testimony must be "rationally based on [her] perception[s]." N.C. R. EVID. 701. However, she fails to satisfy this requirement.

Ms. Gutiérrez's report and testimony relies on data collected by Democracy North Carolina during the 2016 general election, not her first-hand observations. She opines about what this data means, *see, e.g.*, Ms. Gutiérrez Affidavit ¶ 13 ("[T]he qualitative data collected during the 2016 General Election demonstrated that poll workers were . . . confused about which rules needed to be enforced."); *id.* ¶ 14 ("The data collected during the 2016 General Election demonstrates that many poll workers still believed that voters were required to show photo ID in order to vote in person, and relayed their misunderstanding to voters at the polls."), thereby "mov[ing] beyond reporting what [s]he saw or experienced through [her] senses, and turn[ing] to interpretation or assessment 'to assist' the [fact-finder] based on [her] 'specialized knowledge.'" *Davis*, 368 N.C.

at 798, 785 S.E.2d at 315. Ms. Gutiérrez is thus "rendering an expert opinion." *Id.* Lay witnesses, however, are not permitted to render expert opinions.

In order to render an expert opinion, Ms. Gutiérrez must be qualified as an expert. But she is not qualified to analyze the data Democracy North Carolina collected during the 2016 general election and offer her opinions based on that data. She has never sought to have her work published in peer-reviewed publications, Dep. Tr. at 33:13–16; has not published any peer-reviewed papers on public awareness campaigns, voter confusion, or implementation periods, *id.* at 94:21–23, 96:4–8, 215:4–7; and has only basic research training consisting of two classes in research methods that included qualitative and quantitative methods that she completed as part of her social work program, *id.* at 20:7–16, 33:17–24. She has also never acted as an expert witness in any legal proceedings. *Id.* at 34:22–24. Therefore, Ms. Gutiérrez's testimony is inadmissible as expert witness testimony.

Accordingly, because Ms. Gutiérrez's testimony is neither permissible lay witness testimony nor permissible expert witness testimony, this Court should exclude it in its entirety.

D. Ms. Gutiérrez's Testimony Is Not Based On A Reliable Methodology.

Ms. Gutiérrez's testimony is inadmissible and must be excluded for the additional reason that it is not based on a reliable methodology. First, the lay poll monitors, legal poll monitors, and Election Protection Hotline operators—those individuals who fielded the calls and who filled out the incident reports, polling place checklists, and exit surveys that became the basis for *From the Voter's View* and Ms. Gutiérrez's testimony—were not provided with data collection and analysis training to prepare them for their roles. Dep. Tr. at 55:19–56:6, 59:3–19, 60:3–15. Indeed, the training that Democracy North Carolina provided to the lay poll monitors was "extremely limited"—"to observe and report, not to go beyond that." *Id.* at 56:4–6. And Ms. Gutiérrez

described Democracy North Carolina's training of the Hotline operators as "[t]his is the database[;] [t]hese are the fields[;] [m]ake sure you complete all of them." *Id.* at 61:6–9. Given this barebones training of the individuals who collected the data on which Ms. Gutiérrez relies for her testimony and report, this Court cannot have any confidence regarding the trustworthiness or provenance of that data.

Second, Ms. Gutiérrez "did not select a representative sample" of North Carolina counties from which to gather the data on which her report relies. *Id.* at 71:7–11. Instead, the counties were chosen through "a combination of targeting and where we had volunteers available to travel or where they already were." *Id.* at 70:9–13. Democracy North Carolina targeted counties based on how many voters were in a county, whether the organization had previously received complaints from that county, and whether the county had previously been a covered county when Section 5 of the Voting Rights Act was in effect. *Id.* at 70:14–71:3. But without collecting data from a representative sample of counties statewide, Ms. Gutiérrez is unable to determine whether—taken as true—the anecdotal stories that Democracy North Carolina collected are representative of voters' experiences in North Carolina or whether they are outliers.

Third, Ms. Gutiérrez did not include all the voter stories that Democracy North Carolina collected in the report. *See id.* at 72:4–9. Instead, Ms. Gutiérrez "culled and analyzed" the anecdotal stories that Democracy North Carolina gathered to "inform" *From the Voter's View* and her testimony. Ms. Gutiérrez Affidavit ¶ 11. But she did not select a representative sample of voter stories for her report, Dep. Tr. at 72:23–74:17, instead choosing stories that "were illustrative of the clump of problems that we had seen," *id.* at 72:12–22. Ms. Gutiérrez testified that *From the Voter's View* did not include and did not purport to include positive experiences that voters had while voting, but instead that the report focused on "barriers and gaps." *Id.* at 93:11–16; *see also*

id. at 93:17–94:5. Consequently, Ms. Gutiérrez's testimony and report does not give an accurate overview of voters' experiences and poll workers' implementation of HB 589.

Accordingly, because Ms. Gutiérrez's testimony is based on unreliable methodology, this Court should exclude it in its entirety.

E. Even If Ms. Gutiérrez Were To Qualify As An Expert, She Has Not Disclosed The Underlying Information That She Relied On For Her Testimony.

For the reasons stated above, Ms. Gutiérrez is not qualified to analyze the data Democracy North Carolina collected during the 2016 general election and offer her opinions based on that data as an expert witness. But even if Ms. Gutiérrez were to qualify as an expert—even though Plaintiffs have not offered her as an expert witness—she has not disclosed "the underlying facts or data" on which she bases her opinions, in contravention of N.C. R. Evid 705 and the parties' witness stipulation. Stipulation Governing Witness Disclosures and Exhibits (Dec. 21, 2020), Moss Ex. 9 ("Witness Stipulation").

North Carolina Rules of Evidence 705 requires an expert witness to disclose facts or data underlying her opinion or inference if an adverse party requests that disclosure. Similarly, the Witness Stipulation requires that each expert's report 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. Ms. Gutiérrez has failed to satisfy both of these requirements.

On June 7, 2019, Legislative Defendants subpoenaed Ms. Gutiérrez, requesting documents and communications related to: (1) third-party comments on drafts of *From the Voter's View*; (2) the alleged incident involving "Davidson County Voter J.L." discussed in *From the Voter's View*; (3) the paragraph on page 3 of *From the Voter's View* that discussed alleged confusion about the voter ID law in place during the 2016 general election; (4) paragraph 17 of Ms. Gutiérrez's affidavit, which discussed certain voters that allegedly should not have been required to show

photo ID before voting but were required to do so anyway; and (5) the results of the exit poll or exit survey Ms. Gutiérrez referred to during her deposition. Although Ms. Gutiérrez produced some limited documents, she objected to each request and withheld numerous documents, including drafts of her report on which third parties had commented, spreadsheets compiling research of poll-monitor-reported issues that formed the basis of *From the Voter's View*, and emails between Ms. Gutiérrez and her colleagues about incorporating third-party feedback into the report and how to develop the report. Consequently, because Ms. Gutiérrez has not disclosed the underlying documents that she relied on for the *From the Voter's View* report and that formed the basis of her testimony, her testimony must be excluded.

F. The County Board Officials' Testimony Is Irrelevant To Plaintiffs' Challenge To SB 824.

The county board of elections officials' testimony regarding the implementation of SB 824 prior to the March 2020 primary is not relevant to whether the General Assembly acted with racially discriminatory intent or purpose in enacting SB 824. Evidence regarding the *implementation* of SB 824 in the aftermath of its passage does not have "any tendency to make the existence of any fact . . . more probable or less probable" in this dispute over the *enactment* of SB 824. N.C. R. EVID. 401.

Plaintiffs' four county board of elections witnesses—Courtney Patterson, John "Jake" Quinn, Noah Read, and Greg Flynn—entered similar affidavits in this case. All focus exclusively on logistical concerns with distributing free ID cards immediately following the passage of SB 824. For example, these witnesses allege that budgetary constraints made implementation of the free ID card requirement difficult. *See* Affidavit of Courtney Patterson ¶ 6 (May 14, 2019), Moss Ex. 29 ("Patterson Aff."); Affidavit of John Quinn ¶ 8 (May 14, 2019), Moss Ex. 30 ("J. Quinn Aff."); Affidavit of Greg Flynn ¶¶ 6–8 (May 14, 2019), Moss Ex. 31 ("Flynn Aff."); Affidavit of

Noah Read ¶¶ 7, 10 (May 9, 2019), Moss Ex. 32 ("Read Aff."). Similarly, they all note that they had not been adequately trained on how to implement SB 824's free ID card requirement. *See* Patterson Aff. ¶ 8; J. Quinn Aff. ¶ 7; Flynn Aff. ¶ 10; Read Aff. ¶ 9. Several also discuss concerns that they will not have enough time to issue free ID cards, *see* J. Quinn Aff. ¶ 7; Flynn Aff. ¶ 4, and complain that they were only given one machine to provide free ID cards to voters, *see* Patterson Aff. ¶ 6; J. Quinn Aff. ¶ 8; Flynn Aff. ¶ 7; Read Aff. ¶ 10. The county board of elections officials further speculate that voters will not be able to reach their board of elections offices due to a lack of public transportation. *See* Patterson Aff. ¶ 10; Read Aff. ¶ 11.

None of the evidence in these affidavits is relevant to proving that the General Assembly acted with "racially discriminatory intent or purpose" in enacting SB 824. *Arlington Heights*, 429 U.S. at 265. The budgetary, logistical, and timing constraints that various county boards of elections faced have no logical tendency to prove that the General Assembly passed SB 824 with intent to discriminate against voters of color. None of these witnesses' allegations relate to the historical background of SB 824, the sequence of events preceding its enactment, departures from the normal procedure, or SB 824's legislative history. *Id.* at 267–68.

Finally, all of the county board of election officials' evidence bears only on what occurred (or their hypothetical speculation about what *might* occur) between the passage of SB 824 and its enjoinment in 2019. While this testimony may have been relevant when the Court was considering whether to enter a preliminary injunction, it has no relevance now that the sole issue before the Court is the merits of Plaintiffs' intentional discrimination claim. Thus, testimony from the time frame that these witnesses proffer is irrelevant and should be excluded under Rule 402.

G. Including Evidence From The County Board Of Elections Officials Wastes Time.

Evidence from county board of elections officials regarding the implementation of SB 824

prior to the March 2020 primary should be excluded under Rule 403 because including it would be a waste of time and judicial resources. Fact-specific details about budgets, employee training, and other logistics have no relevance to Plaintiffs' claim that SB 824 was enacted with discriminatory intent. Accordingly, allowing Plaintiffs to proffer such evidence at trial needlessly consumes judicial resources. It is well settled that courts have "a proper interest in judicial efficiency." *Renwick v. News & Observer Publ'g Co.*, 310 N.C. 312, 323, 312 S.E.2d 405, 412 (1984). It is within this Court's discretion to exclude evidence that has no probative value and serves only to consume time. *See State v. Collins*, 345 N.C. 170, 174, 478 S.E.2d 191, 194 (1996). Thus, Mr. Patterson's, Mr. Quinn's, Mr. Flynn's, and Mr. Read's testimony regarding the difficulty of implementing SB 824 prior to the March 2020 primary should be excluded.

IV. Conclusion

For the foregoing reasons, Legislative Defendants respectfully request that the Court exclude the *From the Voter's View* report as inadmissible hearsay, the entirety of Ms. Gutiérrez's testimony as improper purported expert opinion, and the county board of election officials' testimony as irrelevant.

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 Hearsay Report and Certain Non-Expert Witness Testimony, 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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