STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 15292

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, *and* PAUL KEARNEY, SR.,

Plaintiffs,

v.

TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILLIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; DAVID R. LEWIS, *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.

PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE IN PART THE EXPERT OPINIONS OF KEEGAN CALLANAN, Ph.D.

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INTRODUCTION

Professor Keegan Callanan has submitted three expert affidavits in this case, expressing a range of opinions. Plaintiffs seek to exclude two of those opinions because they are neither relevant nor reliable, and therefore cannot meet the standard for expert testimony under North Carolina Rules of Evidence Rule 702 ("Rule 702").

First, in his December 14, 2020 affidavit, Professor Callanan opines that the list of IDs legislators included as acceptable for voting under S.B. 824 does not evince a design to favor IDs held disproportionately by white voters. *See* Riggs Aff., Ex. D[1] at ¶ 19. To arrive at this conclusion, Professor Callanan considers a mish-mash of statistics, including some—like the nationwide demographics of concealed carry permit owners—that have no real connection to North Carolina. But, even assuming (generously) that Professor Callanan's statistics could support his overall conclusion, there is a more fundamental problem: Professor Callanan admits that the data he relies upon does not show that the forms of ID included in S.B. 824, whether individually or collectively, actually reduce the overall disparity in ID possession rates between Black and white voters. Professor Callanan admits that is not a question he even tried to answer. As a result, his opinion cannot help this Court determine whether S.B. 824 bears more heavily on Black voters, one of the four key factors under the *Arlington Heights* framework.

[1] Citations to "Riggs Aff., Ex. __" are exhibits to the Affidavit of Allison J. Riggs, appended to the Notice of Filing accompanying Plaintiffs' Motions in Limine.

Importantly, Professor Callanan does ***not*** offer the opinion that the legislature that enacted S.B. 824 actually considered the data he reviewed at the time the law was enacted, or that the legislature was motivated by these data in its selection of acceptable IDs to include in S.B. 824. On the contrary, Professor Callanan admits he is not aware of "specific evidence that any of these specific data points were. . . on the desk of any legislator" when S.B. 824 was being enacted. Riggs Aff., Ex. E at 98:6–8. Professor Callanan's opinion is thus nothing more than an irrelevant post-hoc rationalization. He should be precluded from offering it at trial because it cannot help this Court determine what was actually in the mind of the legislature that enacted S.B. 824, and it cannot help this Court determine whether S.B. 824 bears more heavily on Black voters.

Second, in his June 18, 2019 affidavit submitted during the preliminary injunction proceedings, Professor Callanan opines that it is "reasonable to conclude that S.B. 824 may significantly increase public confidence in election integrity in North Carolina." Riggs Aff., Ex. F at ¶ 76. There are at least three reasons why the Court should preclude Professor Callanan from offering that opinion at trial. To begin with, although he is a well-credentialed political scientist, Professor Callanan is an expert on Montesquieu and republican theory—not on election law, election administration, voter fraud, or voter ID laws. His opinion that S.B. 824 will "significantly increase public confidence" is not based on his own research or

experience, but instead his survey of a small number of academic articles on the topic, the findings of which Professor Callanan candidly admits "are split." *Id.* at ¶ 75. Worse still, the articles on one side of the split (purportedly showing a positive correlation between voter ID laws and voter confidence) on which Professor Callanan relies do not study this issue in North Carolina, and Professor Callanan discloses no methodology to explain why or how those results are likely to occur in North Carolina. Professor Callanan's opinion that S.B. 824 will somehow "significantly" increase voter confidence is thus based on inconclusive data and *ipse dixit*—not a reliable foundation for admissibility under Rule 702.

LEGAL STANDARD

The "three-step framework" of evaluating a proposed expert witness's qualifications and the relevancy and reliability of their proffered testimony is "not new to North Carolina law." *State* v. *McGrady*, 368 N.C. 880, 892 (2016).

North Carolina Rule of Evidence 702(a) ("Rule 702(a)") demands that an expert witness be "qualified as an expert by knowledge, skill, experience, training or education." N.C. R. Evid. 702(a). "Different fields require different [expertise]." *McGrady*, 368 N.C. at 896. Thus, a witness must be excluded where they lack the "competence to testify as an expert in the field of [their] proposed testimony." *Id.* at 889.

Rule 702(a) also imposes a "special obligation . . . to ensure that any and all scientific testimony is . . . [both] relevant . . . [and] reliable. *State*

v. *Thomas*, 814 S.E.2d 835, 838 (N.C. Ct. App. 2018) (quoting *State* v. *Hunt*, 792 S.E.2d 552 (N.C. Ct. App. 2016)).

To satisfy Rule 702(a)'s relevancy requirement, the proffered expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. R. Evid. 702(a). This demands "something more" of the proffered expert testimony than that it "meet the minimum standard for logical relevance." *McGrady*, 368 N.C. at 889. A court must exclude testimony that is not "sufficiently tied to the facts of the case" that it will not aid in resolving a factual dispute. *Thomas*, 814 S.E.2d at 838. Where an expert concedes that their opinion is based on a speculative assumption—not based on any actual facts—their testimony must be excluded. *See State* v. *Babich*, 252 N.C.App. 165, 172 (N.C. Ct. App. 2017) (holding that the court below abused its discretion by admitting such testimony). Although experts may, and often do, base their opinions upon factual assumptions . . . those assumptions, in turn, must find evidentiary foundation in the record. *Id.* at 171–172 (citation omitted). "Mere conjecture" must be excluded. *Id.*

To be reliable under Rule 702(a), the proffered expert testimony must be based upon sufficient facts or data, must be the product of reliable principles and methods, and the witness must have applied the principles and methods reliably to the facts of the case. N.C. R. Evid. 702(a); *McGrady*, 368 N.C. at 892. To assist courts in making this determination, the North Carolina Supreme Court has endorsed the use of the factors articulated in *Daubert* v.

Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), that bear on reliability: "(1) 'whether a theory or technique . . . can be (and has been) tested'; (2) 'whether a theory or technique has been subjected to peer review and publication'; (3) the theory or technique's 'known or potential rate of error'; (4) 'the existence and maintenance of standards controlling the technique's operation'; and (5) whether the theory or technique has achieved 'general acceptance' in its field." *McGrady*, 368 N.C. at 891 (quoting *Daubert*, 509 U.S. at 593–94). Although this inquiry's primary focus is on the witness's principles and methodology, "conclusions and methodology are not entirely distinct" and courts are "not required 'to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *McGrady*, 368 N.C. at 891 (quoting *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997)).

ARGUMENT

I. PROFESSOR CALLANAN'S OPINION ABOUT THE TYPES OF IDs ACCEPTABLE FOR VOTING UNDER S.B. 824 IS IRRELEVANT

Professor Callanan opines that the "General Assembly's choices do not evince a design to favor forms of ID held disproportionately by white voters," because the legislature "excluded several forms of ID held disproportionately by whites and accepted by other voter ID states," while including "several forms of ID that are held disproportionately by members of racial minorities and rejected by other states." Riggs Aff., Ex. D at ¶ 19. To support that opinion, Professor Callanan examines a range of data sources,

many of which do not reliably explain anything at all about the rates at which white and minority voters in ***North Carolina*** possess various forms of ID. For example, Professor Callanan cites statistics showing that "[m]ilitary IDs are held disproportionately by members of racial minorities in the United States," but does not explain whether the same holds true for registered voters in North Carolina. *Id.* Likewise, he relies on concealed carry license applicant data from Florida, Indiana, Massachusetts, Texas, and Utah to establish that firearm permits are "held disproportionately by whites nationwide," and says nothing of firearm permit ownership among registered voters, let alone registered voters in North Carolina. *Id.* But, leaving the shortcomings in his data aside, there is a more fundamental problem with Professor Callanan's opinion that renders it irrelevant and thus inadmissible.

The central question in this case is whether the legislature that enacted S.B. 824 intended to discriminate against Black voters. That question can be answered through direct evidence of intent, or through circumstantial evidence, such as the extent to which the law bears more heavily on Black voters than white voters. *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Professor Callanan's opinion provides neither.

Professor Callanan's Report suggests that the legislature made informed, deliberate choices about the forms of ID to include in S.B. 824 based on racial data, but he admitted at his deposition that he has no evidence to support that assertion. Riggs Aff., Ex. E at 79:2–19, 86:8–18, 97:12–98:8.

Professor Callanan concedes that he has no evidence showing either that the General Assembly considered the data he cites in his report, *id* at 79:11–14, or even that the General Assembly requested such data while crafting S.B. 824. *Id.* at 79:15–19. Instead, Professor Callanan simply assumes that the data he analyzes "would be the kind of data that would have been available to the state legislators," *id.* at 77:5–7, even though he admits he is "not aware of any specific evidence that any of these specific data points were . . . on the desk of any legislator." *Id.* at 98:6–8. Professor Callanan cannot draw a line from his hypothetical legislator who he claims may have been aware of his data to the members of the North Carolina General Assembly who actually enacted S.B. 824. *See id.* at 86:17–18 ("But we don't know whether such a hypothetical legislator existed."). As a result, he has no basis for concluding that the legislature deliberately included in S.B. 824 forms of ID held disproportionately by minority voters, while excluding forms of ID held disproportionately by white voters. "[T]he most [h]e c[an] say is that the hypothetical legislator who is looking to favor or disfavor forms of ID on the basis of race with an informed opinion" could have considered the data Professor Callanan relies upon. *Id.* at 86:12–17. But speculation about the beliefs of hypothetical legislators untethered from the facts of this case is neither reliable nor relevant, and cannot help this Court determine the intent of the very real legislators who enacted S.B. 824.

Nor can Professor Callanan's statistics help the Court to understand whether S.B. 824 bears more heavily on minority voters. *Vill. of Arlington Heights*, 429 U.S. at 266. As the Court of Appeals has explained, S.B. 824 disproportionately burdens Black voters to the extent those voters "lack[] acceptable IDs at a greater rate than white voters." *Holmes* v. *Moore*, 270 N.C. App. 7, 840 S.E.2d 244, 253, 262–63 (N.C. Ct. App. 2020). To answer that question, it is necessary to understand "whether the Legislature's choices reduce the racial disparity in ID possession"—a question Professor Callanan admits he is "not asking." Riggs Aff., Ex. E at 136:3–8 ("So [Professor Quinn] is asking whether the Legislature's choices reduce the racial disparity in ID possession . . . I'm not asking that question."). As a result, he cannot speak further to the "intentions of the legislators," *id.* at 94:12–15; or to whether "any preexisting disparity" in ID possession rates is "reduce[d]" or "erased" by S.B. 824's list of qualifying IDs, *id.* at 96:1–8; or to "the extent to which the inclusion or exclusion of any of these forms of ID impacts any overall racial disparity in ID possession." *Id.* at 94:23–95:4. As a result, Professor Callanan's opinion cannot help this Court evaluate the relevant issue identified by the Court of Appeals. It is therefore inadmissible and should be excluded.

II. PROFESSOR CALLANAN'S VOTER CONFIDENCE OPINION IS UNRELIABLE.

Professor Callanan separately opines that it is "reasonable to conclude that S.B. 824 may significantly increase public confidence in election integrity in North Carolina." Riggs Aff., Ex. F at ¶ 76. That opinion is the

product of no reliable methodology and extends well beyond the scope of Professor Callanan's expertise. Professor Callanan's "areas of research specialization include democratic theory; political culture; and the origins and development of American political institutions and principles." *Id.* at ¶ 3. He publishes on 18th and 19th Century political thinkers like Montesquieu and Tocqueville, *id.*, not on voter fraud or voter ID. Riggs Aff., Ex. G at 25:15–26:3. His opinion is based not on his own scholarly work or experience, but instead on his review of a small number of academic articles cited in his report submitted during the preliminary injuniction proceedings. *Id.* at 101:2–102:12. Professor Callanan freely admits that the results of those studies are split: some show no correlation between voter ID and voter confidence, while the two studies he favors purport to show the opposite. Riggs Aff., Ex. F at ¶ 75. But Professsor Callanan's favored studies are tangential at best. One study measured the effect of informational mailers on voter confidence—not the effect of the Virginia photo ID law—and found that the mailers *decreased* confidence among some voters, specifically Democrats. *Id.* at ¶ 73 (emphasis added). The other study, which considered a New Mexico law that required only some voters to present photo ID, concluded that "voter identification policies appear to have little effect . . . . [and] did not carry over into higher levels of confidence [in the election results]." Riggs Aff., Ex. H at 102, 117.

Critically, neither of the studies Professor Callanan relies upon draws any conclusions about voter confidence in *North Carolina*. Professor

Callanan simply assumes that if a voter ID law or a mailer in one state is shown to enhance voter confidence, then it is "reasonable to conclude that S.B. 824 may significantly increase public confidence in election integrity in North Carolina." Riggs Aff., Ex. F at ¶ 76. He does not study or evaluate the extent to which those states' voters are similar or dissimilar to North Carolina voters. And he does not study or evaluate the extent to which those states' voter ID laws are similar or dissimilar to S.B. 824. Professor Callanan discloses no methodology whatsoever for his conclusion that the purported effect of voter ID laws in one state will occur in North Carolina. Therefore, his opinion is not the product of reliable, testable methods, but rather mere *ipse dixit*—precisely the type of unfounded conclusory assertion that courts routinely exclude as unreliable and inadmissible. *McGrady*, 368 N.C. at 890 (quoting *Joiner*, 522 U.S. at 146). This Court should do the same and preclude Professor Callanan from testifying at trial on S.B. 824's likely impact on voter confidence.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion to exclude in part the expert opinions of Professor Callanan.

Respectfully submitted this the 2nd day of March, 2021.

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