

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
THE TESTIMONY OF
M.V. HOOD III**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. Professor Hood's Testimony Is Not Relevant.....	3
II. Professor Hood's Testimony Is Unreliable.....	4
CONCLUSION.....	9

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Gen. Elec. Co. v. Joiner</i> , 522 U.S. 136 (1997)	5, 7
<i>Gray v. Allen</i> , 197 N.C. App. 349, 677 S.E.2d 862 (N.C. Ct. App. 2009).....	3
<i>Holmes v. Moore</i> , 270 N.C. App. 7, 840 S.E.2d 244 (N.C. Ct. App. 2020).....	1, 3, 7
<i>Howerton v. Arai Helmet, Ltd.</i> , 358 N.C. 440, 597 S.E.2d 674 (2004)	2, 5
<i>In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. (No II) MDL 2502</i> , 892 F.3d 624 (4th Cir. 2018)	9
<i>State v. McGrady</i> , 368 N.C. 880, 884, 787 S.E.2d 1, 5 (2016)	passim
<i>State v. Underwood</i> , 134 N.C. App. 533, 518 S.E.2d 231 (N.C. Ct. App. 1999).....	3
OTHER AUTHORITIES	
M.V. Hood III and Scott E. Buchanan, <i>Palmetto Postmortem: Examining the Effects of the South Carolina Voter Identification Statute</i> (2019)	8
N.C. R. Evid. 702	passim

INTRODUCTION

To be admissible under North Carolina Rule of Evidence 702 (“Rule 702”), expert evidence must be relevant and reliable. Professor Hood’s testimony is neither. The Court should preclude him from testifying at trial.

Professor Hood compares S.B. 824 to South Carolina’s voter ID law and opines that, because of similarities between the two laws, North Carolina will share South Carolina’s experience with voter ID—*i.e.*, that S.B. 824 will not depress minority voter turnout. That opinion is inadmissible for two reasons.

First, the Court of Appeals has already held that the relevant question in this case is not whether S.B. 824 actually succeeds in preventing Black voters from “participat[ing] in the elections,” but whether S.B. 824 places disproportionate “additional burdens” on Black voters. *Holmes v. Moore*, 270 N.C. App. 7, 840 S.E.2d 244, 253, 263 (N.C. Ct. App. 2020). As the Court of Appeals explained, S.B. 824 disproportionately burdens Black voters to the extent those voters “lack[] acceptable IDs at a greater rate than white voters” and more likely bear “the additional burdens” associated with obtaining ID. *Id.* at 262–63. Professor Hood offers no opinions about ID possession rates in North Carolina or the burdens associated with obtaining an acceptable ID. Therefore, his opinion and testimony cannot assist the Court in answering the relevant question identified by the Court of Appeals, as it must to be admissible under Rule 702.

Second, Professor Hood’s conclusions should be excluded because they rest on several faulty premises. He admits he has done nothing to study or explain why the result he observes in South Carolina is likely to occur in North Carolina. All

Professor Hood has done is note that the two voter ID laws share certain features. That, without more, is no basis to infer that the laws will have the same effect. Further to the point, Professor Hood ignores obvious variables that he admits could affect his conclusion. And he discloses no methodology whatsoever to support his determination that the results in South Carolina would translate to North Carolina. Moreover, Professor Hood's conclusion that South Carolina's ID law did not suppress minority turnout is itself unreliable and inadmissible because it is based on an academic paper that draws unsupported inferences from cherry-picked data. Under scrutiny, Professor Hood's own study shows that the South Carolina law actually *did* have a suppressive effect on minority voters when all eligible voters are considered. Professor Hood's opinions thus fail to meet the basic indicia of reliability set forth under North Carolina law.

This case is simply too important to be decided on the basis of unsubstantiated guesswork. Professor Hood's testimony should be excluded.

ARGUMENT

Expert testimony must be relevant and reliable. N.C. R. Evid. 702; *State v. McGrady*, 368 N.C. 880, 884, 787 S.E.2d 1, 5 (2016) ("We hold that the 2011 amendment adopts the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases."); *see also Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). Professor Hood's testimony is neither and should therefore be excluded.

I. Professor Hood's Testimony Is Not Relevant.

Professor Hood's testimony is not relevant. On that basis alone, the Court should exclude it. Expert testimony is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. R. Evid. 702(a); *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 ("This is the relevance inquiry."). Evidence is not relevant, and therefore not admissible, if "it has no logical tendency to prove a fact at issue in the case." *Gray v. Allen*, 197 N.C. App. 349, 353, 677 S.E.2d 862, 866 (N.C. Ct. App. 2009) (internal quotations omitted); *see also McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 ("In other words, the testimony must 'relate to [an] issue in the case.'" (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 591 (1993))); *State v. Underwood*, 134 N.C. App. 533, 543, 518 S.E.2d 231, 239 (N.C. Ct. App. 1999).

Professor Hood's analysis attempts to predict whether S.B. 824 will stop Black voters from casting ballots at higher rates than white voters. But the Court of Appeals has already, and properly, concluded that analysis "fundamentally miss[es] the point[.]" *Holmes*, 840 S.E.2d at 253. The ability for Black voters to "conceivably still participate in the elections . . . is, in and of itself, not determinative of whether or not S.B. 824 negatively affects" the constitutionally protected right to participate in elections on an equal basis. *Id.* Instead, the relevant question framed by the Court of Appeals "is the discriminatory burdens S.B. 824 imposes on [voters'] right to participate in elections on an equal basis" by requiring Black voters to "jump[] through the allegedly discriminatory hoops of S.B. 824." *Id.* at 253, 253 n.4. To evaluate that question, the Court of Appeals looked to the rate at which Black voters possess acceptable forms of ID compared to white voters and "the additional burdens"

Black voters bear in obtaining ID—not voter turnout rates. *Id.* at 262–63 (noting that Black voters “lack[] acceptable IDs at a greater rate” and “disproportionately lack the resources to travel and acquire such IDs in comparison to white voters”).

Professor Hood’s analysis has no connection to those issues. As he admitted in his deposition, he offers no opinion on ID-possession rates. Riggs Aff., Ex. A¹ at 39:10–12. He does not know how many North Carolina voters possess acceptable forms of ID. *Id.* at 38:20–39:3. He does not know the racial demographics of North Carolina voters who possess acceptable forms of ID under S.B. 824. *Id.* at 39:4–9. And he offers no opinion about the racial demographics of voters who do not possess acceptable forms of ID. *Id.* at 39:10–17. Professor Hood also has “not done *any* analysis on ID possession in *North Carolina*.” *Id.* at 39:8–9 (emphasis added). Professor Hood’s opinion and testimony regarding the likely impact of S.B. 824 on Black voter turnout is thus not relevant and should be excluded.

II. Professor Hood’s Testimony Is Unreliable.

Regardless of whether Professor Hood’s testimony is relevant (and it is not), it should be excluded because it is unreliable. North Carolina courts employ a three-pronged test to evaluate the reliability of expert testimony; indeed, “all of the following [must] apply”: (1) the testimony is based upon “sufficient facts or data,” (2) the testimony is the “product of reliable principles and methods,” and (3) the witness “has applied the principles and methods reliably to the facts of the case.” N.C. R. Evid. 702 (“Rule 702”); *McGrady*, 368 N.C. at 884, 787 S.E.2d at 5. “The

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.

primary focus” is “the reliability of the witness’s principles and methodology, not on the conclusions they generate.” *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (internal citations and quotation marks omitted); *see also Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (recognizing reliability as a “foundational inquiry into the basic methodological adequacy of an area of expert testimony”). Professor Hood’s opinion fails to meet any of these indicia of reliability.

Professor Hood’s conclusion rests on an untested, logical fallacy. According to Professor Hood, S.B. 824 was “modeled” off the South Carolina voter ID law, South Carolina’s voter ID law had a certain impact on Black voters,² and so the North Carolina law will therefore have a similar impact on Black voters. At each step, Professor Hood’s analysis fails to meet the Rule 702 standard.

As an initial matter, Professor Hood failed to take any steps to validate his opinion that S.B. 824 was modeled on the South Carolina law. Professor Hood did not interview any legislators, review any of the legislative debates from 2018, or review any internal documents or correspondence between legislators. *Riggs Aff.*, Ex. A at 43:12–44:2. His opinion is “not . . . about legislative intent[.]” *Id.* at 45:1–4. His opinion that S.B. 824 was “modeled” on South Carolina’s voter ID law is based not on “sufficient facts and data,” but speculation and *ipse dixit*. That is not enough. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that a court need not “admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert”); *see also McGrady*, 368 N.C. at 890, 787 S.E.2d at 9.

² As discussed *infra*, this conclusion itself is flawed and should be excluded.

Next, Professor Hood opines that because his “published analysis of South Carolina’s substantially similar voter ID law found no evidence of any racially disparate impact,” S.B. 824 “will also be racially neutral.” Riggs Aff., Ex. B at ¶ 29. That opinion is not the product of any reliable methodology. Professor Hood discloses no methodology—much less a reliable one—that would allow him to draw the causal inference at the heart of his opinion. He did not design or conduct any study that would measure the likelihood that the results from his South Carolina study would apply with equal force to North Carolina and S.B. 824. Riggs Aff., Ex. A at 79:4–23. Professor Hood made no attempt to replicate his South Carolina study in North Carolina. He could have tried to replicate his South Carolina analysis to study the impact of H.B. 589—North Carolina’s prior voter ID law, which was in place for the 2016 primary, and which Professor Hood admits also shares similarities with the South Carolina voter ID law. He did not. *Id.* at 67:20–68:4, 64:25–65:9. All he does is assume that because the South Carolina voter ID law and S.B. 824 share certain features, the two laws will have the same impact on voters of different states.

In leaping to that conclusion, Professor Hood ignores obvious variables that could affect his analysis. He admits that he did not control for, or explicitly analyze, differences between the North and South Carolina electorates, despite acknowledging that such differences can drive voter turnout. *Id.* at 92:20–23, 90:4–92:19. As he put it, he “wasn’t asked to compare the North and South Carolina electorates,” so he did not. *Id.* at 93:13–14. The only thing Professor Hood analyzes is “how close the North and South Carolina statutes were.” *Id.* at 85:13–18; *see also*

id. at 92:24–93:6. But that is only one-half of the equation. To draw any remotely valid comparison between the effect of voting laws on the South and North Carolina electorates, Professor Hood also needed to study the similarities (or differences) between those electorates.³ He did not. Instead, he considered demographic differences between those electorates only “implicitly” and admits that he does *not* “make a specific comparison” of demographic factors, including comparative racial compositions, “in the report.” *See id.* at 83:9–85:3, 91:1–92:3. Courts routinely reject expert testimony that fails to account for key variables. *See, e.g., McGrady*, 368 N.C. at 898, 787 S.E.2d at 14 (affirming exclusion of testimony where expert “acknowledged that variables could affect his opinions . . . but did not consider th[ose] in reaching his conclusions”); *see also Joiner*, 522 U.S. at 146 (affirming exclusion of expert testimony where “there [wa]s simply too great an analytical gap between the data and the opinion proffered”). This Court should do the same.

Even if Professor Hood could reliably use the experience in South Carolina to make predictions about the effects of S.B. 824 on voter turnout in North Carolina, there is yet another fatal flaw in his opinion: his underlying study of South Carolina’s law is itself methodologically unsound and unreliable. Professor Hood’s South Carolina study relies on the “parallel trend assumption,” which assumes that the voter turnout rate remains constant over multiple elections for voters with and

³ Indeed, the Court of Appeals has already distinguished an “analysis” of South Carolina’s law as “inapplicable” to the “discriminatory-intent analysis of S.B. 824” because “the South Carolina legislature slowed down the process and sought out input from both political parties to alleviate any potential discriminatory impact the new law might create.” *Holmes*, 840 S.E.2d at 264, 264 n.10.

without ID. Riggs Aff., Ex. A at 73:25–74:8. As a result, Professor Hood’s South Carolina study does not account for variables that could alter voter turnout, such as the candidates for office in any given election, changes in voter mobilization efforts, and political issues in specific elections that may have a motivating effect on turnout. *Id.* at 73:25–75:6. Professor Hood “did not take those factors into account” in his South Carolina study, despite admitting that those and other variables could affect voter turnout in different election cycles. *Id.* at 74:22–75:6. That aside, when all eligible voters in South Carolina are considered, even Professor Hood’s study shows that the South Carolina voter ID law has a suppressive effect on Black voters. Riggs Aff., Ex. C at Table B. How, then, did Professor Hood conclude that the South Carolina voter ID law would be race-neutral? Rather than evaluate all eligible voters (all of whom would need to meet the requirements of South Carolina’s ID law in order to vote), Professor Hood restricted his study’s sample to only “active” voters.⁴ Asking how a new requirement is likely to affect voters who are already regular voters is like asking how a speed bump is likely to affect only cautious drivers. By ignoring an entire category of eligible, but less consistent, voters to whom the South Carolina voter ID law applies, Professor Hood biases his results toward his preferred conclusion. Courts have “consistently excluded expert testimony” on this basis because such an approach “does not reflect scientific knowledge, is not derived by the scientific method, and is not ‘good science.’” *See In re Lipitor (Atorvastatin Calcium)*

⁴ South Carolina classifies registered voters into two categories: active and inactive. Riggs Aff., Ex. A at 68:16–19. Professor Hood’s analysis excludes “inactive” voters, even though “inactive” voters are eligible to vote and would have to meet the requirements of South Carolina’s voter ID law in order to do so. *Id.* at 68:20–69:8.

Mktg., Sales Practices & Prod. Liab. Litig. (No II) MDL 2502, 892 F.3d 624, 634 (4th Cir. 2018) (“Result-driven analysis, or cherry-picking, . . . is a quintessential example of applying methodologies (valid or otherwise) in an unreliable fashion.”) (internal citations and quotation marks omitted). This, too, is a reason to exclude Professor Hood’s testimony.

CONCLUSION

Professor Hood’s irrelevant opinion is the product of nothing more than flawed inference piled upon flawed inference. It falls well short of the Rule 702 standard for admissibility and should be excluded from trial.

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

By: /s/

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