IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Civil Action No. 1:13-CV-00949

DAVID HARRIS and CHRISTINE BOWSER, Plaintiffs, v. PATRICK MCCRORY, in his capacity as Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections, Defendants.	**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY BY DR. STEPHEN ANSOLABEHERE**

Plaintiffs, in their Response, claim that the expertise of Dr. Ansolabehere is "beyond cavil." (D.E. 121, p.1) Perhaps. Yet conducting an analysis with a methodology that even a political novice in North Carolina would know is incorrect and that contravenes established United States Supreme Court precedent is not just a trivial mistake. It is a fundamental flaw rendering any testimony based upon it inherently suspect and therefore inadmissible.

Moreover, the flaw is amplified by Dr. Ansolabehere's prior work, which suggests that he knew or should have known that the Supreme Court has rejected the argument that expert testimony analyzing registration statistics may be used to prove that race was the predominant motive in the construction of a legislative or congressional district. In fact, in the *Bethune-Hill* litigation cited by plaintiffs' counsel, Dr. Ansolabehere did *not*

use registration statistics to support his testimony but instead used election results. As even a political novice in North Carolina knows, the difference between using registration statistics and election results when analyzing voting behavior is like night and day. Thus, contrary to the argument of plaintiffs' counsel, Dr. Ansolabehere's testimony in this case is *not* "almost precisely the same analysis" he performed in *Bethune-Hill.* It's not even close. No doubt, Dr. Ansolabehere used registration statistics in this case because the use of elections results, similar to the actual analysis performed by Dr. Ansolabehere in *Bethune-Hill,* would show in this case that politics was the predominant motive for CD 1 and 12, a conclusion that would require dismissal of plaintiffs' claims.

It is specious for plaintiffs to argue that Dr. Ansolabehere's testimony should be admitted and given whatever credibility or weight to which it is entitled because the Supreme Court has already ruled that expert testimony based upon registration statistics is entitled to no weight. Any expert who would use registration statistics after *Easley v. Cromartie,* 532 U.S. 234 (2001) ("*Cromartie II*") is not entitled to any credibility.

Plaintiffs argue that Dr. Ansolabehere's testimony is similar to the testimony to be offered by another plaintiffs' expert, Dr. David Peterson. Plaintiffs incorrectly describe Dr. Peterson's testimony in at least two respects. First, the Supreme Court in *Cromartie II* did not "rely heavily" on Dr. Peterson's "segment analysis" as represented by the plaintiffs. In that case, Dr. Peterson performed his segment analysis, relied upon by the plaintiffs in this case, *and* an analysis comparing race with partisan voting behavior. In *Cromartie II*, the Supreme Court reversed the district court's decision that CD 12 was an illegal racial gerrymander. The Supreme Court noted that the district court's criticism of

Dr. Peterson focused on his segment analysis as opposed to Dr. Peterson's study on the voting behavior of African Americans. *Cromartie II*, 532 U.S. at 252. Without regard to Dr. Peterson's segment analysis, the Supreme Court in *Cromartie II* concluded that the evidence before the district court did not prove a racial gerrymander "because race in this case correlates closely with political behavior." *Cromartie II*, 532 U.S. at 257. Because the Supreme Court relied on evidence showing a correlation between race and politics, including Dr. Peterson's analysis of that issue, Dr. Peterson's segment analysis was never subjected to any serious scrutiny by that Court. The decision in *Cromartie II* is based on evidence showing a correlation between African Americans and voters who support Democratic candidates. The decision is not based upon Dr. Peterson's segment analysis. Thus, Dr. Peterson's segment analysis has not been "accepted" by the Supreme Court nor has it been subjected to any serious scrutiny by that Court.

Moreover, Dr. Peterson has not testified that race was the "predominant" motive for either CD 1 or 12. For CD 1, Dr. Peterson's testimony will be that this district is equally explained by either politics or race. Thus, Dr. Peterson will have to concede that under his analysis he cannot say that race was the predominant motive for CD 1 and that his analysis shows that the district may be explained by politics. Further, as to CD 12, while Dr. Peterson may testify that race "better explains" that district as compared to politics, he will not testify that his analysis – flawed as it is – shows that race was the predominant motive for CD 12. In fact, Dr. Peterson will concede that his analysis does not show that race was the predominant motive of CD 12. Indeed, as to both CD 1 and CD 12, Dr. Peterson has already previously admitted that he *did not and could not*

conclude that race was the predominant motive in drawing the districts. (Peterson Dep. pp. 86-91) And, when limited to the information that the legislature's mapdrawer, Dr. Hofeller, in fact used during the mapdrawing process (voting age population and election results for President Obama in 2008), Dr. Peterson's own data will show that the *party* hypothesis is a *better* explanation for the boundaries of CD 12. The same data show that the race hypothesis and the party hypothesis are tied in the analysis for CD 1. (Peterson Dep. pp. 113-15)

Dr. Ansolabehere knowingly used a method for analyzing the impact of race on the construction of a district that has been rejected by the Supreme Court, even though in the prior *Bethune-Hill* litigation, he used election results. His testimony is therefore entitled to no weight and should be excluded.

Respectfully submitted this 7th day of October, 2015.

NORTH CAROLINA DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY BY DR. STEPHEN ANSOLABEHERE** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 7th day of October, 2015.

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