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.	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY AND REPORT OF STEPHEN ANSOLABEHERE**

Defendants Patrick McCrory, North Carolina State Board of Elections, and Joshua Howard (collectively "Defendants"), pursuant to Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), submit this Memorandum of Law in support of their Motion to Exclude the Testimony and Report of Stephen Ansolabehere. In support of their motion, Defendants show the Court as follows:

ARGUMENT

Stephen Ansolabehere should be precluded from testifying as an expert witness on behalf of Plaintiffs and all related materials supporting his purported "expert" conclusions regarding North Carolina's 2011 Redistricting Map— including his report (D.E. 18-1), his report in response to defense expert Thomas Hofeller (D.E. 37-1), and his

deposition testimony (D.E. 68-4 & 68-5)—should be excluded from the record for several reasons.

First, Ansolabehere has never drawn a state districting plan, or even a single district map, for a state legislature. (D.E. 68-4, pp. 47-48, 51; D.E. 68-5, pp. 91, 107). As a result, he has no experience or training that would enable him to understand the factors governing such undertakings and is not qualified to offer opinions regarding the motives of the North Carolina General Assembly when it enacted its districting plan in 2011. Second, Ansolabehere's methodology is unreliable and unsubstantiated. Significantly, Ansolabehere arrived at his "expert" conclusions by analyzing registration statistics for voter tabulation districts ("VTDs") instead of actual election results for VTDs, *a methodology that he acknowledges has been expressly rejected by the United States Supreme Court***.** (D.E. 68-4, pp. 58-61; D.E. 68-5, p. 106). *See Easley v. Cromartie*, 532 U.S. 234, 244-245 (2001) ("*Cromartie II*")(evidence that "focuses upon party registration, not upon voting behavior…[is] inadequate because registration figures do not accurately predict preference at the polls). And third, in analyzing whether race was a factor in the composition of the districts challenged by Plaintiffs, Ansolabehere employed a novel "envelope of counties" theory that he admits has never been recognized by any court, much less a court deciding a redistricting case. (D.E. 18-1, p 9; D.E. 68-5, pp. 90-93). Such an unrecognized, or out-right rejected, methodology cannot be said to be "generally accepted" or "established to be reliable" as required by *Daubert*. Accordingly, Ansolabehere's report, and subsequent deposition testimony, is fundamentally flawed and fails to meet the standard of admissibility established by the

Supreme Court. This Court should disregard his submitted materials and exclude his testimony.

I. Standard of Review

The determination of whether Ansolabehere's report and testimony is admissible should be made with reference to Rule 702 of the Federal Rules of evidence. Under that Rule,

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (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.
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> The factors a court must consider when evaluating an expert's admissibility include:
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> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594 (1993); *United States v. Downing*, 753 F.2d 1224, 1238–41 (3d Cir.1985). Rule 702 requires the trial judge to be a "gatekeeper" by admitting only specialized testimony that is relevant and reliable. *See Daubert*, 509 U.S. at 589. As a "gatekeeper," the trial judge must ensure that "any and all [specialized] testimony or evidence is not only relevant, *but also reliable*." *Id.* (emphasis added), *see also Dunn v. Sandoz Pharm. Corp*., 275 F. Supp. 2d 672, 676

(M.D.N.C. 2003) (stressing the importance of excluding unreliable evidence because of the 'very powerful' influence of expert testimony). The proponent of the expert testimony bears the burden of proving reliability of the expert's opinion. *See Maryland Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780, 783 (4th Cir. 1998) (discussing the requirement that a party must demonstrate by a preponderance of the evidence that an expert's opinion is "reliable").

II. Ansolabehere is Not Qualified to Offer Expert Testimony on the Issues for Which Plaintiffs Proffer His Report.

Ansolabehere is not qualified to offer the expert opinions Plaintiffs proffer him for. *First, and foremost, Ansolabehere has never before drawn a state districting plan, or even a single district map, for a state legislature*. (D.E. 68-4, pp. 47-48, 51; D.E. 68-5, pp. 91, 107). Further, while Ansolabehere has authored "numerous scholarly works" on general political science topics, none of his prior work involved redistricting, racial gerrymandering, or any other subject directly relevant to his work in this case. (D.E. 18-1, ¶ 3; D.E. 68-4, pp. 43-46). The majority of the "experience" listed on his resume is likewise unrelated to legislative redistricting or racial gerrymandering. (D.E. 18-1, ¶¶ 1-2; D.E. 68-4, pp. 7-).[1] In fact, the only work Ansolabehere has ever conducted related to

[1] Specifically, the majority of Ansolabehere's "experience" consists of being a professor of Government, teaching classes that cover a broad range of political science topics, "from Intro to American Government to…advanced graduate classes," but not a class specifically on legislative redistricting. (D.E. 68-4, p. 9). He has headed a "Voting Technology Project," which sought to help find solutions to various technical problems experienced in elections. (D.E. 68-4, p. 7). He is a consultant for CBS News on election night, a position in which he attempts to predict election results using "real-time" data. (D.E. 68-4, p. 10). He has also worked as a consultant in cases involving topics such as: issue advertisements, voter registration, the ability of overseas military personnel to cast

redistricting has come recently at the behest of Plaintiffs' counsel in the instant case, as an "expert" witness in several cases currently challenging districting plans enacted by Republican-controlled state legislatures. (D.E. 68-4, pp. 46-47).

Courts have repeatedly held that expert witnesses must possess "some special skill, knowledge, or experience…*concerning the particular issue before the court*." *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 392 (D. Md. 2001)(emphasis added). With regard to cases involving elections, the special knowledge must be more than "significant political experience," it must be "particular expertise" on the practices at issue in the case. *Id*. *See also Koppell v. N.Y. State Bd. Of Elections*, 97 F. Supp. 2d 477, 481-82 (S.D.N.Y. 2000)(excluding testimony of political scientist who had "significant political experience," but "lack[ed] any particular expertise" on the election practices at issue, and whose work in the area "has neither been tested nor subject to peer review"). Finally, qualified experts must be able to testify about "matters 'growing naturally and directly out of research they have conducted independent of the litigation,'" rather than opinions developed "expressly for purposes of testifying." *Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 470 (M.D.N.C. 2006)(quoting *Daubert*, 43 F.3d 43 F.3d 1311, 1317 (9th Cir. 1995)); *see also* Fed. R. Evid. 702, advisory committee's note.

Here, just like in *Koppell* and *Shreve*, any expertise that Ansolabehere may possess is related to politics and political science generally. With regards to drawing districting plans or maps, Ansolabehere at most has "casual experience teaching students

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ballots, and technical administration of elections. (D.E. 68-4, pp. 24-28).

how to draw plans [in class]" and on "some" occasions has reviewed alternative district theories on redistricting software subsequent to a case being filed. He does not possess the "particular" expertise in drawing legislative maps for a state districting plan that *Daubert* requires in order for him to be admitted as an expert witness in this case. D.E. 18-1, ¶¶ 1-2; D.E. 68-4, pp. 7- 28).

Furthermore, any knowledge that Ansolabehere has developed regarding the creation of legislative districts has been obtained expressly for the purposes of testifying on behalf of clients represented by Plaintiffs' counsel in similar cases pending in courts around the country. Ansolabehere's opinions did not "grow naturally" out of research he "conducted independent of…litigation," but rather were developed "expressly for purposes of testifying" against redistricting plans enacted by North Carolina and other Republican-controlled state legislatures. Accordingly, Ansolabehere does not possess the "specialized knowledge" required of an expert under *Daubert* or Rule 702. He should be precluded from testifying and the materials he has submitted should be excluded from the record.

III. Ansolabehere's Methodology Does Not Satisfy Federal Rule of Evidence 702 or *Daubert*'s Reliability Prong.

Ansolabehere's methodology also fails the admissibility standards set forth in Rule 702 and *Daubert*. As stated, Ansolabehere arrived at his "expert" conclusions by using methodology that has been rejected by the Supreme Court and is not recognized within the relevant redistricting community.

A. Ansolabehere's "expert" opinions were formed by analyzing registration statistics for VTDs instead of actual election results, a methodology rejected by the Supreme Court.

Ansolabehere's conclusions, expressed in his report and at his deposition, are fundamentally flawed because they are based on his analysis of registration statistics instead of actual election results. (D.E. 68-4, pp. 58-61; D.E. 68-5, pp. 67, 106). Specifically, at his deposition, Ansolabehere admitted that he only looked at registration records, not elections results, because he "couldn't determine the race of the voters" by only examining election results. (D.E. 68-4, pp. 58-59).

The Supreme Court in both *Cromartie I* and *Cromartie II* expressly rejected the argument that plaintiffs in racial gerrymandering cases can prove that race was the predominant motive in the formation of a VTD by examining voter registration statistics as opposed to actual election results. *Cromartie II*, 532 U.S. at 244-45. The Supreme Court opined that the "problem" with using registration data as such evidence was that it focused on "party registration, not upon voting behavior…[and] registration figures do not accurately predict preference at the polls." *Id.* at 245. Importantly, the *Cromartie* Court noted that in North Carolina, "party registration and party preference do not always correspond." *Id.* This is so because "white voters registered as Democrats 'cross-over' to vote for a Republican candidate more often than do African-Americans, who register and vote Democratic between 95% and 97% of the time." *Id.* As a result, the Court acknowledged that a "legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior…[and that] a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district

containing more heavily African-American precincts, but the reasons would be political rather than racial." *Id*.

Ansolabehere admitted that he had read and was familiar with the *Cromartie* decisions. (D.E. 68-4, p. 61; D.E. 68-5, p. 106). However, he ignored the rulings and focused solely on voter registration statistics, despite acknowledging that in North Carolina: (1) registered white Democrats are more likely to vote for a Republican candidate than a African American Democrat is to vote for a Republican; (2) that unaffiliated white voters are far more likely to vote for Republican candidates than are unaffiliated black voters; and (3) that registered white Democrats vote Democratic at far lower percentages than registered African American Democrats. (D.E. 68-5, pp. 98, 101). These uncontroverted facts explain why certain VTDs were moved in or out of the 2011 versions of Districts 1 and 12—to protect or improve Republican opportunities in adjoining districts—a conclusion Ansolabehere would have arrived at had he applied the methodology endorsed by the Supreme Court in a case involving the same district at issue here.

In explaining his decision not to review election results in the VTDs added to or moved out of Districts 1 and 12, Ansolabehere stated that he believed actual voting conduct and registration statistics are "highly correlated." This belief was not based on any prior work or study of legislative redistricting, but on his "practical experience predicting [national] elections" with CBS News. (D.E. 68-5, p. 106). As stated, the Supreme Court has specifically rejected such a contention and has agreed that registration data is not reliable information upon which to predict voter behavior. *Cromartie II*, 532

U.S. at 245 (rejecting trial testimony by Dr. Ronald Weber). Thus, Ansolabehere's methodology has been expressly rejected as unreliable by the Supreme Court and his opinions should not be considered here.

B. Ansolabehere also employed a novel theory in arriving at his ultimate conclusions that he admits has never previously been recognized.

The reliability of Ansolabehere's report and testimony also suffers because he employed a novel "envelope of counties" theory in arriving at his conclusions. (D.E. 18-1, p. 9; D.E. 68-5, pp. 90-93). Ansolabehere explained his theory as one wherein a map drawer looks at a geographic area containing a "set of counties where there is a set of people with particular characteristics," and decides how to "configure the district within that envelope defined by the county." (D.E. 68-5, p. 90). Using his theory, Ansolabehere concluded that the challenged districts were "highly non-compact," crossed municipal boundaries not crossed under the 2001 legislative map, and presented a "very large difference" between the percentages of African Americans and percentages of whites that were included in Districts 1 and 12 "from the counties that comprise the Envelope of these districts." (D.E. 18-1, pp. 4-5, 18; D.E. 64-5, p. 112)

Ansolabehere formulated his "envelope of counties" theory from "map drawing in… contexts" outside of state legislative redistricting efforts. (D.E. 68-5, p. 90). His theory completely discounted the fact that the North Carolina legislature could have drawn the new districts anywhere when they undertook their 2011 redistricting efforts. For example, the 2011 General Assembly could have drawn District 12 from Charlotte to Wilmington, as originally suggested by the United States Department of Justice in 1992.

Shaw v. Hunt, 517 U.S. 889, 901, 917 (1996) ("*Shaw II*"). The First District could have been drawn into Wake County or combined with Durham County, instead of some of the counties in eastern North Carolina. Instead, the legislature drew Districts 1 and 12 in the same geographic areas where they had been drawn historically. In the case of District 12, the 2011 General Assembly elected to draw the district into the same six counties in which it has been located since the 1997 version of the district. Regardless, at his deposition, Ansolabehere admitted that his "envelope" theory had not been recognized by any courts, especially a court deciding a case similar to the instant one. Specifically, Ansolabehere testified:

> Q: So, using the envelope to predict or assess the number of Republicans or blacks that end up in or out of a district is not something you encountered before this case?
>
> A: Not−yeah, not explicitly that, yeah
>
> Q: *That's not something a court has recognized as a way to assess the evidence in a racial gerrymandering case?*
>
> A: *Not that I know of.*

(D.E. 68-5, pp. 93).

Thus, Ansolabehere again employed unreliable methodology not generally accepted in the redistricting community in formulating his "expert" opinions.

C. Ansolabehere's flawed methodology produced conclusions that should be disregarded because they are not reasonably accurate or reliable.

The aforementioned flaws in Ansolabehere's methodology demonstrate that his report and testimony do not meet *Daubert's* standard for reliability. If Ansolabehere were

an expert in redistricting, and possessed experience drawing redistricting maps for state legislatures, he would have looked at actual election results instead of registration statistics. The election results would have given him insight into the percentage by which African American Democrats are likely to vote for Democratic candidates compared to the lower percentage by which white Democrats do the same. (D.E. 68-5, pp. 95-96, 101). Similarly, if he were truly a redistricting expert, he would have analyzed election results for districts that adjoin Districts 1 and 12 and determined that the 2011 versions of the districts are now better performing Republican districts than the 2001 versions. (D.E. 68-5, pp. 99-100, 103-105, 109). Such analysis would have shown that the VTDs moved out of Districts 1 and 12, and into the adjoining Republican districts, had a higher percentage vote for Republican presidential candidate John McCain than the VTDs that were moved into the challenged districts. (D.E. 68-5, pp. 113-115).

Ansolabehere's flawed approach and lack of expertise caused him to ignore large amounts of data showing the General Assembly was concerned, not with race, but with the constitutionally acceptable goal of strengthening Republican opportunities in 2011 Congressional districts that adjoined Districts 1 and 12. Courts often reject expert conclusions that are based on incomplete data, and this Court should do the same with regards to Ansolabehere's materials and testimony. *E.E.O.C. v. Freeman*, 778 F.3d 463, 466 (4th Cir. 2015) (holding that trial court did not abuse its discretion to exclude an expert when complete and accurate information was available to him and he chose not to use it).

IV. Conclusion

For the foregoing reasons, Stephen Ansolabehere should be precluded from testifying as an expert witness on behalf of Plaintiffs and all related materials supporting his purported "expert" conclusions should be excluded from the record.

This the 17th day of September, 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 **Memorandum of Law in Support of Defendants' Motion to Exclude the Testimony and Report of 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 17th day of September, 2015.

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