IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
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 the Chairman of the North Carolina State Board of Elections,

Defendants,

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE IN PART TESTIMONY OF DR. THOMAS HOFELLER

TABLE OF CONTENTS

Page

I. INTRODUCTION

Pursuant to Federal Rule of Evidence 702, Plaintiffs move this Court for a narrow and targeted order precluding Defendants' expert witness, Dr. Thomas Hofeller, from offering improper legal conclusions at trial (assuming that Defendants have laid an appropriate foundation and the Court has otherwise accepted Dr. Hofeller as an expert witness in an identified area of expertise). Plaintiffs file this motion because, in the two reports he has drafted, Dr. Hofeller repeatedly strays beyond the boundaries of permissible expert testimony and instead offers *legal* opinions about the United States Supreme Court's redistricting jurisprudence and its application to this case. Pursuant to Federal Rule of Evidence ("Rule") 702, the Court should strike these portions of Dr. Hofeller's reports and preclude Dr. Hofeller from offering similar testimony at trial.

II. STATEMENT OF FACTS

A. Background Regarding Dr. Hofeller

Defendants have identified Dr. Hofeller as an expert witness in this matter to give various opinions regarding the General Assembly's conduct of redistricting in 2011.

Dr. Hofeller presented two reports in the course of discovery. *See* Declaration of Kevin J. Hamilton ("Hamilton Decl.") ¶¶ 2-3 & Exs. A-B. These are styled as the Expert Report of Thomas B. Hofeller, Ph.D ("First Report") and the Second Expert Report of Thomas B. Hofeller ("Second Report"), respectively. Defendants have indicated they intend to introduce these reports at trial. *See* Dkt. #104, at 15 (Exs. 8-9 to Transcript of First Deposition of Thomas Hofeller).

Dr. Hofeller holds a Ph.D in political science from Claremont Graduate University. *See* First Report, ¶ 4. Dr. Hofeller does *not* hold a law degree. Dr. Hofeller serves a peculiar role in this case. Dr. Hofeller is not a typical expert witness retained after a lawsuit is filed to bring his or her expertise to bear on an issue presented by the case. Rather, Dr. Hofeller is also a *fact* witness because he was engaged by Sen. Rucho and Rep. Lewis to be the "chief architect" of the state and federal maps. Pl. Ex. 121 (Rucho Dep. 31:14-16); Pl. Ex. 127 (Hofeller Dep. 30:19-25).

Perhaps reflecting his personal stake in this litigation, given his role as "chief architect" of the challenged districts, Dr. Hofeller offers a full-throated defense of CD 1 and CD 12. In so doing, Dr. Hofeller repeatedly offers his interpretation of the meaning and significance of United States Supreme Court redistricting jurisprudence and his views on the import of that case law on the matter before the Court. The following table provides a list of all passages in Dr. Hofeller's reports that fall into this category:[1]

Portion of Report	**Text**
First Report, ¶ 10, lns. 2-5.	"I am familiar with the *Shelby County* decision of the United States Supreme Court and that Section 4 of the VRA has been ruled unconstitutional resulting in all states having been released from compliance of Section 5 of the VRA."
First Report, ¶ 19, lns. 19-24.	"District 1 must be characterized as a 'VRA Section 2 Minority District', while District 12 is correctly characterized as a 'political' district along with the remaining 11 districts. This is a vital distinction which is a result of a long series of federal court rulings, the most recent being the *Cromartie* decisions and the *Strickland* decision."

[1] For the Court's convenience, the copies of Dr. Hofeller's reports attached to the Hamilton Declaration are highlighted to show the specific passages to which Plaintiffs object.

Portion of Report	Text
First Report, ¶ 34	"The Supreme Court, in its remand of the *Cromartie* case (*Easley v. Cromartie*, 532 U.S. 234, 244 (2001)), agreed with this premise. Justice Breyer wrote for the Court that 'the primary evidence upon which the District Court relied for its race, not politics, conclusion is evidence of voting registration, not voting behavior; and that is precisely the kind of evidence that we said was inadequate the last time this case was before us.'"
First Report, ¶ 41.	"When the Plaintiff's [sic] in Easley v. Cromartie asserted a safe Democratic Old District 12 could have been created with a lower percentage of African-Americans, Justice Breyer, writing for the majority, stated that 'unless the evidence also shows that these hypothetical alternative districts would have better satisfied the legislature's other nonracial political goals as well as traditional nonracial districting principles, this fact alone cannot show at [sic] improper legislative motive. After all, the Constitution does not place an affirmative obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority.' (*Cromartie* II at 249). The same principle applies to the Republican's [sic] desire to create a stronger Democratic New 12th district to satisfy their own political goals."
First Report, ¶ 42, lns. 8-10	"What was uniquely different in the case of District 1 was that this District had been determined by the Supreme Court to be a 'VRA Section 2' district and was vulnerable to a challenge of retrogression under VRA Section 5. Additionally because of the U.S., [sic] Supreme Court's *Strickland* decision in 2009, the General Assembly determined that the New District 1 had to be a majority-minority district which required an African-American TBVAP in excess of 50%. The resulting TBVAP of 52.26% is hardly excessive in terms of this majority-minority requirement, especially since the Old District 1's TBVAP was 48.34% - only 3.92% lower. Nor would this difference sustain a charge of using race as the predominant criterion as Plaintiffs assert."
First Report, ¶ 49, p. 16, lns. 24-26 through p. 17, ln. 1	"Given the requirements of *Strickland* to build majority-minority districts at level 50% TBVAP or more (a requirement which was not imposed by the U.S. Supreme Court when the Old Plan was enacted in 2001), a 52.7 BTVAP district is neither excessive nor unreasonable for New District 1."

Portion of Report	Text
First Report, ¶ 55, p. 19, ln. 4	"This is the same error that was identified by the Supreme Court in *Cromartie I*."
First Report, ¶ 65, lns. 1-8.	"The U. S. Supreme Court made it clear in *Cromartie II at 258*, , [sic] that just because the strongest Democratic precincts, in terms of percentage of voting behavior, happened to be the highest in percentage of adult African-Americans, the General Assembly would not be precluded from adding them to a strong Democratic district. Justice Breyer stated that 'the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparatively consistent with traditional redistricting principles.'"
Second Report, ¶ 25, lns. 12-15.	"In line with the *Cromartie* decisions of the United States Supreme Court, the GOP majority in the General Assembly treated the 12th Congressional District as a political district and not as a Voting Rights Act district."
Second Report, ¶ 32, lns. 22-23	"The Supreme Court has noted this fact in the *Cromartie* decisions."

For the reasons stated below, Plaintiffs ask the Court to exclude these portions of Dr. Hofeller's reports and to preclude Dr. Hofeller from offering similar opinions at trial.

III. ARGUMENT

A. Dr. Hofeller's Testimony Should Be Excluded to the Extent He Offers Legal Conclusions or His Characterizations of U.S. Supreme Court Case Law

In order for expert testimony to be admissible, the expert must be "qualified as an expert by knowledge, skill, experience, training, or education." Rule 702. Moreover, a qualified expert may only offer opinion testimony if it "will help the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Accordingly, a court must "determine whether an expert's opinion is reliable and whether his testimony will be

helpful" to the factfinder. *Sheffield v. W. Am. Ins. Co.*, No. 7:08-CV-191-H, 2010 WL 2990012, at *3 (E.D.N.C. July 27, 2010) (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993)). The party seeking to introduce an expert's testimony "bears the burden of proving admissibility." *Id.*

The Rules of Evidence permit introduction of expert testimony that "embraces an ultimate issue to be decided by the trier of fact." Rule 704(a). It is, however, improper for an expert to offer "opinion testimony that states a legal standard or draws a legal conclusion by applying law to the facts." *United States v. McIver*, 470 F.3d 550, 561-62 (4th Cir. 2006) (collecting cases in which courts determined that particular expert testimony constituted an improper legal conclusion); *U.S. Search, LLC v. U.S. Search.com Inc.*, 300 F.3d 517, 522 n.4 (4th Cir. 2002) (affirming district court's conclusion that expert's "proffered testimony was nothing more than a legal opinion and was thus inadmissible").

One species of legal conclusion masquerading as expert opinion is particularly obvious and improper; where an expert merely recites his or her interpretation of case law or statutory text and then applies that interpretation to the facts of the case. The role of an expert is to bring to bear his or her expertise to illuminate complex issues for the benefit of the factfinder. It is most assuredly *not* an expert's place to tell the factfinder what the law is and how it bears on the issues to be decided. These sorts of legal conclusions are improper because they are unhelpful to the factfinder and invade the

province of the Court as the arbiter of the law. Courts thus routinely exclude "expert" testimony that purports to recite and apply relevant case law.[2]

As discussed above, Dr. Hofeller's two expert reports are rife with precisely this kind of improper content. Dr. Hofeller repeatedly purports to summarize the meaning and significance of a subset of the Supreme Court's redistricting jurisprudence. He explicitly discusses cases, quotes from them, and purports to explain their meaning. He opines that CD 1 "must" be characterized as a "VRA Section 2" district and CD 12 "must" be characterized as a "political" district under this jurisprudence. Further, he repeatedly states that the General Assembly abided by and drew CD 1 and 12 in a way that complies with this jurisprudence.

None of this is proper expert testimony. If Dr. Hofeller is proffered and accepted by the Court as an expert during trial then, of course, he would be free to offer opinions that fall within the scope of his expertise regarding the composition of CD 1 and 12 and inferences that can be drawn about them based on their history and objective characteristics. What he is *not* free to do is offer his own musings on the meaning and

[2] *See Little v. Tech. Specialty Prods., LLC*, 940 F. Supp. 2d 460, 468 (E.D. Tex. 2013) (excluding expert report that "consist[ed] almost entirely of legal analysis and conclusions" because it "review[ed] in detail statutes, case law, and facts relevant to [the expert's] analysis to reach his conclusions as to whether Defendants' policies violate the FLSA or not"); *Proctor & Gamble Co. v. Teva Pharm., USA, Inc.*, No. CIV.A. 04-940-JJF, 2006 WL 2241128, at *1 (D. Del. Aug. 4, 2006) (excluding expert report that "focuses on case law related to commercial success and discusses its applicability to the instant action"); *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417, 420-21 (E.D. Pa. 2006) (holding inadmissible expert's opinion on the application of an insurance policy because expert's "opinions on the issue of contract construction would not assist the jury in understanding coverage, are based solely on [expert's] subjective interpretation of the policy language, and are impermissible legal conclusions"); *McCrink v. Peoples Benefit Life Ins. Co.*, No. 04–CV–01068, 2005 WL 730688 (E.D. Pa. Mar. 29, 2005) (excluding expert testimony based upon the expert's "subjective interpretation of insurance case law and the application of this case law to the instant dispute").

significance of case law and then tell the Court what to decide based on his understanding of that case law. Such testimony is improper and should be stricken.

IV. CONCLUSION

For these reasons, Plaintiffs respectfully ask the Court to enter an order precluding Dr. Hofeller from offering legal conclusions at trial and striking the following passages of Dr. Hofeller's expert reports:

- First Report, ¶ 10, lns. 2-5; ¶ 19, lns. 19-24; ¶ 34; ¶ 41; ¶ 42, lns. 8-10; ¶ 49, p. 16, lns. 24-26 through p. 17, ln. 1; ¶ 55, p. 19, ln. 4; ¶ 65, lns. 1-8.
- Second Report, ¶ 25, lns. 12-15; ¶ 32, lns. 22-23.

Respectfully submitted, this the 25th day of September, 2015.

PERKINS COIE LLP

/s/ Kevin J. Hamilton
Kevin J. Hamilton
Washington Bar No. 15648
Khamilton@perkinscoie.com
William B. Stafford
Washington Bar No. 39849
Wstafford@perkinscoie.com
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: (206) 359-8741
Facsimile: (206) 359-9741

John M. Devaney
D.C. Bar No. 375465
JDevaney@perkinscoie.com
Marc E. Elias
D.C. Bar No. 442007
MElias@perkinscoie.com
Bruce V. Spiva
D.C. Bar No. 443754
BSpiva@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Attorneys for Plaintiffs

POYNER SPRUILL LLP

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
John W. O'Hale
N.C. State Bar No. 35895
johale@poynerspruill.com
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspruill.com
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

Local Rule 83.1
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE IN PART TESTIMONY OF DR. THOMAS HOFELLER**, with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record who have appeared and consent to electronic service in this action.

This the 25th day of September, 2015.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.