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 and of the North Carolina State Board of Elections,

Defendants,

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY AND REPORT OF DR. STEPHEN ANSOLABEHERE

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I. INTRODUCTION

Dr. Stephen Ansolabehere holds a Ph.D. from Harvard University, where he is a professor in the Department of Government. Dr. Ansolabehere's academic research addressing redistricting and similar topics has been published in leading academic journals. Dr. Ansolabehere is familiar and facile with redistricting software. He has many years of experience using various data sources, including voter registration data, to predict voter behavior. Dr. Ansolabehere has testified in numerous voting rights cases such as this, and no court has *ever* excluded his testimony. Dr. Ansolabehere's expertise is beyond cavil. Indeed, just last week, Professor Richard Hasen, one of the nation's leading election law experts, called Dr. Ansolabehere part of the "A-list of political scientists working at the intersection of election law and political science."[1]

Given Dr. Ansolabehere's credentials, it comes as no surprise that Defendants are motivated to keep Dr. Ansolabehere's testimony out of the court record. Dr. Ansolabehere's analysis is highly problematic for Defendants because his straightforward regression model demonstrates that racial, not political, considerations best explain the contours of CD 1 and CD 12. While understandable, Defendants' request that the Court exclude Dr. Ansolabehere's testimony is, to put it mildly, misguided. This is a *bench* trial where the Court will sit as the factfinder. Defendants are free to cross examine Dr. Ansolabehere. The Court is fully capable of assessing Dr. Ansolabehere's testimony in light of the full record developed at trial and giving it

[1] https://electionlawblog.org/?p=76186 (discussing amicus brief submitted by Dr. Ansolabehere and other leading political scientists in *Evenwel v. Abbott*, the "one-person, one-vote" case currently pending before the U.S. Supreme Court).

whatever weight the Court deems appropriate. For all these reasons, and those further discussed below, the Court need waste little time in denying Defendants' motion.

II. BACKGROUND

A. Dr. Ansolabehere Is One of the Nation's Most Respected Political Scientists Working at the Intersection of Political Science and Electoral Law

Dr. Ansolabehere received his Ph.D. in political science from Harvard University, where he has served as a Professor of Government at Harvard since 2008. *See* Declaration of Kevin J. Hamilton ("Hamilton Decl."), Ex. A (Ansolabehere curriculum vitae).[2] Dr. Ansolabehere formerly served as a professor of Political Science at the Massachusetts Institute of Technology, where he was an Associate Department Head from 2001-2005, and served as Co-Director of the Caltech/MIT Voting Technology Project. *See id.* at 1, 13. Dr. Ansolabehere has received numerous accolades over his career. He is a member of the American Academy of Arts and Sciences and a Carnegie Scholar, and serves on numerous professional boards. *See id.* at 1, 12-13.

Dr. Ansolabehere's areas of expertise include electoral politics, representation, and public opinion, as well as statistical methods in social sciences. *See id.*, Ex. B (Ansolabehere Report), ¶ 3. He has authored numerous scholarly works on voting behavior and elections, with particular focus on the application of statistical methods. This scholarship includes articles published in such academic journals as the Journal of the Royal Statistical Society, the American Political Science Review, the American Economic Review, the American Journal of Political Science, Legislative Studies

[2] Information about Dr. Ansolabehere's academic work is also available at http://scholar.harvard.edu/sansolabehere/publications?page=1.

Quarterly, the Quarterly Journal of Political Science, Electoral Studies, and Political Analysis. *Id.* Dr. Ansolabehere has published articles on issues of election law in the Harvard Law Review, Texas Law Review, Columbia Law Review, New York University Annual Survey of Law, and the Election Law Journal. *Id.*

For many years, Dr. Ansolabehere has focused much of his work and research on issues related to voting rights, electoral districts, and redistricting. Even a cursory examination of Dr. Ansolabehere's curriculum vitae reveals the depth and breadth of Dr. Ansolabehere's academic work and expertise in this area. To provide just a sample of Dr. Ansolabehere's work from his CV:

- Stephen Ansolabehere, Nathaniel Persily, & Charles Stewart, *Regional Differences in Racially Polarized Voting: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 Harvard Law Review F 205 (2013);
- Stephen Ansolabehere & James M. Snyder Jr., *The Effects of Redistricting on Incumbents*, 11 Election Law Journal 490 (2013);
- Stephen Ansolabehere, Joshua Fougere, & Nathaniel Persily, *Partisanship, Public Opinion, and Redistricting*, Election Law Journal (2010);
- Stephen Ansolabehere & James M. Snyder Jr., *The End of Inequality: One Person, One Vote and the Transformation of American Politics* (W. W. Norton 2008);
- Stephen Ansolabehere, *Election Administration and Voting Rights*, *in* David Epstein & Sharyn O'Hallaran, *Renewal of the Voting Rights Act* (Russell Sage Foundation 2007);
- Stephen Ansolabehere, Nathaniel Persily, & Charles Stewart, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 Harvard Law Review 1385 (2010);
- Stephen Ansolabehere & James M. Snyder Jr., *Reapportionment and Party Realignment in the American States*, 153 Pennsylvania Law Review 433 (2005);

- Stephen Ansolabehere, Alan Gerber, & James M. Snyder Jr., *Equal Votes, Equal Money: Court-Ordered Redistricting and the Public Spending in the American States*, 4 American Political Science Review 767 (2002);
- Stephen Ansolabehere, Ruimin He, & James M. Snyder Jr., *Evidence of Virtual Representation: Reapportionment in California* (2002).

See id., Ex. A, at 2-10. Dr. Ansolabehere's work has required him to become facile with the software tools used to draw redistricting maps. Dr. Ansolabehere is familiar with Maptitude and "freeware" redistricting software. He has been trained in Maptitude, in particular, and has experience using redistricting software in the course of, among other things, teaching students, drawing proposed redistricting plans, and performing consulting work. *See, e.g.*, *id.*, Ex. C (Ansolabehere Dep. 47:9-24, 48:8-53:20).

Dr. Ansolabehere also has many years of teaching and professional experience related to the analysis of data (including voter registration information, polling data, and election results) to predict voter behavior. *Id.* (Ansolabehere Dep. 9:9-10:1). Of particular note, for the last decade, Dr. Ansolabehere has worked as an analyst for CBS, where he is responsible for "calling" races on election night—work that requires complex data analysis. *See, e.g.*, *id.* (Ansolabehere Dep. 10:2-14:9).

In addition to his renowned academic work and high profile work for CBS, Dr. Ansolabehere has brought his expertise to bear as a witness in voting rights litigation, including Voting Rights Act cases and reapportionment cases such as this. He has worked for the Department of Justice and private litigants in the following cases:

- *Perez v. Perry*, No. 5:11-cv-00360 (W.D. Tex. 2011);
- *State of Texas v. United States*, No. 1:11-cv-01303) (D.D.C. 2011);
- *Guy v. Miller*, No. 11-OC-00042-1B (D. Nev. 2011);

- *In re Senate Joint Resolution of Legislative Apportionment*, Nos. 2012-CA-412, 2012-CA-490) (Fla. 2012);
- *Romo v. Detzner*, No. 2012 CA 412 (Fla. 2nd Cir. Ct. 2012);
- *LULAC v. Edwards Aquifer Authority*, No. 5:12cv620-OLG (W.D. Tex. 2012);
- *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. 2012);
- *Veasey v. Perry*, No. 2:13cv00193 (S.D. Tex. 2013);
- *Bethune-Hill v. Virginia State Board of Election*s, No. 3:14cv852 (E.D. Vir. 2014).

See id., Ex. A, at 13-14. With the exception of *In re Senate Joint Resolution of Legislative Apportionment*, Dr. Ansolabehere testified in each of the cases above (via in-person testimony, declaration, or deposition testimony). No court has *ever* deemed Dr. Ansolabehere unqualified to testify. Indeed, to the best of Plaintiffs' counsels' knowledge, no party has even *attempted* to exclude Dr. Ansolabehere's testimony.

B. Dr. Ansolabehere's Analysis Provides Strong Circumstantial Evidence That Race Predominated the Creation of CD 1 and CD 12

In this case, Dr. Ansolabehere examined the geographic characteristics and racial composition of the enacted versions of CD 1 and CD 12 as compared to the predecessor districts in the benchmark map. *See id.*, Ex. B, ¶ 6. Using well-established and commonly relied upon measures of compactness,[3] he concluded that the enacted versions of the district were significantly less compact than their predecessors, and split a large

[3] *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 455 (2006) (Stevens, J., concurring in part and dissenting in part) (relying on measures of compactness used by Dr. Ansolabehere); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 570 (N.D. Ill. 2011) (describing Reock measure as "widely acceptable"); *Diaz v. Silver*, 978 F. Supp. 96, 114 (E.D.N.Y.) aff'd, 522 U.S. 801 (1997) (relying on area-to-perimeter measure of compactness).

number of political subdivisions. *Id.* ¶¶ 8-17. Defendants do not raise any challenge to the *methods* Dr. Ansolabehere used to calculate the compactness of CD 1 and CD 12.

Dr. Ansolabehere also analyzed whether race or party affiliation was a stronger predicator of the persons and voting tabulation districts moved into, retained, or moved out of CD 1 and CD 12 during the 2011 redistricting process. *Id.* ¶¶ 20-21. Dr. Ansolabehere used regression analysis to "control" for political affiliation as a means of testing a "race, not politics" hypothesis. Dr. Ansolabehere concluded that African Americans were far more likely to be included in the two districts than whites in the same geographic area—even controlling for party affiliation. Likewise, the voting tabulation districts that were retained or moved into CD 1 and CD 12 had much higher African-American populations than the voting tabulation districts moved *out* of the two districts; again, even when controlling for party affiliation. *See generally id.* ¶¶ 22-53.

Dr. Ansolabehere's testimony thus provides strong circumstantial evidence that traditional redistricting principles *cannot* explain CD 1 and CD 12 (given their bizarre shapes and disregard of political subdivisions), and that racial considerations *do*. Notably, the analysis Dr. Ansolabehere performed here is almost precisely the same analysis he has performed in other redistricting litigation in which his testimony was received into evidence. For example, in the *Bethune-Hill* litigation, pending before the United States District Court for the Eastern District of Virginia, Dr. Ansolabehere assessed whether racial considerations were predominant with respect to the construction of certain majority-Black state legislative districts in Virginia. *See* Hamilton Decl., Ex. D (*Bethune-Hill* Report), ¶¶ 79-129. Dr. Ansolabehere testified at trial, and the Eastern

District of Virginia received his testimony into evidence. *Id.* ¶ 5. Similarly, in the *Romo* litigation, Dr. Ansolabehere assessed the partisan and racial effect of modifications made to the boundary of certain congressional districts in Florida. *See, e.g.*, Hamilton Decl., Ex. E (Supplemental *Romo* Report). Again, Dr. Ansolabehere testified at trial and, again, the court received his testimony into evidence. *Id.* ¶ 6.

III. ARGUMENT

A. The ER 702 Standard Is Liberal and the Exclusion of Expert Testimony Is Disfavored

The admissibility of expert testimony is controlled by Federal Rule of Evidence 702, which provides, in relevant part, that "[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 . . . may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. The test to determine whether an expert is "qualified" is not overly formalistic. An expert can be "qualified . . . by knowledge, skill, experience, training, *or* education." *Id.* (emphasis added).

Expert testimony is admissible under Rule 702 if it concerns (1) scientific, technical, or other specialized knowledge that (2) will aid the trier of fact in understanding or resolving a fact at issue. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993). Ultimately, an expert's testimony is admissible under Rule 702 if it "rests on a reliable foundation and is relevant." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (internal quotation marks omitted).

While recognizing that the court serves a "gatekeeping" role to keep junk "science" away from juries, the *Daubert* standard was intended by the United States Supreme Court to be "a liberalization, not a tightening, of the rules controlling admission of expert testimony." *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1158 (4th Cir. 1996). "[E]xclusion is the least favored means of rendering questionable [expert] evidence ineffective." *Id.* As the Supreme Court made clear in *Daubert*:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. . . . These conventional devices, rather than wholesale exclusion under an uncompromising . . . test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

Daubert, 509 U.S. at 596. These standards, applied to Defendants' motion, directly control this motion and compel its denial.

B. Defendants' Effort to Exclude Dr. Ansolabehere's Testimony in This Bench Trial is Misguided

As a threshold matter, the Court should reject Defendants' motion to exclude Dr. Ansolabehere's testimony out of hand because *this is a bench trial*. It is well-established that because "[t]he 'gatekeeper' doctrine was designed to protect juries" it "is largely irrelevant in the context of a bench trial." *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004); *see also Sunland Const. Co. v. City of Myrtle Beach*, No. CIVA4:05-CV-1227-RBH, 2007 WL 2822509, at *3 (D.S.C. Sept. 26, 2007) (same, collecting cases). Obviously, "[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *United States v. Brown*, 415

F.3d 1257, 1269 (11th Cir. 2005). A court holding a bench trial thus "does not err in admitting evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702." *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006). Accordingly, courts in the Fourth Circuit have repeatedly refused to exclude expert testimony in advance of a bench trial.[4]

Dr. Ansolabehere is a decorated academic who will offer expert testimony on issues of central importance to this case. Even assuming Defendants' objections had any force (as explained below, they do not), cross examination at trial—not a *Daubert* motion—is the proper forum to raise those objections. The Court should reject Defendants' motion on this threshold basis alone.

C. Dr. Ansolabehere is Plainly Qualified as an Expert Under ER 702

As discussed above, an expert can be "qualified" to give expert testimony in a host of different ways, including knowledge, skill, experience, training, *or* education. Dr. Ansolabehere effectively qualifies under *all* of those ways, as even Plaintiffs' cursory

[4] *See, e.g.*, *Dey, L.P. v. Teva Parenteral Medicines, Inc.*, No. 1:09CV87, 2012 WL 2466658, at *4 (N.D.W. Va. June 27, 2012) (denying *Daubert* motion where "there is no jury to protect because the Court is the finder of fact"); *Traxys N. Am., LLC v. Concept Mining, Inc.*, 808 F. Supp. 2d 851, 853 (W.D. Va. 2011) (same: "The gatekeeping function of the court is relaxed where a bench trial is to be conducted . . . because the court is better equipped than a jury to weigh the probative value of expert evidence"); *Davis v. United States*, No. 5:10-CV-00384, 2011 WL 7053628, at *2 (S.D.W. Va. Sept. 16, 2011) (same: "The Court is more than capable of weighing the probative value of [an expert's] testimony" at trial); *Larosa v. Pecora*, No. CIV.A. 1:07CV78, 2009 WL 3460101, at *3 (N.D.W. Va. Mar. 2, 2009) (same: "because this case is a bench trial, this Court is in the position to freely accept or reject the experts' testimony at trial without inappropriately usurping its gatekeeping function."); *Sunland*, 2007 WL 2822509, at *4 (D.S.C. Sept. 26, 2007) (same: "Because this case will be tried non-jury, the court would prefer to hear the disputed testimony before it makes a decision whether to exclude or disregard any part or all of the testimony.").

discussion of Dr. Ansolabehere's curriculum vitae above demonstrates. *See, e.g.*, Hamilton Decl., Ex. A.

Dr. Ansolabehere is a Professor of Government at Harvard University who has spent decades writing, teaching, and publishing in the fields of electoral politics, representation, as well as statistical methods in social sciences. He has published numerous articles related to the redistricting process. He has years of experience analyzing data to predict voter behavior. He is familiar with Maptitude and other redistricting software programs. He uses these programs in his academic and consulting work. And he has testified on numerous occasions in courts throughout the country in these areas of expertise. Never once have his credentials even been challenged, and for good reason: Dr. Ansolabehere is the very model of a qualified expert witness.

D. Defendants' Objections to Dr. Ansolabehere's Testimony Are Meritless and, in Any Event, Go to Weight—Not Admissibility

Defendants' claim that Dr. Ansolabehere's substantive analysis is not "reliable" for *Daubert* purposes is, in any event, meritless. Defendants' arguments go to the *weight* not the *admissibility* of Dr. Ansolabehere's testimony.

Dr. Ansolabehere's testimony, though specialized, is not difficult to understand. He simply looked at the geographic area in which the General Assembly chose to draw CD 1 and CD 12 and tested the "just politics" defense offered by Defendants by examining the likelihood that, among other things, African Americans were moved into these districts as compared to Democrats. As discussed above, this straightforward and

common sense approach is the same analysis the Court's sister court, the Eastern District of Virginia, accepted into evidence in the *Bethune-Hill* case.

Defendants premise their objections to Dr. Ansolabehere's testimony entirely on their misapplication of the two *Cromartie* cases ("*Cromartie*"), which concerned redistricting conducted in the 1990s. Defendants' reliance on *Cromartie* is misplaced.

First, Defendants' reliance on *Cromartie* in the context of a pretrial *Daubert* motion is grossly misplaced because the *Cromartie* court *considered and did not exclude* the testimony of the plaintiffs' expert. Nothing in *Cromartie* even suggests that expert analyses that consider voter registration data are per se *inadmissible*. If *Cromartie* has any relevance to the present motion, it is show that the Court should *deny* Defendants' motion. It is telling, indeed, that Defendants do not cite a single redistricting case in which the court excluded an expert because he or she considered voter registration data.

Second, Defendants' reliance on *Cromartie* is misguided because it relies on discussion of antiquated data about the relative correlation between party registration and electoral behavior in North Carolina in the 1990s. Defendants cannot simply wish away (and offer no evidence to contradict) Dr. Ansolabehere's conclusion that *at present* "[r]egistration is highly correlated with actual election results in the State of North Carolina." Hamilton Decl., Ex. F (Ansolabehere Rebuttal Report), ¶ 31. Defendants' claim that Dr. Ansolabehere based this conclusion on his work for CBS News rather than "any prior work or study," Dkt. 108, at 8, is incorrect. As explained in his rebuttal report, Dr. Ansolabehere reached this conclusion by analyzing recent elections *in North*

Carolina. *See id.* ¶¶ 30-33. Defendants offer nothing to even *rebut* this conclusion, let alone demonstrate it is inadmissible.

Indeed, the fact that time has not stood still since *Cromartie* was decided is demonstrated most powerfully in the analysis of Dr. David Peterson, who will testify on behalf of Plaintiffs at trial. In the *Cromartie* cases, the U.S. Supreme Court relied heavily on Dr. Peterson's boundary segment analysis that "concluded that the State included the more heavily Democratic precinct much more often than the more heavily black precinct." *Hunt v. Cromartie*, 526 U.S. 541, 550 (1999). Here, by contrast, Dr. Peterson did the same analysis and reached the opposite conclusion: "[R]acial considerations better account for the boundary definition of the 12th NC Congressional Voting District than do party affiliation considerations." Dkt. 69-1, Ex. 28, ¶ 18.

Dr. Ansolabehere used a regression analysis that—like Dr. Peterson's boundary segment analysis—considers the racial and political makeup of the geographic areas included and excluded from CD 1 and CD 12. He reached the same conclusion as Dr. Peterson—race predominated. Defendants may not like that conclusion. They may contend that Dr. Ansolabehere's analysis should have taken a larger geographic area or additional election data into account. *See generally* Dkt. 108, at 9-11. None of these methodological quibbles make Dr. Ansolabehere's testimony *inadmissible*. *See PBM Products, LLC v. Mead Johnson Nutrition Co.*, No. 3:09-CV-269, 2010 WL 56072, at *9 (E.D. Va. Jan. 4, 2010) ("[R]egression analysis is a widely recognized method for determining the relationship between various variables in a complex system" and the fact that a party "may dispute the conclusions [an opposing expert] made during the course of

his analysis . . . goes to the weight of his evidence rather than its admissibility."), aff'd sub nom. 639 F.3d 111 (4th Cir. 2011); *see also Bazemore v. Friday*, 478 U.S. 385, 402 (1986) ("While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said" that it must be deemed inadmissible); *In re Titanium Dioxide Antitrust Litig.*, No. CIV.A. RDB-10-0318, 2013 WL 1855980, at *17 (D. Md. May 1, 2013) (objections to specific construction of an expert's regression analysis "go to their weight and not their reliability").

IV. CONCLUSION

Nothing in Defendants' motion supports their extraordinary request for the Court to exclude probative expert testimony in advance of a bench trial rather than assessing that testimony in light of the full record developed at trial. For the reasons stated above, the Court should deny Defendants' motion.

Respectfully submitted, this the 2nd day of October, 2015.

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Local Rule 83.1
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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY AND REPORT OF DR. STEPHEN ANSOLABEHERE** 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 2nd day of October, 2015.

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