IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, *et al.*, Defendants.	**NAACP, LEAGUE OF WOMEN VOTERS PLAINTIFFS' AND DUKE PLAINTIFF-INTERVENORS' OPPOSITION TO DEFENDANTS' MOTION IN LIMINE** Civil Action No. 1:13-CV-658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 1:13-CV-660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 1:13-cv-861

INTRODUCTION

The Defendants' motion in limine attempts to improperly exclude evidence

reflecting the Defendants' discriminatory intent in enacting S.L. 2013-381, among other evidence. Because such evidence is highly relevant to the Plaintiffs' challenges and plainly admissible under the Federal Rules of Evidence, the Defendants' motion should be denied.

ARGUMENT

1. Dr. Lichtman's Supplemental Expert Report regarding declining public assistance voter registrations is relevant and should be admitted.

The four-page June 9, 2015 Supplemental Expert Report by Dr. Allan Lichtman was not untimely and is distinguishable from the out-of-time reports generated by fact witnesses served by the Defendants in this matter. If the Court wishes to apply a simple rule excluding all materials provided after relevant discovery deadlines, however, then such a rule should apply across the board to all untimely materials, including the reports issued by the Defendants (which are the subject of Plaintiffs' June 30, 2105 motion in limine (No. 13-cv-658, ECF No. 308)) in addition to Dr. Lichtman's Supplemental Expert Report.

Dr. Lichtman is an expert in electoral analysis and historical and quantitative methodology retained by the NAACP Plaintiffs in these cases. His Supplemental Expert Report addresses the substantial decline in voter registrations at North Carolina's public assistance offices since January 2013. The data summarized in the report was publicly available and, as it came from the Defendants' own records, was available to Defendants prior to the issuance of that report—unlike the information discussed in Defendants' untimely fact reports, which was not available to Plaintiffs before those reports were

issued. The State is required under the National Voter Registration Act of 1993 ("NVRA") to provide monthly reports on all sources of voter registration, including public assistance offices. Dr. Lichtman's Supplemental Expert Report simply opines on the data published by the State through April 2015 after this issue came to light through the publication of State emails in the press. There can be no prejudice to the State in examining data available to it all along. By contrast, the late-issued fact reports served by the Defendants were based upon information that was exclusively in control of the Defendants themselves, was purposely shielded from discovery through claims of privilege, and did not come to light until the Defendants issued these "reports"—well after the close of fact discovery (and after Defendants' counsel claimed work product over the drafting of such reports when Plaintiffs requested information about them during discovery).

Moreover, contrary to the assertion in Defendants' motion that Dr. Lichtman's Supplemental Expert Report is "irrelevant" to Plaintiffs' pending claims, Dr. Lichtman's analysis of the substantial decline in voter registrations through public assistance offices is *highly relevant* to the Plaintiffs' claims, including, in particular, those relating to North Carolina's elimination of same-day registration. Specifically, as part of their defense as to why the elimination of same-day registration does not burden African American and Latino voters, the Defendants have argued that certain State agencies offer voter registration services such that the voters have an equal opportunity to register, even without same-day registration. *See, e.g.*, Mem. Op. and Order on Pltfs.' Mots. for Prelim. Inj. (Case No. 13-cv-658, ECF No. 184, at 45). In fact, this was the subject of inquiry by

the Court at the preliminary injunction hearing last year. *See* Tr. of Prelim. Inj. Hr'g, Vol. IV, at 135-40.

The data brought to light in Dr. Lichtman's Supplemental Expert Report, however, demonstrates that, contrary to the assertion that registration opportunities at State agencies provide a robust alternative to same-day registration for African American and Latino voters, voter registrations in North Carolina public assistance offices (which the State is required to provide under the NVRA) have *substantially declined* since January 2013. Specifically, public assistance voter registrations fell from an average of 1,981 per month during 2010 to 2012 to an average of 738 during 2013 to 2015, a decline of 63% (resulting in a cumulative shortfall of 34,804 fewer public assistance registrants from January 2013 to April 2015). This falloff in public assistance voter registrations has had a substantial disparate impact on the voting power of African Americans and Latinos as compared to whites in North Carolina, given that these minority groups are typically heavily overrepresented among public assistance registrants, whereas whites are heavily underrepresented. This data confirms that—contrary to the State's representations—voter registrations at public assistance offices have not been a reasonable alternative to same-day registration for minority voters.

2. Dr. Lichtman's matching analysis and Supplemental Expert Report are admissible.

The Defendants' request that Dr. Lichtman's Supplemental Expert Report, as well as an analysis he performed based on the State's March 2013 voter database, be excluded

on the grounds that such analysis post-dated the enactment of S.L. 2013-381 should also be denied.

As an initial matter, Defendants' motion with regard to these analyses—which challenges Dr. Lichtman's methodology in reaching his opinions, rather than the relevance of his work to these proceedings—is in fact an untimely *Daubert* motion that should have been filed earlier in accordance with the Court's schedule for such motions. Defendants' motion should be denied on that basis alone.

In any event, Dr. Lichtman's reliance on these materials is entirely appropriate. First, with regard to the matching analysis described by Dr. Lichtman in his February 12, 2015 report, as Dr. Lichtman explained, that analysis was based on the State's March 2013 voter database (the same database used in the State's own matching analysis published in April 2013, which documented that African Americans and Latinos disproportionately lacked the forms of identification issued by the North Carolina Division of Motor Vehicles ("NCDMV")). *See* Feb. 12, 2015 Lichtman Rpt. at 36 ("To obtain this racial compilation of registered voters matched to expired and unexpired IDs, Compass Demographics [with whom Dr. Lichtman worked] first replicated the SBOE's April 2013 matching procedure using the March [2013] database."). Thus, contrary the suggestion in Defendants' motion, Dr. Lichtman did *not* use "a different snapshot of SBOE's registration rolls and a different snapshot of DMV's data than the information relied upon and used by SBOE to make its April 2013 matching report." Mem. in Supp.

of Defs.' Motion in Limine ("Defs.' Mem.") at 5.[1] Although the State published only an analysis of "unmatched" voters and not of "matched" voters, as Dr. Lichtman explained during his deposition, the list of "*unmatched*" registered voters was produced as a necessary by-product of the State's identification of the set of voters that *did match* to approved NCDMV IDs using the very same database. (Lichtman Dep. Tr. 282:18-284:15.) Thus, the State's analysis and Dr. Lichtman's analysis using that same data set are two sides of a coin, and are directly relevant to the question of access to the forms of ID required by, and the intent of, the North Carolina General Assembly in passing S.L. 2013-381. As evidenced by their own matching analysis, the General Assembly had the data at issue available to it at the time S.L. 2013-381 was enacted in 2013.

Furthermore, the Defendants have failed to come forward with any proof or documentation that decision makers did not have access to the "matched" list. This distinguishes this motion from the ruling in *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998), in which the court observed that "[i]t is *undisputed* that Weddington"—the relevant decision maker in that case—"was unaware that Dowe had ever filed a complaint with the EEOC." *Id.* at 657 (emphasis added). Here, it is very much disputed whether members of the legislature had knowledge of the implications of the unmatched list produced as a product of the State's matching of the

[1] Because the State did not produce its actual list of "unmatched" voters—only a summary and demographic breakdown of those voters, Dr. Lichtman had to replicate the State's "unmatched" list to perform his analysis. In doing so, however, he used the same criteria set forth by the State and replicated the State's results within a statistically insignificant margin of error replicated the State's results. Indeed, none of the Defendants' many experts attempted to show that Dr. Lichtman did not rely on the proper March 2013 database to replicate the State's procedure.

March 2013 registration rolls with NCDMV records. Indeed, as Dr. Lichtman noted in his Expert Report—and the Defendants and their experts have not disputed—a key legislative aide participated in the development of the State's matching procedure for the March 2013 database that produced both the matched and the unmatched list. Accordingly, Dr. Lichtman should be entitled to present the results of his analysis.

Likewise, Dr. Lichtman's analysis of the decline in public assistance voter registrations is also admissible. As set forth above, evidence of the decline is highly relevant to rebutting the Defendants' claims regarding alternative means of registering beyond same-day registration. Additionally, evidence of such decline is relevant to assessing the intent of key decision makers, as it reflects another example of State action (or inaction) to suppress the ability of minorities to participate in the political process on equal footing.

Finally, the Defendants' unsupported criticism of Dr. Lichtman's use of so-called "post hoc information" is particularly unfounded in light of the numerous post hoc rationalizations put forward by the Defendants themselves in defending S.L. 2013-381. *See, e.g.*, Defs.' Mem. in Opp'n to Pltfs.' Mot. for Prelim. Inj., No. 13-cv-658, ECF No. 136, at 35-40. If Dr. Lichtman's analyses—grounded in information and data that was unquestionably available to the legislature at the time the legislation was passed—are excluded, then so too should be the post hoc rationales and characterizations announced in the course of this litigation by the State, which appear nowhere in the contemporaneous record related to the passage of the bill.

3. Defendants' motion in limine to exclude NCDMV e-mails should be denied or reserved.

Defendants' motion for blanket exclusion of "emails from DMV customers" should be denied because the motion does not even identify with any specificity the particular evidence that it seeks to exclude. Defendants describe the challenged evidence only as "emails sent by DMV customers that report statements allegedly made by DMV employees," Defs.' Mem. at 5, but fail to identify a single e-mail that they seek to exclude, instead offering a blanket assertion that all such e-mails are hearsay and should be excluded. This is insufficient. Rather, "[d]ue to the fact-specific nature of a hearsay inquiry," *United States v. Smith*, 606 F.3d 1270, 1279 (10th Cir. 2010), courts routinely deny or reserve motions in limine where, as here, the movant fails to identify the specific documents or other materials at issue and instead provides a generic, catch-all description. *See, e.g.*, *Joliet v. Mid-City Nat. Bank of Chi.*, 2012 WL 5463792, at *10 (N.D. Ill. Nov. 5, 2012) (denying motion to exclude because "[i]t is not clear specifically which documents or exhibits [movant] seeks to exclude"); *Randolph v. ADT Sec. Servs.*, 2012 WL 4480259, at *1 (D. Md. July 23, 2012) (denying motion to exclude where movants did "not identif[y] any specific evidentiary item for exclusion" and instead sought to exclude "broad categories" of evidence).

Defendants further contend—again without identifying any specific document or e-mail that they are challenging—that the NCDMV e-mails are not subject to the hearsay exception for business records. *See* Defs.' Mem. at 7. But that blanket conclusion is again unwarranted given the volume of materials produced in this case and the nuances of

the individual documents at issue. In support of their claim, Defendants cite only *United States v. Cone*, a criminal case in which the Fourth Circuit rejected the proposition that "since a business keeps and receives e-mails, then *ergo* all those e-mails are business records" for purposes of the hearsay exception. 714 F.3d 197, 220 (4th Cir. 2013). But *Cone* did not hold that customer communications are *never* business records. To the contrary, the court there concluded only that the trial court had not made the requisite factual findings "to establish a foundation for admission under Rule 803(6)(B)." *Id.* *Cone* therefore does not provide a basis for excluding these e-mails, and Defendants should be required to identify the specific e-mails they seek to exclude before the Court renders a decision on whether the business records exception permits their admission.

Other exceptions to the general prohibition against hearsay may apply as well. For instance, certain e-mails sent by NCDMV customers were forwarded among NCDMV and NCDOT officials. In one such e-mail, an NCDMV customer complained to NCDOT official Nadine Barnes that she was improperly charged for a voter identification card that the State advertised as free. *See* E-mail from J. Lee to N. Barnes regarding "voter ID - Daniel Trevor Lee," Oct. 17, 2014 (DOT00013884). That same document contains a subsequent communication from Ms. Barnes to an NCDOT colleague concluding that the $10 fee for Ms. Lee's voter identification card was, in fact, "wrongfully collected," and directing the colleague to "start the proceedings to refund monies back to [the customer] that were wrongfully collected." *Id.* At the very least, the communication from Ms. Barnes—an NCDOT employee writing about a matter within the scope of her employment—may be introduced as a party admission. *See, e.g.*, *Union First Mkt. Bank*

v. Bly, 2014 WL 496657, at *8 (E.D. Va. Feb. 6, 2014). Moreover, the e-mail is also admissible under Rule 803's public records exception, which permits admission of a "record or statement of a public office" if it "sets out," *inter alia*, "the office's activities." Fed R. Evid. 803(8). Ms. Barnes's directive to "start proceedings to refund monies" is a "record" that "sets out … [such] activities."[2] At the very least, this one specific e-mail exchange underscores the need for a document-by-document inquiry into the specific documents at issue in the Defendants' challenge.

In any event, Defendants' request that e-mails sent to and from NCDMV officials be excluded should be denied, or at a minimum reserved, because the admission of such as-yet-unidentified e-mails is premature. These e-mails—which, based upon the Defendants' description in their motion, document the struggles of North Carolina citizens in obtaining from the NCDMV photo identification required to vote under S.L. 2013-381—are predominantly relevant to the voter photo identification issues that have been deferred from the trial commencing on July 13, 2015. As even the Defendants acknowledge, ruling on such motion is likely unnecessary at this stage. *See* Defs.' Mem. at 5 n.2 ("It also may be premature for this Court to rule on this matter."). Accordingly, if the Court does not deny Defendants' motion for its lack of specificity, it should at least defer ruling on this motion until the voter photo identification issues are to be decided.

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[2] The e-mail exchange between Ms. Bucholtz and Ms. Barnes—like countless other NCDMV e-mails produced in this matter—contains an e-mail legend stating: "Email correspondence to and from this sender is subject to the N.C. Public Records Law and may be disclosed to third parties." That legend further supports a finding that the exchange is admissible under the public records exception to the prohibition on hearsay.

4. Plaintiffs' experts may testify to the Defendants' discriminatory intent.

In yet another attempt to end-run the deadline for *Daubert* motions, Defendants seek to exclude Plaintiffs' experts, including Dr. Lichtman and League of Women Voters expert Dr. J. Morgan Kousser, on the grounds that these experts are providing an "impermissible legal conclusion." Defs.' Mem. at 7-8.[3] In addition to being untimely, this motion lacks merit and should be denied. Dr. Lichtman and Dr. Kousser intend to offer testimony and opinions regarding the intent of the legislature and officials in enacting S.L. 2013-381—testimony that is wholly permissible under the Federal Rules. As discussed below, Dr. Lichtman and Dr. Kousser are historians who have studied North Carolina history, its legislative process, and its lawmakers' relationship with minorities. They have been qualified as experts in dozens of prior cases regarding legislative intent and other matters related to voting rights, and their testimony has been credited by federal courts. Their analyses easily pass the threshold of admissibility.

As an initial matter, under Federal Rule of Evidence 702, a witness may provide expert opinion testimony if he is "qualified as an expert by knowledge, skill, experience, training, or education," Fed. R. Evid. 702, and if his testimony is "relevant and reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). Furthermore, contrary to the suggestion in Defendants' motion, an expert may testify to any relevant fact, including facts that "embrace[] an ultimate issue" in a case. Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue."). As pertinent here, courts

[3] This opposition focuses on the credentials and opinions of Dr. Lichtman and Dr. Kousser, but the same arguments advanced here support admission of Dr. Steven Lawson, an expert retained by the United States.

in voting rights cases routinely admit expert testimony concerning discriminatory intent and the history of discrimination in voting. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 547-48 (1999) (discussing intent evidence); *United States v. Blaine Cty.*, 363 F.3d 897, 912-913 (9th Cir. 2004) (discussing expert testimony on history of discrimination); *Garza v. L.A.*, 918 F.2d 763, 767, n.19 (9th Cir. 1990) (crediting expert testimony in finding discriminatory intent); *Johnson v. DeSoto Cty. Sch. Bd.*, 995 F Supp. 1440, 1440 (M.D. Fla. 1998) (discussing intent evidence). Indeed, courts in a broad of array of cases, including Voting Rights Act cases, have repeatedly rejected attempts to exclude expert testimony regarding the factual inferences supporting a finding of intentional discrimination—inferences drawn from contemporaneous legislative, media, and other materials commonly relied upon by historians. *See, e.g.*, *Texas v. Holder*, No. 12-128 (D.D.C. 2012) (Minute Order, July 3, 2012); *South Carolina v. United States*, No. 12-203, ECF No. 226 (D.D.C. Aug. 22, 2012); *Perez v. Perry*, No. 5:11-cv-00360, ECF No. 1131 (W.D. Tex. July 9, 2014).

The same should be true of Dr. Lichtman's and Dr. Kousser's testimony here. As an initial matter, each expert is eminently qualified to perform the analyses they have put forth in this matter:

Dr. Lichtman: Dr. Lichtman is a Professor of History at American University in Washington, D.C., where he has been employed for 40 years. His areas of expertise include political history, electoral analysis, and historical and quantitative methodology, and he is a highly regarded expert in the field of voting rights, having served as an expert witness or consultant in over 80 voting rights cases, including several cases in North

Carolina. *See*, *e.g.*, *Shaw v. Hunt* (E.D.N.C. 1993); *Ward v. Columbus Cty.* (E.D.N.C. 1991); *Person v. Moore Cty.* (M.D.N.C. 1989). Dr. Lichtman's statistical work has been frequently cited, including in the majority opinion written by Justice Kennedy in *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). With specific regard to the issue of intent, Dr. Lichtman has testified on the issue of racially discriminatory intent in numerous cases, as well as on the issues of racially polarized voting and quantitative methods.

Dr. Kousser: Dr. Kousser is a preeminent voting rights historian with specific expertise in North Carolina history. Dr. Kousser received his doctorate degree in history from Yale University in 1971 and since then has been a professor of history and social science at the California Institute of Technology. In additional to publishing three books, Dr. Kousser has authored dozens of scholarly articles on issues relating to voting rights and discrimination. One such article, published in *The Journal of Southern History*, described the racial and class consequences of North Carolina's historic policies of disenfranchisement by showing how educational expenditures were dramatically shifted away from black and poor white children after their fathers lost the right to vote. Similarly, one of Dr. Kousser's books, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (University of North Carolina Press, 1999), featured a chapter titled, "A Century of Electoral Discrimination in North Carolina." In addition to his scholarly work, Dr. Kousser has been recognized as an expert historian in 25 voting rights and racial discrimination cases, including cases in which he offered testimony similar to the testimony he offers here.

The testimony that these experts intend to put forth in this case, as reflected in their reports, builds upon their scholarly work ***and is similar to the expert work they have performed and was admitted in numerous other cases***. Dr. Lichtman's report examines the choices made by the North Carolina legislature in enacting S.L. 2013-381to determine whether there is evidence that the legislature intended to reduce or limit the ability of minority voters to freely and fairly participate in the State's elections. In doing so, Dr. Lichtman followed the standard practice of historians, as guided by the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), to analyze the intent of decision makers. Indeed, Dr. Lichtman's report makes clear: "The purpose of this report is not to make legal conclusions, but to establish substantive findings about discriminatory intent. The *Arlington Heights* methodology is consistent with standard causal analysis in history, which I have followed in my substantive scholarship and written about in my theoretical work . . . ." (Feb. 12, 2015 Lichtman Rpt. at 6.) Dr. Lichtman's substantive analysis required extensive historical research regarding the enactment of S.L. 2013-381, including the contemporaneous statements and actions of decision makers. It also required the compilation of statistical information to document both the "discriminatory effect" criteria of the *Arlington Heights* decision as well as the racial implications of the actions taken by decision makers before and after the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Notably, as Dr. Lichtman will explain, his analysis followed the same procedure that he followed in opining on intent issues in other cases, including challenges to Texas's voter photo identification law and recent senate

redistricting plan. *See Texas v. United States*, No. 11-1303 (D.D.C.); *Texas v. Holder*, No. 12-128 (D.D.C.).[4]

Likewise, Dr. Kousser's analysis follows the same process he employed in prior cases, including a thorough analysis of the factors set forth in *Arlington Heights*. Consistent with well-established historical methodology, Dr. Kousser examined numerous contemporaneous sources of information—from submissions to the legislature to transcripts from legislative debates to public statements offered by legislative leaders, among many other things—to gather and synthesize for the Court all of the factual information that will be relevant to this Court's final determination on Plaintiffs' intentional discrimination claims. This approach is entirely consistent with Dr. Kousser's work in prior federal cases, most notably *Garza v. Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990). In that case, which involved questions of racial intent underlying prior redistricting decisions, Dr. Kousser provided evidence of the facts underlying that ultimate question. His testimony was not only admitted—it served as the basis for the district and appeals court decisions on that issue. *See id.* at 1309-11.

Dr. Lichtman's and Dr. Kousser's opinions should likewise be accepted here. While each expert concludes that evidence exists that the legislature intended to discriminate against minority voters by limiting or eliminating methods of voting that have been disproportionately used by minorities—including same-day registration, out-of-precinct voting, and early voting—neither expert draws any conclusions as to the legal

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[4] As Defendants do here, Texas filed motions in limine seeking to exclude Dr. Lichtman's testimony in both the redistricting and voter photo ID case. Dr. Lichtman's opinions were admitted over the state's objection in both cases.

implications of their findings. Instead, Dr. Lichtman's and Dr. Kousser's testimony will cover the *factual* evidence that supports a finding of intentional discrimination without focusing on the *legal* consequences of that finding. Accordingly, their testimony falls within the proper scope of expert opinion under Rule 704(a) and meets Rule 702's relevancy requirement. Defendants' motion should be denied.

5. Defendants should not be permitted to invoke the hearsay rule with respect to public statements by legislators while simultaneously refusing to make those legislators available to testify.

During and following the passage of S.L. 2013-381, certain legislators who were influential in the bill's passage made public statements regarding the strategy behind the bill and its impact. For instance, on the day of the Supreme Court's ruling in *Shelby County v. Holder*, Senator Tom Apodaca, the Chairman of the Rules Committee, was quoted by WRAL.com as stating, "So, now we can go with the full bill," referring to S.L. 2013-381. *NC voter ID bill moving ahead with Supreme Court ruling*, WRAL.com (June 25, 2013). The "full bill" included numerous additional restrictions, including restrictions on same-day registration, early voting, and the counting of out-of-precinct provisional ballots that were not included as part of an earlier version of the bill passed by the House. Similarly, in an article published on the same website in March 2013, then-Speaker of the House Thom Tillis was quoted as saying, with regard to the proposed photo identification provisions of S.L. 2013-381, "There is some evidence of voter fraud, but that's not the primary reason for doing this. We call this restoring confidence in government." *Tillis: Fraud 'not the primary reason' for voter ID push*, WRAL.com (March 16, 2013) (PX528).

As an initial matter, several of these statements are already admitted and Defendants' arguments to exclude them from the upcoming trial have been waived. For instance, Senator Apodaca's statements regarding the "full bill" were admitted at last year's preliminary injunction hearing, and the Defendants have already stipulated to the admissibility of the newspaper article containing that statement at the upcoming trial as part of the Joint Appendix from last year's preliminary injunction hearing. *See* J.A. 1831 (PX81 (admitted by Joint Stipulations Regarding Preliminary Injunction Record, 11-cv-358, ECF Nos. 275 & 275-1)). Indeed, that same statement was quoted in the opinions issued by this Court and the Fourth Circuit in 2013. *See* ECF No. 184, at 9; *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 231 (4th Cir. 2014). Thus, in light of the basic rule that evidence is admitted for all purposes unless it is admitted for a limited purpose, *see, e.g.*, *United States v. Pardee*, 531 F. App'x 383 (4th Cir. 2013); *United States v. Saunders*, 88 F.2d 56 (4th Cir. 1989), the Defendants have already agreed to the admissibility of these statements by virtue of the stipulation regarding the preliminary injunction record, and cannot now object to them.

Plaintiffs have sought to introduce this evidence via several means. Given that the statements were made in public and reported on by the press, Plaintiffs initially proposed that Defendants stipulate to their admissibility. When Defendants refused, Plaintiffs indicated that they planned to subpoena the legislators to testify regarding their public statements. In response, Defendants claimed that any subpoena would be barred by legislative privilege and threatened to seek sanctions against Plaintiffs in the event they pursued those subpoenas—even though the subject of the testimony sought by Plaintiffs

was to be limited to confirming *public* statements made by lawmakers and reported in the press. Given this history, Plaintiffs seek to introduce the underlying press coverage of the lawmakers' statements at trial. These statements are admissible for several reasons.

Rule of Evidence 807 permits the introduction of hearsay if (1) the statement has sufficient "circumstantial guarantees of trustworthiness"; (2) "it is offered as evidence of a material fact"; (3) "it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts"; and (4) "admitting it will best serve the purposes of these rules and the interests of justice." Described as the "residential exception to the hearsay rule," Rule 807 allows for the admission of statements that might otherwise constitute hearsay "[w]hen a party seeks to introduce out-of-court statements that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available." *United States v. Dunford*, 148 F.3d 385, 393 (4th Cir. 1998) (internal quotation omitted). Plaintiffs' proffered press articles meet all four of Rule 807's requirements:

First, each statement appears in a respected North Carolina publication, demonstrating that the statements have the requisite "circumstantial guarantees of trustworthiness." Moreover, the lawmakers quoted in the press accounts have never publicly disclaimed the statements attributed to them, nor has any publication issued a retraction of the quoted statements. *Second*, the statements are "offered as evidence of a material fact" because they tend to show that members of the North Carolina legislature were aware that S.L. 2013-381 would have a disparate impact on minority voters, a key

element of Plaintiffs' case. *Third*, the newspaper accounts are "more probative … than any other evidence that [Plaintiffs] can obtain through reasonable efforts." As discussed above, Plaintiffs have sought to obtain testimony from the lawmakers themselves to eliminate any hearsay problem, but Defendants have taken the untenable position that such testimony on *public statements that legislators have previously broadcast* is prohibited by legislative privilege. The press accounts thus represent the best alternative to live testimony. *Fourth*, admitting the press accounts "will serve … the interests of justice" because doing so will deny Defendants the opportunity to block the presentation of relevant, probative evidence through their own gamesmanship and the frivolous threat of sanctions. Plaintiffs' selected press accounts of lawmaker statements thus satisfy the requirements of Rule 807, and Defendants' motion in limine should be denied on this score. Alternatively, the Court should order Defendants to make the lawmakers identified by Plaintiffs available at trial to testify on the sole subject of their public statements regarding S.L. 2013-381.

In any event, Plaintiffs' experts may properly rely on the press accounts. Federal Rule of Evidence 703 provides that an expert "is entitled to rely on factual underpinnings—including those based on hearsay—that are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'" *Tassi v. Holder,* 660 F.3d 710, 721 (4th Cir. 2011) (quoting Fed. R. Evid. 703); *see also United States v. Palacios,* 677 F.3d 234, 242-43 (4th Cir. 2012) (hearsay rules "in no way prevent[] expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to

otherwise inadmissible evidence"); *United States v. Leeson*, 453 F.3d 631, 637 (4th Cir. 2006) (expert testimony based on hearsay was properly admitted because the hearsay was of a type reasonably relied upon by experts in the field).

The touchstone for determining whether an expert is "giving an independent judgment or merely acting as a transmitter" for otherwise inadmissible hearsay is whether that expert "is applying his training and experience to the sources before him and reaching an independent judgment," thereby producing "an original product that can be tested through cross-examination." *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). Here, Plaintiffs' experts—who are respected historians and social scientists in their own right, *see supra* Part 4—relied on multiple sources, all of which are sources typically relied upon by experts in their respective fields. Notably, none of the cases relied on by the Defendants involved the exclusion of an expert witness' testimony because the testimony was based, in part, on that expert's evaluation of information in newspaper articles that were directly relevant to the expert's opinion and which were of the type typically relied on by experts in that field. Here, Plaintiffs' experts applied their training and specialized knowledge to their evaluations of respected sources and reached their own independent judgments. Accordingly, the underlying facts or data "need not be admissible for the [experts'] opinion[s] to be admitted." Fed. R. Evid. 703. Defendant's motion in limine is without merit and should be denied.

CONCLUSION

For the foregoing reasons, the Defendants' motion should be denied.

Dated: July 8, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2015, I electronically filed the foregoing **NAACP AND LEAGUE OF WOMEN VOTERS PLAINTIFFS' AND DUKE PLAINTIFF-INTERVENORS' OPPOSITION TO DEFENDANTS' MOTION IN LIMINE**, using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record, including those counsel listed below.

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General Information

Court	United States District Court for the Middle District of North Carolina; United States District Court for the Middle District of North Carolina
Federal Nature of Suit	Civil Rights - Voting[441]
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