

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

NORTH CAROLINA STATE )  
CONFERENCE OF THE NAACP, *et al.*, )

Plaintiffs, )

v. )

1:13CV658

PATRICK LLOYD MCCRORY, in his )  
official capacity as Governor of North )  
Carolina, *et al.*, )

Defendants. )

LEAGUE OF WOMEN VOTERS OF )  
NORTH CAROLINA, *et al.*, )

Plaintiffs, )

*and* )

LOUIS M. DUKE, *et al.*, )

Plaintiffs-Intervenors, )

v. )

1:13CV660

THE STATE OF NORTH CAROLINA, *et al.*, )

Defendants. )

UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

1:13CV861

THE STATE OF NORTH CAROLINA, *et al.*, )

Defendants. )

---

**DEFENDANTS' MEMORANDUM IN SUPPORT OF  
MOTION TO EXCLUDE TESTIMONY BY UNITED STATES'  
EXPERT, DR. CHARLES STEWART**

---

Now come defendants, by and through undersigned counsel, and hereby offer this memorandum in support of their Motion to Exclude Expert Testimony By The United States' Expert, Dr. Charles Stewart. By that motion, defendants respectfully request, pursuant to Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), that the Court exclude plaintiffs' expert, Charles Stewart III, from offering his report and testimony relating to his analysis regarding registered voters who purportedly lack photo ID. Stewart used unreliable data to conduct his analysis, lacked first-hand knowledge of the relevant data systems, and failed to properly account for human error in the data entry process. Stewart also did not have access to the federal databases purportedly used to determine if registered voters possessed one of the forms of federal photo IDs that may be used to prove identity under the Voter Information and Verification Act ("VIVA"). Stewart's report also contains many other flaws. As such, Stewart's report is fundamentally flawed and fails to meet the standard of admissibility established in *Daubert*.

In further support of their motion, defendants show the Court as follows:

**I. STANDARD OF REVIEW**

The determination of whether Stewart's report and testimony is admissible should be made with reference to Rule 702 of the Federal Rules of evidence. It provides:

If 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.

The factors a Court must consider when evaluating an expert's admissibility include:

(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.

*See 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 scientific 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 scientific 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 the reliability of the expert’s opinion. *See Maryland Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780, 783 (4<sup>th</sup> Cir. 1998) (discussing the requirement that a

party must demonstrate by a preponderance of the evidence that an expert’s opinion is “reliable”).

## II. BACKGROUND

Plaintiffs asked Stewart to prepare a report to determine whether the photo ID requirements of 2013 N.C. Sess. Laws 381, also known as the “Voter Information Verification Act (“VIVA”),<sup>1</sup> would have a disproportionate effect on minority voters. (Stewart Decl. ¶ 1) Stewart elected to use a process known as data matching, which compares records from the North Carolina voter registrations database (“SEIMS”) against records from the North Carolina driver license database (“SADLS”), to complete his report. (*Id.* at ¶ 2) Stewart claims that the process allows him to estimate both registered voters who lack photo ID and the racial disparities among those voters. (*Id.*) Stewart, however, concedes that data matching presents “challenges” involving typographical errors and other inconsistencies that make it difficult to conduct accurate and reliable data matching. (Stewart Decl. ¶ 28)

Stewart completed his report and filed a Declaration on February 12, 2015. Defendants asked Brian Neesby, a system analyst for the North Carolina State Board of Elections (“the State Board”), to analyze Stewart’s methodology. Neesby performed this analysis in the regular course of his duties with the State Board, where his responsibilities include list matching projects. Neesby analyzed the Stewart Report to determine whether

---

<sup>1</sup> 2013 N.C. Sess. Laws 381 is frequently referenced by the bill designation given it when it was introduced in and considered by the General Assembly—House Bill, or H.B. 589.

techniques and criteria used by Stewart might improve future list matching projects by the State Board. The State Board has also sent mailings to some of the individuals on Stewart's no-match list (those who were not also included in the State Board's prior no-match report, who have already been contacted by the State Board) to advise them that they may lack photo ID. In performing his regular job responsibilities, Neesby determined that Stewart's analysis contained fundamental flaws.

Neesby discovered that Stewart did not use all available data, did not attempt a sufficient number of field combinations, used an unreliable one-to-many matching approach and made only minimal attempts to control for human error and voter roll inflation. (Neesby Aff. ¶ 6, Ex. A) After analyzing Stewart's methods and correcting for many of Stewart's oversights, Neesby determined that at least 84,675, or roughly 21.5 percent, of the voters that Stewart declared on his "no-match" list in fact had an unexpired DMV issued identification at the time that Stewart conducted his analysis. (*Id.* at ¶ 5)

Defendants' expert, Dr. Janet Thornton, has provided testimony on other flaws in Stewart's report. Stewart did not have access to federal databases maintained by agencies who issue photo IDs that may be used to prove identity under VIVA. Stewart instead requested that the agencies run matching swaps requested by Stewart. There has been no independent review to determine whether the federal databases include matching information on fields that could have produced more matches than reported. Nor has there been any analysis of whether false negatives—or persons who should have matched

with SEIMS but were not—exist under the no-match lists reported to Stewart by the federal agencies. Other flaw discovered by Dr. Thornton are discussed below.

### **III. ARGUMENT**

#### **A. Stewart Used Incomplete Data.**

Stewart's report contains unreliable conclusions because he failed use the most complete records that were provided to the plaintiffs. Stewart's unfamiliarity with SADLS led him to analyze the incorrect data set. Stewart queried SADLS' "Driver\_ID" table, which contains only a North Carolina Division of Motor Vehicles ("DMV") customer's most recent application or issuance. (Neesby Aff. ¶ 13) In contrast, the "Driver\_Hist" table, which Stewart did not include in his analysis, contains all other issuances, even if they remain unexpired. (*Id.*) As such, Stewart's report incorrectly assumed that DMV customers with an inactive or expired ID in the "Driver\_ID" table did not possess a valid DMV-issued identification card. This false assumptions leads to significant inaccuracy; specifically Stewart included at least 38,801 customers on his "no-match" list even though they had an unexpired, DMV-issued ID in the "Driver\_Hist" table. (Neesby Aff. ¶ 14)

The reliability of Stewart's report also suffers because it analyzes data from July 13, 2014, almost four months before the 2014 general election. (Stewart Decl. ¶ 29) Plaintiffs received a snapshot of both the driver license and voter registration databases on the day of the 2014 election that provided much more comprehensive information about registered voters and DMV customers who had acquired IDs. (Neesby Aff. ¶ 17)

In relying on a mid-year snapshot, Stewart failed to consider all available, relevant data in his analysis.<sup>2</sup> Dr. Stewart's conclusions based on incomplete data and should be rejected. *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 expert when plaintiffs provided him with full, accurate information and he chose not to use it).

**B. Stewart Failed to Utilize Proper Methods to Improve the Accuracy of His Findings.**

Stewart not only failed to consult all of the relevant data during his analysis, he also failed to use proper methods to maximize the accuracy of his results within the flawed dataset. Stewart did not attempt a sufficient number of field combinations for his data matching efforts and determined his unique identifiers based on intuition rather than mathematical examination. Stewart chose to use 21 field combinations out of thousands of potential options. (Stewart Decl. Table 3) Stewart's choice of field combinations did not represent the most effective approach to avoid duplicates and conduct the most accurate data matching. (Neesby Aff. ¶ 34) Out of the eleven different data points available for matching,<sup>3</sup> Stewart could have chosen from hundreds of more unique field combinations. (*Id.* at ¶ 33) Instead, Stewart's flawed approach led him to place more

---

<sup>2</sup> Stewart claims that he used the July 2014 data because he would not have had time to conduct his analysis using the updated November data. (Stewart Dec. ¶ 29) Time constraints do not provide a valid excuse for the use of unreliable data. *See Galaxy Computer Servs., Inc. v. Baker*, 325 B.R. 544, 562 (E.D. Va. 2005) (excluding expert testimony when expert relied on incomplete data because he said he did not have enough time to consider all the records).

<sup>3</sup> The eleven available fields for matching purposes are: (1) first name, (2) middle name, (3) last name, (4) suffix, (5) address, (6) birth date, (7) phone number, (8) driver license number, (9) social security number, (10) sex and (11) race.

voters with valid IDs, who could have been found with more effective use of field combinations, on his no-match list.<sup>4</sup> Notably, Stewart's report ignores registrants' phone numbers altogether, even though phone number represents the second most unique data point available behind driver license number. (Neesby Aff. ¶ 35) Stewart's failure to make more rigorous and effective use of available field combinations renders his results unreliable.

Stewart's report also compounds the problem of human error in data entry rather than effectively controlling for it. For example, Stewart converted addresses to numerical combinations including residence number and zip code,<sup>5</sup> presumably to account for human error in the entry of address data. (Stewart Decl. ¶ 89) However, by simplifying these data points, Stewart necessarily causes more matches to duplicate within the database. (Neesby Aff. ¶ 41) In itself, the increase in duplicates does not harm the analysis. However, Stewart conducted 'pre-processing' that threw out duplicates from the data pool used to conduct matching. Thus, Stewart's attempt to control for human error likely led to the elimination of numerous voters that could have been properly matched to a DMV ID if they had not been removed from the data pool through pre-processing.

Finally, Stewart fails to properly control for list inflation in the voter registration

---

<sup>4</sup> One such voter was Board of Elections Executive Director Kim Strach. Ms. Strach's name appeared on Stewart's no-match list because her voter registration information did not contain her social security number and her last name did not match in Stewart's analysis because she changed it after her marriage. (Neesby Aff. ¶ 11) It is unlikely that this erroneous result was unique to Ms. Strach.

<sup>5</sup> Thus, for example, the address 2408 Main Street, Raleigh, NC, 27609 becomes 240827609.

data. Because the voter rolls are not updated immediately after someone dies or leaves the state, names remain in the voter registrations database even after the person associated with that record becomes ineligible to vote in the state. Stewart attempts to control for deceased voters using his flawed matching process, but, unsurprisingly, his approach still resulted in 692 dead people appearing on the “no-match” list. (Neesby Aff. ¶ 68) Additionally, Stewart considered more than 1.5 million DMV customers with records indicating that they no longer live in North Carolina. (*Id.* at ¶ 69) Stewart included more than 46,000 of those apparent out-of-state residents on his no-match list. (*Id.*)

**C. Stewart’s Report Has Other Flaws, Including the Lack of Access to Federal Databases Maintained by Agencies That Issue Federal IDs That Are Acceptable for Proving Identity Under VIVA.**

Defendants’ expert, Dr. Janet Thornton, has identified many other flaw in Dr. Stewart’s Report that render it inherently unreliable.

Dr. Stewart used a snapshot of registered voters as of July 2014. He declined to use updated databases provided after the 2014 General Election or the full previous database provided in December 2014. As a result, and as confirmed by Mr. Neesby, Stewart did not use table changes of address or name changes from SADLS. (Thornton Decl. ¶¶ 32-34, 54) If Stewart had used these tables, he would have found that as many as 217,686 listed on this no-match list may in fact possess a driver license. (Thornton Decl. ¶ 55)

The United States Departments of State and of Defense maintain databases of

persons who possess federal ID cards that are acceptable forms of identification under VIVA (passports and military/veterans IDs). The United States Department of Justice (“USDOJ”) provided to federal agencies the July 2014 snapshot of registered voters and DMV customers instead of the November 2014 snapshot of registered voters and the complete DMV database provided as of that time. USDOJ provided matching protocols it asked each federal agency use to seek matches in the federal databases and matching criteria requested by North Carolina. Plaintiffs’ experts only used the resulting matching reports provided by the federal agencies for the USDOJ matching criteria and not the criteria requested by North Carolina. The federal agencies refused North Carolina’s request that residence and mailing addresses be used to match persons in the federal databases. USDOJ also refused to apply matching criteria against databases showing citizenship which could have been obtained from the United States Department of Homeland Security or the Social Security Administration. (Thornton Decl. ¶¶ 35-38).

USDOJ provided the matching protocols to the federal agencies. Neither USDOJ nor North Carolina were allowed access to the federal databases. It is difficult to either determine the most useful matching criteria or to assess the effectiveness of the matching criteria because the data from the federal agencies is essentially a set of three black boxes. The parties have no knowledge of the format of the data from each federal agency, the sets of data that were or might have been available, the underlying programming code written to apply data modifications and matching criteria, or whether additional criteria or data management could have been used for more complete

matching. (Thornton Decl. ¶¶ 48-52).

A large portion of the Stewart's no-match list includes registered voters who do not have the last 4 digits of a social security number listed in SEIMS. For example, 195,534 (or 49%) of Stewart's list of unmatched registered voters (397,971) are missing the last four digits of their social security numbers. There is no driver license number for 235,654 (or 59%) of the 397,971 registered voters who could not be matched with the DMV snapshot by Stewart. (Thornton Decl. ¶ 53) As noted by Neesby, SEIMS was not programmed to record either the last four digits of a social security number or driver license numbers until 2004. (Neesby Aff. ¶ 34) Therefore, the fact that a registered voter is not listed in the SBOE database with the last four digits of their social security number or their driver license number (such as the State Board's Executive Director) does not mean that they lack either. Instead, it means that it is more likely that voters in these groups are far more difficult to match even though they may possess a social security number and a driver license. (Thornton Decl. ¶ 53)

Stewart did not account for the over-representation of women on his no-match list, a group that is more likely to change names without updating their information with the State Board or with DMV. (Thornton Decl. ¶ 56) Likewise, Stewart did not account for the high percentage of college students included in his no-match list. College students often attend college at a different location from their county or state of residence and may not update information regarding their current address with either the State Board or with DMV. The large number of out-of-state college students in North Carolina also raises an

issue of whether at least some of these registered voters are genuine residents of North Carolina. (Thornton Decl. ¶¶ 57-64)

In addition, Stewart did not account for the likely inflation of North Carolina's voter rolls. Among Stewart's no-match list, 86,069 (225) have been removed from the voter rolls following Stewart's report. (Thornton Decl. ¶ 65)

Stewart also did not conduct a comprehensive manual review of his no-match list. Manual review of the no-match list provided by the federal agencies is not possible because the parties do not have access to those databases. (Thornton Dec. ¶¶ 72-75)

**D. Stewart's Conclusions Are Not Reasonably or Reliably Accurate.**

The aforementioned flaws in Stewart's methodology demonstrate that his report does not meet *Daubert's* standard for reliability. Additionally, data matching that attempts to compare voter registration information to driver license information suffers from inherent flaws, and courts have refused to credit such evidence in similar cases. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (noting in a constitutional challenge to a voter ID law that data matching relied upon by plaintiffs was "incomplete and unreliable"). Because Stewart did not use the best available data or methodology to conduct his analysis, his data matching conclusions similarly lack reliability. Even without recreating Stewart's analysis, Neesby discovered discrepancies for at least 84,675 people appearing on Stewart's "no-match list." (Neesby Aff. ¶ 5) Because the numerous errors in Stewart's approach and the inherent unreliability of the data in both the voter registration and driver license databases, the Court should exclude

Stewart's report and testimony under Rule 702.

**IV. CONCLUSION**

For the foregoing reasons, Defendants respectfully request that this Court grant its motion to exclude Charles Stewart III's report and testimony and the testimony by any other expert who relies upon Dr. Stewart's matching analysis.

Respectfully submitted, this the 23<sup>rd</sup> day of June, 2015.

ROY COOPER  
ATTORNEY GENERAL OF NORTH  
CAROLINA

/s/ Alexander McC. Peters

Alexander McC. Peters  
Senior Deputy Attorney General  
N.C. State Bar No. 13654  
apeters@ncdoj.gov

/s/ Katherine A. Murphy

Katherine A. Murphy  
Special Deputy Attorney General  
N.C. State Bar No. 26572  
kmurphy@ncdodoj.gov

N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602  
Telephone: (919) 716-6900  
Facsimile: (919) 716-6763  
*Counsel for Defendants North Carolina and  
State Board of Election Defendants.*

OGLETREE, DEAKINS, NASH  
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr

Thomas A. Farr  
N.C. State Bar No. 10871  
Phillip J. Strach  
N.C. State Bar No. 29456  
thomas.farr@ogletreedeakins.com  
phil.strach@ogletreedeakins.com  
4208 Six Forks Road, Suite 1100  
Raleigh, North Carolina 27609  
Telephone: (919) 787-9700  
Facsimile: (919) 783-9412  
*Co-counsel for Defendants North Carolina  
and State Board of Election Defendants.*

BOWERS LAW OFFICE LLC

By: /s/ Karl S. Bowers, Jr.

Karl S. Bowers, Jr.\*

Federal Bar #7716

P.O. Box 50549

Columbia, SC 29250

Telephone: (803) 260-4124

E-mail: butch@butchbowers.com

\*appearing pursuant to Local Rule 83.1(d)

*Counsel for Governor Patrick L. McCrory*

By: /s/ Robert C. Stephens

Robert C. Stephens (State Bar #4150)

General Counsel

Office of the Governor of North Carolina

20301 Mail Service Center

Raleigh, North Carolina 27699

Telephone: (919) 814-2027

Facsimile: (919) 733-2120

E-mail: bob.stephens@nc.gov

*Counsel for Governor Patrick L. McCrory*

**CERTIFICATE OF SERVICE**

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

***Counsel for United States of America:***

T. Christian Herren, Jr.  
John A. Russ IV  
Catherine Meza  
David G. Cooper  
Spencer R. Fisher  
Elizabeth M. Ryan  
Jenigh Garrett  
Attorneys, Voting Section  
Civil Rights Division  
U.S. Department of Justice  
Room 7254-NWB  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Gill P. Beck  
Special Assistant United States Attorney  
Office of the United States Attorney  
United States Courthouse  
100 Otis Street  
Asheville, NC 28801

***Counsel for NCAAP Plaintiffs:***

Penda D. Hair  
Edward A. Hailes, Jr.  
Denise D. Liberman  
Donita Judge  
Caitlin Swain  
ADVANCEMENT PROJECT  
Suite 850  
1220 L Street, N.W.  
Washington, DC 20005  
phair@advancementproject.com

Adam Stein  
TIN FULTON WALKER & OWEN  
312 West Franklin Street  
Chapel Hill, NC 27516  
astein@tinfulton.com

Irving Joyner  
P.O. Box 374  
Cary, NC 27512  
ijoyner@ncu.edu

Thomas D. Yannucci  
Daniel T. Donovan  
Susan M. Davies  
K. Winn Allen  
Uzoma Nkwonta  
Kim Knudson  
Anne Dechter  
Bridget O'Connor  
Jodi Wu  
Kim Rancour  
KIRKLAND & ELLIS LLP  
655 Fifteenth St., N.W.  
Washington, DC 20005  
tyannucci@kirkland.com

***Counsel for League of Women Voter  
Plaintiffs:***

Anita S. Earls  
Allison J. Riggs  
Clare R. Barnett  
Southern Coalition for Social Justice  
1415 Hwy. 54, Suite 101  
Durham, NC 27707  
anita@southerncoalition.org

Laughlin McDonald  
ACLU Voting Rights Project  
2700 International Tower  
229 Peachtree Street, NE  
Atlanta, GA 30303  
lmcdonald@aclu.org

Dale Ho  
Julie A. Ebenstein  
ACLU Voting Rights Project  
125 Broad Street  
New York, NY 10004  
dale.ho@aclu.org

Christopher Brook  
ACLU of North Carolina Legal Foundation  
PO Box 28004  
Raleigh, NC 27611-8004  
cbrook@acluofnc.org

***Counsel for the Intervening Plaintiffs:***

John M. Davaney  
jdevaney@perkinscoie.com  
Marc E. Elias  
melias@perkinscoie.com  
Kevin J. Hamilton  
khamilton@perkinscoie.com  
Elisabeth Frost  
efrost@perkinscoie.com  
PERKINS COIE, LLP  
700 Thirteenth Street, N.W., Suite 600  
Washington, D.C. 20005-3960

Edwin M. Speas, Jr.  
espeas@poynerspruill.com  
John W. O'Hale  
johale@poynerspruill.com  
Caroline P. Mackie  
cmackie@poynerspruill.com  
POYNER SPRUILL, LLP  
301 Fayetteville St., Suite 1900  
Raleigh, NC 27601

This the 23<sup>rd</sup> day of June, 2015.

OGLETREE, DEAKINS, NASH  
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr

Thomas A. Farr

21587989.1

## General Information

|                               |  |
|-------------------------------|--|
| <b>Court</b>                  | United States District Court for the Middle District of North Carolina; United States District Court for the Middle District of North Carolina |
| <b>Federal Nature of Suit</b> | Civil Rights - Voting[441]   |
| <b>Docket Number</b>          | 1:13-cv-00660  |