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.	**Case No.: 1:13-CV-658**
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	**Case No.: 1:13-CV-660**
UNITED STATES OF AMERICA, Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al, Defendants.	**Case No.: 1:13-CV-861**

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE DECLARATION OF THOMAS HOFELLER AND MOTION IN LIMINE TO EXCLUDE HIS TESTIMONY AT PRELIMINARY INJUNCTION HEARING

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The Declaration of Thomas Hofeller ("Hofeller") (ECF No. 143 (Case No. 1:13-CV-00660-TDS-JEP)) and all related supporting materials submitted by Defendants in support of their response in opposition to the pending motions for preliminary injunction should be stricken, and any testimony on the same excluded, for three reasons. First, Hofeller is not qualified to offer the opinions contained in his Declaration: He admits that has never before conducted analyses similar to those he undertook at the request of Defendants' counsel, and he lacks relevant experience. Second, Hofeller's methodology is unreliable and unsubstantiated. He does no more than repeat data provided to him by his client, then speculate as to its possible meaning, relying on selective leaps of logic that fail to account for alternative reasonable explanations, and ultimately reaches opinions—subject to the caveat that "further study" is required—that are tethered to the data by no more than his *ipse dixit*. The "further study" to which Hofeller refers, however, is precisely what an expert is supposed to provide; his speculation is no more helpful to the Court than the speculation of any lay person. Third, Defendants twice imply that Hofeller reached conclusions that are neither contained in his Declaration nor supported by his deposition testimony. For each of these reasons, the Court should disregard the Hofeller materials and exclude his testimony.

I. ARGUMENT[1]

A. Hofeller Is Not Qualified To Offer Expert Testimony On The Issues For Which Defendants Proffer His Declaration

Hofeller is not qualified to offer the expert opinions Defendants offer him for. He has never before conducted an analysis similar to the one that he prepared for Defendants, Hofeller Dep. 78:14-18,[2] and none of the publications that he has authored are relevant to his work in this case, *id*. at 78:24-79:10. Although he claims to be "very familiar with . . . the demographic characteristics of the State of North Carolina," *id*. at 67:7-9, he admits that the conclusions that he reaches in his Declaration "are a result of what [he] saw in the data that was compiled" for him, by his client, and not that experience, *id*. at 72:25-73:7; *see also* Hofeller Decl. ¶ 14. And the fact that Hofeller is a consultant who specializes in redistricting does not save him. The experience listed on his resume is almost exclusively in redistricting, and all of the litigation in which Hofeller was involved prior to this matter involved redistricting, *see* Hofeller Resume (Exhibit B)—not the issues he purportedly reviews and opines upon in this case.

Because Hofeller has no experience that qualifies him to offer opinions on the

[1] With regard to the applicable legal standard, Plaintiffs refer the Court to and hereby incorporate the standard set forth in the Brief In Support of Plaintiffs' Motion to Strike Declaration of Sean Trende and Motion in Limine to Exclude His Testimony at Preliminary Injunction Hearing, filed earlier today (ECF No. 158 at 2-5 (Case No. 1:13-CV-00660-TDS-JEP)). As with that motion, the undersigned are authorized to represent that Plaintiff, the United States of America, joins this motion.

[2] Cited excerpts of Hofeller's Deposition, taken in this matter on June 4, 2014, are attached as Exhibit A.

specific election practices at issue in this case, he plainly cannot meet the standards for expert testimony. *See Shreve v. Sears, Roebuck & Co*., 166 F. Supp. 2d 378, 392 (D. Md. 2001) (holding that an expert witness must possess "some special skill, knowledge or experience . . . *concerning the particular issue* before the court") (emphasis added); *Koppell v. N.Y. State Bd. of Elections*, 97 F. Supp. 2d 477, 481-82 (S.D.N.Y. 2000) (excluding testimony of political scientist who had "significant political experience," but "lack[ed] any particular expertise" on the election practices at issue, and whose work in the area "has neither been tested nor subject to peer review"). Furthermore, Defendants indisputably offer Hofeller to testify *not* about "matters 'growing naturally and directly out of research [he has] conducted independent of the litigation,'" but rather to opinions that he has developed "'expressly for purposes of testifying.'" *Doe v. Ortho-Clinical Diagnostics, Inc*., 440 F. Supp. 2d 465, 470 (M.D.N.C. 2006) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)). *See also* Fed. R. Evid. 702, advisory committee's note.

Thus, Hofeller "cannot satisfy even the minimal requirements of" expertise set forth in Rule 702 or *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993), and his Declaration and supporting materials should be stricken and testimony excluded. *Thomas J. Kline, Inc. v. Lorillard, Inc*., 878 F.2d 791, 799-800 (4th Cir. 1989).

B. Hofeller's Methodology Does Not Satisfy Rule 702 or *Daubert*'s Reliability Prong

Hofeller's methodology also fails the basic reliability requirements of *Daubert* and

Rule 702. As set forth below, Hofeller, at bottom, does nothing more than compile selected data provided to him by his client, and then speculate as to its meaning. He admits that he has never before conducted a similar analysis, nor is he aware of anyone else who has ever used similar methodology to examine the issues upon which he purports to offer his opinions. In other words, Hofeller's technique fails to satisfy any of the four non-exhaustive factors discussed by the *Daubert* Court as useful for determining whether a purported expert's opinion is supported by adequate validation to render it trustworthy: It cannot possibly be tested (because it is entirely speculative); it has not been subjected to peer review or publication; there are no standards whatsoever controlling its operation; and it does not enjoy general acceptance within a relevant scientific community. *See Cooper v. Smith & Nephew, Inc*., 259 F.3d 194, 199 (4th Cir. 2001) (discussing relevant factors for *Daubert* analysis).

1. Hofeller simply and uncritically repeats data provided to him by his client.

Hofeller admits that "[t]he majority of the analyses used for [his] report have been produced," not by him, but by the North Carolina General Assembly's Information Services Division ("ISD"); Hofeller has simply "reformatted" them, and in certain instances added "additional calculations." Hofeller Decl. ¶ 18. Furthermore, Hofeller admitted in deposition that, even when it came to these additional calculations (e.g., geocoding voter addresses to calculate the distance between voters and one-stop voting centers), he relied almost entirely on legislative staff—although he knows nothing about

their experience with geocoding, what programs they used, or what they did (if anything) to check that geocoding for accuracy. Hofeller Dep. 119:16-122:18. This is reason alone to strike Hofeller's Declaration and exclude his testimony. *See Capital Concepts, Inc. v. Mountain Corp.*, 936 F. Supp. 2d 661, 672 (W.D. Va. 2013) ("An expert cannot simply parrot his client's findings or calculations and then pass that data off as his own expert opinion.").

2. Hofeller's analysis is speculative, fails to rule out reasonable alternative explanations, and is admittedly incomplete.

Defendants rely on Hofeller to support their claim that "the location of one-stop locations favored Democratic and African American voters," Defs.' Br. 32 (citing Hofeller Decl. ¶¶ 68-74) (ECF No. 138), but this is based on nothing more than Hofeller's review of maps produced by ISD that identified the locations of one-stop centers in 2012, and his speculative determination that—because a larger percentage of Wake County's African-American population was located within 3 miles of those centers than the non-Hispanic White population, and "the skew is comparably favorable to voters who voted Democratic," Hofeller Decl. ¶ 73—the one-stop locations in 2012 "clearly favored" Democratic and African American voters. *Id*; Hofeller Dep. 126:13-127:2.[3]

[3] The paragraphs of the Declaration cited by Defendants also discuss Hofeller's opinions about Sunday voting locations and operating hours of one-stop centers, but because Defendants' Brief only focuses on the *location* of one-stop centers, Plaintiffs do not specifically address these other paragraphs. Hofeller's opinions on those related issues, however, suffer from the same fatal flaws.

In deposition, Hofeller admitted that he did not consider the obvious possibility that the placement of the centers was designed to serve the most voters in the most efficient way—even though he admitted that the number of centers correlated to the relative size of the population, *id*. at 127:3-128:12, and that he could not rule out this alternate explanation for the location of the one-stop centers, *id*. at 130:1-8.[4] Further, Hofeller admitted that he had not conducted any analysis of how voters actually used one-stop centers. *Id*. at 135:9-24.

Given these failures, Hofeller was right to concede in his deposition that "there are many, many issues involved in this case and the analysis of the file that need additional study," and that conducting that study "would be an ongoing process of digging deeper into this list or into the placement of the centers and drawing more information up and making conclusions on that information." *Id*. at 129:2-25. In other words, Hofeller admitted that his opinion was based on an analysis that was incomplete, and that failed to consider reasonable alternative explanations that he conceded were supported by the data. This practice "offers no solid grounds for rejecting" other explanations, and renders

[4] With regard to this omission, as with many others, Hofeller attributed it to a claimed lack of time. *See* Hofeller Dep. 128:7-14. *See also id*. at 33:12-15, 44:1-2, 83:20-25. But, Hofeller also testified that he was first contacted by Defendants about this matter in November or December of last year. *Id*. at 80:5-18. Despite that early discussion about "[w]hat sort of things that might be relevant to look at with regard to the defense of the case," and Hofeller's opinion that "[s]omebody really needed to start doing" the analysis that he believed needed to be done, Hofeller did not start working on his analysis until sometime in February of 2014. *Id*. at 80:19-81:10.

Hofeller's opinion that the one-stop centers favored Democrats and African Americans "little more than speculation." *Cooper*, 259 F.3d at 203. As the Supreme Court and the Fourth Circuit have "repeatedly held, 'nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999)). *See also Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250-51 (4th Cir. 1999) (finding opinion testimony inadmissible where expert lacked additional necessary information, without which "[h]e could only speculate as to a possibility which was no more likely than other available possibilities").

3. Defendants imply that Hofeller reached opinions that he never expressed.

Defendants also cite Hofeller to argue that African-American voters are not "more burdened by the elimination of out-of-precinct voting," because "[w]hite voters and Republican voters who voted out-of-precinct in 2012 did so in a precinct located a farther distance from their home precinct than Democratic and African American voters." Defs.' Br. 34 n.12 (citing Hofeller Decl. ¶¶ 81, 87, Tbl. 23). In fact, nowhere in his Declaration does Hofeller actually state an opinion about the relative burden that the elimination of out-of-precinct voting imposes on African-American voters. *See generally* Hofeller Decl. Defendants appear to base this assertion on nothing more than Hofeller's summary of data provided to him by the General Assembly and the SBOE. *See* Hofeller Decl. ¶¶ 81, 87, Table 23. But, if Defendants wanted to present that data, they should have done so

directly through fact witnesses from the General Assembly or the SBOE, and produced them for deposition; they cannot seek to introduce the information indirectly, through an "expert" witness who simply repeats what he was told and offers no analysis whatsoever. *See, e.g., In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 608 (S.D.W. Va. 2013) ("Expert testimony which merely regurgitates factual information that is better presented directly to the [factfinder] rather than through the testimony of an expert witness is properly excluded.") (internal quotation marks omitted); *Barnes v. 3/12 Transp., Inc.*, No. CV410-178, 2012 WL 1014810, at *3-4 (S.D. Ga. 2012) (excluding expert witness opinion that merely "parrot[s]" admissible evidence and did not require specialized analysis or expertise).

Similarly, Defendants rely on Hofeller to claim that the North Carolina voter rolls are inflated and "include many alleged registered voters who no longer reside in North Carolina" or "may no longer be alive," Defs.' Br. 35 (citing Hofeller Decl. ¶¶ 78, 94, 95, Table 17), a fact that Defendants inexplicably claim is "relevant to eliminating [SDR] and closing the registration books 25 days prior to an election." *Id*. In fact, Hofeller has not offered *any* opinion that would link his assertions about the composition of the voter rolls to the elimination of SDR. His Declaration contains no mention whatsoever of SDR. And, when asked at his deposition whether North Carolina has taken any actions to address the fact that there appear to be "excess names on the [voter] file that are not voters," Hofeller first said that he was not sure he could address that question—which he

suggested would be "best addressed to witnesses you have from the [SBOE]," Hofeller Dep. 159:6-11—and then, said that he believed the SBOE was "making an effort" by doing things like "go[ing] to the [National Change of Address Program] . . . [and] the death file," and cross-referencing names of voters against those databases. *Id*. at 159:12-159:20. At no point did Hofeller suggest that his opinion was in any way connected to the elimination of SDR.

Moreover, Hofeller's "analysis" regarding the composition of the voter rolls is, like those analyses discussed above, unsubstantiated and unhelpful. The paragraphs in Hofeller's Declaration upon which Defendants rely assert that (1) certain precincts have registration rates that are abnormally high in relation to the adult population, Hofeller Decl. ¶¶ 78, 95; and (2) that the voter file includes voters who participated in the 2008 presidential election, but not in the ensuing 2010 mid-term or 2012 presidential, which Hofeller concludes "may well mean a large number [of these voters] have left the State," *id*. ¶ 94.

Neither assertion is supported by reliable analysis or helpful to the Court. As to the first, Hofeller is unable to offer an opinion as to how many of the voters on the rolls "shouldn't be there." Hofeller Dep. 17:9-18:7. When pressed, Hofeller said that it was "probably . . . in the hundreds of thousands," but was unable to state how confident he was in that estimate. *Id*. at 18:8-19; *see also id*. at 37:4-11. Hofeller's inability to ascribe a confidence level to his opinion is understandable, given how he came to it. In fact,

Hofeller admitted that the methodology upon which the second assertion above rests is so unorthodox that he is unaware of anyone else who has ever reached a conclusion about whether a voter is likely to still reside in the state based on turn out over just a couple of elections, nor is he aware of any analysis that has been done as to how likely a voter is to cast a ballot after sitting out two elections. *Id*. at 33:16-21, 36:23-37:3. Hofeller has not studied voting patterns, nor has he studied how likely voters are to turn out for election after election consistently. *Id.* at 32:11-17. He has made no effort to determine whether any of the voters on North Carolina's rolls have subsequently voted elsewhere. *Id*. at 38:23-39:1.

In other words, Hofeller's "opinion" on this subject is nothing more than his layman's observation of "indicators of a process occurring which needs more examination." *Id*. at 37:25-38:2. Such amorphous, unhelpful speculation cannot survive *Daubert*'s scrutiny. *See Oglesby*, 190 F.3d at 250 (holding that "[a] reliable expert opinion" may not be based on mere "belief or speculation, and inferences must be derived using scientific or other valid methods"); *see also Kumho Tire,* 526 U.S. at 137.

C. Hofeller's Testimony Cannot Satisfy Rule 702 or *Daubert*'s Relevance Prong

The relevance prong asks whether the proffered expert testimony is "sufficiently tied to the facts of the case [such] that it will be of assistance to the factfinder in resolving a disputed fact." *Bourne ex rel. Bourne v. E.I. Dupont de Nemours & Co*., 189 F. Supp. 2d 482, 495 (S.D.W.Va. 2002). "[A]n expert's opinion is helpful to the trier of fact, and therefore relevant under Rule 702, 'only to the extent the expert draws on some special

skill, knowledge or experience to formulate that opinion; the opinion must be an *expert* opinion (that is, an opinion informed by the witness' expertise) rather than simply an opinion broached by a purported expert.'" *Shreve*, 166 F. Supp. 2d at 393 (quoting *Ancho v. Pentek Corp.*, 157 F.3d 512, 518 (7th Cir. 1998)). Here, Hofeller admits that he does not draw on any specific expertise to reach his opinions—he simply looked at the data and stated what he believed it meant, without engaging in any kind of principled analysis to exclude other alternative explanations. *See, e.g.*, Hofeller Dep. 72:25-73:7, 32:11-17, 33:16-21, 36:23-37:3, 37:25-38:2, 38:23-39:4, 127:3-128:12, 130:1-8, 134:9-135:24. Thus, Hofeller's "opinions" are irrelevant and inadmissible under *Daubert* and Rule 702.

II. CONCLUSION

For all of the reasons set forth herein Plaintiffs request that the Court enter an order striking Hofeller's Declaration and supporting materials, and excluding any testimony about the same at the hearing on the motions for preliminary injunction.

Dated: June 30, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2014, I served Plaintiffs' Motion to Strike Declaration of Thomas Hofeller and Motion in Limine to Exclude His Testimony at Preliminary Injunction Hearing with the Clerk of Court using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which on the same date sent notification of the filing to the following:

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