

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO,  
EASTERN DIVISION**

TOMMY RAY MAYS, II, <i>et al.</i> ,	:	
	:	
Petitioners,	:	Case No. 2:18-cv-1376
	:	
v.	:	JUDGE WATSON
	:	
FRANK LAROSE, in his official capacity as	:	MAGISTRATE JUDGE VASCURA
Secretary of State of Ohio,	:	
	:	
Defendant.	:	

**MOTION, *IN LIMINE*, TO EXCLUDE THE EXPERT TESTIMONY  
OF DR. MARK SALLING, PH.D**

Pursuant to Evidence Rule 702, Defendant Ohio Secretary of State Frank LaRose moves this Court to exclude the expert testimony of Dr. Mark Salling, Ph.D. Dr. Salling’s testimony is unreliable as it is based entirely on inaccurate and irrelevant data, void of any independent validation, lacks any legitimate, valid methodology, and contains imprecise, biased conclusions. Dr. Salling is the quintessential expert for hire who prepared his reports solely in anticipation of litigation. The reasons supporting this Motion are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

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*s/ Julie M. Pfeiffer*

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**MEMORANDUM IN SUPPORT**

**I. INTRODUCTION**

Plaintiffs' counsel hired Dr. Mark Salling, Ph.D as their expert witness to prepare two reports exclusively for this action: (1) the "Proximity Report" – a map showing the locations of all jails and hospitals in Ohio in relation to the county boards of elections, and (2) the "Incarcerated Voter Report" - estimating the number of late jailed voters statewide that were allegedly prevented from voting on the last four general election days due to incarceration.<sup>1</sup> The Plaintiffs will offer Dr. Salling's reports, the Incarcerated Voter Report in particular, as their estimate of the "burden" on the right to vote.<sup>2</sup> In this case, the higher the estimate of disenfranchised late jailed voters, the better the Plaintiffs believe they will fare.

With this in mind, there is no mystery to why Plaintiffs' counsel hired Dr. Salling as their expert to state that the burden on late jailed voters is "substantial." He is the Plaintiffs' quintessential "expert for hire" – having routinely been the expert witness for plaintiffs in social justice claims against governmental agencies. In fact, Dr. Salling prepared two nearly identical reports for another set of plaintiffs in a similar voting lawsuit in 2013. *Fair Elections Ohio v. Husted*, 47 F. Supp. 3d 607 (S.D. Ohio 2014).

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<sup>1</sup> Ohioans can vote starting nearly a month before Election Day. Any registered voter can vote early-in-person or absentee-by-mail. Even registered voters who are in jail can cast an absentee ballot until noon on Saturday before Election Day. Ohio Rev. Code 3509.08(A). Only a voter or the voter's minor child who is hospitalized for an unforeseen reason has more time to cast an absentee ballot than a jailed voter. Ohio Rev. Code 3509.08(B).

<sup>2</sup> Tommy Mays and Quinton Nelson are two jailed individuals who missed the Saturday noon deadline for absentee voting in the 2018 General Election. They contend that the First and Fourteenth Amendments to the U.S. Constitution guarantee their right to vote by absentee ballot in jail through Election Day. (Compl.) In order to prevail, the Plaintiffs must prove that Ohio's voting laws as applied in their situations amounted to an *unconstitutional* burden on the right to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 432 (1992).

And, Dr. Salling is personally invested in this case. Dr. Salling believes that his part in this action impacts democracy and furthers his personal “code of ethics.”

As the Plaintiffs’ expert for hire, Dr. Salling’s testimony is simply unreliable. He failed to employ any legitimate methodology in making his conclusions. And, he did not rely much on his specialized knowledge and expertise as a social scientist in drafting his reports either. He blindly accepted whatever data Plaintiffs’ counsel fed him, even when he had no idea where the data came from, or whether it had been validated, or how the Plaintiffs’ counsel actually manipulated the data. In perhaps the most egregious example, Dr. Salling utilized “matching scores” allegedly derived from Plaintiffs’ counsel’s own algorithm that has never been disclosed in this case. Even Dr. Salling is completely ignorant of how this “black box” algorithm worked.

In the end, this Court should see Dr. Salling for what he is – just the Plaintiffs’ mouthpiece – and, as such, should reject his testimony as unreliable and irrelevant.

## **II. BACKGROUND**

Dr. Mark Salling is the Director of the Northern Ohio Data & Information Service (NODIS) and a Senior Research Associate/College Fellow at the Maxine Goodman Levin College of Urban Affairs at Cleveland State University. (Salling Dep. 15; Exh. 4). He holds a Bachelors’ Degree, Master’s Degree and Ph.D in Geography. (Id). Dr. Salling purports to have expertise in Demography, Geographic Information Systems, and Survey Design and Analysis. (Doc 2-3; Salling Aff. ¶ 1). According to his Curriculum Vitae, Dr. Salling has written numerous articles over the years on a wide variety of social and geopolitical matters including health care, housing, community empowerment, socioeconomic trends, immigration, teen pregnancy, environmental justice, community access to mortgage loans, the opioid crisis, as well as voting. (Salling Dep. 15; Exh. 4).

According to its website ([www.levin.urban.csuohio.edu/nodis/](http://www.levin.urban.csuohio.edu/nodis/)), NODIS is “designated by the State of Ohio and the U.S. Bureau of the Census as the regional data center for northern Ohio.” NODIS provides U.S. Census information to “the university community, public administrators, civic organizations and the general public on a cost-recovery basis” and “makes available data for other areas in Ohio and the US.” In addition to being a depository for all types of population data, NODIS “provides data analysis, mapping and programing services, technical assistance and training.” As the NODIS Director - a position that he has held since 1982 - Dr. Salling is responsible for managing NODIS staff and its teaching, research and technical assistance functions. (Salling Dep. 15; Exh. 4).

Plaintiffs’ counsel engaged Dr. Salling to conduct data analysis and to write two reports exclusively for use in this action. (Salling Dep. 1; Exh. 3). In his first report entitled “Analysis of the Proximity of Jails and Hospitals to County Boards of Elections in Ohio” (“Proximity Report”), Dr. Salling plotted on a map the locations of all jails and hospitals in Ohio and listed the distances between the county boards of elections and the jails and hospitals in each county. (Salling Dep. 65; Exh. 6). Dr. Salling’s second report entitled “Estimation of the Number of Registered Voters Prevented from Voting Because They Were Arrested After the Absentee Ballot Request Deadline and Detained Through General Elections in November 2012, 2014, 2016 and 2018” (“Incarcerated Voter Report”), is his estimation of the number of late jailed voters statewide that were allegedly prevented from voting on election day due to their incarceration. (Salling Dep. 89; Exh. 9). For both of these reports, Dr. Salling relied almost exclusively on data and information gathered and manipulated exclusively by the Plaintiffs’ counsel, and he conducted little to no independent analysis of the Plaintiffs’ data in making his conclusions. (Salling Dep. Exhs. 6 and 9).

The Secretary of State engaged Dr. Stephen Mockabee, Ph.D, Associate Professor and Graduate Program Director of the Department of Political Science at the University of Cincinnati to review Dr. Salling's data analysis and the conclusions in his reports. (Mockabee Dep. 5; Exh. 1). Dr. Mockabee, who has specific experience in data matching and data collection, discovered several significant deficiencies in both the data and the methodology used by Dr. Salling to support his conclusions. (Mockabee Dep. 17-18; Exh. 1).

The origins of Dr. Salling's reports did not begin with this case. In 2012, a group of plaintiffs, who also brought constitutional claims over late jailed voters' access to voting on election day, retained Dr. Salling as their expert witness in *Fair Elections Ohio, et al. v. Husted*, Case No. 12-cv-797 (S.D. Ohio) before Judge Spiegel. Dr. Salling submitted several expert reports in support of the *Fair Elections* plaintiffs' claims including a "Proximity Analysis" and an "Incarcerated Voter Analysis" and a "Supplemental Incarcerated Voter Analysis. (Doc. 2-3; Salling Aff. Exhs. 4-6). These reports were nearly identical in form and purpose to Dr. Salling's Proximity Report and Incarcerated Voter Report in this case and were also prepared solely in anticipation of litigation. In fact, Mays and Nelson offered Dr. Salling's original 2013 reports from the *Fair Elections* case in support of their Motion for Class Certification in this case. (Doc. 29).

Dr. Salling is no stranger to testifying against the Ohio Secretary of State and other governmental agencies in litigation over what he views as "issues of social consequence and of social interest." (Salling Dep. 42:2-3). In fact, Dr. Salling has been retained at least eight times as an expert witness for plaintiffs who have brought social justice claims against governmental agencies. (See Salling Dep. 19-36; Exh. 4). Dr. Salling believes that his work on this case is furthering his personal "code of ethics." (Salling Dep. 42).

### III. LAW AND ARGUMENT

#### A. Standard of Review

Fed. R. Evid. 702 governs the admissibility of expert testimony and states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In the context of a bench trial, the district judge enjoys broad discretion in admitting proffered expert testimony initially and then deciding whether the evidence deserves to be credited under the requirements set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1998). *Deal v. Hamilton Cnty. Bd. Of Edu.*, 392 F.3d 840, 852 (6<sup>th</sup> Cir. 2004). *See also Gonzales v. Nat'l Bd. Of Med. Exam'rs*, 225 F.3d 620, 635 (6<sup>th</sup> Cir. 2000). Still, the party proffering the expert opinion bears the burden of establishing the admissibility of the evidence by a preponderance of proof. *Nelson v. Tenn. Gas Pipeline, Co.*, 243 F.3d 244, 251 (6<sup>th</sup> Cir. 2001); *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6<sup>th</sup> Cir. 2000).

In *Daubert*, the Supreme Court developed a four factor test to determine the relevancy and reliability of proffered expert testimony. *Id.* In general, courts may factor: (1) whether the expert's methodology "can be (and has been) tested"; (2) whether the expert's "theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of

error” of the expert’s opinion; and (4) whether the expert’s technique is “generally accepted” in the relevant scientific community. *Id.* at 593-595.

Later, the Supreme Court generally applied the *Daubert* test to non-scientist experts whose testimony is based on “technical” and “other specialized” knowledge. *Kumho*, 526 U.S. at 141. The *Kumho* Court further recognized that “the test of reliability is flexible, and *Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.” *Id.* (internal quotations omitted).

**B. Dr. Salling’s reports are based on inaccurate and irrelevant data derived from multiple sources for which Dr. Salling has no independent knowledge.**

Courts must consider and evaluate the underlying facts and data relied upon by an expert in determining whether the expert’s opinion is reliable. *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1182 (8<sup>th</sup> Cir. 1997). Expert opinions that are premised on faulty and incomplete data, as well as faulty methodology, are properly excluded under Fed. R. Evid. 702. “The reliability analysis applies to all aspects of an expert’s testimony: the methodology, the facts underlying the expert’s opinion, the link between the facts and the conclusion, et alia.” *Pugliano v. United States*, 315 F.Supp. 2d 197, 199 (D. Conn. 2004) quoting *Heller v. Shaw Indus.*, 167 F.3d 146, 155 (3<sup>rd</sup> Cir. 1997). “In deciding whether a step in an expert’s analysis is reliable, the court must undertake a rigorous examination of the data on which the expert relies, the method by which he draws his opinions from such studies and data, and the application of the data and methods to the case at hand.” *Id. citing Amorgianos v. AMTRAK*, 303 F.3d 256, 267 (2<sup>nd</sup> Cir. 2002).

**1. Plaintiffs cannot prove that the size or composition of Dr. Salling’s sample of jail roster information from thirteen counties is appropriately representative of the entire state.**

With respect to the Incarcerated Voter Report, Plaintiffs’ counsel provided Dr. Salling with a sample of data from the jail rosters of thirteen Ohio counties including “the names, booking date, release date, and/or charges facing persons housed in county jails between the absentee ballot request deadline and the general election date in November 2012, 2014, 2016, and 2018.” (Salling Dep. Exh. 9).

To be clear, Dr. Salling neither selected the counties to include in the sample, nor was he consulted as to whether such a sample was accurately representative of the entire jailed population in Ohio. (Salling Dep. 92-93). He surmised that he was given only a sample because obtaining the actual numbers of jailed individuals in Ohio during the weekends before elections was too costly and would mean too much time and effort for Plaintiffs’ counsel to compile. (Salling Dep. 91). Dr. Salling speculated that the Plaintiffs may have picked the sample for geographical and population diversity reasons, or because those were the only counties that responded to records requests. (Salling Dep. 96-97).

Dr. Stephen Mockabee testified to several glaring omissions regarding the sample size and composition, noting that “the report does not provide the criteria that were used in selecting the 13 counties...leaving the reader to speculate as to the possible reasons why these counties were chosen.” (Mockabee Dep. Exh. 1). Dr. Salling’s failure to include this critical information makes it impossible for “a social scientist to reach a conclusion about the accuracy of the estimates.” (Mockabee Dep. 36). On this point, Dr. Salling’s failure to provide a rationale behind the sample size and composition and his failure to include evidence that the sample is actually representative of the entire jailed population in Ohio during the critical times renders his conclusions unreliable.

*See Ask Chems., LP v. Computer Packages, Inc.*, 593 Fed. Appx. 506, 511 (6<sup>th</sup> Cir. 2014) (“Given the unreasonableness of [the expert’s] methods, the faulty and incomplete data upon which they were based, and the general unreliability of the evidence, the district court did not abuse its discretion in excluding [the expert’s] testimony.”); *Ohio Pub. Emples. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 2018 U.S. Dist. LEXIS 137229 (N.D. Ohio 2018) (District court excluded expert report based on an insufficient data sample and inaccurate facts.).

**2. Dr. Salling failed to ensure the accuracy of his data and he failed to adequately record which data he actually relied upon in making his conclusions.**

Plaintiffs’ counsel gave Dr. Salling data derived from several different sources in a spreadsheet for use in drafting the Incarcerated Voter Report. (Salling Dep. 110; Exhs. 10, 12). Unfortunately, Dr. Salling does not know where the bulk of this data comes from, or what the data refers to. (Salling Dep. 111-112; Exhs. 11, 12). For example, Dr. Salling does not know what several of the data sets referred to including “booking date” or “data includes, where available.” (Salling Dep. 108). He believes that some of the information came from “a second database containing national voter registration data” but he is unsure who compiled the data. (Salling Dep. 111). Moreover, Dr. Salling does not fully remember which data fields he actually used from the spreadsheet in making his conclusions. (Salling Dep. 120, 127; Exhs. 12, 14).

Dr. Salling did not fare much better in drafting his Proximity Report. (Salling Dep. Exh. 8). Plaintiffs’ counsel fed him data on the location of hospitals and jails in Ohio. (Salling Dep. 72). He never inquired as to what types of medical facilities (i.e., urgent care clinics) were included as “hospitals.” (Salling Dep. 75). As to the jail locations data, Dr. Salling admitted that his Proximity Report does not include Ohio’s regional jails<sup>3</sup> and that such omission would impact his analysis.

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<sup>3</sup> Some Ohio counties choose to pool resources and form regional jails, serving wide geographic areas, housing inmates from multiple counties. *See e.g.* Southeastern Ohio regional Jail, serving

(Salling Depo. 81). Finally, Dr. Salling plotted the distances between these facilities and county boards of elections in straight lines, not in driving distances. Again, Dr. Salling gives no rationale for his use of this data and he conducted no independent research as to whether there would be any appreciable difference between these distance calculations. (Salling Dep. 83).

Because Dr. Salling offers mere cursory explanations of the data, there is no way to independently test and verify the accuracy and reliability of the data. *See Buck v. Ford Motor Co.*, 810 F.Supp.2d 815 (N.D. Ohio 2011) (Expert testimony must be supported by appropriate validation.)

Also, Dr. Salling conducted very little independent analysis to ensure the accuracy and reliability of any of the data sets that support his conclusions. He only conducted a “random sort of ad hoc review” of the booking data, conducted mere visual “spot checks” of other data and then looked at columns of data “to see if there’s anything that didn’t seem to fit.” (Salling Dep. 121-122). More troubling even than Dr. Salling’s lack of interest in the integrity of his data, are the obvious data errors contained in his report and his admission that his numbers might be inaccurate. (Salling Dep. 131, 138).

All of these glaring red flags show that Dr. Salling is connected to the data merely by *ipse dixit*, and therefore, he should be excluded as an expert witness. “A district court is not required to admit expert testimony that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the

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Athens, Hocking, Morgan, Perry, and Vinton Counties, available at: <http://www.seorj.com/>; Corrections Center of Northwest Ohio, servicing Defiance, Fulton, Henry, Lucas, and Williams Counties, available at: <https://www.ccnoregionaljail.org/>; and Tri-County Regional Jail, servicing Champaign, Madison, and Union Counties, available at: <http://www.tricountyregionaljail.com/>.

opinion proffered.” *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 254 (6<sup>th</sup> Cir. 2001) quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

**3. Dr. Salling’s data contains several inaccurate and unverified assumptions.**

Expert witnesses must show that all factual or data based assumptions in their work are scientifically valid and accurate. *Nelson*, 243 F.3d at 253-254. (Court upheld the exclusion of expert testimony where the expert failed to prove that his assumptions were scientifically valid.) Here, Dr. Salling made several critical assumptions, yet offered no proof of their validity. First, Dr. Salling used data on the numbers of inmates in Ohio’s prison system as opposed to the number of persons jailed in Ohio’s jail system. (Salling Dep. 59-60). Dr. Salling doesn’t know why Plaintiffs’ counsel gave him statewide prison population data instead of statewide jail population data. (Salling Dep. 142). Still, Dr. Salling simply incorporated the prison population data into his report without conducting any research on whether that particular data set can reliably be used to analyze populations in Ohio’s jail system. (Salling Dep. 144).

Additionally, Dr. Salling’s data derived from a national voter database contained assumptions that all of the voters identified were registered to vote in Ohio, and that they were registered to vote in the same counties where they were jailed. (Salling Dep. 148). Again, Dr. Salling made no inquiry into the potential impact of these assumptions or whether they were even accurate.

Finally, Dr. Salling assumed, without any substantiation, that all voters who were jailed during the weekends before election days intended to vote and that their arrests were

unforeseeable - i.e., not the result of a prior court order to report to jail or other situations where the jailed individual had notice of an impending arrest.<sup>4</sup> (Salling Dep. 148-49).

All of these assumptions touch directly on critical legal issues in this case and Dr. Salling's failure to even analyze their potential impacts on the data's veracity is another blow to the reliability of his conclusions. *See Ask Chems.*, 593 Fed. Appx. at 511 ("But [the expert's] wholesale adoption of Plaintiff's estimates, without revealing or apparently even evaluating the bases for those estimates, goes beyond relying on facts or data and instead cloaks unexamined assumptions in the authority of expert analysis.")

**C. Dr. Salling's Incarcerated Voter Report lacks any legitimate methodology.**

"A district court's task in assessing evidence proffered under Rule 702 is to determine whether the evidence both rests on a reliable foundation and is relevant to the task at hand." *Newell Rubbermaid, Inc., v. Raymond Corp.*, 676 F.3d 521, 527 (6<sup>th</sup> Cir. 2012) quoting *Daubert*, 509 U.S. at 597. "One key consideration is whether the reasoning or methodology underlying the testimony is scientifically valid. The inquiry is a flexible one, and the focus...must be solely on principles and methodology, not on the conclusions they generate." *Id.* (Internal citations and quotations omitted).

**1. Dr. Salling failed to identify or explain the methodology behind the "matching algorithm" used to produce the "matching scores" that he relied upon in making his conclusions.**

Plaintiffs' counsel engaged The Movement Cooperative (TMC), an organization that provides data consulting resources to non-profit organizations, to compare its national voter

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<sup>4</sup> Dr. Salling's report fails to account for the fact that in any election a significant percentage of registered voters inevitably choose not to vote. Voter turnout for the elections contained in the report were as follows: 2018 General Election, 55.72%; 2016 General Election, 71.33%; 2014 General Election, 40.65%; and 2012 General Election 70.53%. *See*, <https://www.sos.state.oh.us/elections/election-results-and-data/historical-election-comparisons/voter-turnout-in-general-elections/#gref>.

registration database to the sample set of booking data. (Salling Dep. 111). TMC used a “matching algorithm” to create a “matching score” which apparently identified “how well the registered voter records matched the booking data.” (Salling Dep. 112, 115). In essence, it appears that the matching scores’ values allegedly correlate to how reliably the algorithm identified jailed individuals who were also registered to vote in Ohio.

But, we can’t reasonably rely on Dr. Salling to vouch for the algorithm’s accuracy or even to explain it because he does not possess this mystery algorithm and he does not know, even on a basic level, how it works. (Salling Dep. 112). Dr. Mockabee identified this as a significant deficiency in Dr. Salling’s methodology:

I understand that CLC provided TMC with booking data from the Ohio counties, and TMC used its algorithm to generate a match score between the booking data and voter data. No further information is provided about how these data were collected, or what the algorithm involves, or what the “matching scores” mean. In the parlance of social science, I would say this is a “black box” approach. An input is run through some process to produce an output, but the process is opaque. Metaphorically, we can’t see inside the blackened box to understand what is happening to generate results. Without more information about the data and methods utilized, the reader is unable to critically assess the results and for a determination about their reliability. Absent this information, a reader cannot place high confidence in the conclusions drawn.

(Mockabee Dep. Exh. 1, p.2). Dr. Salling conducted no independent validation on this “black box” approach and Dr. Mockabee established that without more information, it can never be validated. Accordingly, the methodology employed in this case suffers from a wide analytical gap which, standing alone, destroys any reliability in Dr. Salling’s conclusions. *See McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1246 (11<sup>th</sup> Cir. 2005) *citing Amorgianos v. AMTRAK*, 303 F.3d 256, 267 (2<sup>nd</sup> Cir. 2002) (“The *Daubert* requirement that the expert testify to scientific knowledge – conclusions supported by good grounds for each step in the analysis – means that

any step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible.”).

**2. Dr. Salling also failed to follow valid, generally accepted methodologies in making his conclusions when he blindly relied on an insufficient sample of booking data, other unverified data sets and unsupported assumptions, and he took no steps to validate the work.**

“An expert who presents testimony must employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Id. quoting Kumho*, 526 U.S. at 152.

Fed. R. Evid. 703 states in pertinent part, “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.” A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community. *Daubert*, 509 U.S. at 595. *See also Kumho*, 526 U.S. at 157 (Supreme Court upheld the exclusion of expert testimony in part because there was no indication in the record that other experts in the industry used the same methodology).

Expert testimony that is drawn from research of others can be excluded if the court is not given sufficient information to determine if it is valid and supports the expert's opinion. *See Best v. Lowe's Home Cntr.*, 563 F.3d 171 (6<sup>th</sup> Cir. 009). “Red flags that caution against certifying an expert include reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity.” *Id.* at 177. Again, it is the proffering party's burden to show that the expert's methodologies are valid and reliable. *Pride*, 218 F.3d at 578.

As discussed *supra*, Dr. Salling's reliance on an untested and unvalidated sample of booking data falls outside generally acceptable methods and is likely inadmissible under Fed. R. Evid. 703, as there is no avenue for independent validation. Dr. Mockabee succinctly explained, "the report does not provide the criteria that were used in selecting the 13 counties used in the report, leaving the reader to speculate as to the possible reasons why these counties were chosen. This absence of information is not consistent with best practices in social science research. The onus is on the researcher to justify the selection of particular cases to study." (Mockabee Dep. Exh. 1).

Also outside generally accepted methods in the Social Sciences field is Dr. Salling's use of other various faulty data and his failure to conduct appropriate validation procedures in his Incarcerated Voter Report. Dr. Salling failed to conduct necessary analyzes in some instances because he was "lazy" and "running out of time." (Salling Dep. 141). In all, Dr. Mockabee's assessment of the Salling report "is that it does not provide noted, for example, "it is not clear why the report relies on this national database rather than simply utilizing Ohio's voter database maintained by the Secretary of State...Perhaps there is a rationale for this, but it is not clear from the Salling report." (Mockabee Dep. Exh. 1).

**D. Dr. Salling is the quintessential “expert for hire” who prepared his reports solely for this litigation.**

The Sixth Circuit has long recognized that “expert testimony prepared solely for purposes of litigation, as opposed to testimony flowing naturally from an expert’s line of scientific research or technical work, should be viewed with some caution.” *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 434 (6<sup>th</sup> Cir. 2007); *Turpin v. Merrell Dow Pharmaceuticals, Inc.* 959 F.2d 1349, 1352 (6<sup>th</sup> Cir. 1992); *Mike’s Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 408 (6<sup>th</sup> Cir. 2006) (“We have been suspicious of methodologies created for the purpose of litigation.”).

A district court can also analyze more rigorously the admissibility of an expert’s testimony if the expert’s opinion was prepared solely for litigation. *Johnson*, 484 F.3d at 434. “If a proposed expert is a “quintessential expert for hire,” then it seems well within a trial judge’s discretion to apply the *Daubert* factors with greater rigor...Such an expert is not to be accorded a presumption of *unreliability*, but the party proffering the expert must show some objective proof...supporting the reliability of the expert’s testimony.” *Id.* at 435 citing *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311 (9<sup>th</sup> Cir. 1995)(“*Daubert II*”).

Dr. Salling is the “quintessential expert for hire” whose testimony lacks any indicia of reliability. Dr. Salling was hired by Plaintiffs’ counsel to prepare his reports in preparation for this litigation. Dr. Salling relied almost exclusively on data and information fed to him by Plaintiffs’ counsel and merely regurgitated the information into his reports. He conducted virtually no independent review or validation of the data, blindly relying on the assumptions and explanations given to him by Plaintiffs’ counsel. *See Johnson*, 484 F.3d at 435 (Court excluded expert testimony because he failed to perform testing on his methodology and he prepared his report solely for litigation.); *Lawrence v. Raymond Corp.*, 501 Fed. Appx. 515, 518 (6<sup>th</sup> Cir.

2012) (“[The expert’s] testimony demonstrates that he conducts very little non-litigation-related research. The district court’s conclusion that [he] was a “quintessential expert for hire” was not clearly erroneous.”).

Moreover, Dr. Salling offers technically imprecise, layman’s conclusions – “it is *relatively safe* to say that they are about 1,000 persons who were unable to vote...” and estimates widely the number of late jailed voters who were prevented from voting as “*substantial*.” (Salling Dep. Exh. 9)(emphasis added). These are not the conclusions of a true expert drawing on his specialized knowledge to offer probative, reliable evidence. Instead, they are highly suggestive that Dr. Salling’s true role in this litigation is to mimic the Plaintiffs’ position, and to further his own personal, biased beliefs regarding this case.

#### IV. CONCLUSION

For all of the reasons set forth in this Memorandum of Support, the Court should exclude the expert testimony of Dr. Mark Salling, Ph.D.

Respectfully submitted,

DAVE YOST  
Ohio Attorney General

*s/ Julie M. Pfeiffer*

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on July 22, 2019, and served upon all parties of record via the court's electronic filing system.

*s/ Julie M. Pfeiffer*

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