IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

TATI ABU KING, et al., Plaintiffs, v. JOHN O'BANNON, in his official capacity as Chairman of the State Board of Elections for the Commonwealth of Virginia, et al., Defendants.	)	Civil Action No. 3:23-cv-408-JAG

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO EXCLUDE THE TESTIMONY OF DR. EDWARD AYERS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Regulations, Statutes, Rules, and Laws

Other Authorities

INTRODUCTION

Plaintiffs have retained Dr. Edward Ayers as a putative expert witness on Reconstruction-era history and, more specifically, crime and punishment in the American south. The report he has submitted, however, is largely irrelevant to the issues this Court must decide. For example, Dr. Ayers opines at length about the history of racial discrimination in the south, but this case does not present a racial-discrimination claim. And the relevant opinions Dr. Ayers does offer are legal opinions, which are not admissible under the guise of expert-witness testimony. Moreover, in reaching those inadmissible legal opinions, Dr. Ayers failed to apply his usual methods of historical inquiry. An expert report that departs from the expert's normal methodology is not reliable under *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993). The Court should exclude Dr. Ayers's opinion.

RELEVANT BACKGROUND

Through the Virginia Readmission Act of 1870, Congress approved Virginia's 1869 Constitution as "republican." An Act to Admit the State of Virginia to Representation in the Congress of the United States, 16 Stat. 62 (Jan. 26, 1870). At the same time, Congress prohibited Virginia from amending its Constitution to disenfranchise any class of persons not already disenfranchised, unless for crimes that were felonies at common law. 16 Stat. 63. The 1869 Virginia Constitution that Congress approved *already* disenfranchised anyone convicted of any "felony"—including statutory felonies that were not felonies at common law. See VA. CONST. art. III, § 1 (1869). Thus, Virginia continues to disenfranchise all felons under its current Constitution. See VA. CONST. art. II, § 1 (1971).

Plaintiffs contend that Virginia is currently violating the Readmission Act. See Pls.' Opp. to Defs.' Mot. to Dismiss, ECF No. 78 at 10-14 (Oct. 26, 2023). In their view, the Readmission Act permits the Commonwealth to disenfranchise only those convicted of crimes that would have

been understood as felonies at common law in 1870. *Id.* at 11-12. On Plaintiffs' theory, if a present-day felony would not have been understood as a felony at common law in 1870, Virginia may not disenfranchise an individual convicted of that felony. *Id.*

In support of their argument, Plaintiffs have served an expert report by historian Dr. Edward L. Ayers. See Report of Dr. Ayers ("Ayers Report") (attached hereto as Exhibit 1). Dr. Ayers's report purports to analyze "the historical context and purpose of the Virginia Readmission Act." *Id.* ¶ 12. Based on his opinion that "Virginia could not amend its constitution to disenfranchise voters for conviction for felonies not already punishable as felonies at common law at the time of the Act's passage in 1870," *id.* ¶ 12, Dr. Ayers concludes that Virginia's current disenfranchisement of all felons "run[s] counter to the fundamental condition of readmission established in the Virginia Readmission act," *id.* ¶ 17. Defendants move to exclude Dr. Ayers's opinion under Federal Rule of Evidence 702.

LEGAL STANDARD

Federal Rule of Evidence 702 "imposes a special gatekeeping obligation on the trial judge to ensure that an opinion offered by an expert is reliable." *Nease v. Ford Motor Co.*, 848 F.3d 219, 230 (4th Cir. 2017). "Specifically, district courts must ensure that an expert's opinion is 'based on scientific, technical, or other specialized knowledge and not on belief or speculation.'" *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999) (emphasis omitted)). "The burden of establishing the reliability of expert testimony is on the proponent." *Synopsys, Inc. v. Risk Based Sec., Inc.*, No. 3:21-cv-252, 2022 WL 3005990, at *4 (E.D. Va. July 28, 2022) (Gibney, J.) (cleaned up). Although the Rule 702 standard is relaxed for a bench trial, "Rule 702 applies whether the trier of fact is a judge or a jury." *Id.* at *5 (internal quotations omitted).

ARGUMENT

I. Dr. Ayers's testimony is not relevant to the issues the Court must decide

For an expert witness' report to be admissible, it must be relevant. See FED. R. EVID. 702. "Relevant" evidence "is evidence that helps 'the trier of fact to understand the evidence or to determine a fact in issue.'" *Nease*, 848 F.3d at 229 (quoting *Daubert*, 509 U.S. at 591). "The first step to determine relevance is to under[stand] what is 'in issue'" in the case. *United States v. Moore*, 716 F. Supp. 3d 415, 420 (E.D. Va. 2024) (citation omitted). Expert testimony "does not 'help'" the trier of fact "if it is unrelated to facts at issue." 29 Wright & Miller, *Fed. Prac. & Proc. Evid*. § 6265.2 & nn.2-3 (2d ed. 2023).

Dr. Ayers's report will not help this Court "understand the evidence or to determine a fact in issue." FED. R. EVID. 702(a). As an initial matter, the facts "in issue" at this point in the case are extremely narrow because this case presents a nearly pure legal question. As Defendants point out in their motion for summary judgment, filed contemporaneously with this motion, there are no material facts in dispute. The parties agree that King and Johnson have been convicted of felonies, and they further agree on which felonies King and Johnson have been convicted of. See Decl. of Kelly Gee (Sept. 28, 2023) (ECF No. 77-1).

Therefore, the vast majority of Dr. Ayers's opinion is irrelevant. Specifically, much of his report focuses on racial discrimination in the south. But that question is not at issue in this case because Plaintiffs are not bringing a racial-discrimination claim. In addition, Dr. Ayers extensively discusses history related to North Carolina, Mississippi, Arkansas, and Georgia. Ayers Report ¶¶ 27, 34, 36-38. But this case is about Virginia, and as Dr. Ayers admits, "every state follow[ed] a different path through reconstruction." Ayers Deposition Tr. at 46:10-11 (July 8, 2025) ("Ayers

Tr.") (attached hereto as Exhibit 2). Dr. Ayers's opinion regarding other States is thus irrelevant to the issues here.

Finally, Dr. Ayers's report is not helpful to decide any factual issues in this case because the report is centered around the *legal* assertion that "disenfranchisement" in the 1869 Virginia Constitution did "not extend beyond conviction for felonies at common law and participation in the rebellion." Ayers Report ¶ 43; see *United States v. Cortez*, 205 F. Supp. 3d 768, 776 (E.D. Va. 2016). Legal arguments are not helpful within the meaning of Rule 702: "Each courtroom comes equipped with a 'legal expert,' called a judge." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997); see also *Aguilar v. Int'l Longshoremen's Union Loc. No. 10*, 966 F.2d 443, 447 (9th Cir. 1992). Dr. Ayers's discussion of the Military Reconstruction Acts, the legislative history of the Virginia Readmission Act, and the meaning of the 1869 Virginia Constitution are all issues suitable for legal briefing and argument, not expert-witness testimony. The meaning of those statutes and the methods by which to interpret them are "a subject for the court, not for testimonial experts." *Cortez*, 205 F. Supp. 3d at 776 (internal quotations omitted). A party cannot use an expert witness to essentially expand its briefing by making legal arguments. *SunTrust Banks, Inc. v. Robertson*, No. 2:09-cv-197, 2010 WL 11566593, at *5 (E.D. Va. Aug. 12, 2010).

II. Dr. Ayers failed to apply his methodology reliably

Dr. Ayers also departed from his normal method of historical inquiry in preparing his expert report, which is a hallmark of unreliability under *Daubert*. "[U]nder [Rule 702,] the trial judge must ensure that any and all [expert] testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. The Court need not analyze the putative expert's ultimate "conclusions" when determining reliability, but the Court must ensure that the expert has applied

the same reliable methods as he would outside of the courtroom. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig. (No II)*, 892 F.3d 624, 631 (4th Cir. 2006) (internal quotations omitted).

Dr. Ayers's report fails to apply a reliable method for two reasons. First, it is clear from Dr. Ayers's deposition testimony that he applied a different methodology in his report than he would apply as a professional historian. Second, the report makes objective errors throughout, calling into serious doubt the process that led to those errors.

A. Dr. Ayers applied an unreliable methodology in his report

The crux of Dr. Ayers's report is that the history behind the adoption of the term "felony" in the Virginia Constitution of 1869 demonstrates that "Congress understood th[at]" term to mean "felon[y] at common law." Ayers Report ¶ 43; Ayers Tr. at 141:23-142:2 (Q: "[I]s it your position that felony in the Virginia Constitution of 1869, was understood by Congress to mean felony at common law?" A: "Yes."). The way his report supports this legal conclusion, however, is inconsistent with the methodology he follows when not testifying as an expert witness. *Synopsys, Inc.*, 2022 WL 3005990, at *4 (Gibney, J.); *EEOC v. Freeman*, 778 F.3d 463, 469 (4th Cir. 2015) (Agee, J., concurring) (collecting cases). Because this Court must "determine whether the methodology underlying the expert witness' testimony is valid," and Dr. Ayers's methodology is not reliable, this Court should exclude his report. *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 195 (4th Cir. 2017).

Dr. Ayers's normal method of conducting historical research involves the steps that one would expect a historian to take. For example, when asked to describe what his "normal method for figuring out what [a] term means" in a historical source, Dr. Ayers answered that he usually conducts online research into the meaning of the term. Ayers Tr. at 138:11-20. More specifically,

he normally uses the Oxford English Dictionary to "clarify what that word meant in the context of the time." *Id.* at 138:21-24. When the Oxford English Dictionary is not clear, Dr. Ayers will use other sources. For instance, when encountering "legal terms," Dr. Ayers would examine "legal sources" to determine their meaning. *Id.* at 139:21-140:12. Thus, Dr. Ayers's "normal method" for dealing with unclear terms is relatively straightforward: he would consult dictionaries and legal sources to determine their meaning.

Dr. Ayers did not follow this process when interpreting the word "felony" in the Virginia Constitution of 1869. See Ayers Report ¶ 43. Dr. Ayers conceded that he did not "look at any dictionaries defining the term felony, in the mid-19th Century." Ayers Tr. at 143:12-15. Nor did Dr. Ayers consult any traditional legal sources: his report's list of sources did not contain a single treatise that discussed the meaning of "felony" in Virginia or more generally. Ayers Report at Ex. B. Finally, Dr. Ayers was not familiar with the fact that Virginia had codified its criminal law, nor that this Virginia code defined the term "felony." Ayers Tr. at 144:16-145:3.

Instead of looking to dictionaries or traditional legal sources that would ordinarily help determine the meaning in 1869 of the term "felony," Dr. Ayers consulted the legislative history of the Readmission Act to determine whether Members of Congress subjectively believed that Virginia was complying with the Military Reconstruction Acts. See Ayers Report ¶¶ 12, 32. According to Dr. Ayers, the Military Reconstruction Acts included a requirement to grant the franchise to all males over the age of 21 who had not committed a common-law felony. *Id.* ¶ 43. If the legislative history demonstrates that members of Congress all believed that Virginia was complying with the Military Reconstruction Acts, Dr. Ayers reasons, it would be a datapoint indicating that they understood "felony" in Virginia's Constitution to mean "felon[y] at common law." *Id.* Dr. Ayers's choice to engage in this highly attenuated string of inferences to define

"felony" instead of following his usual method of looking to the Oxford English Dictionary and standard legal sources demonstrates that his analysis is unreliable and should be excluded. *In re Lipitor*, 892 F.3d at 631 ("Results-driven analysis, or cherry-picking, undermines principles of the scientific method and is a quintessential example of applying methodologies (valid or otherwise) in an unreliable fashion.").

Dr. Ayers also departed from his normal methodology in another way. Dr. Ayers's report presents the legislative history of the Readmission Act as uniformly supporting his conclusion that members of Congress believed Virginia was complying with the Military Reconstruction Acts, and tied that belief to their approval of Virginia's Constitution. See Ayers Report ¶ 43 & nn. 46-47. The only portions of the legislative history that Dr. Ayers cites are the statements of Senators Stewart and Axtell, both of whom contended that Virginia was "precisely in harmony with the reconstruction acts." *Id.* (quoting Congressional Globe, 41st Cong., 2nd Sess., Jan. 10, 1870, p. 329 (Stewart)).

Ordinarily, Dr. Ayers maintains that a historian should read the entire debate he relies upon. Ayers Dep. 102:1-11. The very pages of the legislative history that Dr. Ayers cites, however, show that there was a robust debate—even amongst the Republicans that dominated Congress at the time—over the issues of whether Virginia had perfectly complied, or needed to perfectly comply, with the Military Reconstruction Acts for approval of its Constitution. Some Republican Senators, such as George Edmunds, Samuel Pomeroy, and Jacob Howard, did not believe Virginia had met all the requirements of the Military Reconstruction Acts. See Congressional Globe, 41st Cong., 2nd Sess., Jan. 10, 1870, p. 328-30. Notably, Virginia's apparent noncompliance was not a dealbreaker for Senator Howard, who explained that mere "substantial compliance" was enough for him to vote to ratify the Virginia Constitution, which he ultimately did. *Id.* Dr. Ayers's failure

to cite both sides of the debate, especially Senator Howard's statement that full compliance was not required for approval of the Virginia Constitution, casts further doubt on the method he used to write his report. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Prac. & Prods. Liab. Litig.*, 174 F. Supp. 3d 911, 932 (D.S.C. 2016) ("[F]ailing to adequately account for contrary evidence is not reliable or scientifically sound."); see also *McEwen v. Baltimore Wash. Med. Ctr. Inc.*, 404 F. App'x 789, 791-92 (4th Cir. 2010) (upholding exclusion of expert testimony where experts "failed to meaningfully account for . . . literature at odds with their testimony").

B. Objective factual errors cast further doubt on Dr. Ayers's methodology

"[F]actual deficiencies" in an expert report can demonstrate the kind of "faulty methods and lack of investigation" that make the report unreliable. *Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765, 773 (7th Cir. 2014); *cf. Dart v. Kitchens Bros. Mfg. Co.*, 253 F. App'x 395, 399 (5th Cir. 2007) (unpublished) (noting that "basic mathematical errors and flaws in methodology" were appropriate reasons to exclude an expert); *Freeman*, 778 F.3d at 469 (Agee, J., concurring) (collecting cases). Dr. Ayers's report contains numerous objective inaccuracies that cast additional doubt on the methods he used throughout the report.

First, Dr. Ayers's claim that Virginia's 1869 Constitution only disenfranchised the persons the Military Reconstruction Acts authorized Virginia to disenfranchise is demonstrably untrue, as even Dr. Ayers admitted in his deposition. In paragraph 43, Dr. Ayers adopted Senator Stewart's sweeping statement that "Virginia has complied in all respects with the reconstruction acts." Ayers Report ¶ 43 (quoting Congressional Globe, 41st Cong., 2nd Sess., Jan. 10, 1870, p. 325 (Stewart)). Yet when confronted with the fact that Virginia's 1869 Constitution also disenfranchised "lunatics" and "duelists"—classes of persons Dr. Ayers agrees were not authorized to be disenfranchised under the Reconstruction Acts—Dr. Ayers admitted that the 1869 Virginia

Constitution disenfranchised a "broader" class of persons than the Military Reconstruction Acts. Ayers Tr. at 99:3-10.

Second, Dr. Ayers's report declares it was "[i]mportant[ ]" that "Virginia was the last of the former Confederate states to have their congressional representatives gain readmission to Congress." Ayers Report ¶ 44. But Dr. Ayers is wrong about this allegedly "important" fact.[1] Virginia had its congressional representatives readmitted to Congress when the Virginia Readmission Act was passed on January 26, 1870. See An Act to Admit the State of Virginia to Representation in the Congress of the United States, 16 Stat. 62 (Jan. 26, 1870). And each member of the delegation was officially seated by February 1, 1870. *Congressional Globe*, 41st Cong., 2nd Sess., Jan. 27, 1870, p. 809, 835, 950. At that point, neither Mississippi nor Texas had been readmitted to representation in Congress. It was not until February 23, 1870, and March 30, 1870, respectively, that those States were readmitted to representation. See An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67 (Feb. 23, 1870); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80 (Mar. 30, 1870).

Third, Dr. Ayers's report declares that "Arkansas was the first former Confederate state to have its congressional representatives readmitted." Ayers Report ¶ 45. Once again, Dr. Ayers's report makes the kind of objective error that demonstrates "faulty methods and lack of investigation." *Brown*, 765 F.3d at 773. Two years before Arkansas had its "congressional representatives readmitted," Congress passed Tennessee's Readmission Act, which "entitled" Tennessee "to be represented by senators and representatives in Congress." Joint Resolution

[1] Why Dr. Ayers believes it is "important" that Virginia was the last State readmitted to the Union is neither explained nor obvious. In any event, the point remains that Dr. Ayers deemed this point "important" and still got it wrong.

Restoring Tennessee to Her Relations to the Union, Pub. L. No. 73, 14 Stat. 364 (July 24, 1866). These errors further undermine the reliability of Dr. Ayers's opinion, and the Court should exclude it.

CONCLUSION

For these reasons, the Court should exclude Dr. Ayers's opinion.

Dated: July 18, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on July 18, 2025, the foregoing memorandum was electronically transmitted to all counsel of record in this matter.

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