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STATE OF MINNESOTA
COUNTY OF RAMSEY

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By [Signature] Deputy

DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: CIVIL OTHER

File No. 62-CV-09-56

In the Matter of the Contest of General
Election held on November 4, 2008, for the
purpose of electing a United States Senator
from the State of Minnesota,

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

**CONTESTANTS'
MEMORANDUM OF LAW
IN OPPOSITION TO
MOTION IN LIMINE
TO EXCLUDE TESTIMONY OF
PROFESSOR KING BANAIAN**

INTRODUCTION

Contestants plan to call Professor King Banaian as an expert to testify that, based on the application of well-established statistical methods, many counties rejected more absentee ballots than expected from the statewide rate. This conclusion is not obvious on the face of the data, and expert testimony is appropriate to support it. Professor Banaian's proposed testimony will rule out, as a matter of statistical analysis, the possibility that the variation in rejection rates across counties was the result of pure chance. As such, his testimony will assist the Court as it considers the equal protection and fairness issue underlying its determination of which ballots are in fact legally cast votes.

In these circumstances, the Court should allow Professor Banaian's testimony. His credentials are more than sufficient under Minn. R. Evid. 702 and related cases. His testimony will assist the Court in understanding whether the disparity in rejection rates among counties is statistically significant—and therefore indicative of inconsistent application of the statutory standards. Therefore, the Court should deny Contestee's motion and allow Professor Banaian to testify.

ARGUMENT

I. PROFESSOR BANAIAN'S OPINIONS ARE RELEVANT, BASED ON RELIABLE AND ACCEPTED METHODS, AND WILL BE HELPFUL TO THE COURT.

Professor Banaian's proposed testimony meets the standard for admissibility because it "will assist the trier of fact to understand the evidence" and "to determine a fact in issue." Minn. R. Evid. 702; *State v. MacLennan*, 702 N.W.2d 219, 233 (Minn. 2005) ("The basic requirement of Rule 702 is the helpfulness requirement."). Contestee claims the Court does not need expert testimony to understand that rejection rates varied by county, Mot. at 4, but Professor Banaian will show that, as a matter of statistical analysis, the variations between counties cannot be the result of pure chance. Since the statistical significance of the variation in rejection rates is not obvious on the face of the data, Professor Banaian's proposed testimony will "help to explain a phenomenon not within the understanding of an ordinary lay person." *State v. Hennum*, 441 N.W.2d 793, 798 (Minn. 1989).

Contestee disparages Professor Banaian's selection of the binomial distribution and chi-square tests, Mot. at 4, but "both the chi-square and binomial tests of statistical

significance are recognized by courts as being valid means of assessing the representativeness of a sample.” *Reynolds v. Giuliani*, 118 F. Supp.2d 352, 374 (S.D.N.Y. 2000) (citing cases). The binomial and chi-square tests are routinely admitted in employment discrimination cases to show disparities in treatment of protected groups. *See, e.g., id.*; *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1463, 1466 (6th Cir. 1990); *Coates v. Johnson & Johnson*, 756 F.2d 524, 536 n.11 (7th Cir. 1985); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 336 n.18 (4th Cir. 1983).

The binomial and chi-square tests would be helpful here for the same reasons they are helpful in employment discrimination cases:

When a plaintiff demonstrates a significant statistical disparity in the discharge rate, he or she has provided strong evidence that chance alone is not the cause of the discharge pattern. The statistics do not and cannot determine whether the more likely cause is the defendant’s bias or a legitimate selection criterion.

Barnes, 896 F.2d at 1468. Employment statistics may thus establish a prima facie case, subject to rebuttal or proof by additional evidence. *Id.* at 1466; *Lilly*, 720 F.2d at 336 n.20. Here, Professor Banaian’s proposed testimony would rule out chance as a possible explanation of the different rejection rates and lay a foundation for the Court to consider inconsistent application of the statutory standard as the cause.

II. PROFESSOR BANAIAN IS QUALIFIED TO PERFORM AND OPINE ON STATISTICAL ANALYSES.

Contestee argues that Professor Banaian should be disqualified for hesitating to proclaim himself an “expert in statistical analysis,” *Snyder Aff.* at 37:2-3, but an expert’s modesty is not a basis for excluding him. Although Professor Banaian does not have a degree in statistics, he testified that he has a Ph.D. in economics, teaches economics and

data analysis to college students, frequently uses statistical analysis in his work, and considers himself a “long-time practitioner of statistical analysis.” *Id.* at 37:4-17.

Professor Banaian has been a professor of economics at St. Cloud State University for nearly 25 years, and he has numerous data-intensive publications. Affidavit of F. Matthew Ralph (“Ralph Aff.”) Ex. 5.

“The qualifications of the expert need not stem from formal training, and may include any knowledge, skill, or experience that would provide the background necessary for a meaningful opinion on the subject.” *See* Minn. R. Evid. 702, 1977 Committee Comment; *Hahn v. Tri-Line Farmers Co-op*, 478 N.W.2d 515, 526 (Minn. App. 1992), *overruled on other grounds by Conwed Corp. v. Union Carbide Chems. & Plastics Co.*, 634 N.W.2d 401, 414 (Minn. 2001). Minnesota courts routinely admit “expert” testimony that is based primarily on practical experience, even when the witness’s education or formal training on the topic has been minimal or limited. *See Hahn*, 478 N.W.2d at 526 (admitting expert testimony based on 28 years of practical experience with the equipment at issue); *State v. Muller*, 358 N.W.2d 72, 76 (Minn. App. 1984) (admitting accounting opinion by a non-accountant with a business degree, experience in retail management, and coursework in bookkeeping). *State v. Thoms*, No. C0-01-1373, 2002 WL 1420724 at *4 (Minn. App. Jul. 2, 2002) (upholding admissibility of statistical testimony by a witness with a B.S. in biology, government training in statistics, and on-the-job application of statistical methods).

Professor Banaian’s qualifications fall squarely within the scope of Rule 702 and cases interpreting it. Whether a different statistical expert could have been used goes to

the weight, not the admissibility, of Professor Banaian's opinion. *See Muller*, 358 N.W.2d at 76.

III. PROFESSOR BANAIAN'S OPINION WAS TIMELY DISCLOSED, AND CONTESTEE HAS NOT BEEN PREJUDICED.

Contestee argues that Contestants' disclosure of Professor Banaian was untimely, Mot. at 2-3, but Contestants served the disclosure before the deadline prescribed in the Court's Scheduling Order. *Compare* Ralph Aff. Ex. 1, *with* Ralph Aff. Exs. 2-4. Given the timeliness of the disclosure, Contestee cannot meet the requisite standard for excluding Professor Banaian, namely, that the disclosure was inexcusably and prejudicially late. *See Norwest Bank Midland v. Shinnick*, 402 N.W.2d 818, 823 (Minn. App. 1987) (quoting *Dennie v. Metropolitan Medical Ctr.*, 387 N.W.2d 401, 405 (Minn. 1986) ("The general rule in Minnesota is expert testimony should be suppressed for failure to make a timely disclosure of the expert's identity only where 'counsel's dereliction...is inexcusable and results in disadvantage to his opponent.'").

Contestee suffered no prejudice whatsoever. Contestee does not claim that Professor Banaian's deposition testimony differed prejudicially from his disclosed opinion, because it did not. *Compare* Ralph Aff. Ex. 5, *with* Snyder Aff. at 12:20-13:5. Contestee complains that he was obliged to depose Professor Banaian after trial commenced, but he does not explain how the timing of the deposition harmed him, especially when it occurred several days before Professor Banaian's trial testimony. In

sum, Contestants' disclosure of Professor Banaian was timely, and Contestee has suffered no prejudice whatsoever to justify exclusion of Professor Banaian's trial testimony.¹

CONCLUSION

For the foregoing reasons, Contestants respectfully requests that the Court deny Contestee's Motion in Limine to Exclude Testimony of King Banaian.

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¹ Contestee claims that Contestants "announced" in their opening statement "that they would not be calling a social scientist to testify to alleged statistical differences between counties," Mot. at 1, but Contestants actually said that they would not call a social scientist to opine that people are just as smart from one county to another. Contestee labels Professor Banaian a "political commentator," but that label is irrelevant to his qualifications or the validity of his methods and opinions. Equally irrelevant are Contestee's claims that Contestants retained Professor Banaian the day before expert disclosures were due or that Professor Banaian did not reach any firm conclusions about the data until after he was disclosed.

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