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

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

Plaintiffs,)

v.)

Case No.: 1:13-CV-658

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

Defendants.)

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

Plaintiffs,)

v.)

Case No.: 1:13-CV-660

THE STATE OF NORTH CAROLINA, et al.,)

Defendants.)

UNITED STATES OF AMERICA,)

Plaintiffs,)

v.)

Case No.: 1:13-CV-861

THE STATE OF NORTH CAROLINA, et al,)

Defendants.)

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE THE
DECLARATIONS OF SEAN P. TRENDE AND MOTION IN LIMINE TO
EXCLUDE HIS TESTIMONY AT TRIAL**

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INTRODUCTION

Pursuant to Federal Rule of Evidence 702, Plaintiffs and Intervenor-Plaintiffs in *League of Women Voters of North Carolina v. North Carolina*, and Plaintiffs in *North Carolina State Conference of the NAACP v. McCrory* (collectively, the “Plaintiffs”)¹ respectfully request that this Court strike the First Declaration of Sean P. Trende (ECF Nos. 138-5, 138-6, 138-7 (Case No. 1:13-CV-00660-TDS-JEP)) (“First Trende Rep.,” attached as Ex. 1); strike the unsigned “Supplement to Declaration of Sean P. Trende” (“Trende Supplement,” attached as Ex. 2); strike the March 16, 2015 Second Declaration of Sean P. Trende (“Second Trende Rep.,” attached as Ex. 3); and exclude any testimony by Trende.

Trende is a “psephologist” who works as “a senior elections analyst,” “writ[ing] articles covering elections” for a website called Real Clear Politics. Deps. of Sean P. Trende, June 6, 2014 & Apr. 10, 2015 (“Trende Dep.,” excerpts of both volumes attached hereto as Ex. 4) at 16:3-21, 26:17, 136:5. In his declarations, Trende offers two opinions:

- Opinion 1: “The voting reforms contained in HB 589 place [North Carolina] within the mainstream regarding these practices.” Ex. 3, Second Trende Rep. at 16.
- Opinion 2: “The data do not consistently support [Plaintiffs’] conclusions regarding the effects of HB589 on minority voting.” *Id.* at 40.

More specifically, he opines that the practices eliminated by HB 589 have “no effect on African American turnout period.” Ex. 4, Trende Dep. at 142:17-18.

¹ Plaintiff the United States of America supports this motion.

As explained below, Trende’s testimony should be excluded because: (i) he is not qualified to offer the opinions proffered in his report; (ii) his methodology for analyzing voter turnout is fatally flawed and riddled with material factual errors; (iii) he fails to address significant rates of error in the underlying data upon which he relies; and (iv) he omits the fact that his conclusions are contrary to the weight of scholarly opinion.

LEGAL STANDARD

The introduction of expert testimony is governed by Federal Rule of Evidence 702 and the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pursuant to these authorities, expert testimony must be qualified, reliable, and relevant to be admissible. The proponent of the testimony bears the burden of establishing its admissibility by a preponderance of proof. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001) (citing *Daubert*, 509 U.S. at 592 n.10).

ARGUMENT

I. Trende is Not Qualified to Render An Opinion Concerning the Effects of the Challenged Provisions

“[O]nly experts qualified by ‘knowledge, skill, experience, training, or education’ may submit an opinion.” *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799 (4th Cir. 1989) (quoting Fed. R. Evid. 702). Trende plainly lacks these hallmarks of expertise.

Education and training. To begin with, Trende does not possess the requisite education and training to be an expert in this case. Trende does not hold a Ph.D. and is

not a political scientist.² Nevertheless, Trende describes himself as a “recognized expert” in “psephology,” Ex. 3, Second Trende Rep. ¶ 2, or “[e]lection prediction,” Ex. 4, Trende Dep. at 26:16-18. Trende acknowledged, however, that there are no degrees or professional certifications in psephology; that no university has a department of psephology; and that there are no professional associations or peer-reviewed journals of psephology. *Id.* at 26:22 – 27:9. Trende’s writings about politics are primarily published online and are aimed at “a lay audience.” Ex. 3, Second Trende Rep. ¶ 14. He has *never* authored a peer-reviewed article in political science or concerning elections, let alone an article about the specific voting practices at issue in this case. Ex. 4, Trende Dep. at 31:11-20; 32:17-21; 352:1-21. His background is plainly insufficient to qualify him as an expert in this case. *See Thomas J. Kline*, 878 F.2d at 799-800 (district court abused its discretion by permitting testimony from a proffered expert on credit and price discrimination who had a “master’s degree in business administration,” but was “not an economist,” and whose only published work “had nothing to do with price discrimination, credit, or antitrust generally”).

Relevant experience, skills, or knowledge. Trende also lacks the specific experience necessary to offer an expert opinion on the particular issues in this case. An expert must possess “some special skill, knowledge or experience . . . concerning the *particular issue* before the court.” *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378,

² Trende holds a J.D. and a master’s degree in political science, but notably, the subject of Trende’s Master’s thesis was the U.S. Supreme Court, not elections or voting patterns. *See* Ex. 1, Trende Rep. at 47 (Exhibit 1: CV of Sean P. Trende).

392 (D. Md. 2001) (emphasis added; citation and internal quotation marks omitted). “[T]hat a proposed witness is an expert in one area, does not *ipso facto* qualify him to testify as an expert in all related areas.” *Id.* at 391 (citing cases). Thus, in an election law case, even a political scientist who has “significant political experience” should be excluded if he lacks “particular expertise” on specific types of election practices, and his work has “neither been tested nor subject to peer review.” *Koppell v. N.Y. State Bd. of Elections*, 97 F. Supp. 2d 477, 481-82 (S.D.N.Y. 2000).³

Here, Trende has *no* prior experience analyzing the effects of the voting practices at issue, other than some “back-and-forths” about early voting “on Twitter.” *See* Ex. 4, Trende Dep. at 44:7 – 45:15. He purports to be an expert on early voting and same-day registration (“SDR”) because he “carefully stud[ied] the literature” on these topics. *Id.* at 29:24 – 30:16. But, prior to this case, he had never even reviewed any state’s laws with respect to SDR, out-of-precinct voting, or pre-registration. *Id.* at 279:1 – 280:5. Trende’s mere “review of the literature, after he was retained as an expert witness in this suit, [i]s insufficient to qualify him as an expert on the issues in dispute.” *Wehling v. Sandoz Pharms. Corp.*, No. 97-2212, 1998 WL 546097, at *4 (4th Cir. Aug. 20, 1998).

³ *Cf. Reliastar Life Ins. Co. v. Laschkewitsch*, No. 5:13-CV-210-BO, 2014 WL 1430729, at *1-2 (E.D.N.C. Apr. 14, 2014) (excluding testimony from insurance professional who did not have any underwriting experience specifically); *Estate of Myers ex rel. Myers v. Wal-Mart Stores, Inc.*, No. 5:09-CV-549-FL, 2011 WL 1366459, at *3 (E.D.N.C. Apr. 11, 2011) (excluding testimony of architect who had no specific experience in parking lot design); *Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 471 (M.D.N.C. 2006) (excluding testimony of a doctor who, although widely published, had not published “on the specific issue at hand”).

Moreover, as explained below, Trende bases his opinions primarily on a “regression” analysis that purports to measure the relationship between the challenged provisions and African-American turnout, *see* Ex. 3, Second Trende Rep. ¶ 221, yet during his deposition, he could not think of a single previous instance in which he had conducted a similar analysis, *see* Ex. 4, Trende Dep. at 281:9-19. His work for this case did not “grow[] naturally and directly out of research [he] conducted independent of the litigation,” and should be excluded on that basis. *Ortho-Clinical Diagnostics*, 440 F. Supp. at 470 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)). Indeed, this case illustrates the need for this rule: as Trende himself subsequently admitted, the regression analysis in his initial report was riddled with basic factual errors, incorrectly characterizing the voting laws in California, Colorado, Connecticut, Minnesota, and even *North Carolina*. *See* Ex. 4, Trende Dep. at 217:13 – 227:5; 229:15 – 232:1.⁴

In sum, Trende has “no particular expertise concerning [the specific issues in this case],” *Shreve*, 166 F. Supp. 2d at 394, and “developed [his] opinions expressly for purposes of testifying,” *Daubert*, 43 F.3d at 1317. He is plainly unqualified to be an expert witness in this case.

⁴ *See also* Ex. 2, Trende Supplement ¶¶ 1-5 (explaining that he erroneously counted California as among the states with same-day registration in 2012; erroneously counted Arizona as having pre-registration; neglected to include North Carolina as among the states with same-day registration, 17 days of early voting, and out-of-precinct voting (it had all three); failed to note that Minnesota had no early voting; and incorrectly counted Colorado as having pre-registration and same-day registration).

II. Trende's Cross-State Comparison of Turnout Is Methodologically Flawed and Scientifically Unreliable

In attempting to measure the turnout effects of the voting reforms at issue in this case, Trende employs a fundamentally flawed and unreliable methodology. Trende's opinion is based primarily on his cross-state comparison of African-American turnout, which purports to measure whether there is a correlation between the number of voting reforms in a state (*i.e.*, pre-registration, early voting, SDR, and/or out-of-precinct voting) and any increase in African-American turnout in that state between the years 2000 and 2012. *See* Ex. 3, Second Trende Rep. ¶¶ 217-224. As explained below, his analysis is riddled with methodological defects that render it unreliable under *Daubert*.

First, “Trende makes the mistake of lumping together considerably different kinds of laws into a single category.” Ex. 5, Sur-Rebuttal Expert Report of Barry C. Burden, Ph.D., dated March 24, 2015 (“Burden Sur-Rebuttal”) at 10.⁵ Trende uses what he calls an “ordinal” system: he assigns points to states for each voting reform present in a state (*e.g.*, one point each for SDR, early voting, out-of-precinct voting, and pre-registration for 16- and 17-year-olds), and then tries to measure if there is a correlation between the number of points assigned to a state and any growth in African-American turnout in that state during the period from 2000 to 2012. Ex. 4, Trende Dep. at 123:24; 206:16 – 207:6.

⁵ Dr. Burden is a Professor of Political Science at the University of Wisconsin-Madison. *See* Ex. 6, Expert Report of Barry C. Burden, Ph.D., dated Feb. 12, 2015 (“Burden Rep.”) at 2. Trende himself acknowledged Dr. Burden as one “of the leading political scientists in the area of early voting research.” Ex. 4, Trende Dep. at 166:13-20.

As Trende acknowledged, his method “assumes that out-of-precinct voting and same-day registration and [early voting] and pre-registration all have the same equal effect on voter participation or turnout.” Ex. 4, Trende Dep. at 274:9-21. That is, if one state adopts out-of-precinct voting and another state adopts same-day registration, he expects the effect on turnout to be “the same.” *Id.* at 273:9-12. But “different voting law reforms have different effects.” Ex. 7, Sur-reply Expert Report & Decl. of Paul Gronke, Ph.D., dated May 2, 2014, ECF No. 117 beginning at JA0661 (“Gronke 2014 Sur-reply”) ¶ 30.⁶ For example, out-of-precinct voting was used by a few thousand voters each year, whereas over 90,000 voters used SDR in recent elections, and millions have used early voting. *See id.* Despite these obvious differences, Trende “treats different reforms as if they can be expected to have the same impact” on voter turnout, and relying on that assumption, finds no systematic relationship between the number of voting reforms adopted in a state and Black turnout. *Id.* But it is “problematic[.]” to assume that these reforms are “of exactly equal value when it comes to affecting voter turnout.” Ex. 5, Burden Sur-Rebuttal at 11. Trende’s methodology is plainly contrary to generally

⁶ Dr. Gronke is Professor of Political Science at Reed College and Director of the Early Voting Information Center. *See* Amended Rule 26(A)(2)(B) Expert Report & Decl. of Paul Gronke, Ph.D., ECF No. 117 (“Gronke 2014 Rep.”) ¶¶ 1-5. He has been acknowledged as perhaps the nation’s leading expert on early voting. *See Florida v. United States*, 885 F. Supp. 2d 299, 322 n.19 (D.D.C. 2012). Both Trende and another of Defendants’ experts, Dr. M.V. Hood, acknowledged Dr. Gronke as one of the leading political scientists in the area of early voting research. *See* Ex. 4, Trende Dep. at 166:13-20; Dep. of M.V. Hood, III, Apr. 8, 2015 (“Hood Dep.,” excerpts attached hereto as Ex. 8) at 28:5-10.

accepted standards within the field of political science. *See id.*; Ex. 7, Gronke 2014 Sur-reply ¶ 33.⁷

Perhaps realizing this, Trende in his initial expert report also sought to analyze the effects of each reform at issue individually. *See* Ex. 1, First Trende Rep. ¶ 125. But like his other work, this analysis was riddled with factual errors,⁸ and Trende notably omitted it from his most recent report, with the exception of an analysis of early voting. *See* Ex. 3, Second Trende Rep. ¶¶ 242-44. But his early voting analysis suffers from similar flaws, as it fails to account for the vastly different ways in which states have implemented early voting – one day of early voting is treated identically across different states, despite the fact that some states offer hundreds of early voting locations while others offer only one per county. *See* Ex. 7, Gronke 2014 Sur-reply ¶ 31.

Second, Trende’s turnout analysis fails to properly account for the passage of time. When attempting to measure the effect of a voting law, the standard practice in political

⁷ In his most recent report, Trende objects that some published political science research uses a similar system to study the effects of voter ID laws on turnout. *See* Ex. 3, Second Trende Rep. ¶ 226 (citing Robert S. Erikson and Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 Election L.J. 85 (2009)). But the research that he cites evaluated a single *type* of election law, voter ID, and ranked different voter ID laws based on how strict they are. It did not, as Trende attempts to do here, treat vastly different types of election laws as an undifferentiated mass. Notably, Trende fails to cite a single peer-reviewed study that, like his report in this case, mixes different types of voting laws together in a single ordinal system. Trende’s failure to understand that distinction is further evidence of his lack of expertise.

⁸ For example, in attempting to measure the effect of SDR on turnout through the 2012 election, *half* of the states that Trende treated as having SDR did *not in fact offer SDR until after the 2012 election*; at the same time, he *failed to include North Carolina* among the states that *did* have SDR in place for the 2012 election. *See* Ex. 4, Trende Dep., at 145:12-22; 217:4-12; 218:17-24; 230:18 – 232:1.

science is to “measure the presence of laws and turnout levels at the same point in time.” Ex. 9, Surrebuttal of Charles Stewart III, Ph.D., dated May 2, 2014, ECF No. 117-2 beginning at JA0992 (“Stewart 2014 Surrebuttal”) ¶ 79.⁹ But Trende’s methodology assumes that a voting reform—regardless of whether it was enacted in 1970 or in 2011—will have an identical effect, measured in terms of causing African-American turnout to increase between 2000 and 2012. *See* Ex. 7, Gronke 2014 Sur-reply ¶ 32. For example, Wisconsin and Minnesota adopted SDR during the 1970s, *see* Dep. Ex. 117,¹⁰ attached hereto as Ex. 10, whereas North Carolina adopted it prior to the 2008 election. But Trende assumes that SDR would have the same effect in each of these states. *See* Ex. 4, Trende Dep. at 131:11-25; 232:7-11; 305:17-24.

This is methodologically improper, because “[i]t is unreasonable to expect reforms to have the same impact on turnout regardless of how long they have been in effect.” Ex. 7, Gronke 2014 Sur-reply ¶ 32. For example, if a state adopts SDR in the 1970s, causing turnout to increase immediately, one would hardly expect additional marginal increases in turnout with each subsequent election during the 2000s. Conversely, some reforms like early voting may have greater impacts the longer they have been in effect: for example, there has been “steady growth in early voting usage in North Carolina since 2000.” *Id.*¹¹

⁹ Dr. Stewart is the Kenan Sahin Distinguished Professor of Political Science at M.I.T. *See* Decl. of Charles Stewart III, Ph.D., dated Apr. 11, 2014, ECF No. 117-2 (“Stewart 2014 Rep.”) ¶¶ 1-13. Defendants’ expert Dr. Hood acknowledged him as “well respected in the field of political science.” Ex. 8, Hood Dep. at 28:11-17.

¹⁰ National Conference of State Legislatures, “Same Day Voter Registration.”

¹¹ In his latest report, Trende states that he treats all reforms identically regardless of

One way that Trende could have attempted to account for these time-specific effects would have been to include more years of data in his analysis, but (with the exception of his analysis of early voting) he omits years of elections data between 2000 and 2012, relying on data only from the endpoints of that interval. *See* Ex. 7, Gronke 2014 Sur-reply ¶ 29. This is inconsistent with generally accepted standards in political science. A time-series analysis should utilize “regression models that include *each year* of turnout data,” in order to account for “the over-time nature of the data.” *Id.* As Dr. Gronke explains, “[a]ppropriate accounting for time dependent processes in statistical data is perhaps the first lesson taught in basic statistics classes on time series.” *Id.*

Third, although Trende describes his cross-state analysis of turnout as a “multivariate” regression, Ex. 4, Trende Dep. at 140:7-11, it does not properly account for the many variables that can affect turnout. As one of Defendants’ other experts, Dr. M.V. Hood, III, explained, many factors can affect turnout, including: competitiveness; voter interest; campaign spending on advertising and voter mobilization; demographic characteristics of the electorate such as education, income, and race; and voting laws. *See* Ex. 8, Hood Dep. at 54:9 – 57:10. As Dr. Burden explained, “any serious social science analysis” of turnout must seek to control for these variables, as it is “widely understood” that, “if those factors are not adequately controlled,

when they were enacted based on his “theory . . . that Democrats, particularly the Obama campaign, began using already-existing early voting laws to get their voters to the polls early.” Ex. 3, Second Trende Rep. ¶ 241. Notably, he cites no peer-reviewed political science research that employs a similar “theory” to ignore the length of time that a voting reform has been in effect.

then any results are likely to be spurious due to the confounding influence of other variables.” Ex. 5, Burden Sur-Rebuttal at 1.

Trende, however, includes only two controls (competitiveness and baseline levels of African-American turnout), *see* Ex. 7, Gronke 2014 Sur-reply ¶¶ 6, 34, despite the fact that it is customary to include “many more” controls, “with the two most basic being age and education,” Ex. 9, Stewart 2014 Surrebuttal ¶ 78. Moreover, instead of employing all of his controls at once, Trende used only one control at a time, which is “highly unusual,” as a proper multivariate analysis would generally introduce all controls simultaneously in order to account for their effects at the same time. *Id.*; *see also* Ex. 7, Gronke 2014 Sur-reply ¶ 6. Thus, Trende fails to properly account for other factors that could have affected turnout in the states that he analyzes. *See Cooper*, 259 F.3d at 202 (failure to consider alternative causes justifies exclusion of expert’s report).

Fourth, Trende’s opinion that the challenged provisions will not affect turnout depends on a methodologically unsound leap that conflates the effects of adding and removing voting opportunities. Trende purports to show that the voting reforms at issue in this case did not increase turnout; he then concludes that removing them will not negatively impact voters. But as one three-judge district court explained in declining to credit similar testimony in another early voting case, “even if the addition of early voting days does not significantly increase turnout, *it is not methodologically sound* to assume that there will . . . be little or no impact on overall turnout when voters (who have habituated to early in-person voting) face a loss of previously available voting days.”

Florida, 885 F. Supp. 2d at 332 (emphasis added, internal quotation marks and citation omitted). Indeed, although some research “has shown that introducing additional convenience for registering or voting has mixed effects on turnout,” there is substantial political science research concerning the habitual nature of voting “demonstrat[ing] that removing options consistently reduces participation, especially among those with fewer resources to navigate the disruption.” Ex. 6, Burden Rep. at 5; *see also* Ex. 5, Burden Sur-Rebuttal at 8; Ex. 7, Gronke 2014 Sur-reply ¶ 12.

Accordingly, even if Trende were correct that the *addition* of voting reforms does not affect turnout—and, for reasons explained herein, that is far from the case—his inference that HB 589’s *elimination* of reforms will have no effect on voters is methodologically unsound, rendering his conclusion unreliable. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (“[C]onclusions and methodology are not entirely distinct from one another. . . . A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”); Fed. R. Evid. 702 Advisory Comm. Notes, 2000 Amendment (courts should consider “[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion”).¹²

¹² In his latest report, Trende briefly cites turnout levels in Ohio and Wisconsin, two states that reduced early voting prior to the 2014 election. *See* Ex. 3, Second Trende Rep. ¶ 138. But he does not cite his data sources, and makes no effort to control for the many variables that could affect turnout, let alone perform any kind of regression analysis that could purport to measure the relationship between these voting laws and turnout.

III. Trende Fails to Account for the Known Rate of Error in the Data Upon Which He Relies

Even if Trende’s work were methodologically sound—which it clearly is not—the Court should reject Trende’s opinions due to his failure to account for “the known or potential rate of error” in the data upon which he relies. *Ruffin v. Shaw Indus., Inc.*, 149 F.3d 294, 296 (4th Cir. 1998). Trende’s cross-state comparisons of turnout rely on a data set from the U.S. Census Bureau’s Current Population Survey (“CPS”), which produces estimates for registration, turnout, and other voting behavior based on a small statistical sample. *See* Stewart 2014 Rep., ECF No. 117-2, ¶ 48. Although the CPS is frequently used by political scientists, it suffers from several known rates of error: (1) sample size error margins; (2) the “non-response rate”; and (3) the “over-reporting rate.” Because Trende fails to account for these error rates, his turnout comparisons across states, racial groups, and different elections are unreliable.

First, the CPS estimates voter turnout based on a small sample of voters, such that the individual “state estimates of black turnout . . . have low reliability.” Ex. 5, Burden Sur-Rebuttal at 9. For example, the CPS estimated Black turnout in Arizona in 2012 at 46.0% with an error margin of plus or minus 12.6 percentage points, meaning that Black turnout could have been as high as 58.6% or as low as 33.4%. *See id.* Trende does not report these confidence intervals, let alone attempt to account for them, which “biases his results against finding statistically significant” effects. *Id.* at 10.

Second, the CPS suffers from a “non-response” rate, which refers to the fact that not all individuals who receive the CPS survey respond to it. The CPS counts these “non-

respondents” as non-voters when calculating the turnout rate. *See* Ex. 4, Trende Dep. at 81:5-7; 211:10 – 214:17; *see also* Dep. Ex. 116,¹³ attached hereto as Ex. 11, at 2. This skews the data significantly: as explained by Dr. Michael McDonald, a renowned political scientist whom Trende cites, *see* Ex. 3, Second Trende Rep. ¶ 150, 13.8% of all people who received the CPS survey did not respond to it in 2008, and 12.8% did not respond in 2012, *see* Ex. 11, Dep. Ex. 116 at 2. Moreover, the non-response rate “varies across important demographic groups—*such as race and ethnicity*—which can lead to *erroneous conclusions* when making temporal comparisons of registration and turnout rates.” *Id.* (emphases added). Indeed, Trende himself admitted that the non-response rate varies from year to year, among different racial groups, and even within individual racial groups. Ex. 4, Trende Dep. at 212:14-17; 213:12-18. This renders comparisons of turnout rates of racial groups based on the CPS data problematic. *Id.* at 211:10 – 212:5.

Third, the CPS suffers from an “over-reporting rate.” Because it is a survey, the accuracy of the CPS data depends on individuals to self-report their voting behavior correctly. But not everyone does so, and in particular, more people report voting than actually cast a ballot. According to Trende, the CPS over-reported the number of Americans who voted by about 4 million in 2012. *See id.* at 177:15-24; Dep. Ex. 110,¹⁴ attached hereto as Ex. 12, at 2. Trende further acknowledged that “there are some good

¹³ Michael P. McDonald, “2012 Turnout: Race, Ethnicity and the Youth Vote,” *Huffington Post*, May 8, 2013.

¹⁴ Sean Trende, “Sweeping Conclusions From Census Data Are a Mistake,” *Real Clear Politics*, May 9, 2013.

reasons to believe that the over-reporting issue isn't uniform across demographic groups.” Ex. 4, Trende Dep. at 174:4-9, 176:9-11; Dep. Ex. 109,¹⁵ attached hereto as Ex. 13, at 2; *see also* Ex. 4, Trende Dep., at 175:3-7; 81:1-2. Over-reporting is higher among African-American respondents, *see* Ex. 4, Trende Dep. at 179:9-18, meaning that the CPS overestimates turnout for African-American voters in particular. For example, the CPS overestimated Black turnout in 2012 in North Carolina by almost 11 percentage points, but did so for white turnout by less than one point. Ex. 5, Burden Sur-Rebuttal at 12. The overreporting rate also varies from year to year, *see* Ex. 4, Trende Dep. at 180:3-14, 363:3-7, and among states, *see id.* at 180:24 – 181:3, 364:6-9.¹⁶ Expert witnesses for both the Defendants, *see* Ex. 8, Hood Dep. at 74:24 – 76:9,¹⁷ and the Plaintiffs, *see* Ex. 5, Burden Sur-Rebuttal at 10-12; Ex. 7, Gronke 2014 Sur-reply ¶ 14, acknowledged that this problem is endemic to the CPS.

Unless these rates of error are accounted for, the CPS cannot serve as the basis for reliable comparisons of turnout of individual racial groups in different states across

¹⁵ Sean Trende, “How Much Did Demographics Matter in Va. Race?” *Real Clear Politics*, Nov. 12, 2013.

¹⁶ *See also* Robert A. Bernstein, *et al.*, *Cross-State Bias in Voting and Registration Overreporting in the Current Population Surveys*, 3(4) *State Politics & Policy Quarterly* 367 (2003) (“There is tremendous nonrandom variation from state to state in the rates at which people overreport voting in the Current Population Surveys (CPS).”), attached hereto as Ex. 14.

¹⁷ *See also* Seth C. McKee, M.V. Hood, III and David Hill, *Achieving Validation: Barack Obama and Black Turnout in 2008*, 12(1) *State Politics & Policy Quarterly* 3, 7 (2012) (“The turnout literature makes it clear that blacks consistently overreport voting at higher rates than whites”), attached hereto as Ex. 15.

different years. Indeed, Trende himself authored an article about the CPS titled, “Sweeping Conclusions From Census Data Are a *Mistake*,” Ex. 12, Dep. Ex. 110 (emphasis added); Ex. 4, Trende Dep. at 176:20 – 177:1, and opined that “analysts and reporters *should avoid making sweeping pronouncements* on the basis of this data,” Ex. 12, Dep. Ex. 110 at 3 (emphasis added); Ex. 4, Trende Dep. at 182:20 – 183:6. Similarly, Defendants’ other expert, Dr. Hood, has described the CPS as “unreliable” and has stated that he “do[es] not believe any credible conclusions can be drawn from this data.” See Dep. Ex. 378, Expert Report of M.V. Hood, III, in *Florida v. United States*, at 31-32, attached hereto as Ex. 16; Ex. 8, Hood Dep. at 92:14-22. Dr. Hood explained that he therefore generally refrains from using survey data when analyzing the effect of voting laws on turnout. See Ex. 8, Hood Dep. at 70:5 – 72:19; 79:11 – 80:16.

In his report in this case, however, Trende failed to heed his own advice. Despite acknowledging that inaccuracies in the data underlying his analysis could call into question the validity of his conclusions, see Ex. 4, Trende Dep. at 207:17-24, Trende makes the sweeping pronouncement that HB 589 will not affect turnout, based entirely on the same CPS data that he has criticized others for relying upon, see *id.* at 208:6-10. He does so despite the fact that he could have easily accounted for these errors in his analysis: political scientists have developed a method of weighting the CPS data to correct the known error rates arising from non-responses and overreporting, a “relatively simple procedure [that] conforms to prevailing standards among political scientists.” Ex. 7, Gronke 2014 Sur-reply ¶ 14. Trende did not use this or any other method to

address these known error rates. Ex. 4, Trende Dep. at 208:11 – 209:2; 214:13-17.¹⁸ Nor did Trende supplement his analysis by examining actual turnout statistics from official state records, even though this data was available to him, *see* Ex. 4, Trende Dep. at 215:16-25, and even though he has used such data in his other work, *see id.* at 36:8-9, 37:20-23. That is a stark contrast to Defendants’ other expert Dr. Hood, who explained that he utilizes “validated” turnout statistics in his own research, rather than survey data like the CPS. *See* Ex. 8, Hood Dep. at 70:24 – 72:19.

Trende’s failure to account for the known rates of error in his data renders his analysis unreliable and warrants exclusion. *Cf. Coleman v. Union Carbide Corp.*, No. 2:11-0366, 2013 WL 5461855, at *26 (S.D. W. Va. Sept. 30, 2013) (excluding expert’s testimony where he made crucial errors in his calculations but failed to admit or remember the source of the errors).

IV. Trende Presents a Selective and Misleading Review of the Existing Scholarly Research

Trende’s analysis should also be rejected because it relies on a selective and misleading representation of existing scholarly research. As Defendants’ expert Dr. Hood explained, political science analysis is typically accompanied by a balanced, objective

¹⁸ In his latest report, Trende notes that some published political science research similarly relies on the CPS data but does not re-weight it, and cites an academic article from 2009. *See* Ex. 3, Second Trende Rep. ¶¶ 163-65 (citing Erikson & Minnite 2009, *supra* note 7). But as Trende himself notes, the method for correcting the CPS data was not developed until 2013. *See* Ex. 3, Second Trende Rep. ¶¶ 163-64 (citing Aram Hur and Christopher H. Achen, *Coding Voter Turnout Responses in the Current Population Survey*, 77(4) *Public Opinion Quarterly* 985 (2013)).

discussion of the previous research on the issue at hand; the failure to include such a discussion—or the presentation of only one side of an issue—is inconsistent with generally accepted standards in the field, and would render a work unacceptable for peer-reviewed publication. *See* Ex. 8, Hood Dep. at 95:3 – 98:14.

In his initial report, Trende included a section titled “Scholarly Literature,” which purported to present a summary of the existing academic research concerning the effect of voting laws on turnout. *See* Ex. 1, First Trende Rep. ¶¶ 145-49. But that discussion was highly selective and misleading, omitting any mention of the substantial body of work by professional scholars in political science contradicting his findings. This is most evident in relation to SDR, as Trende omits any discussion of the consensus among political scientists that SDR boosts turnout. *See* Ex. 7, Gronke 2014 Sur-reply ¶ 53. This includes research showing that SDR produces significant gains in African-American turnout specifically, *see* Gronke 2014 Rep., ECF No. 117, ¶ 43, and that these positive turnout effects persist even when controlling for the competitiveness of elections, *see* Ex. 9, Stewart 2014 Surrebuttal ¶ 74. Indeed, during his deposition, Trende admitted that he is not aware of a single peer-reviewed article indicating that SDR does not boost turnout. Ex. 4, Trende Dep. at 253:24 – 254:6.

Trende conceded that his omission of this research in the literature review section of his report was inconsistent with professional standards. He acknowledged that the standard practice in peer-reviewed political science is to present “a history of the academic literature in the area,” but then conceded that he did not attempt to do so in his

report. *See* Ex. 4, Trende Dep., at 245:17-25. Trende’s failure to present a balanced view of the academic literature is methodologically unsound and inconsistent with generally accepted standards in the field.

Indeed, it is particularly telling that Trende is apparently the only person who has ever analyzed SDR and opined that it has not affected turnout.¹⁹ That fact constitutes yet another ground for exclusion. As the Advisory Committee Notes to the 2000 Amendment to Federal Rule of Evidence 702 explain,

[W]hen an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied.

See also Marsh v. W.R. Grace & Co., 80 F. App’x 883, 887-88 (4th Cir. 2003) (affirming exclusion where expert’s opinion was “not generally accepted in the scientific community”); *Ortho-Clinical Diagnostics*, 440 F. Supp. 2d at 470, 472-73 (excluding expert whose testimony “relied upon a number of disparate and unconnected studies” to reach “a piecemeal conclusion” that is not “generally accepted in the scientific community”).

Notably, Trende’s latest report now simply omits a “Scholarly Literature” section entirely. Instead, Trende relies primarily on news articles and similar internet-based sources to argue that turnout patterns in North Carolina in recent presidential elections

¹⁹ Trende’s treatment of the literature on early voting, similarly, is selective at best and misleading at worst. *See* Ex. 7, Gronke 2014 Sur-reply ¶¶ 54-56; Gronke 2014 Rep., ECF No. 117, ¶¶ 17-20 & n.25.

are the product of the Obama campaign's efforts, rather than the voting reforms at issue in this case. Ex. 3, Second Trende Rep. ¶¶ 201-211. Notably, Trende did not conduct any independent study of these issues himself. *See* Ex. 4, Trende Dep. at 109:13-16; 264:24 – 265:15. Furthermore, his sources generally consist of anecdotal news stories from sources like the CNN website. While such materials are sometimes used in academic work for quotations or to establish basic facts, they are “rarely relied on to rigorously establish statistical patterns” in social science research. Ex. 9, Stewart 2014 Surrebuttal ¶ 72. And, even taking Trende's sources at face value, they do not actually support his conclusions: the news articles include broad statements about the Obama campaign's strategies, but none of them mentions *African-American* voting patterns or *North Carolina* specifically. *See id.* ¶ 75. Trende's reliance on the journalistic reporting of others is an insufficient basis for forming reliable opinions about the effects of election practices. *See Koppell*, 97 F. Supp. 2d at 481-82 (excluding testimony of political scientist “because the analysis he provides is largely anecdotal and does not rely upon any particular type of expertise that would assist the trier of fact in rendering the ultimate determination in this action”).

CONCLUSION

For the reasons set forth herein—including: (i) Trende's lack of relevant qualifications and experience; (ii) the methodological flaws in his report; (iii) his failure to account for known rates of error in his underlying data; and (iv) his omission of the fact that the scholarly consensus runs contrary to his conclusions—this Court should grant Plaintiffs' motion to strike Trende's declarations and exclude his testimony.

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I hereby certify that on June 23, 2015, I served the foregoing Brief in Support of Plaintiffs' Motion to Strike the Declarations of Sean P. Trende and Motion in Limine to Exclude his Testimony at Trial 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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General Information

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