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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as Governor of North Carolina, *et al.*, Defendants.	)	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, *and* LOUIS M. DUKE, *et al.*, Plaintiffs-Intervenors, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV861

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS TO STRIKE AND MOTIONS IN LIMINE AND RESPONSE TO PLAINTIFFS' OBJECTIONS TO DEFENDANTS' DESIGNATIONS OF DEPOSITION TESTIMONY

I. Defendants' Response in Opposition to Plaintiffs' Motions to Strike and Motions in Limine

On June 30, 2014, Plaintiffs filed motions to strike the declarations of Sean Trende, Dr. Thomas Hofeller, and Dr. Donald Schroeder, and motions in limine to exclude the testimony of these experts at the hearing on Plaintiffs' motion for preliminary injunction. For the reasons set forth below, these motions should be denied.

Defendants have proffered their experts to show where North Carolina stands in relationship to other states with respect to practices eliminated or modified by H.B. 589, and to show that many factors other than the practices eliminated or modified by H.B. 589 could have contributed to increased minority participation. Plaintiffs' experts have opined that the practices eliminated or modified by H.B. 589 were responsible for increased minority participation and they speculate that H.B. 589 will have the effect of burdening minority participation. Defendants maintain that proof of a Section 2 violation requires more than a showing that the voting preferences of minorities have been eliminated or modified or that certain voting preferences have become a habit among African Americans.

Plaintiffs' experts have admitted that they have no evidence that African American registration or turnout will decrease as a result of the challenged provisions in H.B. 589. Defendants' experts have questioned whether there is any causal connection between the

challenged provisions and minority participation. Sean Trende has shown that there is no statistically significant relationship between the eliminated/modified practices and African American participation by conducting a cross-state comparison using a regression analysis. Dr. Thomas Hofeller has shown correlations, for example, between the locations of early voting sites and higher percentages of African Americans and between counties that offered Sunday voting and counties that had higher percentages of African Americans. Plaintiffs have not denied or disputed these correlations. Instead, Plaintiffs seek to exclude evidence from Defendants' experts.

ARGUMENT

Rule 702 of the Federal Rules of Evidence provides as follows:

> 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:
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> (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;
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> (b) the testimony is based on sufficient facts or data;
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> (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.

The Supreme Court held in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993), that pursuant to Rule 702, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

Under *Daubert*, "a trial judge, faced with a proffer of expert scientific testimony, must conduct 'a preliminary assessment of whether the reasoning or methodology

underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'" *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001) (quoting *Daubert*, 509 U.S. at 592-93). The Supreme Court enunciated several factors in *Daubert* which the trial court may use in performing its "gatekeeping" role, but these factors are "neither definitive, nor exhaustive." *Id*. The trial court has broad discretion in making its determination regarding the admissibility of expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999) (stating that "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"); *Cooper*, 259 F.3d at 200. The court applying the *Daubert* analysis is not obliged prior to admitting the testimony to "determine that the proffered expert testimony is irrefutable or certainly correct," because, "[a]s with all other admissible evidence, expert testimony is subject to testing by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *United States v. Moreland*, 437 F.3d 424, 431 (4th Cir. 2006) (internal quotation marks omitted).

It is important to note that the expert reports and testimony which Plaintiffs challenge here have been offered in opposition to Plaintiffs' motion for a preliminary injunction, which means there is no jury to protect from undue influence. *See, e.g.*, *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) ("When making these determinations, the district court functions as a 'gatekeeper' whose role is to keep experts within their proper scope, lest apparently scientific testimony carry more weight with the jury than it deserves." (internal quotation marks omitted)); *Gibbs v. Gibbs*, 210 F.3d 491,

500 (5th Cir. 2000) ("Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury."); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1301-02 (Fed. Cir. 2002) (noting that a "concern underlying the rule in *Daubert* is that without this screening function, the jury might be exposed to confusing and unreliable expert testimony," and although the court must apply the *Daubert* standards in a bench trial, "these concerns are of lesser import"). In a bench trial, should the trial court find the case for admissibility to be weak, the evidence should be admitted but given little weight. *See SmithKline Beecham Corp. v. Apotex Corp.*, 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003) (finding that in a bench trial "it is an acceptable alternative to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled," and stating that "*Daubert* requires a binary choice--admit or exclude--and a judge in a bench trial should have discretion to admit questionable technical evidence, though of course he must not give it more weight than it deserves").

Sean Trende

Sean Trende is an expert in psephology (the scientific study of elections), voter behavior, voter turnout, polling, and United States demographic trends and political history, with particular emphasis on Southern politics. (Trende Decl. ¶2)[1] Trende has a J.D. and M.A. in Political Science from Duke University. He is a co-author of *The Almanac of American Politics 2014*. (Trende Decl. Ex. 1) Trende has been studying and

[1] Trende's declaration is Attachment 7 to Defendants' Memorandum in Opposition to Plaintiffs' Motions for Preliminary Injunction and to the United States' Motion for Appointment of Federal Observers.

following elections for over ten years. (Trende Decl. ¶6) He has been a Senior Elections Analyst with RealClearPolitics since January 2009, where his main responsibilities consist of tracking, analyzing, and writing about elections. (Trende Decl. ¶¶10-11) As part of these responsibilities, Trende has studied and written extensively about demographic trends in the country, exit poll data at the state and federal level, public opinion polling, and voter turnout and voting behavior. (Trende Decl. ¶11)

Trende has offered two opinions in his report: (1) the voting reforms contained in HB 589 place the State within the mainstream of American voting laws, (Trende Decl. ¶¶18-61); and (2) the data do not consistently support the turnout effects predicted by Plaintiffs. (Trende Decl. ¶¶62-144) Although Plaintiffs have moved to strike Trende's declaration, they focus their argument only on Trende's second proffered opinion. For the reasons below, Trende's second opinion should not be stricken, nor should his testimony on this subject be excluded.

Plaintiffs argue that Trende is not qualified to render an opinion concerning the effects of the challenged provisions because he does not have a Ph.D. and is not a political scientist; he has not authored any peer-reviewed articles in the area of political science or elections; he had no prior experience analyzing the effects of the specific voting practices at issue; and he had not previously examined any state's laws on the specific voting practices at issue. These observations do not disqualify Trende as an expert.

It is true that Trende does not have a Ph.D. and has not authored any peer-reviewed articles, but while this might disqualify him for an academic position on the

faculty of a college or university,[2] it does not disqualify him from providing expert testimony to this Court. As the Seventh Circuit observed:

> While extensive academic and practical expertise in an area is certainly sufficient to qualify a potential witness as an expert, Rule 702 specifically contemplates the admission of testimony by experts whose knowledge is based on experience. Thus, a court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area.

Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000) (internal quotation marks and citations omitted). Furthermore, it is unnecessary for Trende to have previously performed the exact analysis he performed in this case in order to be qualified as an expert capable of performing that analysis. The analyses Trende performed in the challenged opinion were regression analyses, which he has performed many times before in his many years of experience working with election data. (Trende Dep. p. 33, *ll*. 5-10)[3] The fact that he has not applied a regression analysis to the particular data made available in this case does not detract from his expertise in applying regression analyses generally. *Cf. Martin v. Fleissner GmbH*, 741 F.2d 61, 64 (4th Cir. 1984) (rejecting argument that testimony should be rejected because proffered experts were not expert on particular equipment in question, because "both were knowledgeable in the pertinent

[2] Similarly, 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 does not mean that Trende cannot offer expert testimony relying on the scientific study of elections.

[3] The pages from Trende's deposition testimony cited in this brief are included in Exhibit A to Plaintiffs' Brief in Support of Plaintiffs' Motion to Strike Declarations of Sean Trende and Motion in Limine to Exclude his Testimony at Preliminary Injunction Hearing.

areas of engineering design and familiar with the processes" used by the equipment, and the "lack of direct experience is not a sufficient basis to reject their testimony, but may affect the weight that testimony is given, a decision properly made by the jury").

Plaintiffs next argue that Trende's methodology is unreliable. The methodology Trende employed in the opinion at issue was a regression analysis. The basis of Plaintiff's argument is that Plaintiffs' experts disagree with the assumptions and decisions Trende made in performing his regression analysis. Dr. Charles Stewart, one of Plaintiffs' experts, disagrees with the way Trende conducted his cross-state comparison, but he has admitted that a cross-state comparison combined with a regression analysis is an accepted way to determine whether there is any relationship between the practices affected by H.B. 589 and registration or turnout rates. (Stewart Dep. p. 168, *l.* 9 – p. 170, *l.* 22)[4] The fact that Dr. Stewart would have designed his regression analysis differently from Trende, however, does not make Trende's regression analysis unreliable. Furthermore, even if the Court were to conclude that the criticisms offered by Plaintiffs' experts are valid, these criticisms go to weight of the evidence, not its admissibility. *See ActiveVideo Networks, Inc. v. Verizon Communs., Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012) ("At their core, however, Verizon's disagreements are with the conclusions reached by ActiveVideo's expert and the factual assumptions and considerations underlying those conclusions, not his methodology.").

[4] Dr. Stewart's deposition was designated in its entirety in Defendants' Designations of Deposition Testimony in Connection with Plaintiffs' Motions for a Preliminary Injunction.

Plaintiffs contend that Trende did not address the scholarly authority that contradicts his findings, taking issue with Trende's conclusion that there is no statistically significant correlation between SDR and higher minority turnout. The Supreme Court made clear in *Daubert*, however, that the Court is to look at the principles and methodology employed by the expert, not the conclusions reached, when determining whether to admit expert testimony. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993) ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."). It is significant here that Trende reached his conclusion by applying regression analysis, an analysis that Plaintiffs' experts did not employ. (Trende Dep. p. 327, *l.* 23 – p. 328, *l.* 20)

Finally, Plaintiffs criticize Trende's analysis on the ground that he used a data set from the U.S. Census Bureau's Current Population Survey ("CPS") without first weighting the data. Plaintiffs present this argument as one regarding "the known or potential rate of error," which Plaintiffs identify as one of the *Daubert* factors. However, the factor the Supreme Court discussed in *Daubert* was the rate of error involved in the application of a scientific technique, such as a spectrographic analysis. 509 U.S. at 594. Indeed, it makes no sense to talk about an "error rate" in data; the data are what they are.

Plaintiffs contend that because Trende did not weight the CPS data, his analysis—the application of regression techniques—is unreliable and should be excluded. Trende explained at length in his deposition why he did not weight the data. (Trende Dep. p. 324, *l.* 11 – p. 326, *l.* 23) Trende's decision to use unweighted CPS data may be a factor

in determining the weight to be given to Trende's opinion, but it does not warrant exclusion.

Trende is qualified as an expert. His methodology—a regression analysis—is reliable, and his opinions are relevant to issues in this case. Therefore, Plaintiffs' motion to strike Trende's declaration and exclude his testimony should be denied.

Dr. Thomas Hofeller

Dr. Thomas Hofeller is, among other things, an expert in redistricting. He has a Ph.D. in Government and over 40 years of experience working with census data, geographic mapping, and data retrieval systems. Dr. Hofeller has extensive experience in the area of redistricting. As an expert in redistricting, he regularly analyzes and interprets large sets of demographic and election data in order to draw conclusions regarding voting patterns.

Plaintiffs argue that Dr. Hofeller is not qualified to offer expert testimony because he has no experience qualifying him to offer opinions about the specific election practices at issue in this case. Contrary to Plaintiffs' assertions, Dr. Hofeller is qualified to offer expert testimony because his technical and other specialized knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.

One of the issues in this case is whether the voting practices eliminated or modified by H.B. 589 are responsible for increased minority participation. Evidence that tends to show other reasons for increased minority participation is clearly relevant to this

issue. Dr. Hofeller has acquired knowledge, skill, experience, and training which enable him to address this issue.

As reflected on his resume, Dr. Hofeller's expertise includes, among other things, "analysis of complex technical problems involving large amounts of data—both for analysis and practical use in business, government and politics."[5] Dr. Hofeller worked as the Staff Director for the U.S. House Subcommittee on the Census at the inception of this oversight subcommittee, the purpose of which was to monitor the preparations for and execution of the 2000 Decennial Census. In redistricting cases, Dr. Hofeller has worked with large amounts of data to extract information useful for drawing districts satisfying specified criteria. Dr. Hofeller is familiar with registration files, census data, list matching, and demographic analysis, and is proficient with database construction and the use of geographic information services. (Hofeller Decl. ¶¶3-12; Hofeller Dep. p. 65, *l.* 24 – p. 67, *l.* 12; p. 71, *l.* 18 – p. 73, *l.* 9)[6]. Dr. Hofeller is well qualified to interpret data, and to extrapolate from that data conclusions regarding voting patterns and behaviors.

Plaintiffs next contend that Dr. Hofeller's methodology is not reliable because he did nothing more than compile data provided to him by Defendants and then speculate as to its meaning, and his methods do not satisfy the *Daubert* factors. What Dr. Hofeller

[5] Dr. Hofeller's resume is attached as Exhibit B to Plaintiffs' Brief in Support of Plaintiffs' Motion to Strike Declaration of Thomas Hofeller and Motion in Limine to Exclude his Testimony at Preliminary Injunction Hearing.

[6] Dr. Hofeller's declaration is Attachment 8 to Defendants' Memorandum in Opposition to Plaintiffs' Motions for Preliminary Injunction and to the United States' Motion for Appointment of Federal Observers. The pages from Dr. Hofeller's deposition testimony cited in this brief are included in Exhibit A to Plaintiffs' Brief in Support of Plaintiffs' Motion to Strike Declaration of Thomas Hofeller and Motion in Limine to Exclude his Testimony at Preliminary Injunction Hearing.

did, in fact, was to extract meaningful information from large amounts of data and present information relevant to an analysis of the issues of the case in a manner that is understandable and illuminating.[7] Thus, for example, Table 14 attached to Dr. Hofeller's expert report presents demographic and political characteristics for the counties which provided Sunday early voting and for those which did not. Map 14 presents the information in pictorial form. The presentation of data in this manner allows the Court to see that counties with Sunday voting have a significantly higher percentage of Democrats and African Americans than those counties without Sunday voting, a fact which would not be readily apparent from the raw data itself. Similarly, Table 15 and Map 15 show the demographic and political characteristics for the areas within three miles of early voting sites in Wake County. The presentation of data in this manner allows the Court to see that a significantly higher proportion of Democrats and African Americans had greater access to early-voting sites, in that the eight early-voting sites open for 120 or 126

[7] It is not mandatory that an expert's opinion consist of a scientific or statistical analysis. In cases where the opinion is not scientific or statistical, the *Daubert* factors have less relevance. As noted by the Advisory Committee on the 2000 Amendments to Rule 702: "Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise." Should the Court agree with Plaintiffs that Dr. Hofeller has not provided expert testimony because he has done nothing more than "regurgitate" data provided to him, then Defendants would ask the Court to treat Dr. Hofeller's declaration as that of a fact witness: Regardless of how Dr. Hofeller's analyses of the data are characterized, there can be no question that, by providing intelligible summaries of the massive amounts of data, the analyses provided in Dr. Hofeller's declaration are helpful to understanding the evidence in the case.

hours were placed in areas with a higher percentage of Democrats and African Americans, as compared to the eight early-voting areas open for only 82 hours.

Finally, Plaintiffs argue that Defendants imply Dr. Hofeller reached opinions that he never expressed. Even if this were true, it would not be a ground for excluding Dr. Hofeller's declaration or testimony. Plaintiffs' attempt to introduce additional argument on their preliminary judgment motion should be ignored.

Dr. Hofeller's experience and specialized knowledge allow him to extract meaningful information from an otherwise overwhelmingly large, complex and seemingly random data set. Dr. Hofeller has used this expertise in the past in the area of redistricting, and he has now employed it to show trends and patterns in the administration of North Carolina's voting laws and voter demographics for this case. He is qualified to offer expert testimony in the form of an analysis of the data, his methodology for doing so is sound, and his report is relevant. Therefore, Plaintiffs' motion to strike Dr. Hofeller's declaration and exclude his testimony should be denied.

Dr. Donald Schroeder

Dr. Donald Schroeder is a professor of Political Science at Campbell University. His primary teaching fields are political philosophy and constitutional law, and he has taught courses on American National Government and American Political Parties. Dr. Schroeder's field of expertise is political theory. (Schroeder Decl.; Ex. A, Schroeder Dep. p. 13, *l.* 17 – p. 14, *l.* 21)[8] Dr. Schroeder has a Ph.D. in political science and teaches

[8] Dr. Schroeder's declaration, which includes a copy of his resume, is Attachment 3 to Defendants' Memorandum in Opposition to Plaintiffs' Motions for Preliminary

state and local government as well as constitutional law, which requires research into state statutes. (Ex. A, Schroeder Dep. p. 114, *ll.* 6-17)

Plaintiffs' motion ignores much of Dr. Schroeder's experience and how it relates to his opinions in this case. For instance, his Political Parties class examines electoral politics including voting behavior. (Ex. A, Schroeder Dep. p. 15, *ll.* 8-16) One of his articles was *Aristotle on Law* which has been recently republished. (Ex. A, Schroeder Dep. p. 16, *ll.* 14-16) Several of Dr. Schroeder's classes involve voting laws. (Ex. A, Schroeder Dep. p. 18, *l.* 14 – p. 19, *l.* 17) Indeed, in one of his classes, Dr. Schroeder has specifically discussed the new North Carolina electoral practices post-H.B. 589. (Ex. A, Schroeder Dep. p. 22, *l.* 1 – p. 23, *l.* 2)

Dr. Schroeder relied on his expertise in political thought in preparing his report because such experience is helpful in analyzing statutes. (Ex. A, Schroeder Dep. p. 26, *ll.* 14-22) Moreover, training in political science, such as Dr. Schroeder has, would be significant in assisting a person to analyze and balance the various voting laws assessed by Dr. Schroeder. (Ex. A, Schroeder Dep. p. 58, *l.* 19 – p. 59, *l.* 4) Plaintiffs also completely ignore that Dr. Schroeder spent years as a member of his local board of elections where he became familiar with what was involved in running elections. (Ex. A, Schroeder Dep. p. 89, *ll.* 3-8) His training and experience allow him to analyze election practices such as those at issue in this case and make intuitive judgments about the

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Injunction and to the United States' Motion for Appointment of Federal Observers. Plaintiffs' motion includes excerpts from the transcript of the deposition of Dr. Schroeder. In order to ensure the Court has the complete picture regarding Dr. Schroeder's qualifications and analysis, Defendants have attached the complete transcript to this response as Exhibit A.

relative restrictiveness or permissiveness of the laws. (Ex. A, Schroeder Dep. p. 115, *l.* 12 – p. 117, *l.* 1)

Dr. Schroeder offered his opinion that the changes to North Carolina's election laws in H.B. 589 bring the State within the mainstream with regard to election laws as compared to other states. Importantly, Dr. Schroeder did not attempt to analyze each aspect of H.B. 589 individually against its counterpart in other states. For instance, Dr. Schroeder's study did not attempt to compare the permissiveness or restrictiveness of North Carolina's photo ID requirement against other states' photo ID requirement. Rather, he looked at North Carolina's election practices as a whole, as they relate to voter identification, registration procedures, including pre-registration of minors, and alternative opportunities for voting, including mail-in absentee voting and in-person absentee voting, and concluded that these salient features of North Carolina's electoral system place it in the mainstream of other states. (Ex. A, Schroeder Dep. p. 35, *ll.* 11-13; Ex. A, Schroeder Dep. p. 37, *ll.* 7-17)

Plaintiffs argue that Dr. Schroeder is not qualified to opine on the restrictiveness of state voting laws because he has no specialized knowledge in the area of his opinion and his declaration allegedly contained errors. This argument is without merit.

First, as described above, Dr. Schroeder is fully competent to opine on the relevant restrictiveness of voting laws given his Ph.D. in political science and his years of teaching political science courses that involve voting laws. Moreover, he has focused on constitutional law, much of which has focused on voting registration and related laws. In

addition, Plaintiffs ignore Dr. Schroeder's years of practical experience on his local board of elections, a qualification none of Plaintiffs' expert witnesses possess.

Further, Plaintiffs' seriously overstate the supposed "errors" made by Dr. Schroeder. For instance, they take issue with how he defined what was "more restrictive" in terms of voter ID. (D.E. 159, p. 7) However, Plaintiffs simply disagree with Dr. Schroeder's assessment of what is "more" restrictive versus "less" restrictive. They also ignore that Dr. Schroeder was not comparing individual voter ID laws but was rather placing each states' voter ID law into the context of those states' laws overall, especially as to registration and opportunities to vote. (Ex. A, Schroeder Dep. p. 35, *ll.* 11-13; Ex. A, Schroeder Dep. p. 37, *ll.* 7-17) In addition, as to all of the examples cited by Plaintiffs except for one (Mississippi), Plaintiffs have cited no actual statutes demonstrating that Dr. Schroeder made any error, and he explained that he was only comparing each state's statutory law, not what administrative agencies might have grafted onto a particular state's law. (Ex. A, Schroeder Dep. p. 82, *l.* 23 – p. 83, *l.* 9) Moreover, to the extent that Dr. Schroeder inadvertently miscategorized a state, any such mistake does not change his overall conclusion that North Carolina's election law practices as they relate to registration and voting fall within the mainstream of other states' practices. (Ex. A, Schroeder Dep. p. 111, *l.* 15 – p. 112, *l.* 1; *see, e.g.*, Ex. A, Schroeder Dep. p. 64, *ll.* 3-10) Plaintiffs criticize Dr. Schroeder's analysis of how restrictive a state's laws are on the ground that he did not define "restrictive" in the same way Plaintiffs would. A difference of opinion in the definition of "restrictive" does not render Dr. Schroeder's methodology "fundamentally flawed."

Plaintiffs also argue that Dr. Schroeder relied on a flawed methodology to reach his opinions because he did not consider the application or operation of various state laws in assessing their restrictiveness and his "intuitive balancing" approach does not constitute scientific knowledge. While Plaintiffs deride the intuitive balancing process Dr. Schroeder used to decide what to analyze and how to analyze it, Dr. Schroeder explained that this process is used by all political scientists to some degree or another in any analysis, whether simple or sophisticated. Indeed, as he pointed out, even political science analysis that appears to use a sophisticated methodology makes assumptions that require intuitive balancing in the design and operation of the analytical model.[9] (Ex. A, Schroeder Dep. p. 89, *l.* 19 – p. 91, *l.* 8)

As with any other study, Dr. Schroeder's work for this case involved constructing a model, applying the facts to that model, and then drawing appropriate conclusions. First, in attempting to assess the overall permissiveness of North Carolina's statutory electoral scheme as against other states, Dr. Schroeder chose to focus on the areas he found most salient to that question: voter identification requirements, registration procedures, including preregistration of minors, and alternative methods of voting, including mail-in and in-person absentee voting. (Schroeder Decl.; Ex. A, Schroeder Dep. p. 52, *l.* 25 – p. 53, *l.* 10) Moreover, Dr. Schroeder decided that a fairer analysis would assess the cumulative effect of each of these areas of the law, rather than trying to make a one-to-one comparison of each voting practice in isolation. In constructing his

[9] Indeed, Dr. Schroeder explained that he is not aware of a purely mathematical way of determining whether North Carolina's voting practices fall into the median of other states' voting laws. (Ex. A, Schroeder Dep. p. 41, *ll.* 15-21)

model, Dr. Schroeder focused on each voting practice as it relates to post-H.B. 589 practices. So, for example, with regard to registration procedures, he looked at the number of states with more permissive registration (i.e., those allowing individuals to register less than 25 days before an election), and those with more restrictive registration (i.e., those cutting off registration 25 days or more before an election). Similarly, with regard to in-person early voting, Dr. Schroeder assessed states with more permissive in-person early voting (i.e., those with more than the ten days of such voting allowed in North Carolina post-H.B. 589) against those with more restrictive in-person early voting (i.e., those allowing fewer than ten days of such voting or not allowing such voting at all). Dr. Schroeder then analyzed each state's law, placed them in the appropriate category in his model, and drew his conclusion based on the overall results. (*See generally* Schroeder Decl.) In reaching his final conclusion, that North Carolina falls within the mainstream of other states as to these practices overall, he simply applied his judgment against the background of his education and experience in voting law and elections.

While Plaintiffs may not like the model Dr. Schroeder chose to construct for this analysis, or its results, their disagreement does not render his expert report "useless" or inadmissible. Nor does the fact that Dr. Schroeder did not use the model Plaintiffs apparently prefer: the "strict" versus "non-strict" analysis used by the National Conference of State Legislatures for voter identification requirements. (Ex. A, Schroeder Dep. p. 32, *l.* 16 – p. 33, *l.* 11) Plaintiffs' real problem with Dr. Schroeder's analysis is that it, like Mr. Trende's analysis, lays bare Plaintiffs' claim that H.B. 589 was the most restrictive voting legislation enacted in North Carolina in recent memory. Instead, what

these analyses show is that North Carolina had, in the past decade or so, actually veered well out of the mainstream in voting practices in a way that minimized or put at risk precautions for ensuring that only eligible voters are allowed to cast ballots.

II. Defendants' Response to Plaintiffs' Objections to Defendants' Designations of Deposition Testimony

In their Designations of Deposition Testimony in Support of Motion for Preliminary Injunction, Plaintiffs noted objections to Defendants' Designations of Deposition Testimony in Connection With Plaintiffs' Motions for a Preliminary Injunction ("Defendants' Designations"). Plaintiffs' objections appear to be predicated on three grounds: the form of the descriptions of testimony, the length of the designations and the content of the descriptions. As shown on Exhibit B, Defendants raised concerns about the objections with Plaintiffs, but the parties were unable to resolve their differences. Therefore, Defendants provide this brief response to Plaintiffs' objections.

With regard to the form of the descriptions, Plaintiffs indicate that the form used by Defendants is not what the Court requested—that the Court asked for "a couple of lines per witness." *See* Exhibit B. This does not reflect Defendants' understanding. Defendants understood the Court to ask for brief descriptions of each portion of designated testimony so that the Court would know the nature of that testimony and why the designating parties thought the evidence was relevant. With regard to the length of the designations, Defendants note that the length was driven by two factors: Defendants' understanding of the Court's request for descriptions and the fact that Defendants were

required to include testimony from two of Plaintiffs' experts and from other key witnesses, such as Gary Bartlett or legislators.

Most importantly, with regard to the content of the descriptions, Plaintiffs state "many of the descriptions mischaracterize testimony and purport to provide findings of fact." Plaintiffs also state that the descriptions provided by Defendants are "misleading." This amounts to an assertion that Defendants have made intentional misrepresentations to the Court. Notably, Plaintiffs' objections fail to provide even one example of any purported "mischaracterization" or "misrepresentation," and even when Defendants raised this with Plaintiffs, *see* Exhibit B, Plaintiffs failed to provide even one example of "mischaracterization" or "misrepresentation."

For these reasons, Plaintiffs' objections are not well-founded and should be overruled.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motions to Strike and Motions in Limine should be denied, and Plaintiffs' Objections to Defendants' Designations should be overruled.

This, the 21st day of July, 2014.

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CERTIFICATE OF SERVICE

I, Katherine A. Murphy, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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