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 the Governor of North Carolina, et al., Defendants.	**Case No.: 1:13-CV-658**
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	**Case No.: 1:13-CV-660**
UNITED STATES OF AMERICA, Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al, Defendants.	**Case No.: 1:13-CV-861**

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE DECLARATION OF DONALD SCHROEDER AND MOTION IN LIMINE TO EXCLUDE HIS TESTIMONY AT PRELIMINARY INJUNCTION HEARING

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INTRODUCTION

Through Donald Schroeder's declaration, Defendants seek to offer unsupported legal conclusions as expert testimony. Schroeder, who specializes in Greek political thought, opines that: "[i]f one were to place North Carolina on a continuum reflecting the restrictiveness of the voter verification process relative to other States, it would place somewhere within the center of that continuum." Schroeder Decl. ¶ 10. Apart from being flat wrong, Schroeder is unqualified to provide such an opinion or perform such analyses, as evidenced by his resume and the litany of errors in his declaration. His methodology can only be described as an entirely subjective and unscientific "intuitive balancing" of state laws. Schroeder's analysis falls far short of the standards set forth in Federal Rule of Evidence 702; this court should exercise its gate keeper role and exclude Schroeder's declaration and testimony. Pursuant to Rule 702, Plaintiffs in *North Carolina State Conference of the NAACP v. McCrory*, Plaintiffs in *League of Women Voters of N.C. v. North Carolina*, and the Duke Intervenor Plaintiffs (collectively, the "Plaintiffs") respectfully move for an order striking the declaration of Donald Schroeder ("Schroeder") submitted by Defendants in support of their response in opposition to the pending motions for preliminary injunction and excluding his testimony at the upcoming hearing to be held on the same.[1]

I. LEGAL STANDARD

Plaintiffs hereby incorporate the legal standard set forth in the League of Women Voters of North Carolina's motion to strike the declaration of Sean Trende. (ECF No.

[1] Plaintiff, the United States of America, joins this motion.

157 at 2-5 (Case No. 1:13-CV-00658-TDS-JEP).)

II. ARGUMENT

A. Schroeder Is Not Qualified to Opine on the Severity or Restrictiveness of State Voting Laws.

Before being retained in this matter, Schroeder had never reviewed any of the laws that he purports to analyze in his opinion. *See* Schroeder Dep. at 93:23-94:4 (Ex. A). In fact, throughout his 40-year career, Schroeder has not conducted any research on early voting, voter registration, or voter identification. *See* Schroeder C.V. (Ex. B); Schroeder Dep. at 23:3-8, 93:23-94:18 (Ex. A). He has authored a total of three peer-reviewed articles—two of which are about Aristotle and Greek political thought—but no articles, papers, or presentations about any of the subject matters on which he opines. *See* Schroeder C.V. (Ex. B). Schroeder's only experience with these laws came after Defendants' counsel retained Schroeder and sent him a collection of state statutes relating to early voting, voter registration, and voter identification. *See* Schroeder Dep. at 29:1-17 (Ex. A).

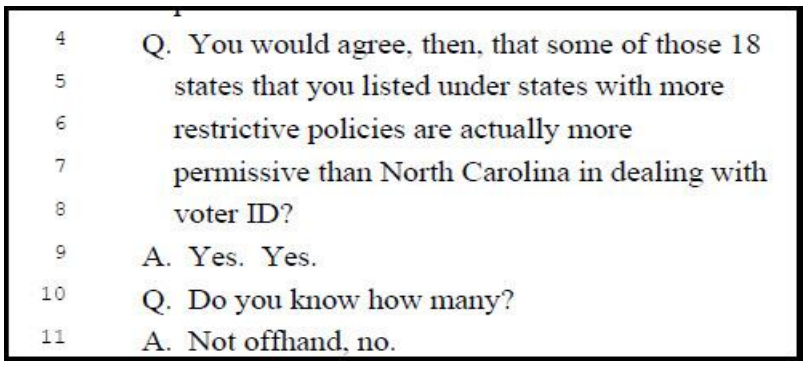
Rule 702 requires that the proposed expert be qualified to assist the trier of fact in an area of "specialized knowledge," and the court must be satisfied that by "knowledge, skill, experience, training or education," the proposed expert has mastered the particular discipline at issue. Fed. R. Evid. 702; *Cooper v. Lab. Corp. of Am. Holdings, Inc.*, 150 F.3d 376, 380-81 (4th Cir. 1998). A proposed expert who lacks "specialized knowledge" in the particular discipline in which he seeks to offer testimony is unqualified to assist the trier of fact, even if he has general knowledge of the subject matter. *See, e.g.*, *Cooper*,

150 F.3d at 380-81 (4th Cir. 1998).

A brief overview of Schroeder's resume confirms his lack of familiarity with the subject matter that forms the basis of his opinion. His primary teaching fields are political philosophy and constitutional law. *See* Schroeder C.V. (Ex. B). His list of scholarly activities consists almost entirely of articles and panel discussions on Greek political thought. *See id*. He has authored three peer-reviewed articles: "Aristotle on Law," "Aristotle on the Good of Virtue-Friendship," and "John Rawls and Contract Theory," none of which have anything to do with early voting, voter registration, or voter identification laws. *See id*; *see also* Schroeder Dep. at 17:10-15, 18:11-13 (Ex. A). And his two working papers are also primarily concerned with Aristotle and Greek political thought. *See* Schroeder C.V. (Ex. B). Indeed, his resume corroborates his testimony that he has never had occasion to review or analyze the voting laws or ballot access issues relevant to this case. *See* Schroeder Dep. at 94:2-12 (Ex. A).

Putting aside his resume, Schroeder's declaration contains a number of errors that further betray his inexperience in this field. For instance:

- Schroeder's declaration incorrectly identifies eighteen states as having voter ID laws that are as restrictive or "more restrictive" than HB 589. *See* Schroeder Decl. at 7. However, included among these eighteen "more restrictive" states are jurisdictions that allow voters without photo identification to prove their identity and cast a regular ballot through other means:



Q. You would agree, then, that some of those 18 states that you listed under states with more restrictive policies are actually more permissive than North Carolina in dealing with voter ID?
A. Yes. Yes.
Q. Do you know how many?
A. Not offhand, no.

Schroeder Dep. at 36:4-11 (Ex. A).

- Schroeder's declaration lists Georgia, Indiana, Louisiana, and Mississippi among his list of states that do not accept student IDs at the polls. However, all four of those states accept certain types of student IDs as valid forms of voter identification.[2]

- Schroeder's declaration lists California among the states that do not offer early voting. In fact, California does indeed offer early voting for up to 30 days in some counties. *See* California Secretary of State, How to Vote, *available at* http://voterguide.sos.ca.gov/voter-info/how-to-vote.htm. Moreover, Montana allows voters to apply for and cast absentee ballots in person. *See* Montana Secretary of State, Elections and Government Services, *available at* http://sos.mt.gov/elections/FAQ/index.asp. Schroeder excluded these states based on his incorrect understanding of their voting procedures. *See* Schroeder Dep. at 77:11-20 (Ex. A).

- Schroeder believes that North Carolina, pre-HB 589, offered same-day registration during the one-stop period *and* on Election Day. *See* Schroeder Dep. at 61:13-62:6 (Ex. A); *see also* Schroeder Decl. ¶ 2(e). This is plainly false. *See* N.C. Gen. Stat. § 163-82.6A (repealed 2013).

There are many other errors as well. But the examples above, along with Schroeder's resume, demonstrate that this declaration is his first foray into any attempted analysis of

[2] *See, e.g.*, Georgia Secretary of State, "Acceptable Student ID: College, University, Technical College," *available at* http://sos.ga.gov/admin/files/acceptableID.pdf (Ex. C); Ind. Code Ann. § 3-5-2-40.5 (2014); Indiana Secretary of State, Photo ID Law, *available at* http://www.in.gov/sos/elections/2401.htm; *see also* Schroeder Dep. at 47:3-16 (Ex. A); La. Rev. Stat. Ann. § 18:562 (2012); Miss. Code Ann. § 23-15-563(2)(h).

voter registration, early voting, or voter identification laws. When compared to Plaintiffs' experts, who have written extensively on these topics and their effect on voters, Schroeder clearly lacks the experience to opine on the topics addressed in his declaration. Schroeder lacks any specialized knowledge on issues related to early voting, voter registration, or voter identification, and his general background in political science is insufficient to qualify him as an expert in this matter.

B. Schroeder Relies on a Flawed Methodology in Reaching His Opinions.

Schroeder set out to compare the restrictiveness of HB 589's "voter verification" requirements to other states and to determine whether they fell within the "mainstream." Schroeder Decl. ¶ 3. To reach this opinion, he reviewed other states' laws to determine: (1) which states had passed voter identification laws; (2) the number of days of early voting available in each state; (3) which states allowed 16 year olds to pre-register; (4) which states provided for same-day or Election Day registration; and (5) the number of voter registration days available in each state. *See* Schroeder Decl. ¶¶ 4-10; Schroeder Dep. at 81:13-82:9 (Ex. A). For each law, Schroeder attempted to place the states in one of two categories: "more restrictive" or "less restrictive" than HB 589. Schroeder then applied what he describes as "***intuitive balancing***" to determine that HB 589 fell within the "mainstream." *See* Schroeder Dep. at 39:25-40:14 (Ex. A). Notwithstanding the errors in his analysis, Schroeder's methodology is flawed for several reasons.

1. Schroeder Did Not Consider the Application or Operation of the Various State Laws in Assessing Their Restrictiveness.

Schroeder's analysis of the various state laws' restrictiveness is fundamentally

flawed. His declaration attempts to conduct a comparative analysis of HB 589 and other states' voter identification, early voting, and voter registration laws. But his research—which consisted of reading only those statutes that Defendants' counsel provided to him and consulting a couple of websites—sought simply to determine the existence of certain election laws, and stopped short of assessing the actual application or effect of those laws in each state. For instance, Schroeder's declaration suggests that 18 states had voter ID laws that were as restrictive or more restrictive than HB 589's voter ID requirement; but he failed to distinguish between "strict" voter ID states (which require voters to show the required ID to cast a regular ballot) and "non-strict" voter ID states (which allow voters without the required ID to present other proof of identity and cast a ballot that will be counted without further action from the voter). *See* Schroeder Dep. at 32:3-36:9 (Ex. A); *see also* Nat'l Conference of State Legislators, Voter Identification Requirements, *available at* http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. As Schroeder acknowledged, the voter identification laws in "non-strict" states would be less restrictive than HB 589, yet his declaration ignores such distinctions. *See* Schroeder Dep. at 36:4-9 (Ex. A).

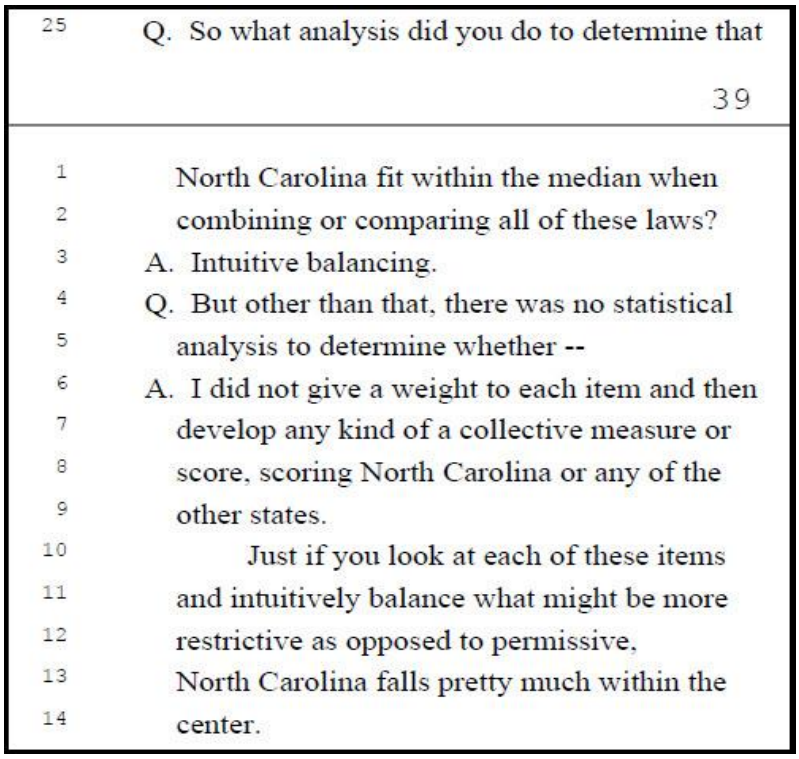
Schroeder's analysis of the voter registration and early voting laws are similarly flawed. In comparing North Carolina to other early voting states, Schroeder simply places the states in two categories: those offering more than 10 early voting days and those offering less. *See* Schroeder Decl. ¶ 9(b). Schroeder then assumes from this limited information that states offering more than 10 days of early voting have "more permissive" early voting laws, and those offering fewer than 10 days have "more

restrictive" laws. *See* Schroeder Dep. at 53:20-54:2 (Ex. A); Schroeder Decl. ¶10. Schroeder employs the same approach for voter registration days and pre-registration of 16 year olds. His cursory analysis ignores important distinctions in the states' election administration practices and renders his opinion useless. He does not consider, for instance, whether the early voting states offer weekend hours; the number of early voting locations; the level of discretion granted to local county boards of election in setting early voting days, locations, and hours; or the number of states that allow for pre-registration of 17 year olds, as opposed to lumping in one category all states that do not allow 16 year olds to pre-register. *See* Schroeder Dep. at 53:11-54:14, 67:5-69:17 (Ex. A). All of these factors must inform any comparative analysis of the restrictiveness of HB 589.

2. Schroeder's "Intuitive Balancing" Approach Is Not Reliable and Does Not Constitute Scientific Knowledge.

After compiling various bits of information about several different state voting laws, Schroeder summarily concludes that HB 589 would fall "somewhere within the center" of a continuum "reflecting the restrictiveness of the voter verification process relative to other States." Schroeder Decl. ¶ 10. Somehow, Schroeder made the logical leap from comparing individual laws (*i.e.*, early voting, voter identification, pre-registration, Election Day registration) to assessing the overall restrictiveness of HB 589 relative to other states. When asked to explain why he limited his analysis of HB 589's restrictiveness to voter registration, early voting, and voter identification, Schroeder stated: "I guess they jumped out at me, I guess, intuitive, I guess. These struck me as the most salient." Schroeder Dep. at 53:8-10 (Ex. A).

Schroeder's explanation of the methodology he used to reach his opinion is equally opaque. According to Schroeder, the process was also "intuitive."



Q. So what analysis did you do to determine that

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North Carolina fit within the median when combining or comparing all of these laws?

A. Intuitive balancing.

Q. But other than that, there was no statistical analysis to determine whether --

A. I did not give a weight to each item and then develop any kind of a collective measure or score, scoring North Carolina or any of the other states.

Just if you look at each of these items and intuitively balance what might be more restrictive as opposed to permissive, North Carolina falls pretty much within the center.

Schroeder Dep. at 39:25-40:14 (Ex. A).

Schroeder's intuition, particularly in a field in which he has no prior research or work experience, is not an accepted methodology. *See Metamining, Inc. v. Barnette*, No. 2:12CV00024, 2013 WL 3245355, at *11 (W.D. Va. June 26, 2013) (excluding expert who "utilized intuition" in reaching his opinions as the court "ha[d] no opportunity to compare his methods to those employed by other experts in the field"); *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 214 F. Supp. 2d 530, 539-40 (D. Md. 2002) (excluding testimony of expert who drew on his "instinct and intuition to patch holes in his methodology"); *see also Oddi v. Ford Motor Co.*, 234 F.3d 136, 158 (3d Cir. 2000) (affirming exclusion of expert testimony that "used little, if any, methodology beyond his

own intuition" because "no standards control[led] his analysis, and no 'gatekeeper' c[ould] assess the relationship of [the expert]'s method . . . and the non-judicial uses to which it ha[d] been put").

It would be impossible to replicate or assess the accuracy and reliability of Schroeder's work. The answers to the multiple questions raised by his analysis are all in his head. By his own admission, he did not have a principled method of selecting the laws he reviewed to arrive at his opinion, *see* Schroeder Dep. at 53:6-10 (Ex. A); he did not assign any weight to any law in particular, *see* Schroeder Dep. at 40:6-14 (Ex. A); nor did he develop a system to combine and compare the effects of the different laws, some of which interact with each other (*i.e.*, Election Day registration and voter registration). Instead, he "thought about it and . . . reflected a bit." Schroeder Dep. at 41:8-9 (Ex. A). This standardless approach renders his testimony inadmissible.

C. Schroeder Does Not Apply Any Specialized Knowledge or Expertise in Forming His Opinion.

Schroeder made clear in his deposition that, in forming his opinion, he reviewed only the statutes provided to him by Defendants' counsel, and confirmed the existence of the statutes on a few websites. Schroeder Dep. at 24:10-25:17, 29:1-30:15 (Ex. A). He also acknowledged that anyone else reviewing the election laws would be able to reach the same conclusion, as his work did not require any additional analysis beyond collecting and reviewing the election laws provided to him. *See* Schroeder Dep. at 26:4-27:1 (Ex. A). In fact he described his analysis as "[n]othing particularly advanced other than simply…counting beans." *Id.*

It should come as no surprise that Schroeder's declaration reads like a simple summary of state voter ID, voter registration, and early voting laws—albeit an inaccurate one. Indeed, none of the analyses described in Schroeder's declaration or testimony requires any specialized knowledge beyond the ability to read a statute, and count. Schroeder Dep. at 26:4-9 (Ex. A). And for the reasons identified, in section B(2), his "intuitive balancing" is not an accepted methodology and is not sufficiently reliable to constitute expert testimony. Schroeder's review of state election laws does not assist the trier of fact any more than an exhibit appending the state statutes themselves. *See, e.g.*, *BorgWarner, Inc. v. Honeywell Int'l., Inc.*, 750 F. Supp. 2d 596, 609 (W.D.N.C. 2010) (excluding expert witness who brought "no specialized knowledge or expertise to his review of the evidence"); *see also Barnes v. 3/12 Transp., Inc.*, No. CV410-178, 2012WL1014810, at *3-4 (S.D. Ga. Mar. 23, 2012) (excluding expert witness opinion that merely "parrot[s]" admissible evidence and did not require specialized analysis or expertise); *Savoy v. State Farm Fire & Cas. Co.*, Civil Action No. 06-0517, 2006 WL 2795475, at *3-4 (E.D. La. Sept. 26, 2006) (excluding expert testimony where "[t]here [was] no indication that [the witness's] expertise . . . was required to draw [his] conclusions").

Schroeder's opinions are not based on the sort of "specialized knowledge" contemplated by Rule 702. Accordingly, the Court should strike Schroeder's declaration and preclude him from providing any testimony in this case.

III. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court strike

the declaration of Donald Schroeder, and exclude any testimony offered by Schroeder relating to issues addressed in his declaration.

Dated: June 30, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2014, I served Plaintiffs' Motion to Strike Declarations of Donald Schroeder and Motion in Limine to Exclude His Testimony at Preliminary Injunction Hearing 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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This the 30th day of June, 2014.

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