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

COMMON CAUSE, *et al.*, Plaintiffs, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, *et al.*, Defendants.	)	CIVIL ACTION NO. 1:16-CV-1026-WO-JEP THREE-JUDGE COURT
League of Women Voters of North Carolina, *et al.*, Plaintiffs, v. Robert A. Rucho, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting, *et al.*, Defendants.	)	CIVIL ACTION NO. 1:16-CV-1164-WO-JEP THREE JUDGE COURT

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO STRIKE THE TESTIMONY OF SEAN TRENDE AT TRIAL

INTRODUCTION

Plaintiffs' motion to prevent testimony by defendants' expert, Sean Trende, is meritless. Plaintiffs misstate his experience and the nature of his report while ignoring the inconvenient truth that Mr. Trende has already been accepted as an expert witness in several voting rights cases, including a case involving the efficiency gap. Plaintiffs' motion has little to do with Mr. Trende's qualifications. Rather, it is an attempt to exclude Mr. Trende's report because his criticisms of Dr. Jackman and the efficiency gap are devastating to plaintiffs' claims. At best, plaintiffs' arguments go to the weight and credibility this court should give to Mr. Trende's report. For these reasons, plaintiffs' motion should be denied.

ARGUMENT

1. In a non-jury trial, a court should admit challenged expert testimony and then consider the weight and credibility of that testimony.

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:

(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;

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

(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, under 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. In applying the *Daubert* analysis, the court 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 judges will be the triers of fact in this case, so there will be no jury to protect from alleged undue influence of the challenged report and

testimony. *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").

2. Sean Trende's credentials and experience show that he is well-qualified to offer an opinion on congressional elections in the United States.

Plaintiffs begin by getting Mr. Trende's credentials backwards. Mr. Trende is not being offered as an expert because he is a graduate student (though that is a relevant

factor). Mr. Trende is qualified to testify because he has studied and followed United States elections on a part-time or full-time basis for nearly two decades at one of the most prominent political companies in the country. Indeed, he was qualified as an expert in multiple cases without the additional credentials offered by his graduate schooling.

This is not to say that Mr. Trende's academic pedigree is lacking. Far from it. He has a B.A. from Yale University (1995), with a double major in history and political science, a J.D. from Duke University (2001), and a M.A. from Duke University (2001) in political science. He is currently enrolled as a doctoral student in political science at The Ohio State University, where he is a rising second year studying American politics and methodology.

Since 2009, Mr. Trende has worked at Real Clear Politics, a company of 60 employees that is routinely cited by some of the most influential voices in politics. Trende is responsible for tracking, analyzing, and writing about elections including rating the competitiveness of Congressional, Presidential, Senate, and Gubernatorial races. He is the author of a well-received book about elections, *The Lost Majority: Why the Future of Government is Up For Grabs and Who Will Take It*, as well as several chapters in books edited by Dr. Larry Sabato of the University of Virginia. He co-authored the *2014 Almanac of American Politics*, where he was responsible for composing detailed congressional district descriptions in a number of states, including North Carolina. To better learn how congressional redistricting and gerrymandering have worked over the years, Mr. Trende has plotted every congressional district ever drawn, beginning in 1789, utilizing standard political science reference books as templates. Mr. Trende regularly

appears as an election expert on network news and in speeches before foundations, institutes and other organizations.

Mr. Trende has authored expert reports admitted in four election law cases including the only other case involving the so-called efficiency gap, *Whitford v. Gill*, 218 F. Supp. 3d 837, 861-62, 908-10, 912 n.319, 912-16, 920, 960 (D. Wisc. 2016). In *Whitford*, the district court acknowledged several points made by Mr. Trende in his testimony as valid criticisms of the efficiency gap. *Id*. at 908-10.

Mr. Trende is clearly an expert in American elections, American congressional elections, and in the discipline of psephology (the scientific study of elections). Mr. Trende will show at trial how Dr. Jackman, plaintiffs' expert, does no more than compare average vote shares and average seat shares for congressional elections in states with more than six congressional districts from 1972. Dr. Jackman then applies a mechanistic formula – the efficiency gap – to allegedly calculate an efficiency gap score for elections that result in one party electing 0.5 seats more than what would be expected based upon the average seat share (even though Dr. Jackman derided the notion of utilizing even a *two* seat threshold just over a year ago). In contrast to Dr. Jackman, Mr. Trende will provide testimony about how efficiency gap scores can be skewed by wave elections, the geographic sorting of votes, the shapes of the districts, whether districts followed traditional districting principles, whether districts were drawn to comply with the Voting Rights Act, the actual intent of the legislatures that drew the districts, population shifts within a state from decade to decade, and other details. As Mr. Trende will explain, Dr.

Jackman's omission of these details renders the efficiency gap theory highly suspect when thrust into the sunlight of the outside world.

Dr. Jackman's significant omissions are revealed in just a few examples of testimony to be given by Mr. Trende. Under Dr. Jackman's theory, an efficiency gap calculation of ± .075 in the first election under the plan constitutes the threshold proposed by Dr. Jackman for subjecting the plan to constitutional scrutiny, at least for states with more than 15 congressional districts (the threshold is +/- .12 for states with 7-15 congressional districts, and there is no threshold for states with fewer than seven districts). Mr. Trende will explain that the 1982 California congressional map is considered one of the worst political gerrymanders in history yet it barely crosses Dr. Jackman's threshold for scrutiny with a score of .0796. This gerrymander was so egregious that it was repealed by referendum and replaced in 1984 by a map described by the author of the 1982 plan, Congressman Phil Burton, as "similar" to the 1982 plan. Justice Stevens, a theoretical proponent of some type of symmetry test, *see League of United Latin American Citizens v. Perry*, 548 U.S. 399, 466-67 (2006) ("*LULAC*"), described the 1984 California plan as an "extreme abuse []" that should have been reviewed by the Supreme Court and that should be covered by any Supreme Court test. *Veith v. Jubelirer*, 541 U.S. 267, 339 n. 34 (2004) (Stevens, J., dissenting) (citing *Badham v. Eu*, 488 U.S. 1024 *summarily aff'd*, 488 U.S. 1024 (1989)). Yet, under Dr. Jackman's efficiency gap analysis, the 1984 plan would not be subject to judicial review because the score it received in the 1984 election (.057) was below Dr. Jackman's .075

threshold for states with more than fifteen seats. Indeed, by the end of the decade, the 1984 map has a *Republican* leaning efficiency gap.

Mr. Trende will explain how, under Dr. Jackman's theory, congressional plans for states with 7 to 15 districts are subject to scrutiny with an efficiency gap score of ±.12 during the first election under that plan. Mr. Trende will also explain, and the evidence at trial will show, that several districts in North Carolina's 2001 plan, including congressional districts 2, 8, 12, and 13, were, in fact, political gerrymanders designed to benefit Democratic incumbents.[1] This occurred because the 2001 General Assembly transformed the predecessor plan, designed to elect an equal number of six Democrats and six Republicans, *see Cromartie v. Hunt*, 173 F. Supp. 2d 407, 413 (E.D.N.C. 2000), *rev'd on other grounds sub. nom Easley v. Cromartie*, *supra*, into a highly gerrymandered 8-5 plan designed to favor Democrats. Because the political environment was favorable for Republicans in 2002 and 2004, the plan was not immediately successful. So, as Mr. Trende will testify, under Dr. Jackman's theory, after the 2002 elections, the 2001 plan received an efficiency gap score of only -.002 and therefore would not have been subject to scrutiny. Indeed, it would have a Republican-leaning efficiency gap. But, after the Democratic wave elections of 2006 and 2008, the plan's Democratic roots were on display, and, in a wave Republican election in 2010, the 2001 plan received an efficiency gap score of .129. This would have subjected the 2001 plan

[1] The 2001 version of congressional district 12 was substantially based upon the politically gerrymandered 1997 version of congressional district 12 approved by the Supreme Court in *Easley v. Cromartie*, 532 U.S. 234 (2000). The 2001 versions of congressional districts 2, 8, and 13 were highly gerrymandered to benefit Democratic candidates at the expense of Republican candidates.

to constitutional review under Dr. Jackman's theory if the 2010 election had occurred in 2002. Thus, as will be explained by Mr. Trende, under Dr. Jackman's theory, obviously gerrymandered plans can escape constitutional review simply because of the timing of different elections during the ten-year cycle of each plan's existence.

Next, Mr. Trende will testify that, under Dr. Jackman's theory, for states with more than 15 congressional seats, an efficiency gap score of over ±.07 indicates the likelihood of a party earning one more seat than the number of seats that would be described by Dr. Jackman as "fair." Thus, as Mr. Trende will explain, under Dr. Jackman's theory, the 2004 Texas plan unfairly advantaged Republicans because it received an efficiency gap score of -.09044. But Dr. Jackman's theory contrasts with the findings of several Justices in *LULAC* that the 2004 Texas map simply brought the state's results in line with the state's voting patterns. *LULAC*, 548 U.S. at 419. Indeed, given that Texas' 2004 mid-decade redistricting was obviously motivated by partisan intent, the implication of Dr. Jackman's approach is that the five Justices who concluded that *LULAC* did not involve an unacceptable partisan gerrymander simply got it wrong.

Mr. Trende will further testify that the 1992 North Carolina congressional plan provides another example of how the efficiency gap is deceptively flawed. In *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.) *summarily aff'd*, 506 U.S. 801 (1992), the Supreme Court affirmed the district court's opinion that plaintiffs had not stated a claim for a political gerrymander. This finding was made despite the fact that the 1992 plan had divided 44 counties and at least 77 precincts and made districts contiguous by the dubious concept of point contiguity. *See* Chart of North Carolina Congressional Plans, 1992 –

2016, Counts of Count and VTD Divisions (attached as Ex. 1); *Shaw v. Hunt*, 861 F. Supp. 408, 465-69 (E.D.N.C. 1994), *rev'd on other grounds*, 517 U.S. 899 (1996). Moreover, it is undisputed that the highly gerrymandered 1992 plan was drawn with the express intention of protecting at least four white Democratic incumbents. *Id*.at 468. Yet, despite these undisputed facts, as Mr. Trende will detail, under Dr. Jackman's theory, the 1992 plan would have escaped legal scrutiny with an efficiency gap score of just .096 following the 1992 general election.

Finally, Mr. Trende will explain how maps drawn by independent redistricting commissions have produced maps that violate Dr. Jackman's efficiency gap. For example, New Jersey's 2012 congressional plan would be flagged as a Republican gerrymander with a score of -.174, even though it was drawn by a commission and designed to create six Republican districts and six Democratic districts. Another example is the 1992-2000 commission-drawn plan for the State of Washington. Though not disclosed by Dr. Jackman, as Mr. Trende will explain, this plan has efficiency gap scores that are both contradictory and eclipse the efficiency gap score Dr. Jackman has calculated for North Carolina's 2016 plan. Thus, in 1992, under Dr. Jackman's theory, this independent commission plan favored Democrats with an actionable efficiency gap score of .2344. Under Dr. Jackman's testimony, this plan should have experienced efficiency gap scores of at least .08 for the rest of the ten year cycle. But instead, and quite remarkably given Dr. Jackman's standard, in 1994, the map that had unfairly favored Democrats in 1992 completely flipped in favor of Republicans with an actionable efficiency gap score of -.2297. Dr. Jackman would no doubt insist that the "intent" prong

of their test would render this sort of map not actionable. Apart from being wholly naïve about the way litigation works, it also misses the point. If the efficiency gap is really about gerrymandering, there is no reason such massive efficiency gaps should be produced by an independent commission.

These facts, and many other examples to be explained by Mr. Trende, expose the nature of the constitutional leap of faith plaintiffs are asking this court to make under the efficiency gap: that what they report tracks with what are considered gerrymanders in the "real world." The Supreme Court has recently criticized the use of mechanical formulas to create districts that provide minorities with an equal opportunity to elect candidates of choice. *See Alabama Legislative Black Caucus v. Alabama*, 135S. Ct. 1257, 1273 (2015). Yet, the efficiency gap is nothing more than a mechanical formula that often protects gerrymanders from scrutiny while requiring review of plans that are not gerrymandered at all – such as the 2016 congressional plan.

Before this court considers whether Justice Stevens was wrong when he called California's 1984 map an "extreme" gerrymander, whether several Justices were wrong when they concluded that Texas's 2004 map simply brought the state's results in line with the state's voting patterns and was not an unacceptable partisan gerrymander, whether Dr. Jackman's theory would operate to protect from review two of the most highly gerrymandered congressional plans in North Carolina history, and whether Dr. Jackman's mechanical formula shows that maps drawn by independent redistricting commissions are constitutionally flawed, the court should have the benefit of Mr.

Trende's expert opinion. This is exactly the type of testimony Mr. Trende provides, and the court should not decline the opportunity to hear his evidence.

3. Plaintiffs' arguments only go to the weight and credibility of Mr. Trende's testimony.

Mr. Trende will explain to the court that there is no one efficiency gap theory that has been universally adopted by experts. In fact, Dr. Jackman's report in this case is significantly different from the theory advocated by the scholars who originally conceived of the efficiency gap, as well as Dr. Jackman's own reports filed in the Wisconsin litigation. Under the theories of the efficiency gap that have been promulgated in academic literature, neither the 2011 nor the 2016 congressional plans would be subject to constitutional scrutiny. Mr. Trende also explains that the efficiency gap is very difficult to calculate and that it cannot provide sufficient guidance to a legislature when it is ***enacting*** a new districting plan, since it is impossible to predict what the electoral environment will look like in the first year. In fact, as Mr. Trende explains and as Dr. Jackman admits, Dr. Jackman's theory is entirely dependent upon the results of the first election under a new plan and whether those results exceed a threshold adopted only by Dr. Jackman for determining when a districting plan is subject to scrutiny. Dr. Jackman himself has never drawn a districting plan and admits that no legislature has ever attempted to draw a new plan that will survive Dr. Jackman's efficiency gap threshold after the first election.

It is interesting that plaintiffs complain about errors in Mr. Trende's calculations given that no such errors were found in Mr. Trende's actual report. The only errors found

in actual reports in this case were in those submitted by plaintiffs' expert. Mr. Trende discovered two significant errors made by Dr. Jackman in his report that were confirmed by Dr. Jackman during his deposition, though he claims in his reply that including statistics from an earlier version of a report is not an error. If one of the leading proponents of the efficiency gap, who authored an article on the method of vote imputation he utilizes here, has made errors in an expert report submitted in federal court, one wonders how a state legislature could ever use the efficiency gap to draw prospective plans – with or without the help of Dr. Jackman. Moreover, as briefly discussed above, Mr. Trende points out how many districting plans or individual districts, noted at the time of their enactment as obvious political gerrymanders, would escape scrutiny under Dr. Jackman's theories.

Perhaps most importantly, Mr. Trende explains, as admitted by Dr. Jackman at his deposition, that efficiency gap liability can be avoided by gerrymandering districts so that each party has an equal number of completely safe seats, without any concern for traditional redistricting principles – a reality that stands in stark contrast to plaintiffs' public position that they are only seeking "fair" and "competitive" districts. North Carolina could draw eight serpentine, solidly Republican districts that stretch from Asheville to Avon, and five similarly distended Democratic districts. If the parties split the popular vote evenly, this court would have to declare to the public that what had occurred was not, in fact, a gerrymander. Mr. Trende also points out that Dr. Jackman cannot explain how to apply his efficiency gap theory to states with six or fewer congressional districts and that, even under Dr. Jackman's theory, different thresholds for

constitutional scrutiny apply to states with 7 to 15 districts as compared to states with over 15 districts.

Trende's testimony has already been admitted and credited to some degree by the two-judge majority in *Whitford* even though that court found, without precedent, the Wisconsin legislative plans to be a partisan gerrymander. Noticeably, after admitting Mr. Trende's testimony, even the Wisconsin court rejected the efficiency gap as an independent standard for determining liability in a political gerrymander case.

The rest of the plaintiffs' objections amount to hand-waving that ignores the nature of Mr. Trende's testimony. Mr. Trende never claims to be a master R programmer (nor does the rule require him to be), nor does he claim to have never made a mistake (nor does the rule require him to be). Dr. Jackman doesn't question any of Mr. Trende's calculations, and Mr. Trende doesn't offer testimony regarding Dr. Jackman's interpretation of political science literature (nor does the rule require him to be an expert on existing political science literature). Plaintiffs' motion merely reflects the conceit among political scientists that only people with Ph.D.'s in political science are truly political experts, something that the law does not support and indeed outright rejects. *Smith v. Ford Motor Co.*, 215 F.3d. 713, 718 (7th Cir. 2000) (rejecting notion that an expert needs a Ph.D. to qualify). Mr. Trende will simply testify that, even if everything Dr. Jackman says is true, the statistic Dr. Jackman proposes for measuring gerrymandering, as applied to the real world, captures a lot of things other than gerrymandering, ignores things almost universally thought to be an integral part of gerrymandering, and will be a nightmare for courts and practitioners to implement. Mr.

Trende is more than qualified to offer such testimony, and this court should allow the testimony in.

This the 3rd day of July, 2017.

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO STRIKE THE TESTIMONY OF SEAN TRENDE AT TRIAL** 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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