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19 **IN THE UNITED STATES DISTRICT COURT**
20 **FOR THE DISTRICT OF ARIZONA**

21 Brian Mecinas, et al.,
22 Plaintiffs,
23 v.
24 Katie Hobbs, in her official capacity as
25 Arizona Secretary of State,
26 Defendant.

Case No: CV-19-05547-PHX-DJH

**ARIZONA SECRETARY OF STATE’S
SUR-REPLY IN FURTHER
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

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1 Defendant Arizona Secretary of State Katie Hobbs (the “Secretary”) respectfully
2 submits this Sur-Reply memorandum in Further Opposition to Plaintiffs’ Motion for
3 Preliminary Injunction. As the Secretary explained in her opposition, Plaintiffs’ assertion
4 of a large ballot order effect in Arizona’s partisan general elections relies on statistical
5 modeling by their expert, Dr. Jonathan Rodden, that does not apply modern statistical
6 techniques. In Plaintiffs’ reply brief (“Reply”) (Doc. 35) they seek to disqualify the
7 Secretary’s expert, Mr. Sean Trende, and object to his report in order to prevent the Court
8 from considering any of several properly calibrated statistical models—each of which
9 casts substantial doubt on the existence of a ballot order effect, let alone a large one. They
10 support their arguments with a reply report from Dr. Rodden (“Second Rodden Rep.”)
11 (Doc. 36-1) Dr Rodden’s reply report includes new and unsupported claims about how he
12 designed his original model, mischaracterizes the academic literature, and incorrectly
13 speculates about Mr. Trende’s motives. The Court should overrule Plaintiffs’ objection to
14 Mr. Trende’s report and deny the motion for preliminary injunction.

15 **I. As every court to consider this specific issue has found, Mr. Trende is**
16 **qualified to testify on the statistical analysis of elections.**

17 Plaintiffs argue that Mr. Trende is not qualified to testify for several reasons.
18 None of these reasons are persuasive.

19 *First*, Plaintiffs complain that Mr. Trende does not identify himself particularly as
20 an expert in ballot order effects and does not hold himself out as an expert in the
21 statistical analysis of elections. This is not true; Mr. Trende does hold himself as an
22 expert in the statistical analysis of elections. (Doc. 30-1) (“First Trende Rprt.”) ¶¶ 5-27.
23 Mr. Trende analyzes elections results professionally—he has “studied and written
24 extensively about demographic trends in the country, exit poll data at the state and federal
25 level, public opinion polling, and voter turnout *and voting behavior.*” *Id.* ¶ 12 (emphasis
26 added). He has also authored several books and book chapters which deal with statistical
27 analysis of elections and demographics. *Id.* ¶¶ 15-17. In other words, just like
28 Dr. Rodden, Mr. Trende has developed expertise in analyzing election results, in

1 consideration of demographics and other factors, while not having specifically written
2 about ballot order effects. He also has an advanced degree in applied statistics. *Id.* ¶ 10.

3 *Second*, Plaintiffs object to Mr. Trende’s experience and training. Mr. Trende has
4 a master’s degree in applied statistics. *Id.* ¶ 9. He is a doctoral candidate in political
5 science at The Ohio State University who has “completed all of [his] coursework and
6 ha[s] passed comprehensive examinations in both methods and American Politics.”
7 *Id.* ¶ 10.¹ Plaintiffs object that Mr. Trende, despite his years of professional work in
8 elections analysis, and advanced training in statistical analysis and political science, is not
9 qualified because he has not yet received a Ph.D. As previous courts have explained
10 while rejecting this identical attack against Mr. Trende, “neither *Daubert* nor Rule 702
11 require particular credentials or require that expert witnesses be academics or PhDs. . . .
12 Although not a social scientist, Mr. Trende has studied, written on, and analyzed voting
13 trends and political geography throughout the United States. He has developed an
14 expertise in this area, and his opinions are informative to the issues before us and are
15 helpful in conducting our analysis.” *Whitford v. Gill*, 218 F. Supp. 3d, 837, 912 n.319
16 (W.D. Wis. 2016) (internal citations, quotation marks and alterations omitted), *vacated*
17 *and remanded*, 138 S.Ct. 1916 (2018). In the three years since *Whitford* acknowledged
18 Mr. Trende’s expertise, he has obtained an advanced degree in applied statistics, and
19 completed all course work towards a doctorate in political science; in short, his already
20 strong credentials have been bolstered by further “knowledge, skill, experience, training,
21 [and] education.” Fed. R. Evid. 702.

22 Similarly, Plaintiffs object that Mr. Trende has never published any statistical
23 analysis in a peer-reviewed journal. Again, nothing requires an expert to have published
24 in a particular forum. And while Plaintiffs argue (at 5) that “Mr. Trende’s strongest
25 claim to expertise is having previously been hired as an expert,” this statement ignores
26 Mr. Trende’s advanced statistical training, his book, his book chapters, his work for
27 various election analysis websites, his teaching, his jobs with RealClearPolitics and

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¹ Plaintiffs incorrectly state that Mr. Trende is still completing his coursework.

1 Dr. Larry Sabato’s “Crystal Ball”, and his work for the Bipartisan Policy Center and the
2 American Enterprise Institute. First Trende Rprt. ¶¶ 11-21. Plaintiffs minimize
3 Mr. Trende’s record, even discounting that they cite nothing (and nothing exists) to
4 support their apparent position that experts must have a Ph.D. and have published in peer
5 reviewed journals to provide testimony.

6 Given Mr. Trende’s extensive qualifications via both his academic and
7 professional experience, it is unsurprising that courts across the country have repeatedly
8 (and all before Mr. Trende completed his master’s degree and doctorate coursework)
9 rejected attempts to disqualify him on the same grounds Plaintiffs suggest. *See Whitford*,
10 218 F. Supp. 3d at 912 n.319 (rejecting motion in limine to exclude Mr. Trende); *Ohio*
11 *Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 723 (S.D. Ohio 2016) (rejecting
12 motion in limine to exclude Mr. Trende); *Common Cause v. Rucho*, 279 F. Supp. 3d 587,
13 647 n.24 (M.D. N.C. 2018) (“We conclude that Mr. Trende’s training and experience
14 render him qualified to provide expert testimony regarding congressional elections,
15 electoral history, and redistricting, and therefore overrule League Plaintiffs’ objection.”).
16 Indeed, despite several challenges to Mr. Trende’s expertise *before* he completed his
17 master’s degree and his doctorate coursework and demonstrated his proficiency in
18 statistical analysis to The Ohio State University, no court has ever rejected his
19 qualifications as an expert. Plaintiffs also cite *Democratic National Committee v. Reagan*,
20 329 F. Supp. 3d 824 (D. Ariz. 2018), for the proposition that Mr. Trende’s opinion
21 “deserved little weight” for various reasons (see Reply at n.3); yet Plaintiffs’ own citation
22 does not support their contention here that Mr. Trende is not qualified to render an
23 opinion. Indeed, the DNC plaintiffs, who are also parties in this lawsuit, did not object to
24 Mr. Trende’s expertise, or seek to preclude his testimony in *Democratic National*
25 *Committee v. Reagan*. More importantly, the district court found in *Democratic National*
26 *Committee v. Reagan* that “some of [Mr. Trende’s] criticisms were worth considering.”
27 329 F. Supp. at 837. Here, Mr. Trende’s report presents legitimate critiques of Plaintiffs’
28 expert report and the statistical models chosen by Plaintiffs’ expert. In short, Plaintiffs’

1 attempt to disqualify Mr. Trende by simply relying on other matters where Trende
2 rendered expert opinions on different subjects is unavailing.

3 **II. Dr. Rodden's reply report is inaccurate and unpersuasive.**

4 Dr. Rodden's reply report accuses Mr. Trende of making several errors in
5 statistical analysis. However, Dr. Rodden's report relies on conclusory statements and
6 statistical claims for which he does not provide numerical support. His criticisms of Mr.
7 Trende and his defenses of his original model are also wrong.

8 First, Dr. Rodden accuses Mr. Trende of either carelessly or nefariously selecting
9 his variables. As Mr. Trende explained, he was concerned by Dr. Rodden's omission of
10 typical demographic controls in his model based on age and race, and re-ran Dr.
11 Rodden's model using the demographic controls Dr. Rodden chose to omit. First Trende
12 Rprt. ¶ 33. Mr. Trende also cited academic literature to support the use of these controls.
13 *Id.* Dr. Rodden ignores Mr. Trende's explanation of his variable choices, claims—
14 without support or citation—that these demographic controls are not necessary, and
15 accuses Mr. Trende of reverse engineering his model by hunting for the variables that
16 obtained the desired result. Second Rodden Rprt. at 6-7. Dr. Rodden's assertions are
17 wrong. To demonstrate this, Mr. Trende looked at a new model that Dr. Rodden
18 introduced in his reply report that abandons demographics entirely, added one new, non-
19 demographic variable to it, and produced a result far more skeptical of any ballot order
20 effect. *See* Second Cone-Roddy Decl. Ex. A ("Second Trende Rprt.") at 5-7. This was
21 not the model Mr. Trende used because his approach was to use the theoretically
22 important variables that Dr. Rodden had omitted without explanation. *Id.* at 9-10.

23 Dr. Rodden also accuses Mr. Trende of creating a model plagued with what is
24 known as multicollinearity. Second Rodden Rprt. at 7. In essence, multicollinearity is a
25 problem in statistical analysis when two variables are so closely associated that they
26 cannot be measured independently. Second Trende Rprt. at 11. There are multiple
27 statistical tests that can be applied to determine whether variables are problematically
28 multicollinear; however, Dr. Rodden did not refer to any of them. Second Trende Rprt.

1 at 14-15; *compare* Second Rodden Rprt. at 4, 7. Under any academically recognized
2 approach to multicollinearity, Mr. Trende’s model is well within the acceptable ranges.
3 Second Trende Rprt. at 15-16.

4 Similarly, Dr. Rodden’s critiques of the various methodologies Mr. Trende
5 suggested to deal with a separate problem—the correlation of election results— miss
6 their mark. Mr. Trende explained that the power of a statistical model relies on
7 observations (here, the share of the vote a Democratic or Republican candidate gets)
8 being independent; this is plainly not the case in election returns. First Trende Rprt. ¶ 42.
9 In particular, it is necessary to adjust a model for this problem when a treatment effect
10 (here, ballot order) is applied to a cluster of observations. *Id.* This is precisely what
11 happens here—under Arizona’s Ballot Order Statute (A.R.S. § 16–502(E)), ballot order is
12 determined at the county level for all elections within the county.

13 Notably, Dr. Rodden does not dispute this—Dr. Rodden appears to agree. *See*
14 Second Trende Rprt. at 20 (noting Dr. Rodden’s apparent acknowledgment of the
15 critique). Instead, he complains that the four techniques Mr. Trende used are either
16 inappropriate in elections analysis or were used incorrectly by Mr. Trende. Second
17 Rodden Rprt. at 8-19. These critiques fail on the merits. Second Trende Rprt. at 25-36.
18 But even if they did not, Dr. Rodden never responds to the central issue: he is treating
19 elections outcomes as independent, which artificially increases the number of
20 observations. As Mr. Trende observed, this allows Dr. Rodden to have “false confidence
21 in the test power, when in reality [he is] simply decreasing the accuracy of the estimated
22 ‘margin of error.’” First Trende Rprt. ¶ 54.

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III. Conclusion.

Mr. Trende is fully qualified to testify as an expert. His opinions are supported by a robust academic literature and well-reasoned statistical choices. They demonstrate that Plaintiffs have not offered proof that a large ballot order effect exists in Arizona for partisan, general elections. The Plaintiffs’ Motion for a Preliminary Injunction should be denied.

Respectfully submitted this 21st day of February, 2020.

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