UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:08-21243-CIV-ALTONAGA

LEAGUE OF WOMEN VOTERS OF FLORIDA;
FLORIDA AFL-CIO; and MARILYNN WILLS;

Plaintiffs,

v.

KURT S. BROWNING, in his official capacity
as Secretary of State of the State of Florida; and
DONALD L. PALMER in his official capacity as
Director of the Division of Elections within the
Department of State for the State of Florida;

Defendants.
____/

DEFENDANTS' MOTION TO STRIKE EXPERT
DECLARATIONS AND MOTION IN LIMINE

Kurt S. Browning, in his official capacity as Secretary of State of the State of Florida, and Donald L. Palmer, in his official capacity as Director of the Division of Elections, respectfully move the Court to strike the expert declarations of Donald P. Green (Docs. 24-5 and 55-3) and Michael P. McDonald (Doc. 55-2) and to enter an order in limine to preclude their testimony at the hearing on Plaintiffs' Motion for Preliminary Injunction scheduled to begin on June 18, 2008.

Introduction

In this action, Plaintiffs seek a preliminary injunction prohibiting the enforcement of Section 97.0575, Florida Statutes, which imposes responsibilities on third-party groups that take possession of the voter registration applications of others. In support of their demand for an exemption from meaningful accountability, Plaintiffs argue that the challenged law is

unconstitutionally vague and that, by attaching consequences to their nonexpressive conduct, it deters them from engaging in protected speech and violates the First Amendment.[1] The declarations executed by Plaintiffs' expert witnesses—Professors Donald Green and Michael McDonald—have no relevance to the merits of either claim and will not assist the trier of fact in understanding the evidence or determine any fact in issue. Moreover, Professor Green's opinions are pure conjecture unsupported by any verifiable methodology. For these reasons, the Court should strike the declarations of Professors Green and McDonald and preclude their testimony at the scheduled hearing.

Argument

To be admissible, expert testimony must, *inter alia*, "assist the trier of fact to understand the evidence or to determine a fact in issue." *See* Fed. R. Evid. 702; *accord United States v. Smith*, 122 F.3d 1355, 1358 (11th Cir. 1997) ("Expert testimony that does not assist the trier of fact can be excluded . . . ."). Thus, "expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person." *United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004) (en banc) (citing *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985)). By contrast, expert testimony "is properly excluded when it is not needed to clarify facts and issues of common understanding which [the trier of fact is] able to comprehend." *Hibiscus Associates Ltd. v. Bd. of Trustees of Policemen and Firemen Retirement Sys. of City of Detroit*, 50 F.3d 908, 917 (11th Cir. 1995). "[E]xpert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262-63 (citing 4 *Weinstein's Federal Evidence* § 702.03[2] [a]).

[1] For reasons not articulated, Plaintiffs do not advance the third count of their Complaint—a claim predicated on the constitutional right to vote of the organizations' members—at the preliminary injunction stage of this proceeding. *See* Doc. 24.

In addition, to assist the trier of fact, expert testimony must be "relevant to the task at hand," such that it "logically advances a material aspect" of the case. *McDowell v. Brown*, 392 F.3d 1283, 1298-99 (11th Cir. 2004). There must be "an appropriate 'fit' with respect to the offered opinion and the facts of the case." *McDowell*, 392 F.3d at 1299 (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 591 (1993)). "The party offering the expert must present the witness' proposed testimony in a form that persuades the trial court that the testimony will in fact assist the trier of fact." *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1113 (11th Cir. 2005); *accord McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir.2002) ("The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion . . . .").

Expert testimony must not only assist the trier of fact, it must be reliable. *See* Fed. R. Evid. 702. District courts "have substantial discretion in deciding how to test an expert's reliability." *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005) (quoting *United States v. Majors*, 196 F.3d 1206, 1215 (11th Cir. 1999)). "*Daubert* instructs courts to consider the following factors: (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." *McCorvey*, 298 F.3d at 1256 (citing *Daubert,* 509 U.S. at 593-94). This "test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). Under this standard, a trial court is required "to conduct an exacting analysis of the proffered expert's methodology." *McCorvey*, 298 F.3d at 1257.

This Court has recently excluded expert testimony for its failure to assist the trier of fact. In *Owaki v. City of Miami*, 491 F. Supp. 2d 1140, 1160 (S.D. Fla. 2007), a protester sued the City of Miami and individual police officers in connection with an alleged battery in violation of the protester's civil rights. The plaintiff submitted the declaration of an expert—a retired police commander—who opined that the City should not have chosen the 36-inch baton in question, that the baton had limited capabilities and gave rise to an increased risk of injury, that the officers received insufficient training and supervision, and that the City improperly handled the protest situation. *Id*. at 1161-63. Judge King concluded that the expert's opinions did "not assist the trier of fact in its determination of the question at issue: whether the Miami Police Department's decision to use the 36 inch baton . . . was based on a deliberate indifference to the rights of the protesters." *Id*. at 1161. Because the expert offered opinions on matters only peripherally related to the question before the Court, it was "unhelpful" and inadmissible. *See id*.

Similarly, in *Martinez v. Rabbit Tanaka Corp. Ltd.*, No. 04-61504-CIV-ALTONAGA, 2006 WL 5100536 (S.D. Fla. Jan. 6, 2006), the plaintiffs alleged that the defendants tortiously interfered with a business relationship by improperly utilizing holographic products designed by the plaintiffs. In granting summary judgment for the defendants, the Court disregarded expert reports submitted by the plaintiffs to establish damages. The initial report, the Court explained, relied "on no discernible methodology at all." *Id*. at *13. Instead, its estimate of damages turned on "a wide variety of assumptions" that were not "'testable' or independently verifiable" and were "unsupported by market data or research." *Id*. Noting that the significance of an opinion is "proportioned to the sources that sustain it," *id*. at *14 (quoting *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 170 N.E. 479, 483 (N.Y. 1930) (Cardozo, J.)), the Court concluded that the expert's "ultimate opinion on damages amounts to nothing more than

his own *ipse dixit*," *id*. at *14. The Court also concluded that the proferred testimony did not assist the trier of fact because it advanced opinions that did not require the application of expertise. *Id*. at *15. The "opportunity for vigorous cross examination and the presentation of contrary evidence alone provide no basis for admitting expert testimony which falls well below the standard for expert testimony envisioned under the Federal Rules of Evidence." *Id*.

The declarations submitted by Plaintiffs present the same deficiencies. None addresses the issues actually before the Court or assists the trier of fact's evaluation of the evidence. Professor Green's declarations, moreover, reflect his own uncorroborated reasoning and are unsupported by any testable or verifiable methodology. Because the declarations fall "well below the standard for expert testimony envisioned" by the federal rules, they must be stricken.

Donald P. Green

The Green declarations are not relevant to the task at hand and exhibit an insufficient "fit" between the opinions expressed and the issues in dispute. The primary opinion expressed by Professor Green is that voter registration drives conducted by third-party groups tend to increase voter turnout.[2] *See* Green Decl. ¶¶ 6-7, 16-18. This opinion has no bearing on Plaintiffs' claims. Any tendency of voter registration drives to increase voter turnout—or to produce any other effect that might be socially or politically beneficial—is irrelevant to whether the collection and submission of applications is protected conduct and, if so, whether the State of Florida nevertheless has a legitimate interest in protecting its citizens' right to vote. The pros and cons of voter registration drives are not on trial, and the perceived civic utility of third-party

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[2] According to Professor Green, voter registration drives increase voter turnout by decreasing the "transaction costs" of voter registration, establishing personal relationships between volunteers and applicants, enabling third-party groups to create databases of potential voters, and priming applicants for subsequent get-out-the-vote efforts. *See* Green Decl. ¶¶ 6-7, 16-18.

registration activities does not affect the constitutionality of the challenged law. "The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *Meyer v. Grant*, 486 U.S. 414, 419 (1988) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

The remaining opinions expressed in Professor Green's first declaration are equally unhelpful to a trier of fact. Professor Green suggests that the physical collection of voter registration applications itself communicates a message, *see* Green Decl. ¶ 8, but this suggestion is a matter of legal argument and not expert opinion. (It also conflicts with Plaintiffs' position in this case. *See* doc. 55 at 7 ("Plaintiffs are not seeking First Amendment protection for their collection of voter registration forms but rather for their protected speech and association that is intertwined with their voter registration drives.")). Professor Green likewise opines that third-party groups will cease to conduct voter registration activities if the handling of voter registration applications is subject to regulation. *See* Green Decl. ¶¶ 13-15. This opinion, however, is little better than an unverifiable extrapolation of fact testimony offered by Plaintiffs' lay witnesses—testimony which the trier of fact can evaluate without expert assistance. It is also irrelevant. That a statute might in practice "chill" speech does not prove its facial unconstitutionality. Rather, in the context of a First Amendment facial challenge, the theoretical danger of chilled speech provides an analytical basis for the application of the overbreadth standard instead of the usual *Salerno* standard. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). And, under the overbreadth standard, the question is whether the challenged law "reaches a substantial number of impermissible applications," *New York v. Ferber*, 458 U.S. 747, 772 n.27 (1982)—not whether or to what extent a statute induces a subjective and self-created chilling effect.

Professor Green's supplemental declaration similarly fails to assist the Court's evaluation of the evidence and determination of issues of fact. It posits that voter registration drives involve conversations and discussions. *See* Green Supp. Decl. ¶ 2. This statement constitutes fact testimony and merely echoes the testimony of Plaintiffs' fact witnesses. *See*, *e.g.*, Giliotti Decl. ¶¶ 14-15, 22-25; Wills Decl. ¶ 9. It also suggests that there is symbolic meaning in the emphasis placed by third-party groups on the registration of individuals of targeted demographics, *see* Green Supp. Decl. ¶ 4, but this position—which is pure legal argument—is not advanced by Plaintiffs. Plaintiffs do not argue that their conduct is expressive, but that their post-collection handling (or mishandling) of voter registration applications derives constitutional protection from the speech involved in voter registration drives. *See* doc. 55 at 7. Finally, Professor Green's assertion that voter registration drives encourage the civic participation of communities that might otherwise be less apt to register to vote—like his assertion that voter registration drives increase turnout—might reflect policy considerations or social benefits but is simply irrelevant to whether the challenged law violates the Constitution. *See* Green Supp. Decl. ¶ 5.[3]

Professor Green's declarations are a mixture of legal argument, fact testimony, and subjective opinions concerning social utility that will not assist the trier of fact to evaluate the evidence and determine issues of fact. To the extent that the declarations contain opinions, the opinions are unrelated to the legal claims before the Court and appear to rest solely on Professor

[3] The challenged law's impact on minority communities might have been relevant to the United States Department of Justice's preclearance of the challenged law under Section 5 of the Voting Rights Act, but it is not relevant to Plaintiffs' claims in this case. Indeed, Plaintiffs' counsel urged the Department of Justice to deny preclearance on precisely this ground. *See* Letter with attachments from Brennan Center to John K. Tanner, Civil Rights Division, U.S. Department of Justice (Sep. 6, 2007) (attached as Exhibit A). The Department of Justice was not convinced and precleared the challenged law on January 23, 2008. *See* Letter from Christopher Coates, Civil Rights Division, U.S. Department of Justice to Bill McCollum, Florida Attorney General (Jan. 23, 2008) (attached as Exhibit B).

Green's own ratiocination, without any methodology, study, or investigation susceptible of verification. The Court is not required blindly to trust any expert, whatever his qualifications may be. "An expert's methodology must be consistent with the 'methods and procedures of science' rather than being founded on 'subjective belief or unsupported speculation.'" *In re Accutane Products Liability*, 511 F. Supp. 2d 1288, 1290-91 (M.D. Fla. 2007) (quoting *Daubert*, 509 U.S. at 592). Professor Green's opinions are not bottomed on testable premises and amount to unverifiable *ipse dixit*.[4] Indeed, if Professor Green's opinions are supported by an acceptable methodology, Plaintiffs have not disclosed it as required by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(a)(2)(B) (requiring "a complete statement of . . . the basis and reasons for" expert opinions). For these reasons, the Court should strike Professor Green's declarations.

Michael P. McDonald

Unlike Professor Green, Professor McDonald's methodology is apparent. His conclusions, however, have no relationship to Plaintiffs' claims and have no tendency to assist a trier of fact. Professor McDonald notes the increasing volume of voter registration in Florida and attributes that fact to an increasing population and an increased interest in voting. McDonald Decl. ¶ 5. He concludes that the rate of submission of voter registration applications increases with the approach of "campaign milestones" such as the book-closing deadlines that precede primary and general elections, *id.* ¶ 9, and opines that applicants who register to vote later—*i.e.*, with less time remaining before registration books close—are more likely to vote than those who register earlier, *id.* ¶¶ 12-13. There is no "fit"—much less an "appropriate" one—between these

[4] For example, although Professor Green states that the challenged law will reduce voter turnout, he does not provide any study or data comparing the voter turnout in states that regulate the handling of voter registration applications to those that do not. *See* Doc. 1, ¶ 47 (noting that Florida is one of nine states that "impose . . . penalties" on the failure of third-party groups to comply with statutory deadlines on the submission of voter registration applications).

opinions and the claims at issue in this litigation. As explained above, voter turnout is not material to the constitutional issues presented here. The challenged law, moreover, does not prevent any person from registering to vote at any time of year. It simply requires third-party groups that take responsibility for applications to submit them timely.[5] Testimony that shows *when* voters register and suggests a relationship between voter turnout and the timing of registration is not relevant to whether the statute is vague or whether third-party groups have a constitutional right to be free from appropriate precautions that favor the right to vote.

WHEREFORE, Defendants respectfully request entry of an order striking the expert declarations of Donald P. Green and Michael P. McDonald and precluding their testimony at the hearing scheduled to begin on June 18, 2008.

Certificate of Pre-Filing Conference

Counsel for Defendants contacted counsel for Plaintiffs on June 10, 2008, in a good faith effort to resolve the issues raised herein. Plaintiffs do not consent to the relief sought.

Respectfully submitted this 13th day of June, 2008.

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[5] Certainly Professor McDonald does not mean to argue that delays by third-party groups in submitting completed applications increase voter turnout—for example, that an applicant who completes an application in January is more likely to vote if the third-party group that takes possession of the application places it in the trunk of an automobile for nine months and submits it to election officials in October. Common sense suggests that voter turnout will not increase—indeed, it will decrease—if collected applications are not submitted at all or are submitted after the book-closing deadline or too late to permit the applicant timely to correct any errors.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Court's CM/ECF system on all counsel or parties of record on the attached service list this 13th day of June, 2008.

/s/ *Andy Bardos*
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