

published in a number of peer-reviewed academic journals, and has extensive experience working with large elections databases. He is a nationally recognized expert on empirical analysis of voting, voter behavior, and voter registration. Prof. McDonald's expert declaration is based on an analysis of the State of Florida's own official voter registration file.

Prof. Donald Green is a highly respected Professor of Political Science at Yale University, where he is also the Director of Yale's Institution for Social and Policy Studies. Prof. Green is a nationally recognized expert in the areas of elections, campaigns, and voter behavior. Prof. Green has been published in numerous academic journals, has served as a peer reviewer for every major academic journal in the field of American politics, and has won recognition for his scholarship from the National Science Foundation.

Defendants have moved to strike the expert declarations of Profs. McDonald and Green on various grounds, none of which has merit. Defendants misunderstand and mischaracterize the experts' reports and the issues to which they are relevant. Their motion is baseless and should be denied.

II. Federal Rule of Evidence 702

When reviewing a challenge to the admissibility of expert testimony under Federal Rule of Evidence 702, courts must consider whether:

(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc).

The Supreme Court has specified several factors relevant to the reliability of expert testimony, including whether an expert's theory has been tested, whether it has been subject to

peer review and publication, the error rate of the technique, and whether the expert's approach is generally accepted in the scientific community. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593-94 (1993). The test is a flexible one, and not every factor will necessarily apply to all expert witness testimony. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). The relevant reliability of certain types of testimony, for example, may come from the expert's "personal knowledge or experience." *Id.* at 151. Courts have "substantial discretion in deciding how to test an expert's reliability and whether the expert's relevant testimony is reliable." *United States v. Majors*, 196 F.3d 1206, 1215 (11th Cir. 1999) (internal quotation omitted). *See also* Fed. R. Evid. 702 advisory committee's note (2000 amendments) (expert testimony should be evaluated according to "standard principles attendant to the particular area of expertise.") (internal citation omitted).

Expert testimony must also be useful to the trier of fact. "Expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person," *Frazier*, 387 F.3d at 1262, or if it presents information "beyond the understanding and experience of the average citizen." *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985); *see also* 4 *Weinstein's Federal Evidence* § 702.02 (2008) ("Under the Federal Rules of Evidence, if the expert's evidence will assist the finder of fact in any way in determining the factual issues before it, the evidence is admissible."); *id.* § 702.03 (evidence is admissible if it helps to understand facts already in record, even if only by putting those facts in context). Additionally, for expert testimony to be helpful, there "must be an appropriate 'fit' with respect to the offered opinion and the facts of the case." *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004).

District courts have "broad latitude" in ruling on the admissibility of expert testimony. *Kumho*, 526 U.S. at 142. However, courts must be careful to not "supplant the adversary system

or the role of the jury: ‘vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.’” *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311 (11th Cir. 1999) (quoting *Daubert*, 509 U.S. at 596).

III. Prof. McDonald’s Expert Testimony is Reliable and Helpful

The Defendants have not challenged Prof. McDonald’s qualifications or the reliability of his evidence. They claim only that his declaration has no relationship to Plaintiffs’ claims. *See* Defs.’ Mot. at 8. But Defendants apparently do not understand Prof. McDonald’s declaration or its relevance to the case.

Defendants have tried to justify the Amended Law by arguing that third-party voter registration groups are responsible for large numbers of applications being filed near or on the book-closing date. They contend that such applications are less likely to be fully completed, with any errors detected and corrected, than applications filed well in advance of the closing deadline. *See* Def. Opp. at 17-18. Defendants also assert that the law furthers the State’s interest in administrative efficiency by avoiding “dramatic spikes in processing workload” allegedly caused by applications filed in the sixty days before an election. *Id.* at 18.¹

Prof. McDonald’s testimony directly undercuts the State’s defense of the challenged statute. His declaration demonstrates that the administrative burdens on elections officials are caused by other factors, including population growth and increased political interest, and not by voter registration groups who purportedly withhold registration forms until late in the election cycle. *See* McDonald Decl. ¶ 5. The surge in late registration in 2004, including registration by

¹ Defendants’ only support for the latter assertion is an extensive quotation from the factual findings of *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1327 (S.D. Fla. 2008). As argued elsewhere, the *Diaz* factual findings are inadmissible for substantive purposes and should be disregarded. *See* Plaintiffs’ Motion to Strike *Diaz* Testimony and Factual Findings [D.E. 57].

third party organizations, was simply the result of a consistent pattern of voter registration found in every presidential election cycle for the past two decades; the only difference in 2004 was the greatly increased total volume of new registrants.

Analyzing the state's data on voter registration, Prof. McDonald demonstrates that the number of applications for voter registration has increased in each of the past five presidential election years, and nearly doubled in 2004. *See* McDonald Decl. ¶¶ 4-5 and Tbl. 1. In addition, the number of registrations consistently increases dramatically around campaign milestones such as primaries, holidays, and, especially, book-closing deadlines. *Id.* ¶¶ 7-11. The spike in late registrations near book-closing—and the concurrent risk that late registrants will be unable to correct incomplete applications in time to vote, as well as the administrative tumult among Supervisors of Elections offices—can thus be explained not as the result of alleged so-called “hoarding” of registration forms by third party organizations, which significantly increased their activities in Florida in 2004, but simply as the interaction between demographic trends and longstanding registration patterns.

Prof. McDonald's expert testimony—the methodology and reliability of which Defendants do not challenge—thus tends to demonstrate that the Amended Law thus will not further the State's asserted interests. Its relevance and helpfulness cannot be disputed.

Prof. McDonald's testimony in this case adds much that would not otherwise be accessible to an average lay person. His testimony that the percentage of voter registrations occurring in the week before the book-closing deadline has remained constant across election cycles – made after statistical analysis of the Florida statewide voter registration file, which contains 11,429,024 individual records (McDonald Decl. ¶ 3) – is not a matter of common understanding, and is helpful in evaluating the State's assertion that the Law is necessary to

prevent administrative burdens like those experienced in the 2004 election, which the State suggests stemmed from third-party groups turning in applications near the book-closing deadline. *Cf. R.K. v. Kanaskie*, No. 02-61534, 2007 U.S. Dist. LEXIS 49224, at *27 (S.D. Fla. Jul. 9, 2007) (expert testimony admissible since witness’ “synthesis and subsequent analysis of numerous documents” was helpful to jury due to complexity of relevant information). Nor is this testimony “nothing more than what lawyers for the parties can argue in closing arguments.” See *Frazier*, 387 F.3d at 1262-63. Being able to evaluate the strength of the State’s proffered interest in the Amended Law will certainly help this Court to “understand the evidence or to determine a fact in issue.” *Frazier*, 387 F.3d at 1260.

IV. Prof. Green’s Expert Testimony Is Admissible

A. Prof. Green’s Reports Apply His Unparalleled Expertise to Key Factual Issues.

Prof. Green’s testimony demonstrates exactly what Defendants claim it does not: an empirically proven and academically unassailable link—indeed, an inherent interconnectedness—between voter registration activity and political speech and association. Defendants hope to exclude that testimony by mischaracterizing it. They claim that Prof. Green’s reports contain legal argument, fact testimony, and opinion that do not concern the issues in this case. But Defendants simply fail to understand the testimony and overlook its fundamental grounding in empirical research and Prof. Green’s extensive expertise in the field, and the testimony’s direct relevance to issues Defendants themselves claim are centrally important to this case.²

² Indeed, Prof. Green’s testimony in *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314, 1324-31 (S.D. Fla. 2006), was cited extensively by Judge Seitz in her opinion granting Plaintiffs’ motion for a preliminary injunction.

Defendants contend that Prof. Green’s demonstration that voter registration drives increase voter turnout “has no bearing on Plaintiffs’ claims.” However, they read Prof. Green’s report too narrowly and misstate its significance. The positive impact on voter turnout is surely one important aspect of voter registration drives—and one that is directly relevant to a challenge to a law that indisputably will *decrease* voter registration by minimizing the amount of voter registration activity, particularly when the State seeks to justify that law as a way to protect the right to vote. *See* Def. Opp. Br. at 17.³ The point is not simply that fewer registration drives mean fewer registered voters, but also that voter turnout will decrease as a direct result of the decrease in speech and association that organized voter registration inevitably entails. This is forcefully demonstrated by the relative ineffectiveness of mere distribution of registration forms, without in-person collection efforts. Green Decl. ¶¶ 6-10, 12.

The link between organized voter registration and voter turnout also bears directly on another key issue in this case in ways that Defendants further fail to appreciate: voter registration drives are successful precisely because they involve speech and association. Voter registration drives reinforce to potential applicants the importance of registering to vote, both through the symbolically significant act of reaching out to prospective voters and collecting and submitting their forms, and by fostering personal contact and direct communication between applicants and registration workers and volunteers. Green Decl. ¶¶ 6-12, 16, 18; Suppl. Green Decl. ¶¶ 2, 3, 4, 5.

Defendants dismiss Prof. Green’s testimony about the link between registration drives and political speech and association as “fact testimony.” Defs.’ Mot. at 7. But Prof. Green

³ The Defendants appear to believe Prof. Green’s declarations are relevant only to voter turnout. (Defs.’ Mot. at 5 & n.2). But Prof. Green clearly states that voter registration itself would suffer from a regulation that disincentivizes registration drives, as would voter turnout and other beneficial forms of civic participation. (Green Decl. ¶ 7.)

offers much more than that: he has testified regarding the results of his own research, the lessons of the experimental research on voting, and the general agreement among political scientists. Green Suppl. Decl. ¶ 2; Green Decl. ¶¶ 5, 6, 11. The “facts” he proffers are the results of empirical study and his own undeniable expertise regarding the relationships among registration activity, voting, the communication of political ideas, and association between those conducting registration drives and potential applicants.⁴

Similarly, Prof. Green testifies that community-based voter registration drives encourage civic participation among communities that might otherwise be less apt to register and vote. Suppl. Green Decl. ¶¶ 3-5. Defendants dismiss this testimony as a reflection of policy considerations or social benefits and not relevant to the legal issues in this case. But once again they misunderstand the testimony and, apparently, their own defense of the Amended Law. First, because Defendants characterize the third-party registration law as protecting voters who forego other registration opportunities, it is important to recognize that many voters who register through drives would not otherwise register to vote. Additionally, the fact that community-based registration groups target such communities is closely linked to the communicative and associational aspects of what they do. Because their goal is to register as many voters as possible, they often focus on communities where their success rates will be high—and they will succeed precisely because the mere fact of reaching out to those communities has important symbolic meaning. And because voter registration groups are often devoted to fostering civic

⁴ Prof. Green’s testimony is therefore totally unlike the expert submissions excluded by this Court in *Martinez v. Rabbit Tanaka Corporation*, No. 04-61504-CIV, 2006 WL 5100536 (S.D. Fla. Jan. 6, 2006), cited by Defendants. The expert in *Martinez* was not only unqualified to offer an expert opinion at all, but also relied solely on recapitulations of the facts (much of which were outside his personal knowledge and unsupported by the record) and his own unverifiable assumptions. *Martinez*, 2006 WL 5100536, at *13. Professor Green is unquestionably an expert in the relevant field, and his testimony is based on that expertise, on specific and verifiable empirical research, and on widely accepted principles of political science.

participation through voting among those who might not otherwise vote, they seek to communicate and associate with groups who historically vote in lower numbers. In short, organized voter registration drives reach out to and succeed in traditionally underrepresented communities *because* they are “without question acts of political expression.” Suppl. Green Dec. at ¶ 4.⁵

Defendants argue that Prof. Green’s expert views regarding the impact of the regulation on protected speech and association are “irrelevant” because the existence of a chilling effect “does not prove [the Law’s] facial unconstitutionality.” Defs.’ Mot. at 6. Their argument is perplexing on several levels. The existence of a chilling effect is obviously of central relevance in this case. Defendants’ novel contention that the existence of a chilling effect is relevant only to the question of which legal standard the Court should use in evaluating the “facial” aspects of Plaintiffs’ challenge is simply wrong. That the risks posed by the Amended Law have and will prevent Plaintiffs from engaging in registration activities, and thereby chill their protected speech and association, is the central constitutional injury at issue. Prof. Green’s expert report underscores both that the Amended Law will discourage registration drives and the result will be a diminution in the communication and community outreach that such drives entail. Its relevance cannot seriously be questioned, and its helpfulness on those core issues is amply demonstrated above.

⁵ The Department of Justice’s pre-clearance of the statute, which Defendants cite and append to their motion, has absolutely no relevance to this point. Not only did the Attorney General explicitly not address this issue (or any other issue relating to portions of the law that were enjoined pursuant to *LWVF I*), but the particular issues on which Prof. Green lends his expertise—the link between voter registration activity in certain communities and the communicative and associational character of that activity—was not specifically at issue.

B. *Prof. Green's Expert Testimony is Reliable.*

Finally, the Defendants have challenged the reliability of Prof. Green's opinions, charging that they are "not bottomed on testable premises and amount to unverifiable *ipse dixit*." Defs.' Mot. at 8. Additionally, the Defendants believe that his declarations should be excluded because they do not compare data across states. Defs.' Mot. at 8. n.4.

Prof. Green's declarations are based on his years of experience as a political scientist and on his extensive research and writing. He has been a professor at Yale University for nearly a quarter of a century and the Director of Yale's Institution for Social and Policy Studies for more than 20 years. *See* Green Decl. ¶ 1. He has extensively studied political campaigns, voter mobilization drives and voter turnout, and has personally participated in a wide array of partisan and nonpartisan campaigns. *Id.* ¶¶ 2, 5. He regularly teaches courses on campaigns, elections, and voter behavior; has published extensively on these topics in preeminent political science journals; has been a reviewer for every major academic journal in the field of American politics; and has presented widely at professional meetings and conferences. *Id.* ¶¶ 2-3. Prof. Green has also been honored for his work by the National Science Foundation and has been elected to the Council of the American Political Science Association and the Board of Overseers of the American Political Science Association. *Id.* ¶ 3. There can be no question that he is an expert in his field with a specialization in areas of specific relevance to voter registration.

Defendants' objections that Prof. Green's declarations are not supported by "testable premises" or particular studies or data ignores both the declarations themselves and the Supreme Court's acknowledgement in *Kumho* that different types of expert testimony may require different tests of reliability. Prof. Green cites to his own studies, writings, and experience and to the experimental literature, *see* Green Decl. at ¶¶ 6 11, 17, 18; Suppl. Green Decl. at 2, and makes clear that the opinions he expresses are based on his long experience in "studying

campaigns and voter turnout in elections at the local, state and federal level.” Green Decl. ¶ 5.

Moreover, since the expert in question here is a professor of political science providing insight into foundational principles in his field, “the relevant reliability concerns” will *necessarily* “focus upon personal knowledge or experience.” *Kumho*, 526 U.S. at 151. Prof. Green’s expertise, as demonstrated by his academic bona fides, numerous publications, and appointments to review boards of preeminent journals, more than adequately demonstrates his qualifications and the reliability of his opinions concerning general principles in political science and voter behavior. *See U.S. v. Simmons*, 470 F. 3d 1115, 1123 (5th Cir. 2006) (noting that certain areas of expertise, such as the social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies,” and that trial judges thus have broad discretion to determine reliability of testimony) (internal quotation marks and citations omitted); *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir.1996) (“Social science testimony, like other expert testimony ... must be tested to be sure that the person possesses genuine expertise in a field and that her testimony adheres to the same standards of intellectual rigor that are demanded in her professional work.”) (internal quotation marks and brackets omitted); *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (although Daubert’s gatekeeper function is applicable to all expert testimony, the Daubert factors do not extend outside the hard scientific orbit to handwriting experts); *W. Tenn. Chapter. of Associated Builders & Contractors., Inc. v. City of Memphis*, 300 F. Supp. 2d 600, 604 (W.D. Tenn. 2004) (“Social science and law do not subject studies to the same rigorous peer review of physics, chemistry, and the hard sciences. . . . [The expert’s] method has been published in many respected journals and is clearly one method accepted in the academic community.”).

Prof. Green's declarations concern principles that are widely accepted within the field of political science.⁶ See, e.g., Green Decl. ¶ 6 ("[T]here is no disagreement about the validity of this general principle..."). While the Defendants may disagree with his opinions, the proper way to challenge them in this case is not an attack on his reliability or methodology, but rather through cross-examination. See *Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); see also *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1324-25 (N.D. Ga. 2008) (rejecting challenge to social science expert on basis that expert should have conducted particular tests or experiments, and finding that testimony was reliable because it was based on expert's "undisputed area of expertise").

V. Conclusion

For the reasons stated above, this Court should deny Defendants' motion and recognize Prof. McDonald and Prof. Green as expert witnesses.

⁶ Professor Green's opinions, although focused on general principles, are nonetheless helpful to the trier of fact, since even widely accepted principles within an academic specialty nonetheless may fall outside the common understanding of an average juror. See *Landrin v. MGA Entm't, Inc.*, No. 05-21145-CIV-HUCK/SIMONTON, 2006 U.S. Dist. LEXIS 97335, at *7 (S.D. Fla. Jan. 3, 2006) (noting that Rule 702 permits "admission of expert testimony regarding general principles of a particular field, where those principles will assist the trier of fact"); see also *Owner-Operator Indep. Driver Ass'n v. USIS Comm. Servs., Inc.*, No. 04-cv-01384-REB-CBS, 2006 U.S. Dist. LEXIS 52331, at *13 (D. Co. Jul. 31, 2006) (rejecting challenge to political scientist expert witness since he had expertise "beyond the ken of a typical juror" and because objections to reliability of his testimony properly went to weight, not admissibility).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 12, 2008, I caused to be electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below by transmission of Notices of Electronic Filing generated by CM/ECF.

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