UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VOTER PARTICIPATION CENTER and CENTER FOR VOTER INFORMATION,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia; SARA GHAZAL, JANICE JOHNSTON, EDWARD LINDSEY, and MATTHEW MASHBURN, in their official capacities as members of the STATE ELECTION BOARD,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; and GEORGIA REPUBLICAN PARTY, INC.,

Intervenor-Defendants.

Case No. 1:21-cv-01390-JPB
Judge J.P. Boulee

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RESPONSE IN OPPOSITION TO STATE DEFENDANTS' RENEWED MOTION TO EXCLUDE THE TESTIMONY AND OPINIONS OF PLAINTIFFS' EXPERT DONALD P. GREEN, PHD

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INTRODUCTION

To assist this Court, Plaintiffs have provided evidence from expert witness Dr. Donald Green, a preeminent scholar in the fields of voter behavior, devising get-out-the-vote efforts, studying language usage on voting-related materials, and quantitative and qualitative research methods. Defendants' own rebuttal expert recognizes Dr. Green as a "luminary in the field." Deposition of Justin Grimmer, Ph.D. (Sept. 20, 2022) ("Grimmer Depo.") 52:8-15, 54:8-25; *see also id.* 179:7-20. Dr. Green applied his decades of experience studying, teaching, and consulting on these subjects to apply his specialized experience to SB 202's Ballot Application Restrictions. He also applied academic literature and the outcomes of quantitative studies to form his opinions in this case.

In his expert report, Dr. Green concludes, *inter alia*, that the challenged provisions (1) increase transaction costs for voting, especially in relation to absentee ballot applications, potentially risking decreased voter participation, Expert Report of Donald Green, Ph.D. (Mar. 21, 2022), ECF No. 103-5 at 3-4, 9-11 ("Report"); (2) reduce the effectiveness of mailings, including those distributed by Plaintiffs, in generating vote-by-mail requests, by prohibiting pre-filled applications forms, *id.* at 8-9; and (3) are likely to deter organizations from engaging in mail campaigns, thus affecting voter participation, by restricting the distribution of vote-by-mail forms to

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certain recipients, *id.* at 9-11.[1] His conclusions provide the Court additional insight into how the challenged provisions adversely affect civic organizations and the voters those organizations seek to persuade to action.

Defendants nevertheless seek to exclude the testimony of an expert whom they agree is eminently qualified to testify about the effects of the Ballot Application Restrictions on voter behavior. They do so by misapplying the applicable law holding that the Federal Rules of Evidence's already "liberal thrust," *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588 (1993), is "even more relaxed in a bench trial situation," *United States v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005), where there is no risk of expert testimony unduly misleading a jury.

Defendants' challenges to the reliability and helpfulness of Dr. Green's methods improperly discount his relevant expertise and mischaracterize the value and relevance of his opinions to this case. Fundamentally, to the extent that they hold any merit, Defendants' concerns about Dr. Green's opinions are best addressed through cross-examination at trial—not wholesale exclusion. As other courts have done, this Court should reject Defendants' effort to exclude Dr. Green's opinions and should instead follow the line of other election-related cases that have admitted and appropriately weighed Dr. Green's testimony. *See*, *e.g.*, *LWV of Fla. v.*

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[1] Dr. Green also concluded that SB 202's disclaimer requirement is likely to create confusion among voters. *See* Report at 6. However, the disclaimer provision is no longer at issue in this case.

Browning, No. 08-21243-CIV, 2008 WL 10943239, at *1 (S.D. Fla. June 19, 2008); *LWV of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1309 (S.D. Fla. 2008); *LWV of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1324-25 n.10, 1331, 1331 n.20 (S.D. Fla. 2006); *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 248 (D.D.C. 2003); *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 133 (D. Conn. 2005). Accordingly, Defendants' Motion should be denied.

LEGAL STANDARD

A witness "who is qualified as an expert by knowledge, skill, experience, training, or education" may offer opinion testimony if (1) the expert's knowledge "will help the trier of fact to understand the evidence"; (2) "the testimony is based on sufficient facts or data"; (3) "the testimony is the product of reliable principles and methods"; and (4) "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702. Such expert witnesses "must be qualified to testify" on the matters they address, their conclusions must rest on reliable methodologies, and the "testimony must assist the trier of fact… to understand the evidence." *Adams v. Lab. Corp. of Am.*, 760 F.3d 1322, 1328 (11th Cir. 2014) (citing *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010)).

Admitting expert testimony, subject to the traditional safeguards of trial, is the general rule, while excluding it is the exception. *See Brown*, 415 F.3d at 1267. Even if part of an expert's testimony is found to be based on unreliable methodology, the

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court should allow those parts that are reliable and admissible. *United Fire and Cas. Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1342 (11th Cir. 2013); *see also Graham v. Ethicon Inc.*, No. 4:20-CV-00245-JPB, 2021 WL 5029433, at *4 (N.D. Ga. Aug. 26, 2021) (admitting some parts of testimony).

ARGUMENT

Defendants' motion to exclude Dr. Green's testimony is fundamentally flawed in three ways. First, as in their prior failed *Daubert* motion against Dr. Green, Defendants continue to conflate the different expert gatekeeping standards between a bench trial and a jury trial, incorrectly applying the more stringent jury-trial standard rather than the more relaxed bench-trial standard. Second, they attempt to hamstring the expertise of a foremost academic in the field of voting behavior by claiming he categorically cannot draw on his years of specialized expertise to form his opinions. Third, Defendants erroneously and inflexibly seek to impose standards for evaluating scientific studies to Dr. Green's analysis while ignoring the relevance and helpfulness of his opinions to this Court.

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I. Defendants mischaracterize the applicable *Daubert* analysis.

In asking this Court to exclude Dr. Green's opinions, Defendants erroneously assert a more "exacting" gatekeeping standard applied to cases with jury factfinders, incorrectly quoting jury-trial case law without acknowledging its inapplicability. Defs.' Br. ISO Renewed Mtn. to Exclude, ECF No. 187-1 at 8-9, 13-15 ("Def. Br.").

The Eleventh Circuit has made clear that, in bench trials, "[t]here is less need for the gatekeeper to keep the gate when [he] is keeping the gate only for himself." *Brown*, 415 F.3d at 1269; *accord In re Teltronics, Inc.,* 904 F.3d 1303, 1312 (11th Cir. 2018).[2]

Because in "a bench trial, the district court [is] not only the gatekeeper but also the factfinder," *Brown*, 415 F.3d at 1269-70, any concerns about an expert are best addressed through "vigorous cross-examination," rather than wholesale exclusion of the expert's testimony. *RLI Ins. Co. v. OutsideIn Architecture, LLC*, No. 8:20-CV-2395-CEH-AEP, 2023 WL 5840590, at *9 (M.D. Fla. Sept. 11, 2023); *Brown*, 415 F.3d at 1270 ("Questions about the weight given to testimony, as distinguished from the issue of its admissibility, are for the factfinder."); *see also Van Alen v. Dominick & Dominick, Inc.*, 560 F.2d 547, 552 (2d Cir. 1977) (finding

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[2] For this reason, courts rarely exclude expert testimony during bench trials. *See, e.g.*, *Ass Armor, LLC v. Under Armour, Inc.*, No. 15-CV-20853-CIV, 2016 WL 7156092, at *4 (S.D. Fla. Dec. 8, 2016) ("As this is a bench trial without a jury, however, the need for an advance ruling to exclude [the expert's] testimony is superfluous and unnecessary."); *Joseph S. v. Hogan*, No. 06 Civ. 1042 BMC SMG, 2011 WL 2848330, at *2 (E.D.N.Y. July 15, 2011) (holding that, unless "the expert testimony amounts to pure speculation . . . expert testimony should be admitted so that the Court could have the benefit of live testimony and cross-examination to determine how much weight, if any, to give to the expert's conclusions"); *Victoria's Secret Stores Brand Mgmt. v. Sexy Hair Concepts, LLC*, No. 07 Civ. 5804, 2009 WL 959775, at *6 n.3 (S.D.N.Y. Apr. 8, 2009) ("[W]here a bench trial is in prospect, resolving *Daubert* questions at a pretrial stage is generally less efficient than simply hearing the evidence . . . ."); *see also Porras v. United States*, No. 8:21-CV-423-JSS, 2022 WL 2073006, at *2 (M.D. Fla. June 9, 2022) (collecting cases).

it "more prudent" to admit even testimony that is "doubtfully admissible," as the court is free to determine how much weight the expert testimony should be accorded in the court's capacity as factfinder).

Defendants rely on *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC* to assert that an expert can, in unusual circumstances, be excluded from a bench trial but fail to demonstrate why that possibility would necessitate Dr. Green's exclusion here. 746 F.3d 1008 (11th Cir. 2014). Unlike Dr. Green's analysis, the expert's analysis in *Winn-Dixie* "analyz[ed] the wrong problem and therefore [did] not assist the trier of fact to determine a fact in issue in [the] case." *Id.* at 1028. The expert in *Winn-Dixie* was also excluded because she selectively used some data from time periods supporting her conclusion but not others and drew arbitrary distinctions in her analysis. *Id.* Defendants do not, and cannot, level any similar critique against Dr. Green's analysis.

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Defendants' other cited cases similarly counter against the pre-trial rejection of Dr. Green's testimony. *See Brown*, 415 F.3d at 1270 (holding the district court did not abuse its discretion in a bench trial when it admitted questionable expert testimony but chose to give it little weight); *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1237-38 (11th Cir. 2005) (finding a district court that, prior to a jury trial, found it "lacked sufficient knowledge on the scientific subject matter" pertinent in a toxic tort case had improperly admittedly expert testimony where it "disavowed its

ability to handle the *Daubert* issues" prior to a jury trial upon the court finding); *State of New York v. United Parcel Serv., Inc.*, No. 15-CV-1136 (KBF), 2016 WL 4735368, at *8 (S.D.N.Y. Sept. 10, 2016) (excluding expert testimony only where expert "lacks the qualifications to design and conduct the survey that forms the basis of his report," "fall[ing] well short of the basic requirements set forth in *Daubert* to assist the Court in assessing reliability").

Moreover, the plaintiffs' *Daubert* filing in *VoteAmerica v. Schwab* is no more helpful to Defendants. There, the Kansas plaintiffs' reasoning for exclusion was fundamentally different as they argued the state defendants' witness "lack[ed] the training or experience to draw statistical conclusions about VPC's mailing list" and "ha[d] extremely limited professional experience [with] election issues." *See* Mem. of Law in Support of Pls.' Mot. Exclude at 1, *VoteAmerica v. Schwab*, No. 2:21-cv-02253-KHV-GEB, 2022 WL 18231134, ECF No. 149 (D. Kan. Oct. 15, 2022) (attached as Exhibit A). Here, by contrast, all agree Dr. Green is "qualified in his field." *See* Def. Br. at 8. Even despite that distinction, the *Schwab* Court ultimately denied the Kansas plaintiffs' motion to exclude during a telephone conference, stating that the expert "will testify" although the plaintiffs and the court "may disagree with his conclusions." *See* Teleconference Tr. at 5:22-24, *VoteAmerica v. Schwab*, No. 2:21-cv-02253-KHV-GEB, ECF No. 175 (D. Kan. Jan. 30, 2023) (attached as Exhibit B). Contrary to Defendants' argument, the *Schwab* Court's

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ruling in fact confirms that exclusion of Dr. Green, whose qualifications are not in question, is unwarranted.

Finally, no matter which gatekeeping standard the Court applies to Dr. Green's testimony, "[t]he inquiry envisioned by Rule 702 is . . . a flexible one." *Daubert*, 509 U.S. at, 594. By misconstruing the Daubert analysis as a rigid test for experts such as Dr. Green, Defendants repeat the same mistake of "view[ing] . . . the reliability requirement . . . too narrow[ly]" as they have made in prior unsuccessful efforts to exclude social-science testimony in election litigation. *See*, *e.g.*, *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-cv-5391-SCJ, 2020 WL 13561776, at *6 (N.D. Ga. Dec. 4, 2020). Just as the district court did with respect to the plaintiffs' qualitative experts in *Fair Fight*, the Court here should reject the unwarranted stringency of Defendants' claimed Daubert standard. *See id.*

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II. Dr. Green's qualifications are relevant to his admissibility.

Defendants do not dispute that Dr. Green is qualified in the topics on which he opines, admitting that his "expertise lies in the area of voting behavior, public opinion, elections, research design, and statistical analysis," and that he is a published author on these topics. Def. Br. at 11. Rather, Defendants incorrectly assert that Dr. Green's experience has not been connected to the facts of the case and is insufficient absent some sort of unspecified study or methodology. *Id*. Not so.

Defendants initially argue that "neither [Dr. Green] nor Plaintiffs have

connected that experience to the facts of this case." But Dr. Green explicitly testified that his expertise in political science, public opinion and political psychology, as well as his "extensive experience studying efforts to register and mobilize voters," Report at 3, enabled him to observe the effects of the Ballot Application Restrictions by surveying the relevant literature and prior experiments to understand how the restrictions would impact voter behavior. *See also*, *e.g.*, P.I. Hearing Day 1 at 218:20-219:20; 232:6-15. Specifically, Dr. Green relied on his publication Get Out the Vote—"a compendium of literally hundreds of randomized trials spanning a wide array of different topics from voter registration to voter turnout, messaging, different kinds of tactics and summarizing for a general audience the implications of those experiments," *id.* at 203:5-16—to understand the "mechanics of actually issuing mass amounts of direct mail." *Id.* at 278:11-21; *see also* Report at 1. Dr. Green also relied on his knowledge of and experience testing transaction costs for potential voters in analyzing SB 202's restrictions. *See*, *e.g.*, P.I. Hearing Day 1 at 213:22-214:10; 229:10-17. Dr. Green has repeatedly articulated how his expertise allows him to observe the effects of the Ballot Application Restrictions.

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Defendants' next assertion that Dr. Green forwent the research methodologies he used in other settings and instead provided his own impressions of the statute is similarly inaccurate. ECF 187-1 at 11. Dr. Green's opinions were not formed in a vacuum; they are formulated based upon his depth of prior knowledge and expertise,

as is appropriate for a qualified social science expert. *See Treminio v. Crowley Maritime Corporation*, No. 3:22-CV-00174-CRK, 2023 WL 8004591, at *3 (M.D. Fla. Nov. 17, 2023) (*citing Carrizosa* ***v****. Chiquita Brands Int'l, Inc*., 47 F.4th 1278, 1318 (11th Cir. 2022)). Indeed, as numerous courts within the Eleventh Circuit have recognized, where "testimony is based on a social science," as it is here, "'professional study or personal experience' is a proper base for expert testimony." *Banks v. McIntosh Cty*., No. 2:16-cv-53, 2020 WL 6873607, at *3 (S.D. Ga. Nov. 23, 2020) (quoting *Maiz v. Virani*, 253 F.3d 641, 669 (11th Cir. 2001)); *see also Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381, 1386 (M.D. Ala. 2014) (because an expert has specialized experience engaging in the studied tasks, he "is qualified by virtue of his experience to discuss the nature of" the tasks "and his perception of their value"). The admissibility of Dr. Green's testimony can be underpinned by "'other indicia of reliability' including 'professional experience, education, training, and observation.'" *Treminio*, No. 3:22-CV-00174-CRK, 2023 WL 8004591, at *3 (M.D. Fla. Nov. 17, 2023) (quoting *Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278, 1318 (11th Cir. 2022)).

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Here, there is no dispute that Dr. Green's professional experience, education, training, and observation qualifies him to testify about the empirical effects of the Ballot Application Restrictions on voter behavior. *See* Def. Br. at 11. Far from *ipse dixit*, Dr. Green's experience led him to render an opinion about the effects of the

Ballot Application Restrictions on Georgia voters. "Opinions grounded in professional literature can form the basis of an expert's opinion where the opinions are rationally and consistently drawn from those accepted texts." *Treminio*, 2023 WL 8004591, at *4. Dr. Green reliably reaches his opinions by applying his experience with formulating ballot initiative and voting material wording and their effects on voters to the facts here. *See, e.g.*, P.I. Hearing Day 1 244:13-19, 217:14-219:17, 228:12-16; Deposition of Donald P. Green, Ph.D. (October 4, 2022) ("Green Depo.") 160:2-161:19; Report at 3.

Specifically, Dr. Green undertook an analysis of the relevant experiments and literature in voting behavior to assess the effects of the Ballot Application Restrictions. *See, e.g.*, Report at 1-2, Green Depo. 89:18-90:12, 164:16-165:17. Based on his experience observing voter behavior in casting and applying for absentee ballots, Dr. Green determined that a quantitative study of the impact of the Ballot Application Restrictions was not necessary to form his opinions, much as "you don't need a randomized trial if you want to know whether striking a match creates a flame." Green Depo. 70:1-6. In other words, the effects of the Ballot Application Restrictions were already observable to Dr. Green based on the font of prior literature and experiments observing the effects of interventions in the absentee ballot process. *See id.* at 165:18-166:17.

The reliability of Dr. Green's methods is further reinforced because

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Defendants' expert, Dr. Grimmer, used "the same general … approach" based largely on his experience and review of published studies to reach his contrary opinions. *Adams*, 760 F.3d at 1330. Despite his criticisms, Dr. Grimmer also attempted to apply principles from the academic literature in different contexts to the facts here, at times relied solely on his experience, and drew conclusions from his "own reading of the [absentee application] form." *See*, *e.g.*, Grimmer Depo. 68:6-72:13, 94:9-16, 104:9-17. And he agrees based on his own research work and a review of the same Mann & Mayhew study on which Dr. Green relies that decreasing transaction costs in the voting process can improve voter engagement. *Id.* 64:9-66:2; 221:4-223:12. While Plaintiffs do not agree with all of Dr. Grimmer's conclusions, Plaintiffs acknowledge that, like Dr. Green, he is qualified and the Court's gatekeeper role does not require wholesale excluding his opinions. Rather than an issue with reliability, disagreements between Dr. Green and Dr. Grimmer "present[] a classic 'battle of the experts'" that the Court can resolve by affording the testimony its appropriate weight. *Teltronics*, 904 F.3d at 1313.

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Dr. Green's expertise and analysis ultimately informed his opinion that the Ballot Application Restrictions increased transaction costs to voting that are created by imposing restrictions to the absentee ballot process. *See* Report at 3-6, 8-11, P.I. Hearing Day 1 at 205:17-212:3. In sum, Dr. Green's qualifications underscore the admissibility of his testimony, far from undermining it. Contrary to Defendants'

claims, Dr. Green's testimony does not offer a plain-text interpretation of the statutory language, but rather opines on the likely effects of that text on voter recipients and the persuasiveness of get-out-the vote mailers. *See, e.g.*, Green Depo. 123:15-22, 160:2-162:7, 165:8-17; P.I. Hearing Day 1 220:18-22.

III. Dr. Green's opinions are reliable and helpful to the Court.

Dr. Green's opinions concerning SB 202's Prefilling Prohibition and Mailing List Restriction are reliable and helpful to the Court in its role as factfinder. In addition to the legal defects described above, Defendants' arguments challenging these opinions misconstrue the applicable standard, take an incomplete view of the record, improperly attack Dr. Green's conclusions instead of his methodology, and attempt to penalize Dr. Green's candor—which only adds to his credibility. The Court should reject these arguments.

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The reliability analysis here that considers Dr. Green's qualitative-focused social science opinions in a bench trial context is not as stringent as Defendants demand. *See supra*, Part II. And, "[w]hen assessing the reliability of expert testimony, considerations pertinent to 'hard' science are inapplicable to social sciences that require expertise through knowledge and experience." *Treminio*, 2023 WL 8004591, at *3 (*citing Carrizosa*, 47 F.4th at 1318). Thus, Defendants' cherry-picked quotations of non-analogous jury-trial cases, especially those considering

scientific and medical expert analysis, are inapposite. Def. Br. at 13-15.[3]

Dr. Green's opinions are also helpful. For *Daubert* purposes, this inquiry is straightforward: whether the expert's opinions are "beyond the understanding of the average lay person." *United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004). As this Court held (and as Defendants agree, *see* Def. Br. at 14), the question is essentially one of relevance. *Graham*, 2021 WL 5029433, at *4. Expert testimony is helpful and relevant if it is "useful to give the court a framework … within which it could understand the experiences described by fact witnesses." *Strange*, 33 F. Supp. 3d at 1393. It "need not prove the plaintiffs' case" by itself but can "merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 564-65 (11th Cir. 1998).

As described below, Dr. Green's testimony does just that by providing additional context to the Court for Plaintiffs' claims both that the distribution of personalized absentee ballot applications is their most effective means of

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[3] For example, Defendants rely on *Allison v. McGhan Medical Corp.*, 184 F.3d 1300 (11th Cir. 1999), concerning a products liability case demanding a jury trial where the court excluded expert medical scientific testimony and consequently granted summary judgment. They cite *Cooper v. Marten Transp.*, No. 1:10-cv-03044-JOF, 2012 WL 12835704 (N.D. Ga. June 4, 2012), where the court in a jury trial case excluded a biochemical engineer whose testimony lacked explanation of how he arrived at his medical causation analysis and admitted speculating key facts. And they refer to the inapposite decision in *Frye v. Daimler Trucks North America, LLC*, No. 1:18-cv-04827-JPB, 2021 WL 4241658 (N.D. Ga. Mar. 11, 2021), in which this Court excluded a proposed electrical engineering witness from testifying before a jury about a product warning label.

communicating their pro-mail voting message, and that the Mailing List Restriction is infeasible and severely hinders civic organization's mail-voting advocacy. Thus, Dr. Green satisfies the reliability and helpfulness requirements under *Daubert*.

a. Prefilling Prohibition

Dr. Green's opinions concerning the Prefilling Prohibition are helpful and reliable. Defendants assert that Dr. Green failed to opine on how the Prefilling Prohibition interferes with Plaintiffs' First Amendment rights and is therefore inadmissible. Def. Br. at 18. But this misconstrues both Dr. Green's opinions and their utility to the Court in considering the constitutionality of the Prefilling Prohibition's restrictions. Indeed, Dr. Green specifically opined that civic organizations' efforts to reduce transaction costs can assist them in effectively conveying their message encouraging voters to engage in the electoral process, including through absentee voting. P.I. Hearing Day 1 206:19-22; Report at 3-8; Amended Rebuttal Report of Donald Green, Ph.D. (June 16, 2022), ECF No. 159-26 at 8-13 ("Rebuttal"). These opinions, based upon cited studies and Dr. Green's expertise in studying voting behavior, are particularly helpful to reinforce Plaintiffs' belief that distributing personalized applications is its most effective means of communicating its pro-mail voting message, which is prohibited under SB 202.

Dr. Green explained how distributing personalized applications lowers the transaction costs for recipients, making it more likely the application is submitted in

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response to receipt of the pro-mail voting communication. He described how "a person who is on the cusp of registering or casting a vote by mail or voting at all, often needs a nudge to get them to get over the behavioral threshold of doing so." P.I. Hearing Day 1 208:18-21. To reduce transaction costs in this context, "sending someone a form where they actually have the form and very often pre-populated the form, … allows them to feel more confident that they'll get through the process quickly." *Id*. 209:16-19, 238:10-12. Dr. Green concluded that such efforts aimed at "reducing the costs of voting seem[] to increase voting." *Id*. 211:20-21. Thus, he emphasized the need for sending both a persuasive cover letter and the actual prefilled application for civic organizations to effectively convey the message persuading people to vote absentee. *See* Green Depo. 78:19-82:4; Report at 3-6.

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Contrary to Defendants' characterization,[4] Dr. Green based his views on the effectiveness of personalizing absentee applications on several key factors. First, he explained that "the randomized trials that are in the public domain strongly indicate that the – that prefilled forms are more effective at both generating absentee votes and generating votes in general." Green Depo. 89:18-90:3. Dr. Green, using his

[4] Defendants insinuate that Dr. Green's analysis is lacking some sort of evaluation of Plaintiffs' specific messaging but provide no explanation of what such an evaluation would look like, nor how such an evaluation would be relevant to Dr. Green's proffered opinions. Def. Br. at 17. Indeed, they cannot. Dr. Green's testimony provides insight to the increased effectiveness of sending personalized applications to communicate Plaintiffs' pro-absentee voting message. It does not require any more specific analysis of Plaintiffs' programming.

decades of expertise, reliably examines the publicly available trials and their findings to apply them to this case. *See Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278, 1319 (11th Cir. 2022) (allowing expert testimony of social scientist who relied on publicly available statistical data, among other publicly available evidence).

Second, based on Dr. Green's experience working with civic organizations and his knowledge of their internal processes, he knows organizations are "constantly doing randomized trials on the minutia of direct mail." Green Depo. 90:4–91:1; *see also* Deposition of Thomas Lopach (Sept. 19, 2022) ("Lopach Depo.") 66:14-67:6. From his experience he recognizes that organizations conducting these randomized trials are "dead set on sending prefilled forms whenever they can" and concludes this is "strongly supportive" of his views on this tactic. Green Depo. 90:4–91:1; *see also id.* 164:16-166:17 ("the fact that [organizations conducting randomized trials] have such an overwhelming preference for prefilled applications speaks volumes to what they believe to be the effectiveness").[5] Dr. Green's application of his decades of experience working with voter mobilization organizations to the facts at issue here is sufficiently reliable.

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[5] Defendants argue that this logic is undermined by other pieces of Dr. Green's testimony considering the behaviors of campaign consultants. Def. Br. at 21; Green Depo. 57:13 – 60:21. But that is irrelevant to Dr. Green's conclusions drawn from his observation that civic organizations conducting internal randomized trials aimed at increasing the efficacy of their outreach consistently prefer to prefill the forms they send.

Third, Dr. Green applies the data and results of two published studies presenting the results of the main randomized control trials bearing on this subject—the Mann and Mayhew study of mailing election-related applications[6] and the Hassell study on prefilling practices. *See* ECF Nos. 185-4, 185-5. Dr. Green concludes from the studies that civic organizations' faith in these practices to convey their pro-absentee voting message is grounded in quantitative research. Green Depo. 90:13-91:1, 165:18-166:17; P.I. Hearing Day 1 209:20-214:22, 232:24-236:1, 271:17-24; Report at 4-6, 8-9; Rebuttal at 8-13. From the Hassell study's data in particular, Dr. Green finds a 25% uptick in the likely persuasion of civic organizations' pro-absentee voting message if their distributed applications are prefilled, and he described a nine-to-one confidence in this conclusion. *See* P.I. Hearing Day 1 212:11-214:22, 233:11-236:1; Rebuttal at 9. Courts consistently approve similar expert opinions that "form[] conclusions by extrapolating from existing data" in published studies. *See*, *e.g.*, *Encompass Indem. Co. v. Ascend Techs., Inc.*, No. 1:13-cv-02668, 2015 WL 10582168, at *11 (N.D. Ga. Sept. 29, 2015).

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[6] Defendants' assertion that the Mann and Mayhew study is irrelevant because it did not specifically consider prefilled forms misses the point. Dr. Green's reference to the Mann and Mayhew study with respect to the Prefilling Prohibition relates to his analysis of the benefit of lowering transaction costs for potential voters, a point on which the study is directly relevant. *See* P.I. Hearing Day 1 at 210:10-211:3; Report at 4-6.

Defendants accept that "[f]rom [the Hassell study's] numbers, the prefilled absentee-ballot application resulted in 25% more requests for absentee ballots than the blank forms." Def. Br. at 19 n.5. Instead of attacking the methods Dr. Green employed to reach his conclusion, they claim as a substantive matter that a 25% increase is insufficient because they argue that such a figure was deemed just below the standard for statistical significance in academic studies. Def. Br. at 19. Defendants overlook that "there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory." *Adams*, 760 F.3d at 1333 (quoting *Daubert*, 509 U.S. at 596-97). Findings from a dataset can be sufficient to support an expert's opinion in litigation even if that finding is not deemed statistically significant in an academic publication; the civil standard of proof is a preponderance, not a 95% certainty to show statistical significance.

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These opinions, and Dr. Green's rationale for reaching them, are directly relevant to this case. Plaintiffs contend that sending personalized mail ballot applications is their most effective means of conveying their core political speech, and that as such it is entitled to First Amendment protections. Dr. Green's expertise on voting behaviors and description of the value of prefilling information on election forms is "beyond the understanding of the average lay person," and helpful to the Court in its consideration of Plaintiffs' claims, regardless of whether the Court ultimately agrees with Dr. Green's opinions. *Frazier*, 387 F.3d at 1262; *see also*

Carrizosa, 47 F.4th at 1318 ("Where appropriate, social science expert testimony can give the [factfinder] a view of the evidence well beyond their everyday experience") (internal citation and quotation omitted). Defendants' remaining critiques of Dr. Green's conclusions on cost effectiveness, organizational incentives, and sourcing for prefilled voter information, *see* Def. Br. at 18-22, challenge his substantive conclusions, not his methodology. As detailed in Part I above, a *Daubert* motion is the wrong place for such arguments, which go to weight rather than admissibility.

b. Mailing List Restriction

Finally, Dr. Green's opinions concerning organizations' interests in distributing absentee ballot applications and the Mailing List Restriction are also reliable and helpful. Dr. Green explained that, similar to the Prefilling Prohibition analysis, mailing application forms reduces transaction costs for recipients and is "demonstrably more effective" than simply pointing them to a government website. Report at 3-6. He further explained how the Mailing List Restriction, particularly when tied to the significant exposure to criminal and civil sanctions, would specifically encumber civic organizations engaged in this type of absentee voting advocacy. Dr. Green again based his opinion on his decades of experience studying civic organizations engaged in get-out-the-vote efforts, applying the well-established principles of transaction costs affecting voter mobilization, and relating

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the academic literature concerning absentee mailer programs to the challenged law. *See*, *e.g.*, Report at 9-11, Rebuttal at 14-16; Green Depo. 90:13-91:1, 165:18-166:17; P.I. Hearing Day 1 at 278:13-21, 280:10-22, 209:20-214:22, 232:24-236:1, 271:17-24.

In criticizing Dr. Green, Defendants fail to explain why Dr. Green cannot reach his opinions by relying on his depth of experience working with voter mobilization groups and applying principles drawn from pertinent randomized trials and studies. Numerous decisions of courts in this Circuit have permitted similar testimony, including in election-related litigation. *Fair Fight*, 2020 WL 13561776, at *6; *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2020 WL 13561791, at *5 (N.D. Ga. Dec. 4, 2020); *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2020 WL 13561754, at *6 (N.D. Ga. Nov. 24, 2020); *Banks*, 2020 WL 6873607, at *4. As the *Banks* Court explained, it is reliable for an expert to "base[] his opinion on his more than 40 years of experience," as Dr. Green does here. 2020 WL 6873607, at *5. This includes offering experience-based testimony on "management of resources and systems" that "is frequently recognized as a social science" expression of expert testimony. *Id.* at *4. Thus, "[w]hen an expert's report has demonstrated the connection between his experience and opinions, even if not precisely explained, the report is sufficiently reliable." *Id.* at *5 (collecting cases standing for same conclusion).

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CONCLUSION

Defendants' objections go to the weight rather than the admissibility of Dr. Green's expert opinions. For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Exclude the Testimony and Opinions of Dr. Green.

Respectfully submitted,

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CERTIFICATE OF SERVICE
AND COMPLIANCE WITH LOCAL RULE 5.1

I hereby certify that I have this date electronically filed the within and foregoing, which has been prepared using 14-point Times New Roman font, with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

Dated: January 19, 2024.

/s/ Alice Huling

Counsel for Plaintiffs

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