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

VOTEAMERICA, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Secretary of State for the State of Georgia, *et al.*,

Defendants,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

Civil Action No.: 1:21-CV-1390-JPB

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Donald P. Green, PhD is the quintessential "supremely qualified expert" who the Eleventh Circuit has cautioned "cannot waltz into the courtroom and render opinions" without basing them "on some recognized scientific method.'" *McDowell v. Brown*, 392 F.3d 1283, 1298 (11th Cir. 2004) (citation omitted). Plaintiffs laud Dr. Green's virtues as "a preeminent scholar" with unimpeachable credentials but fail to grasp that Dr. Green's experience does not exempt him from connecting the dots between his professional experience and his opinions *in this case*. Indeed, Dr. Green's opinions are best summed up by his own observation that his opinions are as obvious as proving "whether striking a match creates a flame." Pls.' Resp. in Opp'n at 11 [Doc. 201] ("Opp'n"); Green Dep. 70:1–6 [Doc. 187-4]. Because such opinions are not based on any recognized scientific methodology, they should be excluded.

In their Opposition, Plaintiffs try to exempt Dr. Green from this scientific foundation requirement by arguing that social scientists are somehow different from other experts. *See* Opp'n at 10, 13, 17, 19–20, citing *Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278 (11th Cir. 2022). But they misrepresent *Carrizosa* (at 17) as "allowing expert testimony of social scientist who relied on publicly available statistical data, among other publicly available evidence," when that is *not* the standard articulated by the court. *See* 47 F.4th at 1319.

The rest of Plaintiffs' arguments (at 4–8) similarly melt under scrutiny. The fact that this case will be tried to the bench and not a jury does not obviate this Court's gatekeeping function under Federal Rule of Evidence 702. Under that Rule, the reasons to exclude Dr. Green are simple; his opinions are unmoored from any reliable scientific methodology and thus fail to satisfy the "helpfulness" standard required by Rule 702 and *Daubert*.

For example, Dr. Green's opinion on the Prefilling Prohibition is based on no more than his observation that "lots of others do it," and a single study—which, ironically, actually highlights the fallacy of his methodology. And Dr. Green's opinions on the Anti-Duplication Provision are even further detached from any reliable methodology. Plaintiffs rely (at 20–21) exclusively on Dr. Green's "decades of experience" working with get-out-the-vote groups but ignore his complete lack of analysis of the issue, a failure that, under Rule 702, renders his opinion inadmissible.

ARGUMENT

Plaintiffs' response to the State's motion to exclude Dr. Green largely frames itself in terms of Dr. Green's credentials, which are not at issue. His credentials and experience do not exempt him from formulating his opinions based on some actual scientific methodology. Moreover, it is Plaintiffs, not Defendants, who bear the burden of demonstrating that Dr. Green's opinions "meet the standards for admissibility under Rule 702" before they are admitted

into evidence. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). Here, this requires Plaintiffs to establish that Dr. Green is not only qualified, but that his opinions are based on a reliable scientific methodology and would be helpful to the trier of fact. *Id.* (citing *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). Plaintiffs have failed to do so, and Dr. Green's opinions should be excluded.

I. Dr. Green's Opinions Should Be Excluded from the Bench Trial.

Plaintiffs misread the Eleventh Circuit's statement that there is "*less* need" to exclude an expert during a bench trial as meaning "*no* need." Opp'n at 4–8 (emphasis added). But Plaintiffs nowhere cite any authority requiring the gatekeeper to abandon the gate when the danger to the fact-finding process is not as great. Plaintiffs rely (at 5) on an opinion from the Middle District of Florida to argue that during a bench trial, "vigorous cross-examination," not exclusion, is the best approach. Opp'n at 5 (quoting *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)). Yet the Eleventh Circuit does not suggest that a district court should abdicate the *Daubert* analysis and just accept inadmissible expert testimony at a bench trial. And the Eleventh Circuit's cases point in the opposition direction. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC,* 746 F.3d 1008, 1027 (11th Cir. 2014) (upholding exclusion of expert testimony in bench trial); *United States v. Brown,* 415 F.3d 1257, 1266 (11th Cir. 2005) (noting

that "a district court abuses its discretion where it fails to act as a gatekeeper" even in a bench trial). Among other problems, allowing Dr. Green to testify would needlessly extend trial when his lack of methodology renders his opinions inadmissible, no matter how qualified he is.

Plaintiffs attempt to distinguish the Eleventh Circuit's recognition in *Winn-Dixie* that experts can be excluded from bench trials by arguing that the expert there "analyz[ed] the wrong problem and therefore [did] not assist the trier of fact to determine a fact in issue in [the] case." Opp'n at 6 (quoting *Winn-Dixie*, 746 F.3d at 1028). Plaintiffs erroneously argue (at 6) that "Defendants do not, and cannot, level any similar critique against Dr. Green's analysis." Defendants can and they do. In fact, Defendants spent the bulk of their motion explaining why Dr. Green's opinions are not based on any reliable analysis of the issues in the case, but rather make assumptions based on "others do it" when it comes to pre-filling of applications and an erroneous reading of the Anti-Duplication Provision. *See* State Defs.' Renewed Mot. at 13–24 (Doc. 187-1) ("Mot.").

Finally, Plaintiffs do not dispute that they made the opposite argument in a similar case. Instead, they argue (at 7) that their motion there was justified because that expert was not as eminent as Dr. Green, and besides, their motion was ultimately denied. The fact that Plaintiffs' motion was denied under the particular facts of that case does not excuse their about-face here in

arguing that experts offering inadmissible opinions need not be excluded in a bench trial.

II. Dr. Green's Qualifications are not Sufficient.

Plaintiffs further misunderstand the requirement that Dr. Green connect his experience to the facts of this case. The State is not disputing that Dr. Green is qualified in a relevant area. The State showed instead that Dr. Green chose to ignore the very research methods he claims are critical for a reliable analysis. Green Am. Rebuttal Rep. at 4 ("Am. Rebuttal Rep.") [Doc. 187-3]. He has not applied his experience to this case; he has ignored it.

Plaintiffs nevertheless assert (at 9) that Dr. Green relied on his own book compiling "literally hundreds of randomized trials." Yet, when asked for the basis of his opinion, other than to say he wrote a book (TR 203:5–16[1]), he says some voters are "dead set on sending prefilled forms whenever they can" (Green Dep. 90:4–12) and then cites one study, the Hans Hassell study, that does not support his conclusions. (Green Dep. 90:13–19; Mot. at 17–18, 21–22). Other than to suggest pre-filling some of the form gives a recipient "a head start," Dr. Green offers nothing to say how Plaintiffs' First Amendment rights are harmed under his "transaction costs" theory due to the Prefilling Prohibition. TR 229:10–17.

[1] Citations to "TR" refer to Dr. Green's testimony during the hearing on Plaintiffs' Motion for Preliminary Injunction (June 9, 2022) [Doc. 129].

In response, Plaintiffs attempt to place Dr. Green in a unique category apart from physicians and other scientists, arguing that social scientists are not required to provide a reliable methodology. But Plaintiffs' key case, *Carrizosa*, undermines their argument. There, the Eleventh Circuit evaluated a district court's exclusion of two social science experts and reiterated that "the *Daubert* framework applies to social science experts, just as it applies to experts in the hard sciences," even if "the measure of intellectual rigor" and "way of demonstrating expertise" may vary. *Carrizosa*, 47 F.4th at 1322 (cleaned up).

Plaintiffs, moreover, do not mention that, in that very case, the Eleventh Circuit affirmed the *exclusion* of an expert who had failed to connect his experience to his opinions, noting an "analytical gap between the data on which [he] relied and his ultimate opinion." *Id.* at 1322 (cleaned up). Plaintiffs focus instead on the Eleventh Circuit's reversal of the order excluding the other expert. But Plaintiffs ignore that the Eleventh Circuit "might have affirmed" even that expert's exclusion if he had relied on no more than temporal and geographic proximity and his experience with publicly available data. *Id.* at 1319. The Eleventh Circuit reversed that expert's exclusion because the district court had failed to consider three *further* categories of information including the specific history of the group at issue, the group's *modus operandi*, and corroborating reports of the victims' statements. *Id.* Even then, the

Eleventh Circuit "might not" have reversed for any one of those grounds and did so only because of the categories' cumulative effect.

Plaintiffs next try to favorably compare Dr. Green with the State's expert, Dr. Grimmer, in a "classic battle of the experts." Opp'n at 11–12 (cleaned up). But the comparison shows that only one of the experts is actually armed. At no point does Dr. Grimmer "rel[y] solely on his experience" to render his relevant opinions here. Instead, his deposition testimony shows he relies on an article, his "experience talking to voters, reading contemporary reports, and talking to election officials." Grimmer Dep. 68:6–72:13 (Ex. A). And the other sections of Dr. Grimmer's deposition that Plaintiffs cite (at 12) deal with the disclaimer provision that is not at issue.

Plaintiffs also argue (at 21) that Dr. Green's experience-based testimony is similar to "[n]umerous decisions of courts in this Circuit." But those decisions only highlight Dr. Green's lack of methodology.

- For example, one expert in *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2020 WL 13561776 (N.D. Ga. Dec. 4, 2020), "explained his methodology, including his newspaper research process, how he determines [his opinion], his interdisciplinary approach, and statistical analyses." *Id.* at *6 (internal citations omitted). And the court there noted that the expert's methodology of "gathering and analyzing multiple sources to reach conclusions about historical facts is an accepted *historical* methodology," *id.* (emphasis added), but said nothing about whether such efforts would allow an expert to predict voter behavior and reactions as Dr. Green purports to do here.

- The other expert in *Fair Fight* similarly described his experience "in great detail" and then "connect[ed] this experience to his opinions" to

provide context for his analysis. No. 1:18-CV-5391-SCJ, 2020 WL 13561754, at *6 (N.D. Ga. Nov. 24, 2020). But Dr. Green, for all his experience, simply has not made the necessary connection between his experience and his opinions here.

- Similarly, the expert in *Banks v. McIntosh County*, No. 2:16-cv-53, 2020 WL 6873607 (S.D. Ga. Nov. 23, 2020), was allowed to testify based on his experience—"so long as he demonstrates why his experience is sufficient *and how he applied his experience* in forming his opinion." *Id.* at *3 (emphasis added). Here again, Dr. Green has not and cannot do that.

Unlike these three experts, Dr. Green has only described his experience. And, like the expert in *Carrizosa*, he has "never explained '*how* his experience … supported his opinion.'" *Carrizosa*, 47 F.4th at 1322 (quoting *Hughes v. Kia Motor Corp.*, 766 F.3d 1317, 1329 (11th Cir. 2014)). Dr. Green's opinions are thus long on credentials and experience but woefully short on explanations of how that experience (as there is nothing else) supports his opinions. Like he said, he himself believes his own opinions are analogous to opining on "whether striking a match creates a flame." Opp'n at 11 (quoting Green Dep. 70:1–6). His opinions are thus no more than a request to let him "waltz into the courtroom and render opinions" without basing them "on some recognized scientific method.'" *McDowell*, 392 F.3d at 1298 (citation omitted).

In short, because Dr. Green fails to connect his experience to his opinions with a reliable methodology, his opinions are nothing more than *ipse dixit* and should be excluded.

III. Dr. Green's Opinions are Neither Reliable nor Helpful.

Plaintiffs have also failed to show that Dr. Green's testimony would be helpful or reliable. As Plaintiffs' note, expert testimony is not helpful unless it concerns matters that are "beyond the understanding of the average lay person." Opp'n at 14 (quoting *Frazier*, 387 F.3d at 1262). By Dr. Green's own admission, his opinions are obvious, so they are not helpful to the trier of fact. *Id.* at 11 (citing Green Dep. 70:1–6). This is so even though Dr. Green is admittedly skeptical of the worth of direct mail solicitations in the first place. Green Dep. 92:1–16. Plaintiffs further ignore that expert testimony must *also* offer something "more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262–63. Dr. Green's shooting from the hip does not offer anything more.

To the contrary, as this Court has explained, "[i]n all events, the expert must have factual and analytical support for his opinions." *Frye v. Daimler Trucks N. Am., LLC*, No. 1:18-cv-04827-JPB, 2021 WL 4241658, at *6 (N.D. Ga. Mar. 11, 2021), *recon. denied,* 2022 WL 18776301 (N.D. Ga. Feb. 25, 2022). Moreover, as the Eleventh Circuit has held, "'nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,' and the 'court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" *MidAmerica C2L Inc. v. Siemens Energy,*

Inc., No. 20-11266, 2023 WL 2733512, at * 8 (11th Cir. Mar. 31, 2023) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Plaintiffs fail to provide any justification for how Dr. Green's two opinions, despite his years of experience, would bridge the "analytical gaps" at issue here, and thus assist the Court in understanding or deciding the issues before it.

A. Prefilling Prohibition

As to the Prefilling Prohibition, as Plaintiffs acknowledge (at 16), Dr. Green opined that a prefilled form might be the "nudge" to get certain voters "over the behavioral threshold" of voting. Opp'n at 16 (quoting TR 208:18–21). However, as the State explained (at 16–22), this opinion is not based on a reliable methodology, is not helpful to the trier of fact, and should be excluded. Indeed, it is not even possible to evaluate Dr. Green's speculation because he offered no data to support his conclusions. Grimmer Dep. 223:21–225:8.

1. Plaintiffs claim (at 16–17) that Dr. Green's opinion on this "nudging" point is reliable because other groups use prefilled forms as a matter of course. As Plaintiffs note, *id.*, Dr. Green supports this assurance by relying on other groups' use of prefilled forms, but he also acknowledges that groups are often wrong about what is effective. Green Dep. 59:17–60:15. This is effectively an admission that his "because-others-are-doing-it" analysis is *not* based on a scientifically reliable theory or methodology. Further, he even

admitted he has no access to the alleged studies performed by these groups that supposedly support their preference for pre-filled forms. *Id.* 90:4–12.

And, while Plaintiffs also claim (at 16–17) that Dr. Green reached this conclusion based on some unidentified "randomized trials that are in the public domain," this Court has already rejected that approach: "An expert's unexplained assurance that he or she has relied on accepted principles fails [to satisfy the admissibility standard] as well." *Cooper v. Marten Transp., Ltd.*, No. 1:10-CV-03044-JOF, 2012 WL 12835704, at *2 (N.D. Ga. June 4, 2012), *aff'd in part on relevant grounds, rev'd in part on other grounds,* 539 F. App'x 963 (11th Cir. 2013) (per curiam).

Further, the effectiveness of any form, as Plaintiffs acknowledge (at 16), is entirely dependent on the "persuasive cover letter" that accompanies the absentee ballot application—a critical factor entirely absent from Dr. Green's opinion on this statutory feature. Plaintiffs criticize the State (at 16 n.4) for "provid[ing] no explanation of what such an evaluation would look like" or what its relevance would be, but the burden is on Plaintiffs to show their expert's opinions satisfy Rule 702. Of course, Dr. Green could have evaluated their accompanying message under some recognized criteria for evaluating the effectiveness of such a message in the election context, but he did not. He just focused on the prefilled versus blank application, which is not part of any scientific analysis.

Plaintiffs further claim (at 18) that the Hassell study supports what Dr. Green described as the benefits of prefilled applications. But Plaintiffs ignore that the Hassell study showed an *insignificant* increase in absentee-ballot participation from a prefilled application and nothing to support Dr. Green's claim of a cost benefit. *See* Mot. at 18; Grimmer Dep. 249:11-14. Plaintiffs are dismissive of that finding but compare apples to oranges when they put the preponderance standard of proof on the same continuum as statistical significance. Opp'n at 19. The standard of proof takes all the evidence presented to a court and weighs it against the contrary evidence, whereas statistical significance merely refers to the likelihood that an observed result was due to chance. TR 212:11-213:8; Grimmer Dep. 245:24-248:14. In other words, the Hassell study does not support the conclusion that pre-filled forms "obviously" decrease transaction costs and lead to higher turnout, as the study itself did not reach that conclusion.

The only arguably reliable transaction cost analysis is the Mann and Mahew study, but the limited value and relevance of that study is underscored by the fact that the study *did not* evaluate prefilled forms; it evaluated the benefit of a *blank form* over a reminder to log-in and get a form. Mot. at 16 n.4. Plaintiffs say only that it is relevant to showing "the benefit of lowering transaction costs for potential voters." Opp'n at 18 n.6. But the mere fact that lower transaction costs benefit voters is one of Dr. Green's "striking a match

creates a flame" opinions, *id.* at 11 (quoting Green Dep. 70:1–6), and thus fails the requirement that it be helpful to the trier of fact.

In short, the limited value and relevance of the Mann and Mahew study cannot provide a scientifically reliable basis for Dr. Green's expressed opinions on the Prefilling Prohibition. Nor, as the State explains (at 18–20), can an insignificant finding in a single partisan study provide that basis.

2. Dr. Green's confidence that prefilled absentee-ballot applications are always more effective than blank applications, *see* Mot. at 4, is also not helpful to the trier of fact in understanding a technical or scientific analysis of the Prefilling Prohibition. Besides resting on a patently unreliable methodology, Dr. Green's opinion is entirely derivative of actions by other groups—information that, if it is admissible at all, can easily be presented and argued by Plaintiffs' lawyers, without expert testimony. *See, e.g., Frazier,* 387 F.3d at 1262–63. There is nothing about Dr. Green's testimony on this point that would assist a trier of fact in understanding those actions. Accordingly, his "because-others-are-doing-it" analysis is not helpful to the trier of fact. *See id.*

B. Anti-Duplication Provision

Plaintiffs, moreover, do not even suggest Dr. Green relied on any scientific analysis for his opinion on the Anti-Duplication Provision. And they

once again fail to establish that this opinion would be helpful to the trier of fact.

1. Instead of pointing to a scientifically reliable methodology as the basis for Dr. Green's opinion on this provision, Plaintiffs rely exclusively (at 20–21) 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 the academic literature concerning absentee mailer programs." Yet Dr. Green does not rely on any "academic literature" to support his conclusions. And he provides no "transaction costs" *analysis* of any facts regarding the Anti-Duplication Provision.[2] Instead, he simply *assumes* that Plaintiffs and other entities are incapable of comparing their mailing lists to the list provided by the State of who has requested, received, or cast an absentee ballot during the five-day safe harbor period. And solely on that basis he claims that Plaintiffs are thus rolling the dice on whether they will be subject to penalties for violating the Anti-Duplication Provision. TR 239:7–240:24; 280:23–25 ("I think ...," "I don't know

[2] Indeed, Dr. Green's analysis misstates the Anti-Duplication Provision and penalties for violation of that provision. Rather than a $100 per mailed duplicate absentee ballot application, *see* Mot. at 5, the penalties are the actual cost for processing a submitted duplicate absentee ballot application, with a maximum of $100 per duplicate application received by election officials. O.C.G.A. § 21-2-381(a)(3)(B). He offers no analysis of what potential penalties anyone might face, let alone Plaintiffs.

...," "I'm guessing ..."). As a result, he *assumes* that some groups, including church groups, will simply not participate in this form of get-out-the-vote activity. Green Expert Rep. at 10–11 [Doc. 103-5]; Am. Rebuttal Rep. at 2, 15–16; TR 239:7–240:24, 241:24–25. That is obviously not enough for scientific reliability.

Indeed, Dr. Green does not even provide anecdotal evidence of a single person or organization that limited, or chose to not send, absentee-ballot applications because of the Anti-Duplication Provision or similar provisions anywhere in the country. TR 280:23–25. To accept such testimony thus requires a huge leap of faith that would undermine Rule 702, and Dr. Green's opinion on this point should be excluded. *MidAmerica C2L*, 25 F.4th at 1327.

CONCLUSION

For all these reasons, and those in the State's Motion, Dr. Green's opinions on the effects of the two SB 202 provisions discussed above are not based on a sound scientific methodology, are unreliable, and provide no assistance to the trier of fact in understanding the issues in this case. Accordingly, Plaintiffs should be precluded from offering any of these opinions.

Respectfully submitted this 2nd day of February, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Reply Brief in Support of State Defendants' Renewed Motion to Exclude the Testimony and Opinions of Plaintiffs' Expert Donald P. Green, PhD has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(C).

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