

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY,	)	
<i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CAUSE NO: 1:05-CV-0634-SEB-VSS
	)	
TODD ROKITA, <i>et al.</i> ,	)	
	)	
Defendants.	)	
<hr/>		)
	)	
WILLIAM CRAWFORD, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
MARION COUNTY ELECTION BOARD,	)	
	)	
Defendant,	)	
and	)	
	)	
STATE OF INDIANA,	)	
	)	
Intervenor.	)	

**PLAINTIFFS' JOINT REPLY IN SUPPORT OF MOTION TO STRIKE PORTIONS OF  
THE AFFIDAVIT OF WENDY ORANGE**

I.  
INTRODUCTION

The Democratic Plaintiffs and the Crawford Plaintiffs have jointly moved to strike portions of the Affidavit of Wendy Orange, a former Marion County Election Board Administrator, whom the State Defendants have offered as an expert witness for the purpose of justifying portions of the Photo ID Law. The Plaintiffs jointly submit this reply in support of their Motion to Strike.

II.  
ARGUMENT

The State Defendants contend that Orange is qualified to offer her opinions regarding the purpose and effectiveness of the signature comparison method of identifying voters, as well as her opinion that the photo identification requirement will make it easier for election officials to identify voters who have falsely identified themselves. The State Defendants contend that Orange's opinions are admissible under Federal Rule of Evidence 702, and that she qualifies as an expert based upon her four years of service as Marion County Election Administrator and two years working for a voting technologies company, Election Systems and Software, Inc. The State Defendants also argue that they are not offering Orange's opinion testimony as a judicial fact in this proceeding, but rather that is being offered solely to support the reasonableness of the General Assembly's reliance upon such opinions as legislative facts. Regardless of the purpose for which the evidence is being offered, Orange's opinions are inadmissible under Federal Rule of Evidence 702 and paragraphs 9, 10, 12, 13, 23, and 25<sup>1</sup> of her affidavit should be stricken.

**A. Orange's opinions are not admissible under Fed. R. Evid. 702**

The State's sole basis for claiming that Orange's opinion is admissible under Fed. R. Evid. 702 is that she has six years of experience in election administration. Based upon this experience, the State claims she is "qualified as an expert to speak on matters of election and voting procedures in Indiana." (State's Response at 3). But the courts will not presume the

---

<sup>1</sup> The Plaintiffs inadvertently left out a reference to paragraphs 23 and 25 of the Orange Affidavit in their Motion to Strike, in which Orange opines that "the signature comparison method used in Marion County provides an effective safeguard against absentee ballot fraud" and that the "addition of a photo identification requirement would not significantly enhance the absentee voter's identification process[.]" These paragraphs are objectionable for the same reasons set forth in the original Motion and Brief, and the Plaintiffs request that they be stricken as well.

qualifications of a witness to offer expert testimony on experience alone. *Durkin v. Equifax Check Services, Inc.*, 406 F.3d 410, 421 (7th Cir. 2005); *Bourelle v. Crown Equipment Corp.*, 220 F.3d 532, 537 n.11 (7th Cir. 2000). Non-scientific testimony may be admissible under Rule 702, but such testimony must still be examined by the Court as part of its gatekeeper function for the purpose of determining its reliability and relevance. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48 (1999); *Durkin*, 406 F.3d at 420, n.10. This necessarily involves an examination of the methodology employed by the expert to arrive at her conclusions. *Durkin*, 406 F.3d at 421 (opinions of English professor and linguist were unreliable because he did not provide an explanation of methodology); 215 F.3d at 718; *see also, Kumho Tire Co.*, 526 U.S. at 153 (engineer with a masters degree in mechanical engineering and over 10 years experience was qualified, but his methodology was not reliable).

Aside from reiterating Orange's work experience, neither Orange nor the State have sufficiently explained the methodology that she has employed to arrive at her opinions. Instead, the State merely asserts that Ms. Orange's opinions cannot be assessed under the *Daubert* reliability standards because they do not "easily lend themselves to scholarly review or to traditional scientific evaluation." (State's Response at 5) (quoting *First Tennessee Bank National Assoc. v. Barreto*, 268 F.3d 319, 335 (6th Cir. 2001)). In other words, the State suggests that Orange's opinions should just be accepted on their face, and their reliability assumed, because Orange has some general experience in the field of election administration. The Seventh Circuit has repeatedly rejected this argument, finding unreliable the opinions of much more qualified experts, including those offering testimony based upon their experience and knowledge, where no appropriate methodology is set forth to support them. *See, e.g., Durkin*, 406 F.3d at 421;

*Bourelle*, 220 F.3d at 537.

Indeed, accepting the State's proposition that qualifications alone are sufficient to make testimony reliable would effectively eliminate the Court's gatekeeping role. The objective of the gatekeeping function is to "make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," even in those instances where the expert is testifying based upon "other specialized knowledge," *Kuhmo Tire Co.*, 526 U.S. at 152. While the State is correct that the district court has leeway in deciding how to go about determining whether particular expert testimony is reliable, there still must be some indication that the opinions are reliable, and even if all of the *Daubert* factors are not applicable, some may be. *Kumho Tire*, 526 U.S. at 151; *Ammons v. Aramark Uniform Services, Inc.*, 368 F.3d 808, 816 (7th Cir. 2004).

Orange's observations appear to be nothing more than her personal opinion. For instance, Orange opines that "the implementation of the new voter photo identification requirement at the polls will significantly enhance the ability of precinct board clerks and other precinct board members to detect those who falsely identify themselves and will also make the precinct board clerk's identity verification job easier." (Orange aff. ¶ 13). How did Orange reach that particular conclusion? One cannot tell from reading her affidavit. "An expert who supplies nothing but the bottom line supplies nothing of value to the judicial process." *Huey v. United Parcel Service, Inc.*, 165 F.3d 1084, 1087 (7th Cir. 1999); *see also, Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 420 (7th Cir. 2005).

The State seeks to make admissible Orange's personal opinions about the efficacy of the

signature comparison and challenge procedures in detecting identity fraud (Orange aff. ¶¶ 9, 12) by stating that they are founded on complaints she heard from poll workers who reported problems, “including complaints regarding fraud and the difficulty in detecting it.” (State’s Brief at 6). There is no description of these complaints in Orange’s affidavit. As such, Orange has not herself identified this as the methodology she employed to arrive at these conclusions. But even if she had, citation to vague reports of fraud by election workers would not make her opinion anything more than her personal speculation. *See Greenwich Industries, L.P. v. Specialized Seating, Inc.*, 2003 WL 21148389 \*5 (N.D. Ill. 2003) (citing Advisory Committee Notes to Fed. R. Evid. 702) (a witness testifying based solely upon experience must “explain how the experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts”).

The State concedes that Orange conducted no study and has no empirical evidence on which to base her opinion that the signature comparison and the existing challenge procedures were inadequate to detect identity fraud. And Orange has provided no explanation regarding how her experience permits her to reach these conclusions. In light of this, Orange’s opinions simply do not assist the trier of fact in determining any matter at issue in this litigation and should be stricken.

**B. Orange’s opinions are not admissible as support for “legislative facts.”**

The State claims that Orange’s opinions should not be examined with the same rigor ordinarily required by *Daubert* and *Kumho Tire* because her opinions are not being offered for the purpose of establishing judicial facts. (State’s Brief at 7-8). The State argues that it is not asking the Court to find that Orange’s opinions are true; rather, it contends only that the General

Assembly could have relied upon ideas similar to hers as “legislative fact” supporting the Photo ID Law, and that Orange’s opinion is offered to support the reasonableness of such facts. (State’s Brief at 8). The State cites no authority for its theory that *Daubert*’s reliability standards have lesser applicability where the expert testimony is being proffered as support for legislative facts, and indeed, there is no reason to reach such a conclusion.

Legislative facts are the “considerations that typically influence legislative judgments.” *Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995); *Menora v. Illinois High School Ass’n*, 683 F.2d 1030, 1036 (7th Cir. 1982). The State’s theory appears to be based upon an assumption that rational basis review is applicable, because where a law is subject to rational basis review, the legislative facts that might support the constitutionality of the law are viewed deferentially. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Johnson v. Daley*, 339 F.3d 582, 586-87 (7th Cir. 2003). The legislative facts necessary to sustain the constitutionality of a law under rational basis review are not “subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *F.C.C. v. Beach Communications*, 508 U.S. at 315.

As the Plaintiffs have set forth in their briefs in support of summary judgment, the Photo ID law is not subject to rational basis review, but rather to strict scrutiny. (*See, e.g.*, Democratic Plaintiffs’ Brief In Support of Summary Judgment pp. 28-35). Accordingly, the burden falls on the State to demonstrate that the Photo ID Law “advances a compelling state interest and that it is narrowly tailored to serve that interest.” *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 222 (1989). But even if rational basis review were applicable here, application of that standard would not alter the evidentiary standards for admissibility of Orange’s opinions.

Orange's opinions are not being offered as proof of the legislative facts themselves. Although the General Assembly might be entitled to rely on evidence that does not meet the *Daubert* standards for reliability for the purpose of establishing legislative facts under the rational basis standard of review, Orange's testimony is not being offered for the purpose of establishing matters that were actually before the General Assembly. Orange has not testified that she offered these opinions to the General Assembly herself or that similar opinions were considered by the legislature.

According to the State, Orange's opinions are offered to support the reasonableness of the General Assembly's decision to treat absentee ballots different from in-person ballots.<sup>2</sup> As such, the State is asking the Court to consider the evidentiary value of Orange's opinions as support for legislative facts. This is more than asking the Court merely to determine the legislative facts that supported the Photo ID Law. Since Orange's opinions are being proffered as evidence in a judicial setting, the reliability standards of *Daubert* and *Kumho Tire* must apply.

### III. CONCLUSION

For each of the foregoing reasons, the Plaintiffs respectfully move that the Court strike the opinions set forth in paragraphs 9, 10, 12, 13, 23 and 25 of the Affidavit of Wendy Orange.

---

<sup>2</sup> This disparate treatment alone compels heightened scrutiny. *See Rockefeller v. Powers*, 74 F.3d 1367, 1377, n.16 (2nd Cir. 1995), *cert. denied*, 517 U.S. 1203 (1996) (suggesting that strict scrutiny applies where ballot access rules impose different appreciable burdens on the right to vote); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1223 (4th Cir. 1995); *see also, Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 315-18 (3rd Cir. 1999) (en banc) (applying intermediate scrutiny).

Respectfully submitted,

s/ William R. Groth  
William R. Groth

s/ Geoffrey S. Lohman  
Geoffrey S. Lohman

FILLENWARTH DENNERLINE GROTH  
& TOWE  
1213 North Arlington Avenue, Suite 204  
Indianapolis, IN 46219  
Telephone: (317) 353-9363  
Telecopier: (317) 351-7232  
E-mail: [wgroth@fdgtlaborlaw.com](mailto:wgroth@fdgtlaborlaw.com)  
E-mail: [glohman@fdgtlaborlaw.com](mailto:glohman@fdgtlaborlaw.com)

s/ Barry A Macey  
Barry A. Macey

MACEY SWANSON & ALLMAN  
445 N. Pennsylvania Street, Suite 401  
Indianapolis, IN 46204  
Telephone: (317) 637-2345  
Telecopier: (317) 637-2369  
E-mail: [bmacey@maceylaw.com](mailto:bmacey@maceylaw.com)

*Attorneys for Plaintiffs, Indiana Democratic  
Party and Marion County Democratic  
Central Committee*

s/ Kenneth J. Falk  
Kenneth J. Falk

Indiana Civil Liberties Union  
1031 E. Washington Street  
Indianapolis, IN 46202  
E-mail: [ken.falk@iclu.org](mailto:ken.falk@iclu.org)

*Attorney for William Crawford, et al.*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3<sup>rd</sup> day of January, 2006, a copy of the foregoing pleading was filed electronically upon the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Thomas M. Fisher, Esq.  
Douglas J. Webber, Esq.  
Indiana Attorney General's Office  
302 W. Washington street  
IGCS - 5th Floor  
Indianapolis, IN 46204

E-mail: [tfisher@atg.state.in.us](mailto:tfisher@atg.state.in.us)  
E-mail: [dwebber@atg.state.in.us](mailto:dwebber@atg.state.in.us)

James B. Osborn, Esq.  
Office of Corporation Counsel  
1601 City-County Building  
200 E. Washington Street  
Indianapolis, IN 46204

E-mail: [josborn@indygov.org](mailto:josborn@indygov.org)

Karen Horseman, Esq.  
717 South East Street  
Indianapolis, IN 46225

E-mail: [khorseman@sbcglobal.net](mailto:khorseman@sbcglobal.net)

s/ William R. Groth  
William R. Groth

p/778/je