

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INDIANA DEMOCRATIC PARTY,)	
et al.,)	
Plaintiffs,)	
)	
v.)	
)	
TODD ROKITA, et al.,)	
Defendants,)	
)	
<hr style="border: 0.5px solid black;"/>		
)	
WILLIAM CRAWFORD, et al.,)	
Plaintiffs,)	
)	
v.)	
)	
MARION COUNTY ELECTION BOARD,)	
Defendant,)	
)	
and)	
)	
STATE OF INDIANA,)	
Intervenor.)	

No. 1:05-CV-00634 SEB-VSS

**STATE DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION TO STRIKE
PORTIONS OF AFFIDAVIT OF WENDY ORANGE**

Intervenor State of Indiana and Defendants Indiana Secretary of State and the Co-Directors of the Indiana Election Division (collectively, “State Defendants”) respectfully submit this response to Plaintiffs’ Motion to Strike Portions of Affidavit of Wendy Orange. State Defendants respectfully request that this Court deny Plaintiffs’ motion and admit the relevant portions of Orange’s affidavit because the contested paragraphs constitute admissible expert testimony under Federal Rule of Evidence 702 — Orange’s extensive experience and involvement in elections in Indiana qualify her as an expert and, furthermore, her opinions are reliable for purposes of *Daubert*.

ARGUMENT

Plaintiffs move to strike opinions contained in paragraphs 9, 10, 12, and 13 of Orange's affidavit. Plaintiffs first contend that these opinions are inadmissible under Rule 701 because Orange's duties at the Marion County Election Board and at Election Systems & Software, Inc. did not put her in the actual polling place during elections. Second, Plaintiffs contend that these opinions are inadmissible under Rule 702 because (1) Orange is not an "expert," (2) Orange did not use any "scientific methodology in forming her opinions," and (3) Orange did not rely on any "empirical data" in forming her opinions. Plaintiffs' Brief, at 7.

State Defendants listed Orange on their expert disclosure list served on the Plaintiffs on October 13, 2005. State Defendants contend that her opinions are admissible under Rule 702 based on her knowledge and experience in the conduct of elections in Indiana and, therefore, do not address the Plaintiffs' anticipatory Rule 701 argument.

I. Orange possesses the requisite experience to be an expert.

While Plaintiffs admit that Orange has "experience in election administration," Plaintiffs argue that she is not qualified as an expert because she does not possess proper "academic credentials." Plaintiffs' Brief, at 7.

Federal Rule of Evidence 702 provides that a witness may be qualified as an expert by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. The Rule does not require, as Plaintiffs suggest, that an expert have any particular formal education or formal training. Instead, "a witness can be qualified as an expert without formal training or education by virtue of his or her experience." *Jones v. Lincoln Elec.*

Co., 188 F.3d 709, 724 (7th Cir. 1999). In fact, Rule 702 allows an expert to qualify based on “extensive hands-on experience over a meaningful period of time during which [the expert] develops a working expertise in a certain area.” *Id.*

Orange undoubtedly has the requisite knowledge, skill, and experience for purposes of Rule 702. Orange was the Marion County Election Board Administrator from June 1996 to January 2001.¹ Orange Aff. ¶¶ 1, 4, 6. During her four and one-half years as Marion County Election Board Administrator, Orange was responsible for the administration of elections in Marion County. In that capacity, she had significant interaction with poll workers, ranging from training to payment. Moreover, Orange served as Project Manager for Election Systems and Software, Inc. from January 2002 to May 2004, where she coordinated and implemented training of poll workers. Orange Aff. ¶ 6. During her two and one-half year tenure with Election Systems and Software, Inc., she was the Project Manager for Marion County for one and one-half years. As a result, Orange has had over six years of experience monitoring the polls in the State of Indiana. Orange Aff. ¶¶ 5-7. This is exactly the type of specialized knowledge, training, and experience contemplated by Rule 702, and this Court should find that Orange is qualified as an expert to speak on matters of election and voting procedure in Indiana.

II. Orange’s opinions are reliable and, therefore, admissible under *Daubert* and *Kumho Tire*.

Plaintiffs are correct that *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), extended *Daubert* and held that courts must serve as gatekeepers not only with respect to scientific-expert testimony, but also with respect to non-scientific-expert

¹ In paragraph 1, the word “former” was mistakenly omitted. Orange is not currently the Marion County Election Board Administrator. Instead, as noted in paragraph 6, Orange held this position from June 1996 to January 2001. *See* Orange Aff. ¶¶ 1, 6.

testimony. *See id.* at 148-49. However, the Supreme Court recognized that while some expert testimony “rests upon scientific foundation, not all expert testimony does so.” *Id.* at 50. “There are many different kinds of experts, and many different kinds of expertise,” and in some cases, “the relevant reliability concerns may focus upon personal knowledge or experience.” *Ibid.*

Reliability is necessarily determined on a case-by-case basis, and “the factors identified in *Daubert* may or may not be pertinent in assessing reliability.” *Ibid.*; *see also First Tenn. Bank Nat’l Assoc. v. Barreto*, 268 F.3d 319, 335 (6th Cir. 2001) (“[W]e find the *Daubert* reliability factors unhelpful in the present case, which involves expert testimony derived largely from [the expert’s] own practical experiences through forty years in the banking industry.”). Therefore, a “trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Kumho Tire*, 526 U.S. at 151.

Plaintiffs fault Orange for failing to use “any scientific methodology in forming her opinions” and for failing to identify on what “empirical data” she relied in forming her opinions. Plaintiffs’ Brief, at 7. Orange is an expert not because she has a particular scientific expertise. Rather, Orange is an expert because she has over six years of relevant, specialized experience in administering and monitoring elections. Orange opines about how voter challenge procedures have been used in the past, about the efficacy of the signature-matching process, and about how photo-identification requirements will impact the ability of poll workers to detect fraud. These opinions, based on Orange’s six years of interaction with poll workers, are not the sort of opinions whose reliability can be assessed by the *Daubert* factors. “Opinions formed in such a

manner do not easily lend themselves to scholarly review or to traditional scientific evaluation.” *First Tenn. Bank Nat’l Assoc.*, 268 F.3d at 335.

In cases of specialized expertise, the question of qualification and reliability are often intertwined. In this case, Orange’s opinions are reliable precisely because they are based on her six years of experience with elections in Marion County, where she played an integral role in the conduct of elections. Furthermore, Plaintiffs have foregone the opportunity to test Orange’s expertise and the reliability of her opinions through cross-examination at a deposition. Had they done so, Orange could have demonstrated even more conclusively the reliability of her testimony. Therefore, Plaintiffs have no basis for calling into question the reliability of her expertise.

The opinions given by Orange are exactly the types of conclusions experts may draw through observations. *See Kumho Tire*, 526 U.S. at 149 (“Experts of all kinds tie observation to conclusions through the use of what Judge Learned Hand called ‘general truths derived from . . . specialized experience.’”). Election and redistricting cases routinely rely on non-scientific experts, such as Orange, whose experience qualifies them as experts. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 356 n.6 (S.D.N.Y. 2004) (three-judge court) (The defendants have relied, in part, upon the direct testimony of Mark Burgeson, assistant to Sen. Skelos (R), Co-Chairman of LATFOR, who worked on New York’s redistricting plans during the 1980, 1990, and 2000 districting cycles. Mr. Burgeson testified as a redistricting expert and was ‘asked to provide an objective assessment of the 2002 Senate plan’s compliance with various redistricting criteria.’” *aff’d*, 125 S. Ct. 627 (2004); *see also Bay County Democratic Party v. Land*, 347 F. Supp.

2d 404, 420 (E.D. Mich. 2004) (relying on opinion testimony of Christopher Thomas, the Michigan director of elections).

First, Orange states that in her experience the “challenge procedure was not used primarily to verify the voter’s identity, but instead was used to verify that a voter met the residency requirements for voting in the precinct.” Orange Aff. ¶ 9. As Marion County Election Board Administrator, poll workers frequently reported problems or incidents that occurred at various polling places throughout Marion County to Orange. This included instances where a voter was challenged. Second, Orange opines that the “signature identification process at the polls is not an effective means for detecting identity fraud.” Orange Aff. ¶ 12. In her various capacities, Orange has six years’ experience with elections in Marion County. In this time, she interacted with poll workers and listened to their complaints, including complaints regarding fraud and the difficulty in detecting it.

Finally, Orange opines that “the implementation of the new voter photo identification requirement at the polls will significantly enhance the ability of the precinct board clerks and other precinct board members to detect those who falsely identify themselves and will also make the precinct board clerks’ identity verification job easier.” Orange Aff. ¶ 13. As Marion County Election Board Administrator, Orange was charged with administering elections in Marion County. As part of her duties, Orange was intimately familiar with the procedures used to verify identity and the complaints and problems experienced by poll workers, including complaints about the difficulty in detecting identity fraud. Therefore, Orange was perfectly situated to opine that a change in the procedures would alleviate or address the concerns of the poll workers.

III. *Daubert* factors are less relevant where expert opinion is offered in support of reasonableness of legislative fact.

Finally, the *Daubert/Kumho Tire* factors are less relevant to a situation such as this where the expert's opinions are proffered not for a judicial determination of fact, but rather to support the reasonableness of a legislative fact. See *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (holding that constitutionality of partial-birth abortion statute “must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges”); see also *Klinger v. Director, Dep't of Revenue*, 366 F.3d 614, 621 (8th Cir. 2004) (Richard Arnold, J., dissenting) (“What is at stake is a question of ‘legislative fact,’ the kind of fact that is expressly or implicitly ‘found’ by a legislative body when it enacts a law, rather than ‘judicial fact,’ the kind of fact that has to do with who did what and the effect that activity had on the parties to the case.”), *judgment vacated by* ___ U.S. ___, 125 S.Ct. 2899 (2005).

Here, the State proffers Orange's opinion to support the Indiana General Assembly's rationale for requiring in-person voters, but not absentee voters, to present photo identification. To rule in favor of the State Defendants, it is not necessary for the Court to make a factual finding concerning the opinions that Orange sets forth. Rather, it is only necessary for the Court to conclude that the General Assembly's decision to treat absentee ballots different from in-person ballots is reasonable. See *Getty Petroleum Mktg., Inc. v. Capital Terminal Co.*, 391 F.3d 312, 322 n.12 (3d Cir. 2004) (Lipez, J., concurring) (noting the difference between legislative and adjudicative facts and noting that the Supreme Court has taken judicial notice of legislative facts “in evaluating the

rationality of statutes”). Orange’s opinions are offered to assist the Court in reaching that modest conclusion.

Put another way, unlike most situations where a party relied on Rule 702 expert testimony, here State Defendants are not asking the Court to declare that certain facts exist as an abstract proposition. State Defendants are merely asking the Court to recognize that a legitimate basis exists for the General Assembly to draw the distinction it has drawn. In a sense, it is asking the Court not to determine that Orange’s opinions are correct, but only that the General Assembly would be entitled to rely on them. Even if the standard for distinguishing between absentee voters and in-person voters is something more than a rational basis, the evidence is helpful for establishing the compelling justification that absentee voters should not be subjected to regulations that have no substantial benefit. Again, however, State Defendants are not asking the Court to make a finding of fact that Orange’s statements are true, only that the General Assembly could have relied on these ideas to support its judgment that a compelling interest exists. For that additional reason, it would be improper to strike Orange’s expert opinions based on the *Daubert* factors.

CONCLUSION

For the reasons set forth above, State Defendants respectfully request that this Court deny Plaintiffs' Motion to Strike Portions of Affidavit of Wendy Orange.

Respectfully submitted,

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By: s/ Thomas M. Fisher.
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Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2005, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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