No. 11-36008

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANY CULTURES, ONE MESSAGE; and
RED STATE POLITICS, d/b/a "CONSERVATIVE ENTHUSIASTS,"
a Washington not-for-profit corporation,

Plaintiffs - Appellants,

v.

JIM CLEMENTS, Chair; DAVE SEABROOK, Vice Chair; JANE NOLAND; BARRY SEHLIN; JENNIFER JOLY, in Their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; DOUG ELLIS, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission,

Defendants - Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF *AMICI CURIAE* OF DISTINGUISHED PROFESSORS OF POLITICAL SCIENCE AND ECONOMICS IN SUPPORT OF APPELLANTS AND REVERSAL

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RULE 29 STATEMENTS

This brief of *Amici Curiae* is submitted on motion and pursuant to Federal Rule of Appellate Procedure 29. As noted in the motion for leave to file, *Amici* endeavored to obtain the consent of all parties to the filing of this brief before moving the Court for permission to file the proposed brief; however, Appellees withheld consent.

No counsel for a party authored this brief in whole or in part. Further, no such counsel or party, or person other than *Amici Curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

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INTERESTS OF *AMICI CURIAE*

Amici Curiae are distinguished professors in the fields of political science and economics. They have served as expert witnesses for both plaintiffs and defendants in a variety of cases in both state and federal courts, and anticipate that they will continue to do so in the future. The district court's decision to exclude the declaration and report of Plaintiffs' expert in American political economy creates unobtainable standards for relevance and reliability of expert testimony in the field of political science. Although *Amici* do not always agree on their substantive research findings, *Amici* submit this brief out of concern for the larger implications of the district court's decision and its potentially wide-ranging impact on the use of political science experts in litigation.

Dr. Donald P. Green is a Professor of Political Science at Columbia University and, formerly, of Yale University. He received his Ph.D. in Political Science from the University of California, Berkeley. Dr. Green's body of work includes four books and more than one hundred essays, and his research interests span a wide array of topics, including voting behavior, partisanship, campaign finance, hate crime, and research methods. Much of his current research uses field experimentation to study the ways in which political campaigns mobilize and persuade voters. In 2010, Dr. Green helped found the Experimental Research Section of the American Political Science Association and served as its first

president. He serves on the editorial boards of the *Journal of Politics*, *Political Analysis*, the *Journal of Causal Inference*, *Randomized Social Experiments eJournal*, and *Campaigns & Elections Magazine*. Dr. Green was an expert witness in litigation over the Bipartisan Campaign Reform Act of 2002, *McConnell v. FEC* (D.D.C. 2003).

Dr. Andrew D. Martin is a Professor of Law and Political Science at Washington University in St. Louis. His expertise is in political methodology and the study of judicial decision-making. He received his Ph.D. in Political Science from Washington University in St. Louis. Dr. Martin currently serves as the founding director of the Center for Empirical Research in the Law at Washington University. From 2007 to 2009, Dr. Martin served as the Associate Editor and then Acting Editor of *Political Analysis*—the discipline's leading methodology journal. He was an expert witness in *Idaho Republican Party v. Ysursa* (D. Idaho 2010).

Dr. Michael Munger is a Professor in the Economics and Political Science departments at Duke University. He received his Ph.D. in Economics from Washington University in St. Louis. Dr. Munger currently serves as the director of the Philosophy, Politics and Economics Program at Duke University and as the President of the North Carolina Political Science Association. From 2000 to 2006, he was the North American Editor of the academic journal *Public Choice*. He has served as an expert opposite from Dr. Martin in *Idaho Republican Party v. Ysursa*

(D. Idaho 2010), as well as in *Libertarian Party of North Carolina et al. v. North Carolina* (N.C. 2011) and *Broward Coalition et al. v. Browning* (N.D. Fla. 2009). Dr. Munger also has testified as an expert before the U.S. Senate Committee on Rules and Administration, as well as in a variety of cases on statistical inference and election laws in North Carolina and Texas in the 1990s.

Dr. Kyle L. Saunders is an Associate Professor of Political Science at Colorado State University. He received his Ph.D. from Emory University. Dr. Saunders' expertise is in the field of American politics and, in particular, the sub-fields of political parties, public opinion, voting behavior, survey research, and research design. He served as an expert in *Idaho Republican Party v. Ysursa* (D. Idaho 2010) and in *Static Control Components, Inc. v. Lexmark International, Inc*. (E.D. Ky. 2007).

Dr. Robert Y. Shapiro is a Professor and former chair of the Department of Political Science at Columbia University. He received his Ph.D. from the University of Chicago. Dr. Shapiro served as the acting director of Columbia's Institute for Social and Economic Research and Policy from 2008 to 2009. Currently, Dr. Shapiro is the chair of the Advisory Committee for *Public Opinion Quarterly* and serves on the editorial boards of *Public Opinion Quarterly*, *Political Science Quarterly*, *Presidential Studies Quarterly*, and *Critical Review*. He served

as an expert in litigation over the Bipartisan Campaign Reform Act of 2002, *McConnell v. FEC* (D.D.C. 2003).[1]

[1] Each of the Professors here represent their own personal views, and do not in any way claim to speak on behalf of their university, department, or other unit. Further, the academic affiliations are included solely for the purposes of identification.

SUMMARY OF ARGUMENT

In excluding the declaration and report of Plaintiffs' expert in American political economy, the district court applied novel categorical rules that, if allowed to stand, will dramatically limit and potentially exclude all expert testimony from the field of political science. The court found that the expert's testimony failed the relevance and reliability inquiries articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But in doing so, the district court did not follow *Daubert*'s flexible case-by-case approach and instead invented unobtainable bright-line standards for relevancy and reliability.

The district court first applied a rule for relevancy that, in practical effect, would exclude a significant amount of political science research. The court concluded that the proffered declaration and report were not relevant because the underlying research did not involve the particular law or state at issue in this case. This rule suggests an unfamiliarity with the research methods employed by political scientists. It is common practice in the field to draw conclusions about one context by extrapolating from research concerning a distinct, but analogous, factual context. A properly extrapolated conclusion can provide important and useful insight on political behavior where, due to practical or fiscal constraints, original research is not available.

The district court likewise applied an extremely restrictive bright-line rule for reliability. The court found the proffered testimony not reliable because the expert's research was not peer-reviewed and because the expert had been compensated in this litigation specifically and for his research more generally. These blanket restrictions are also out of step with reality. To begin with, a substantial body of scientifically valid political science research is not peer-reviewed. For example, due to the length of time required for peer-review, recent and timely research usually is not published in peer-reviewed journals. It is also the case that most experts are compensated for their time and most political science research is funded externally.

These categorical rules find no support in the law and, when applied together, would render inadmissible most, if not all, expert testimony in the field. Under *Daubert*, proffered expert testimony must be both relevant *and* reliable. Putting all of the district court's rules together, the only admissible political science testimony would be peer-reviewed research that was completed without external funding and that addresses the precise law at issue in the case. That is an impossible standard to meet and, if applied in future litigation, would deprive the courts of important and scientifically valid evidence.

ARGUMENT

The district court erred by applying several categorical rules to exclude the declaration and report of Plaintiffs' expert in American political economy.[2] According to the district court, the expert's research and findings failed to satisfy the relevance and reliability requirements set forth in the Supreme Court's now-familiar *Daubert* opinion. In reaching that conclusion, however, the district court invented novel threshold rules for admissibility that are virtually unobtainable for litigants that seek to introduce expert testimony in the field of political science.

In *Daubert*, the Supreme Court explained the requirements that govern the admission of expert testimony. Federal Rule of Evidence 702 provides that an expert witness may offer opinion testimony "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Fed. R. Evid. 702. Interpreting Rule 702, the *Daubert* Court concluded that expert testimony is admissible if "the reasoning or methodology underlying the testimony is scientifically valid and . . . th[e] reasoning or methodology properly can be applied to the facts in issue"—*i.e.*, if it is both reliable and relevant. 509 U.S. at 592-93. The Court explained that

[2] American political economy is an area of interdisciplinary academic expertise at the intersection of political science and economics. Experts in this specialty perform empirical analysis of the effects of political regulations and institutions, among other things.

"[m]any factors will bear on the inquiry," but stressed that it would "not presume to set out a definitive checklist or test." *Id*. at 593. Above all, "[t]he inquiry envisioned by Rule 702 is . . . a *flexible* one." *Id*. at 594 (emphasis added); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) (same).

The district court disregarded the Supreme Court's emphasis in *Daubert* on case-by-case flexibility and adopted a definitive checklist for admissibility of expert testimony. The district court did not hold a *Daubert* hearing and made no effort to familiarize itself with the research methods and practices commonly accepted in the field of political science. Rather, the district court excluded the expert's declaration and report because it failed the following bright-line tests: (1) the underlying research was not specific to the particular law at issue; (2) the research and report have not been peer-reviewed; and (3) the expert had been paid to produce the report and had a history of being paid to do research. If allowed to stand and applied in future litigation, these blanket rules will exclude virtually all political science research.

This Court should vacate the judgment below and remand for a proper application of the *Daubert* test. *Amici* take no position on the admissibility of the contested expert testimony under the proper legal standards. Nor do *Amici* offer any views on the ultimate merits of this case.

I. THE DISTRICT COURT APPLIED AN UNOBTAINABLE STANDARD OF RELEVANCY.

Under the district court's reasoning, only a limited realm of research would survive the relevancy inquiry. The district court found that the proffered expert's testimony was not relevant for two reasons. *First*, the expert relied on prior empirical research that studied a different type of disclosure law than the one at issue (*i.e.*, disclosure requirements for grassroots ballot-measure campaigns, and not for grassroots lobbying). *Many Cultures, One Message v. Clements*, No. 3:10-cv-05253, Slip Op. at 31-32 (W.D. Wash. Nov. 8, 2011) ("Slip Op.") (ER32-33). *Second*, the expert relied on research involving the laws of another state, which might have been implemented and enforced differently. *Id.* at 32 (ER33). In short, the district court excluded the expert declaration and report as irrelevant solely because the underlying research was not specific to the particular law and state at issue.

The district court's categorical threshold rule for relevancy suggests an unfamiliarity with the research methods commonly employed by political scientists. Broadly speaking, political scientists use survey studies, experimentation, and literature review as research tools. And as described below, it is common practice in the field to draw conclusions about one context by extrapolating from research involving a distinct, but analogous, factual context.

Political scientists use surveys and experiments as an observational tool to analyze and understand political behavior. *See* Henry E. Brady, *Contributions of Survey Research to Political Science*, PS: Political Science & Politics, Vol. 33, No. 1, at 47 (Mar. 2000). Using sampling techniques, surveys of a randomly selected subset of a population can be used to paint a reliable, representative, and unbiased picture of the much larger population. *Id.* Surveys often are conducted in conjunction with experiments to assess the impact of particular "events or manipulations" on individual political behavior. *Id.* The primary survey used in political science research is the American National Election Study ("ANES"). *Id.* at 48. The ANES is a biennial national survey commonly used to research political behavior, such as voters' reactions to registration or disclosure requirements, voting rules, and other similar conditions. *Id*. at 49; *see also* Steven J. Rosenstone & David C. Leege, *An Update on the National Election Studies*, PS: Political Science and Politics, Vol. 27, No. 4, at 694 (Dec. 1994).

It is widely accepted that survey data about one group of voters can reliably be used to draw conclusions about another group of voters with similar socioeconomic characteristics. Researchers generally agree that voters with similar socioeconomic characteristics will react the same way to voting rules and requirements no matter where they live. For example, whether from New Hampshire or New Mexico, a middle-class, male, college student can be counted

on to respond in a certain way to changes in polling hours. This presumption underlies the general acceptance of national survey data sets, such as the ANES, which consist of data drawn from different states and pooled together. *See* ANES, Our Studies, http://electionstudies.org/OurStudies/OurStudies.htm (last visited Mar. 20, 2012).

More importantly, it is also common practice to use survey data about one group of voters to draw conclusions about another group of voters with *dissimilar* socioeconomic characteristics. The national ANES data set, for instance, has been used time and again by political scientists to draw specific conclusions about state-level voting behavior, even though individual states rarely have the same socioeconomic breakdown as the nation at large.[3] To properly make such comparisons, a researcher must acknowledge and account for population differences. When drawing statistical conclusions, mathematical tools, such as multiple regression analyses, are often used to control for socioeconomic and other

[3] *See* Jeffrey R. Lax & Justin H. Phillips, *How Should We Estimate Public Opinion in The States?*, Am. J. Pol. Sci., Vol. 53, No. 1, at 107 (Jan. 2009) ("one can accurately estimate state opinion using only a single large national survey"); *see also* Paul Brace et al., *Public Opinion in the American States: New Perspectives Using National Survey Data*, Am. J. Pol. Sci., Vol. 46, No. 1, at 184 (Jan. 2002) ("using national-level public opinion data disaggregated to the states[,]" one "can evaluate how differing institutional designs across the states [such as] elections, referenda, [or] initiatives" impact the electorate) (discussing analogous survey); *id.* at 174 ("social scientists can pool survey data collected from national surveys to estimate state public opinion").

variations. When drawing more qualitative conclusions about one context based on research from another context, a researcher will often explain why certain differences do not matter or appropriately qualify their conclusions. In either event, a properly extrapolated conclusion can provide important and useful insight on political behavior where, due to practical or fiscal constraints, original survey data are not available.

In much the same way, political scientists commonly employ field experiments as a tool to make causal inferences about the impact of particular laws or events on political behavior or opinions. For example, one might conduct field experiments in a given location (*e.g.*, New Haven) and replicate these experiments in a variety of other locations (*e.g.*, Seattle, Columbus and Raleigh) to determine whether voters react in the same way to particular laws or events. Drawing from field experiment research, political scientists can predict and explain the impact of particular laws or events on individual political behavior in still other locations. *See, e.g.*, Donald P. Green and Alan S. Gerber, Get Out The Vote: How to Increase Voter Turnout (Brookings Institution Press, 2d ed. 2008) (meta-analysis of over 100 field experiments).

Literature review is another common tool employed in political science research. Political scientists often use literature review to survey existing scholarship for answers to a given research question. Iain McMenamin, *Process*

and Text: Teaching Students to Review the Literature, PS: Political Science & Politics, Vol. 39, No. 1, at 134-35 (Jan. 2006). They first "summarize the findings or claims that have emerged from prior research efforts" addressing the particular question. Jeffrey W. Knopf, Doing A Literature Review, *PS: Political Science & Politics*, Vol. 39, No. 1, at 127 (Jan. 2006). A review then concludes with an "assess[ment] [of] the strength of support [in the literature] offered for those claims." *Id*. at 127-28.

Where literature on the precise question at hand does not exist, it is common for a researcher to extrapolate from existing literature addressing analogous questions. After distilling analogous works to their core findings, a researcher draws conclusions about the probability that those findings hold true in distinct, but comparable, settings. *Id.* at 131. Thus, a political scientist could review a body of published literature about a particular law or state and extrapolate the findings in that literature to different laws or to another state.

In sum, political scientists routinely rely on surveys, experiments, and literature review in research within their discipline, and they routinely extrapolate from such research to draw conclusions about distinct, but analogous, contexts. The conclusions they draw are not rooted in blind faith; rather, they follow from commonly accepted methods and practices in the field.

But the district court's blanket exclusion would foreclose all of this research from consideration. It is possible, of course, to critique on a case-by-case basis whether an expert has properly extrapolated from research conducted in another context. For example, one might argue that the expert failed to employ sufficient statistical controls, that the expert's qualitative explanations are unpersuasive, or that the literature reviewed was not sufficiently related to the question at hand. The district court, however, did not attack the methods of extrapolation employed by Plaintiffs' expert or permit the expert to defend his methodology. Instead, the district court adopted the novel conclusion that *no* election-law research can ever be relevant and admissible unless it involves the very law at issue and was conducted in the very state at issue.

This categorical rule finds no support in the law. Rule 702 contemplates that expert testimony is relevant if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. The inquiry is one of "helpfulness" and "fit." *Daubert*, 509 U.S. at 591-92. Nothing about this flexible standard suggests that research conducted in a separate, but analogous, context can *never* be relied upon. To the contrary, courts regularly consider such evidence. *See*, *e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 578-79 (2000) (evidence in First Amendment challenge to California "blanket" primary rule included expert testimony on the "cross-over" voting phenomenon in Washington state, which had

a similar rule). By excluding Plaintiffs' expert simply because his underlying research concerned a different law and jurisdiction than the ones at issue, the district court imposed a novel and inflexible standard of its own creation.

II. THE DISTRICT COURT LIKEWISE APPLIED AN UNOBTAINABLE STANDARD OF RELIABILITY.

The district court's view of reliability also would exclude vast amounts of political science research. The district court found that the declaration and report of Plaintiffs' proffered expert was not reliable for two reasons. *First*, the district court noted that the research has not been subject to peer-review. Slip Op. at 32-33 (ER33-34). *Second*, the district court found unacceptable the fact that the expert had been paid for the report and for other research outside the litigation. *Id*. at 33 (ER34). *Amici* do not contest that these factors may be appropriate to consider as part of a flexible inquiry into the reliability of an expert's opinions. But the district court converted these factors into a bright-line rule for reliability, which in practical effect would exclude nearly all political science research.

To begin with, a substantial body of scientifically valid political science research is not peer-reviewed. Only a small percentage of material submitted for publication in social science journals is accepted for peer-review and publication. The overall acceptance rate of articles into peer-reviewed journals in political science is approximately 15 percent. *See* Stephen Yoder & Brittany H. Bramlett, *What Happens at the Journal Office Stays at the Journal Office: Assessing Journal*

Transparency and Record-Keeping Practices, PS: Political Science & Politics, Vol. 44, No. 2, at 363-73 (Apr. 2011). And the acceptance rate into top peer-reviewed journals in the discipline is less than ten (10) percent. *See* Yoder & Bramlett, *supra*; Micheal W. Giles & James C. Garand, *Ranking Political Science Journals: Reputational and Citational Approaches*, PS: Political Science & Politics, Vol. 40, No. 4, at 741-51 (Oct. 2007).

It is well recognized that, given their limited space and resources, peer-reviewed journals turn away articles for many reasons, only one of which is lack of scientific validity. Scientific validity is necessary but far from sufficient for acceptance for peer-review and publication. Editorial bias on the part of journal reviewers might exclude a submission based solely on the topic, *see* Yoder & Bramlett, *supra*, at 364, or on a perceived lack of substantive or theoretical significance of the work, *see* Giles & Garand, *supra*, at 749. Journal reviewers also consider "generalizability of the findings." *Id.* As a result, peer-reviewed journals do not often publish research that focuses solely on a single state, such as the report at issue in this case. A review of the articles published between 2000 and 2012 in the top ten political-science journals reveals that *none* of the articles studied survey data drawn from a single state as a means of reaching conclusions about a single state or locality.

In fact, the well-known editorial bias of peer-review journals has led to what is referred to in academia as the "file-drawer" problem. Aware that journal reviewers generally prefer papers with splashy findings, political scientists often choose not to submit some research for peer-review and publication. Those "humdrum" papers that remain in the file drawer, however, often are no less rigorous than the more theoretically interesting or thought-provoking papers that are submitted to peer-reviewed journals.

The time required for peer-review also means that recent and timely research usually is not published in peer-reviewed journals. *See Daubert*, 509 U.S. at 593 ("Some propositions . . . are too particular, too new, or of too limited interest to be published."). The research process itself is time-intensive. A researcher must: formulate the question; design, plan for, and conduct the research; analyze the research; and, finally, prepare a written product. Then, from the time of submission it typically takes two to three months for a political scientist to receive an editor's initial decision. *See* Yoder & Bramlett, *supra*, at 365. Most often, the journal editor requires at least one round of revisions to the piece before a final "acceptance" decision. *See generally id.* The entire peer-review process commonly takes in excess of one year from the time of submission. *See generally id*. It follows that, from formulating the question to finally publishing the findings, peer-reviewed research often takes as long as two years to complete.

The district court's categorical rule requiring peer-review would therefore exclude much scientifically valid political science research. Had the court conducted a *Daubert* hearing, it could have familiarized itself with the way peer-review works in the field of political science. Instead, the district court invented a threshold rule that is significantly out of step with reality.

Worse than requiring peer-review, however, is the district court's blanket prohibition of experts who have been compensated for their time or paid to do research. The district court found reliability "lacking" in part because Plaintiffs' expert was paid $2,500 for the report proffered in this case. Slip Op. at 32-33 (ER33-34). The court also found fault with the fact that the Institute for Justice, which represents Plaintiffs in this case, has often provided funding for the expert's research. *Id*. at 33 (ER34). If allowed to stand, these categorical rules would exclude essentially *all* political science research from consideration by courts.

It is common knowledge that nearly all experts are compensated for their time. "Most experts, like most attorneys, are not willing to do much work without being compensated. If payments to experts were eliminated, there would not be much expert testimony." Stephen D. Easton, *Ammunition for the Shoot-out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 Ariz. St. L.J. 465, 496 n.98 (2000) (citation omitted); *see also*, *e.g.,* M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony in its*

Epistemological Place: What Predictions of Dangerousness in Courts Can Teach Us, 91 Marq. L. Rev. 1119, 1136 n.76 (2008) ("Most experts are paid quite handsomely for their testimony."). The Federal Rules of Civil Procedure acknowledge this fact, requiring experts who provide written reports to disclose their compensation. Fed. R. Civ. P. 26(a)(2)(B)(vi).

It is also commonplace for political scientists to receive some sort of funding for their research. Research—in particular, conducting original surveys or experiments—is expensive. *See* Brady, *supra*, at 54-55 ("Survey research is costly and difficult[,]" and a "'cost-power' gap confronts all political scientists trying to deploy the most powerful survey designs"). Most political science research is conducted with funding from an outside source, such as the National Science Foundation or other government entities, private foundations, non-profit organizations, for-profit companies, or advocacy groups.[4] To illustrate the general principle, *Amici* reviewed the most recent 100 articles published in the *American Political Science Review* (from January 2010 through February 2012) and found that 45 expressly acknowledge outside funding for the research underlying the

[4] *See, e.g.*, National Science Foundation, Division of Social and Economic Sciences, http://www.nsf.gov/div/index.jsp?div=SES (last visited Mar. 20, 2012); American Political Science Association, Grants, Fellowships, and Other Funding Opportunities, http://www.apsanet.org/content_3115.cfm (last visited Mar. 20, 2012) (cataloguing various sources of outside funding).

findings.[5] Twelve of the 100 articles involved survey-based research, and each of those acknowledged receiving outside funding.[6] Of specific relevance to this case, private parties regularly fund social science research in campaign finance initiatives. *Cf., e.g.*, Ray LaRaja and Sidney M. Milkis, *For the Plaintiffs: The Honor and Humility of Defending Political Parties in Court*, PS: Political Science & Politics, Vol. 37, No. 4, at 771-72 (Oct. 2004) (Republican National Committee retained and paid political science experts who, in turn, conducted research and prepared reports for litigation over campaign finance law).

Like the district court's rules for relevance, the court's blanket rules for reliability find no support in the law. To the contrary, the Supreme Court and this Court have squarely rejected both principles adopted by the district court. The Supreme Court has unequivocally stated that peer-reviewed publication "is not a *sine qua non* of admissibility" and "does not necessarily correlate with reliability." *Daubert*, 509 U.S. at 593; *see also id.* ("[I]n some instances well-grounded but innovative theories will not have been published."); *Kumho Tire*, 526 U.S. at 151 (positing that "a claim made by a scientific witness [may not have] been the subject of peer review" because "the particular application at issue may never

[5] Other authors likely received indirect funding for research.

[6] Four of these articles relied on pre-existing data sets, such as ANES data. Funding for the ANES and other national surveys comes from the National Science Foundation. *See* Rosenstone & Leege, *supra*, at 693; Brady, *supra*, at 55.

previously have interested any scientist"). Further, this Court has long recognized that the fact "[t]hat an expert testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

The reliability inquiry focuses "solely on principles and methodology." *Daubert*, 509 U.S. at 595. The question is whether an expert has derived his opinion by methods that satisfy the standards for the methodology his profession ordinarily requires for research. *See People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537 (7th Cir. 1997). Whether "the theory or technique has been subjected to peer review and publication" is one of many "pertinent consideration[s]," but neither that alone nor any other consideration is singularly determinative. *Daubert*, 509 U.S. at 593.

As it did with relevance, the district court failed to follow established legal principles and created its own novel rules. These bright-line rules ignore the Supreme Court's express instruction that expert testimony should not be judged against a "definitive checklist or test." *Id.* at 593-94; *Kumho Tire*, 526 U.S. at 150. And if allowed to apply in future cases, the district court's rules would foreclose from consideration essentially all expert testimony in the field of political science.

III. TAKEN TOGETHER, THE STANDARDS APPLIED BY THE DISTRICT COURT WOULD EXCLUDE MOST EXPERT TESTIMONY FROM THE FIELD OF POLITICAL SCIENCE.

The district court's error in adopting categorical rules is magnified significantly by the fact that *all* of its rules must be satisfied for expert testimony to be admissible. Under *Daubert*, proffered expert testimony must be both relevant *and* reliable. Putting together all of the district court's rules for relevance and reliability, a political science expert's testimony would be admissible only if drawn from (1) peer-reviewed research (2) that was completed without external funding and (3) that addresses the precise law at issue in the case.

That combination of criteria would be impossible to meet. Given the vagaries of peer-review, it is unlikely enough that timely peer-reviewed research on a specific, challenged state law could be completed within the time limits imposed by ordinary litigation. There is no possibility that such research also could be completed without external funding.

The district court has turned *Daubert* on its head. *Daubert* reflects the liberal approach to the admissibility of evidence embodied in the Federal Rules. *See Daubert*, 509 U.S. at 588 (rejecting a "rigid" reading of Rule 702 as "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony'" (citation omitted)). Courts have thus long erred in favor of admitting evidence and trusting in the rigors of the adversary

system. *See id.* 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."). "As long as an expert's scientific testimony rests upon 'good grounds, based on what is known,' it should be tested by the adversary process . . . rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." *United States v. Mitchell,* 365 F.3d 215, 244 (3d Cir. 2004) (citation omitted); *see also, e.g.*, *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002). This has been particularly true with respect to expert testimony in the social sciences, where courts have recognized that research simply cannot have the exactness of hard science methodologies. *See Jensen v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297 (8th Cir. 1997); *United States v. Simmons*, 470 F.3d 1115, 1123 (5th Cir. 2006).

In excluding Plaintiffs' expert in American political economy, the district court instead applied an unobtainable threshold standard. That approach is inconsistent with the law and would deprive the courts of expert testimony that has long played an important role in the adjudicatory process. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003) (citing expert reports of distinguished political scientists relied upon by district court).

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment below and remand for a proper application of the *Daubert* test.

Respectfully submitted,

Dated: March 22, 2012

By: */s/ Elbert Lin*

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 5,166 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 14 point Times New Roman font.

Dated: March 22, 2011 */s/ Elbert Lin*

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2012, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Elbert Lin

Counsel for Amici Curiae