IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER, Plaintiffs, v. GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE, Defendants.	)	No. 15-cv-421-bbc

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PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE THE SECOND DECLARATION OF DR. KENNETH MAYER

INTRODUCTION

During trial, Judge Griesbach asked questions and made requests of plaintiffs' counsel that appeared to counsel to be aimed at making a meaningful comparison between the 2000s and post-Act 43 wards and the votes cast in elections both before and after Act 43. Plaintiffs and defendants stipulated to the raw data and the shapes of the wards, which were supplied to the Court (Dkt. 152). But the data provided in the Stipulation (Dkt. 152), standing alone, does not provide the Court with the information to make the comparison that plaintiffs believe the Court was seeking. Accordingly, plaintiffs submitted Dr. Mayer's second declaration to answer the Court's questions and to help the Court make a meaningful comparison of the 2000s wards and the post-Act 43 wards, and the votes cast in presidential elections in those wards (Dkt. 154).

Defendants argue against admitting Dr. Mayer's second declaration (Dkt. 154-1). As with most of their other arguments opposing the admission of plaintiffs' expert evidence, that opposition has nothing to do with the helpfulness of the proffered evidence, nor do defendants even argue that the evidence would not be helpful to the Court. The arguments they do make are unpersuasive at best, and do not respond to the bulk of the arguments plaintiffs made in their motion for leave.

ARGUMENT

I. Judge Griesbach's questions and requests to counsel appeared to seek information sufficient to allow a meaningful comparison of the 2000s and post-Act 43 wards, which the publicly available data provided by the parties cannot alone provide.

The defendants claim that "plaintiffs' motion is based on a misreading of Judge Griesbach's questions to Professor Goedert." Defs.' Opp. Br. (Dkt. 160) at 1. That claim rests on an excessively narrow interpretation of the information Judge Griesbach appeared to be seeking in the context of his questions. Plaintiffs believe that providing the Court with only the data that the defendants argue is responsive to their narrow reading of Judge Griesbach's request ultimately would not be helpful to the Court, and would leave Judge Griesbach's questions unanswered and unanswerable.

Judge Griesbach's questions arose in the context of the defendants' redirect examination of Professor Goedert, and specifically with respect to Figure 1 in his expert report, which analyzes the vote distributions of Wisconsin's post-Act 43 wards. Tr. Vol. IV at 253; Tr. Ex. 136 at 22. Judge Griesbach asked if the underlying data for Figure 1 was composed of the actual ward vote totals for 2012, and then said "as well as the 2010 wards, we can see what the wards look like…before they were redrawn under Act 43?" Tr. Vol. IV at 253:1-18.[1] Judge Griesbach

[1] Defendants also argue that Dr. Mayer should not be able to file a second declaration because "Judge Griesbach asked his questions of Professor Goedert, not Professor Mayer." Defs.' Opp. Br. (Dkt. 160) at

continued, "since the wards were redrawn, it might be helpful to see what they looked like before and after." Tr. Vol. IV, 254:15-16.[2] Given that context, it appears to plaintiffs' counsel that Judge Griesbach was seeking a way to meaningfully compare what the wards looked like both before and after the enactment of Act 43 in terms of the distribution of presidential votes.

Even if the defendants are correct that Judge Griesbach wanted to compare the raw vote totals in order to get an idea of "what the wards actually look like," they are mistaken that the publicly available data filed with the parties' Stipulation (Dkt. 152) would provide a meaningful comparison of the 2000s and post-Act 43 wards. Defs.' Opp. Br. (Dkt. 160) at 2. Plaintiffs provided several reasons why the raw data alone could not be used to compare the 2000s and post-Act 43 wards in their original motion (Dkt. 154) at ¶¶ 6-9, and so will only quickly summarize them here.

First, one set of the raw data provided by the parties is from the Legislative Technology Services Bureau ("LTSB"), whose datasets have known errors and usually require validation and/or correction before use. The LTSB data provided by the parties was not validated or corrected, because the defendants would not stipulate to validated data. *Id*. at ¶ 7-8. The second set of data is from the Government Accountability Board ("GAB"), which provides the vote totals for *reporting units*, not wards. Reporting units often combine multiple wards together, and thus do not give insight into the vote totals at the ward level in the state. *Id*. at ¶ 8. ***Second***, the

3. But as Professor Goedert acknowledged at trial, the data he had on the matter came from Dr. Mayer's reliance material, not his own. Tr. Vol. (IV) at 253:9-11. Further, if the Court prefers, plaintiffs can offer Dr. Mayer's second declaration as rebuttal testimony.

[2] Evidence of the presidential vote distribution in the post-Act 43 wards was already in the record, Tr. Exs. 107, 136 at 22, and thus it would make sense to compare the 2000s ward vote distribution to the post-Act 43 ward vote distribution. Figure 1 of Professor Goedert's expert report (Dkt. 51, Tr. Ex. 136 at 22), analyzed the post-Act 43 ward vote distribution and was intended to rebut the opinions and the Demonstration Plan found in Dr. Mayer's original expert report (Dkt. 54, Tr. Ex. 2). Dr. Mayer's expert rebuttal report and testimony (Dkt. 95, Tr. Ex. 114) then in turn addressed the opinions that Professor Goedert expressed in Figure 1 of his expert report (Dkt. 51, Tr. Ex. 136 at 22).

ward names and boundaries are not the same for the 2000s and post-Act 43 wards, and the overall number of wards, and the number of wards in some municipalities, is not constant. The result is that a direct comparison of a specific ward from the 2000s to post-Act 43 would be extremely difficult, if not impossible. *Id*. at ¶ 9-10. The defendants ignore these concerns in their response brief, but that does not make them disappear.

Given that the raw data alone is insufficient to allow a meaningful comparison of the presidential vote totals in the 2000s and post-Act 43 wards, without Dr. Mayer's second declaration, the Court would not have the information necessary to meaningfully compare the wards or to answer Judge Griesbach's questions. That is exactly why Dr. Mayer prepared his second declaration. As the plaintiffs stated in their original motion, "Dr. Mayer's declaration serves to answer a question posed by the Court, and does not provide testimony for the plaintiffs' case-in-chief or raise new theories." *Id*. at ¶ 12. Not only does Dr. Mayer's second declaration answer a question of interest for the Court, it is also consistent with the opinions he expressed in his expert reports and at trial.

II. Defendants' argument that the ward maps prepared by the LTSB at the defendants' request are not equivalent to expert testimony is unpersuasive.

Defendants also argue that the maps posted online by the LTSB are not the equivalent of expert opinions because "these maps, like the vote totals, are publicly available records." Defs.' Opp. Br. (Dkt. 160) at 3-4. However, the ward maps, as constituted on the LTSB ArcGIS website, were not previously publicly available as clickable layers on a customizable map. The LTSB created them, at the request of the defendants, and made them publicly available. Dr. Mayer's second declaration is no different; it was created by analyzing publicly available data and submitted as responsive to a question of the Court. By defendants' logic, which holds that content posted online is not expert testimony because it is "publicly available," defendants

should have no objection to Professor Chen's Wisconsin analysis (Tr. Exs. 156-160), which has been publicly available online for months. There is no reasoned evidentiary basis to permit the defendants to provide post-trial ward-level data to the Court by having the LTSB post that data on its website in response to the Court's questions, but to prohibit Dr. Mayer from providing an analysis of the same data for the same reason.

Ultimately, the question that the Court should ask – whether as to the post-trial evidence the defendants presented through the LTSB, or the post-trial evidence the plaintiffs tendered through Dr. Mayer's second declaration – is whether the proffered evidence is helpful to the Court. If it is, the Court should admit it, and as this is a bench trial, accord it the weight that the Court deems appropriate. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) ("'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,' an expert 'may testify thereto'"); *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006) ("Where the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702.")

III. Defendants' discussion of the Wisconsin sensitivity analysis provided during trial by Dr. Jackman in response to questioning by the Court is irrelevant and inaccurate.

Defendants next argue that "the plaintiffs merely used the Court's question about the application of [Dr.] Jackman's work to Wisconsin as an excuse to introduce new expert testimony at trial . . . ." Defs.' Opp. Br. (Dkt. 160) at 5. As a threshold matter, this argument is irrelevant to plaintiffs' motion. Plaintiffs' motion seeks to admit a declaration of Dr. Mayer, not Dr. Jackman. Defendants nonetheless complain about a different proffer of evidence the plaintiffs made during trial that is not related to the present motion. Responding to the substance of the argument, plaintiffs note that the defendants again misunderstand the context in which the

plaintiffs provided information requested by the Court. On the third day of trial, Judge Ripple asked Dr. Jackman a series of questions specifically about a Wisconsin-focused analysis. Judge Ripple asked, "The database that you're using, here, Professor, the swings that you have observed are from all over the United States, am I right? . . . Why are they relevant or probative evidence of what would happen in Wisconsin? . . . Couldn't the swing be very different…for Wisconsin?" Tr. Vol. III at 220:9-25.

In direct response to these Wisconsin-specific questions from Judge Ripple, the plaintiffs provided the Court with Dr. Jackman's Wisconsin sensitivity analysis. Tr. Vol. III at 222:23-223:7. As is evident from the transcript, this information was only provided in response to questioning from the Court, and not, as defendants argue, "as an excuse to introduce new expert testimony at trial in violation of the federal rules." Defs.' Opp. Br. (Dkt. 160) at 5. Dr. Mayer's second declaration is no different; plaintiffs are providing it to respond to the Court's questions and to be helpful to the Court, in line with the procedure established in the Preliminary Pretrial Conference Order entered October 15, 2015 (Dkt. 33) at ¶ 2.

CONCLUSION

For the reasons set forth above and in plaintiffs' motion for leave (Dkt. 154), plaintiffs' respectfully request that the Court grant their motion for leave to file the second declaration of Dr. Kenneth Mayer, and that Dr. Mayer's second declaration be admitted in the record of this action.

Dated this 30th day of June, 2016.

Respectfully submitted,

/s/ Annabelle E. Harless

Annabelle E. Harless
CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(312) 561-5508
aharless@campaignlegalcenter.org

One of the Attorneys for the Plaintiffs, William Whitford, et al.