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

WILLIAM WHITFORD, *et al.*,

Plaintiffs,

v. Case No. 15-cv-421-bbc

GERALD C. NICHOL, *et al.*,

Defendants.

DEFENDANTS' POST-TRIAL REPLY BRIEF

The plaintiffs' post-trial brief makes clear their proposed legal standard is inconsistent with Supreme Court precedent. All nine Justices in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), made plain that a democratically-enacted districting plan like Act 43 is entirely lawful when it complies with traditional districting principles. The plaintiffs claim Act 43 is unconstitutional because it (1) "aimed to benefit Republicans and handicap Democrats," (Dkt. 155:12); (2) its efficiency gap (*EG*) is consistent with the *EG*s seen under the prior court-drawn plan; and (3) it is possible to draw a different plan similar on some traditional redistricting principles with a lower efficiency gap (*EG*). None of these three features support striking down Act 43—partisan intent is lawful, the alleged "discriminatory effect" is present even in neutral plans, and the plaintiffs' burden-shifting argument effectively uses the "unavoidable" and "necessary" test that this Court correctly rejected on summary judgment.

I. The plaintiffs' standard is barred by Supreme Court precedent.

The plaintiffs' argument that *Vieth* held that a redistricting plan like Act 43 can be an unlawful gerrymander even where that plan complies with traditional districting principles, (Dkt. 155:21), is the opposite of what all nine Justices concluded. The four Justice plurality held that all redistricting plans survive a partisan gerrymandering challenge. 541 U.S. at 281 (plurality op.). *A fortiori*, the plurality's approach would uphold as lawful any plan that complies with neutral districting principles. Justice Kennedy emphasized the importance of a test identifying plans where political classifications "were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 307 (Kennedy, J. concurring). It is entirely implausible that Justice Kennedy, who sought a narrower test than proposed by the dissenting Justices, was supporting an approach that would strike down a redistricting plan that is entirely consistent with all "legitimate legislative objective[s]." *Id.* And, of course, all four of the dissenting Justices in *Vieth* explained that they would only strike down plans that were inconsistent with neutral districting principles. *Id.* at 339 (Stevens, J., dissenting) ("no neutral criterion can be identified to justify the lines drawn"); *id.* at 348 (Souter, J., dissenting, joined by Ginsburg, J.) ("paid little or no heed to those traditional districting principles"); *id.* at 366 (Breyer, J., dissenting) ("depart radically from previous or traditional criteria").

The plaintiffs' application of *Vieth* to redistricting plans that comply with traditional districting principles is thus entirely wrong. The Supreme Court explained in *Marks v. United States*, 430 U.S. 188, 184 (1977), that "[w]hen a

fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotation omitted). The Court has also held that dissenting and concurring opinions can be combined together when circumstances warrant. *See*, *e.g.*, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599 (2012); *United States v. Jacobsen*, 466 U.S. 109, 115-18 & n.12 (1984). Under any possible approach to interpreting splintered Supreme Court decisions, a majority of the *Vieth* Court—indeed, all nine Justices—made plain that a plan that is consistent with neutral districting principles survives a partisan gerrymandering challenge.

The plaintiffs' remaining arguments on this score fail. They assert that upholding plans that comply with neutral districting criteria is "bad policy," (Dkt. 155:21), but this is an unsupported normative claim foreclosed by *Vieth*. And they argue that non-compliance with neutral districting principles could be taken into account during the intent prong. But, again, *Vieth* makes plain that departure from traditional districting principles is a necessary *element* of *any* partisan gerrymandering claim, which the plaintiffs must prove. The plaintiffs' standard is inconsistent with *Vieth* because it is trying to change the very definition of a gerrymander. Given that the undisputed evidence at trial established that Act 43 complies with these principles, it is lawful.

II. The plaintiffs' brief highlights the problems with their burden-shifting step.

A. A plan cannot be struck down merely because an alternative map could be drawn with a lower efficiency gap.

The plaintiffs' application of the burden-shifting step is also inconsistent with the decision on the motion for summary judgment. While the plaintiffs' post-trial brief uses the word "justified," their argument only works under the "unavoidable" or "necessary" standard rejected on summary judgment. (Dkt. 94:32–34.)

The defendants justified Act 43 by showing its comparability to past plans and the Demonstration Plan on traditional districting principles. While the defendants do not believe they have to justify Act 43's efficiency gaps, those are justified by the fact they are indistinguishable from *EG*s seen under the *Baumgart* plan (–13 and –10 compared to –12 and –10). The plaintiffs predict Act 43 will have "an average efficiency gap of –10% over its lifetime," (Dkt. 155:15), yet this is not much different from the *Baumgart* plan, which had an average of –8. (Ex. 34, Table 1.) Act 43's *EG*s are justified because they are similar to the *Baumgart* plan and thus entirely consistent with how Wisconsin was districted by a neutral body.

The plaintiffs' mode of analysis gets things entirely backwards. They argue that Act 43's efficiency gap was not justified because there are other plans that match Act 43 on some traditional districting criteria, but would have had a lower efficiency gap in hypothetical alternative elections in 2012. (Dkt. 155:18–19.) Under their approach, a state cannot "justify" a plan that undisputedly complies with traditional districting principles because there is an alternative map with a lower *EG* that matches the democratically-enacted plan on some, but not all, traditional

criteria. This makes the State prove that the *EG* was "necessary" or "unavoidable" because it will always be possible to draw an alternative plan with a different *EG*, and this would make the *EG* the most important factor in districting. This is the antithesis of the "great caution" urged by Justice Kennedy. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

B. The Demonstration Plan does not prove Act 43 is unjustified.

The Demonstration Plan does not show Act 43 is unjustified because it is not a justified plan itself. It simply is not a realistic plan that could have been enacted by a court or a commission. When districting, courts would not draw tortured districts around Lake Winnebago to offset a Democratic disadvantage in wasted votes elsewhere in the State. (Dkt. 149:106–11; Ex. 515; Ex. 520.) Nor would a court enact a plan that ignored core retention and disenfranchisement, and rampantly paired incumbents (37 total, 26 Republicans). (Ex. 520; Dkt. 153:24.) Given its weaknesses, the Demonstration Plan cannot be used to overturn a democratically-enacted plan that satisfies neutral districting criteria.

Further, the defendants' argument regarding a uniform swing is not "hard-to-follow." (Dkt. 155:24.) The Demonstration Plan's virtue is supposedly that it meets Act 43 on traditional districting principles with a lower *EG*. Professor Mayer, however, used 20/20 hindsight to draw districts to get the political result he wanted, specifically assuming that Democrats would win a large number of close races. (Ex. 561; Ex. 568; Dkt. 149:94–101.) Before the 2012 election, Mayer would not have been able to offer his Demonstration Plan as an alternative to Act 43 with

a lower *EG* because his plan has the same *EG* as Act 43 in a good Republican year like 2014. (Ex. 561; Ex. 568; Dkt. 149:94–101.) His plan only "works" for the plaintiffs' purposes under the specific conditions of the 2012 election—and even then only by assuming real elections under his plan would occur as predicted by his model.

III. The plaintiffs have not proven unconstitutional partisan intent.

A. There was not an excess of the ordinary and lawful motive of partisanship so as to invalidate Act 43.

The plaintiffs' brief confirms that they have not proven an unconstitutional level of partisan intent. Because the defendants have previously addressed the weaknesses in the plaintiffs' intent element (Dkt. 73:3–4; Dkt. 133:5–7; Dkt. 153:7–10), this section focuses on specific claims made in the plaintiffs' post-trial brief.

The plaintiffs argue that Act 43 is unconstitutional because (1) Republicans might win 59 seats on 49% of the vote and (2) Democrats might not win a majority of seats even if they won 54% of the statewide vote. (Dkt. 155:9.) Similar results, however, were seen under prior court-drawn plans. From 1998 to 2004, Republicans won 55 seats on 49% of the vote, 56 seats on 50.25%, 58 seats on 50.5%, and 60 seats on 50%. (Dkt. 125:48, 51, ¶¶ 233, 250–53.) In addition, Democrats won 54% of the vote in 2006 and 2008 (Dkt. 125:51, ¶¶ 254–55), yet failed to win a majority in 2006 and only won a narrow majority of 52 seats in 2008. (Dkt. 125:48, ¶ 233.) It is not unconstitutional to intend results actually seen under prior court-drawn plans.

The plaintiffs' argument on the timing of Act 43's passage is essentially that Republicans should not have been able to adopt a districting plan until early 2012

after each and every municipality completed its ward-drawing. This argument borders on the absurd, considering the Democrats filed a lawsuit claiming the old districts were unconstitutional on June 10, 2011, one month before Act 43 was introduced. (Dkt. 153:11.) The plaintiffs' argument about the pending recall elections is similarly futile—it is immaterial because the Republicans maintained control and it shows nothing more than ordinary politics. Legislatures are not prevented from passing laws because control of a house might change due to recalls; nor is it unusual that a party (whether Republican or Democrat) would continue to pass laws while it maintained the majority.

B. The plaintiffs misstate the evidence on partisan intent.

The plaintiffs incorrectly claim that Professor Gaddie's S-curves show that "Act 43's authors aimed to give Republicans a large and durable advantage." (Dkt. 155:10.) This contradicts Gaddie's testimony that his S-curves did not "provide any information on the durability of the districts over time." (Dkt. 108:182:lines 20–23.) Further, the composite score was a simple average of races from 2004 to 2010 that becomes less useful as time passes; it is not a forward-looking number. (Dkt. 153:8.)

In order to attack Ottman's testimony, the plaintiffs are forced to misrepresent it. Ottman did not testify about that his plan "included more Republican seats than the Final Map," (Dkt. 155:13), he testified that one of his plans had 54 "safe and lean" seats whereas the final map had 52. (Dkt. 148:109–10.) The plaintiffs extensively relied on the "safe" and "lean" categories on cross,

(*e.g.*, Dkt. 147:58, 62–64; Dkt. 148:15–16); Ottman's testimony showed the final map did not have the highest number of these districts possible. Further, Ottman did not testify that "he did not provide senators with partisan data about their districts," (Dkt. 155:13); he testified that he did provide political information to senators, like election results of particular races, but that he did not present *the composite partisan score* to them. (Dkt. 148:107–08.) This just a continuation of the plaintiffs' using *consistent* testimony to "impeach" witnesses, which they did numerous times at trial. (*E.g.*, Dkt. 147:197–199; Dkt. 148:18–19, 28; Dkt. 150:103–05, 110–11, 213–15.)

Lastly, the plaintiffs strangely equate the import of traditional districting criteria in the drafting of Act 43 with the amount of documents that were saved separately on the drafting computers. (Dkt. 155:13–14.) The proof that the drafters of Act 43 cared about traditional districting factors is in the results they achieved, not in a number of documents. In any event, Adam Foltz explained how the drafters paid attention to various factors, like population equality and compactness, as they drew districts, and how they would run reports in the drafting program and did not need to print or save them separately. (Dkt. 147:53–59.)

C. The plaintiffs do not understand the importance of the incorrect partisan scores.

The incorrect partisan scores, both the data error in the composite and the large discrepancies between the composite and Gaddie's model, show that these partisan scores cannot be used as gospel fact and do not necessarily translate to the real world of elections. The 2004 to 2010 average was supposed to capture an

average of all 13 statewide races during the time period. The plaintiffs respond to the error by contending that an average of 12 statewide races comes out about equal to the average of all 13 races with a significant data error. (Dkt. 155:11.) This merely compares one incorrect score with another; it does not create a correct composite score. The actual average is much more favorable to Democrats.

The plaintiffs' contention that the composite matched Gaddie's model at the ward level is irrelevant. (Dkt. 155:10–11.) Legislative staff ran composite scores at the district level with the erroneous data (Dkt. 147:120–32; Ex. 172:3; Ex. 556); there were no ward-level composite partisan scores. Further, partisan scores for *districts* are only relevant if they actually work at the *district* level; the undisputed evidence showed the composite was wrong at the district level and that the composite's district scores varied substantially from those in Gaddie's S-curves. (Dkt. 147:120–40, 176–83.) Given that legislative staff testified they did not use Gaddie's S-curves (Dkt. 147:139; 183; Dkt. 148:19), the S-curves cannot be used to show legislative intent. This is particularly true when Gaddie's district scores vary so significantly from the composite score that was actually used. (Dkt. 147:134–40, 176–83; *compare* Ex. 173:3 *with* Exs. 553 & 556.)

IV. The plaintiffs have not countered the many weaknesses of using the efficiency gap in a legal standard.

A. The efficiency gap does not measure discriminatory effect.

A majority of the *Vieth* court rejected a test that uses a "discriminatory effect" that is consistent with court-drawn plans. The plurality rejected an "effects prong" that included the "ability to translate a majority of votes into a majority of seats,"

541 U.S. at 286–87 (plurality op.), because Republicans had won a majority of seats with a minority of votes in an election under a court-drawn plan in Pennsylvania. *Id.* at 289. Justice Kennedy agreed that the plurality had "demonstrat[ed] the shortcomings of" the standard proposed by "the parties before us." *Id.* at 308 (Kennedy, J., concurring). A large *EG* therefore cannot serve as a "discriminatory effect" because a large number of plans, including Wisconsin, show this alleged "discriminatory effect" without any discrimination. (Dkt. 153:20.) The plaintiffs' test has the bizarre result of forcing Republicans in Wisconsin to draw districts more advantageous to Democrats than federal courts, even though partisan intent is lawful. A rule that requires a party in power to district more favorably to the opposition than a federal court has no basis in the Constitution.

The defendants' criticisms of the efficiency gap are not wrong because they also apply "to *any* measure of partisan symmetry that is based on actual election results." (Dkt. 155:17.) Nor are the plaintiffs correct that the defendants' position is not a "tenable stance given that [partisan gerrymandering] remains a viable cause of action," (Dkt. 155:17), and that a standard based on the *EG* must be permissible "as long as partisan gerrymandering remains a legitimate cause of action." (Dkt. 155:20.) The plaintiffs are right only if one assumes partisan gerrymandering claims must involve a measure of partisan symmetry, but a claim need not use the efficiency gap or any other measure of partisan symmetry. Individual Justices' support for partisan symmetry has been "tepid at best." (Dkt. 43:22.)

Under a correct reading of precedent, partisan gerrymandering claims remain theoretically viable because Justice Kennedy did not want to foreclose the possibility that "workable standards do emerge." *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring). This trial revealed the efficiency gap cannot be the core of a workable standard and cast doubt on whether partisan symmetry could be any part of a standard. Given the natural presence of asymmetry in this country (and Wisconsin specifically) since the mid-1990s, as shown by Jackman, Goedert and Trende, partisan symmetry is simply not a good tool for "measuring the burden a gerrymander imposes on representational rights." *Id.* (Kennedy, J., concurring). It is undisputed that asymmetry, including significant asymmetry in Wisconsin, exists apart from gerrymandering. As a result, it is improper to treat the entire amount of asymmetry as the "burden" imposed by a gerrymander.

The plaintiffs' conflation of partisan symmetry with gerrymandering leads to their mistaken contention that if Act 43 is valid, "there might as well not be a cause of action for partisan gerrymandering at all." (Dkt. 155:7.) If partisan gerrymandering claims are viable at all, *cf. Vieth*, 541 U.S. at 306 (Kennedy, J., concurring), the plaintiff must establish lack of compliance with traditional districting principles. Further, a gerrymandering claim is not foreclosed to a plaintiff that showed extreme partisan intent *and* large partisan results inconsistent with neutral districting. The plaintiffs failed to make any of these showings as to Act 43, meaning the Act is lawful.

B. The undisputed evidence showed increased concentration of Democrats in Wisconsin since the mid-1990s.

Sean Trende showed why Professor Jackman found Wisconsin's *EG* (and *EG*s around the country) changed so drastically in the mid-1990s: Democrats lost support in most of the State and gained support in their strongholds. This explains why Wisconsin's *EG* was neutral at the beginning of the 1990s and then shifted drastically in favor of Republicans. The plaintiffs presented no analysis of the change in political geography of Wisconsin or the country from the 1990s to today.

Instead, the plaintiffs relied on methods that have not been used to measure the concentration of partisans. To counter Professor Goedert's demolition of the Isolation Index, they point out that it was used once in a non-published paper written by economists. (Ex. 118; Dkt. 149:39–40.) In addition, Goedert explained at trial why an "adjusted" isolation index makes no difference when populations are equal because the adjustment is for population (which is equal). (Dkt. 150:204.)

Lastly, Republican strength in Waukesha, Ozaukee, and Washington Counties does not show equal concentration of the two parties. (Dkt. 155:27.) First, Republican strongholds are not as packed as Democratic strongholds. The Demonstration Plan contains nine districts that are more heavily Democratic than its most "packed" Republican district. (Ex. 561; Dkt. 149:127, 131–33.) Notably, these "packed" Republican districts actually create more wasted votes for Democrats. (Dkt. 149:128–30.) Further, the Democrats receive more than two times the number of votes in Milwaukee and Dane Counties than the Republicans get in Waukesha, Ozaukee and Washington Counties. (Dkt. 150:134–35.)

V. There is no basis to admit Professor Chen's forthcoming article.

A. Defendants have not misrepresented Professor Chen's work.

The plaintiffs claim the defendants have "misrepresented" Professor Chen's work, yet tellingly offer no quote of these alleged misrepresentations. This is because the plaintiffs are misrepresenting the defendants' use of the Chen and Rodden article. The defendants have stated that the Chen and Rodden article shows "[a]verage bias in favor of Republicans is substantial — surpassing 5% of legislative seats — in around half the states for which simulations were possible." (Ex. 550:262.) Professor Goedert merely described Chen and Rodden's article and quoted this passage in his report. (Ex. 546:18.) He also noted that "Chen and Rodden posit that bias in several states comes out of a surplus of lean-Republican and safe Democratic pockets of population, compared to relative lack of lean-Democratic and safe Republican pockets." (Ex. 546:21.) Sean Trende only used a map from the Chen and Rodden article showing that George W. Bush's vote share in the 2000 election decreased as population density increased. (Ex. 547 ¶ 89; Ex. 550:243.) There is no "misrepresentation" in reporting Chen and Rodden's research.

The defendants have not hypothesized what Wisconsin's *EG* would be using randomized districts or proposed using randomized districting as part of a legal standard. The defendants have not needed to hypothesize about what neutral districting looks like in Wisconsin—that is shown by actual election results under the *Prosser* and *Baumgart* plans.

B. The plaintiffs needed to comply with the federal rules if they wanted to offer opinion testimony from Chen.

Having decided not to retain Professor Chen as an expert witness, the plaintiffs cannot introduce expert testimony through a yet-to-be published article that has not been subject to the adversary process. The plaintiffs' argument under Federal Rule of Evidence 702 does not help them. Rule 26 of the Federal Rules of Civil Procedure requires experts to submit written reports detailing their opinions. Courts do not have free rein to admit expert testimony that was not submitted in compliance with Rule 26 merely because it is "helpful." If the plaintiffs wanted to use Chen as an expert, they needed to follow the federal rules and this Court's scheduling order.

The plaintiffs also cannot use Professor Mayer as a proxy. Chen's forthcoming article is not "reliance material" for Professor Mayer (Dkt. 155:34), because Mayer did not rely on Chen's work in either of his reports. (Ex. 2, Ex. 104; Ex. 114.) In fact, Mayer's deposition revealed that the extent of his "analysis" was to read the document Chen filed with this Court for an hour and a half. (Dkt. 99:36 at p. 139.) At trial, the plaintiffs tried to introduce hearsay statements from Chen, but Mayer testified at his deposition that had not spoken with Chen. (Dkt. 99:36 at p. 139.) The plaintiffs fail to mention that the defendants objected to Mayer offering opinions on Chen's work at the deposition. (Dkt. 99:36 at p. 139.)

Simply put, the defendants have not been able to test Chen's work and they have had no access to anything backing up his yet-to-be-published paper. Such an investigation could reveal problems with his analysis. What we do know reveals a

shortcoming identified by Professor Jackman. (Ex. 83:21.) Professor Chen uses presidential election results rather than legislative results. (Dkt. 82-2:9.) This inflates the Democratic vote by two percentage points because President Obama won 53.5% of the two-party vote, while Democratic legislative candidates received only 51.4% of the statewide vote share. (Dkt. 125:69-70, ¶¶ 288–89.) This two-point difference inflates the number of seats Democrats would win. Given the effect of close races on the efficiency gap, the impact could be significant.

The questions surrounding the Chen article show why experts are required to provide written expert reports, submit to written discovery and deposition, and undergo a thorough examination at trial. The plaintiffs cannot make an end-run around the rules regarding expert testimony.

VI. Conclusion

The Court should grant judgment to the defendants.

Dated this 20th day of June, 2016.

Respectfully submitted,

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