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 NICHOL, *et al*,

Defendants.

DEFENDANTS' RESPONSE TO THE PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF SEAN TRENDE

The Court should deny the plaintiffs' motion in limine to exclude the testimony of Defendants' expert Sean Trende because Trende's testimony meets the requirements of Rule 702 of the Federal Rules of Evidence. An expert witness need not hold a Ph.D. or publish articles in academic journals to qualify as an expert under Rule 702 or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Trende has a Masters degree in political science and years of experience in analyzing the results of elections as a professional elections analyst writing for a website with a million readers. He has written a book on political trends in American history, and has even served as an author of the *Almanac of American Politics*. Trende's combination of education and practical experience is more than sufficient to qualify him to testify to the opinions he has offered.

The plaintiffs' motion covers the entirety of Trende's expert report, even though the defendants used only limited portions of the report in support of their

summary judgment motion. With respect to the opinions submitted in support of summary judgment, Trende's opinions meet the requirements of Rule 702. He analyzes Wisconsin's elections over time in a way that will "help the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702, specifically why the efficiency gap trended in a pro–Republican direction starting in the 1990s and why that trend appeared in Wisconsin in two court-drawn maps. This sheds light on why the efficiency gap should not be part of a legal standard for judging partisan gerrymandering. The plaintiffs do not dispute that Trende performed his partisan index analysis correctly based on correct vote totals—they merely quibble about the conclusions to be drawn from that analysis. The import of Trende's analysis is for the Court to decide; it is not a reason to stop the Court from considering his analysis in the first instance.

The motion in limine is premature in respect to the parts of Trende's expert report that were not used in the summary judgment motion. While "*Daubert*'s requirements of reliability and relevancy continue to apply in a bench trial," the court must take into consideration that "the usual concerns of the rule—keeping unreliable expert testimony from the jury—are not present in such a setting." *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010). This Court should therefore "hear the evidence and make its reliability determination during, rather than in advance of, trial." *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006). The plaintiffs offer many arguments about the weight to be given

Trende's testimony, which the Court can best address after hearing from the witness.

BACKGROUND

The defendants first address the limited number of proposed factual findings on summary judgment that involved Trende's expert report. The defendants then address the portions of Trende's expert report that were not used in the summary judgment motion.

I. Trende's opinion evidence offered on summary judgment

The defendants submitted a limited number of proposed factual findings supported by Trende's expert report in their summary judgment papers. (Dkt. 47 ¶¶ 183, 185, 234–45.) The plaintiffs do not dispute the facts the defendants proposed; instead, they argue about the conclusions that should be drawn from these undisputed facts. As a result, the Court can consider the undisputed facts on summary judgment.

A. Some facts supported by Trende's report are undisputed.

The defendants used Trende's report to support two facts the plaintiffs do not even dispute: (1) that only seven of the seventeen plans that Jackman found to be utterly unambiguous with respect to the sign of the efficiency gap "featured unified partisan control over the districting process" (Dkt. 67 ¶ 183), and (2) "[t]he sign of the efficiency gap does not necessarily correlate to control of the state legislature. In five of the seven plans enacted under unified party control, the party in control of

the state house changed despite the fact that the efficiency gap remained the same sign." (Dkt. 67 ¶ 185.)

B. Trende's analysis of Wisconsin elections over time.

The defendants also used Trende's report to show the change in the areas of Wisconsin favorable to Democrats and Republicans from 1996 to 2012. The plaintiffs do not dispute the basic facts in Trende's report showing these changes. First, in 1996, President Clinton "won Milwaukee, Dane and Rock Counties with 64% of the two-party vote but still managed to carry the rest of the state with 52% of the vote, a difference of twelve percent." (Dkt. 67 ¶ 244.) Second, in 2012, President Obama "received more support in Milwaukee, Dane and Rock Counties—69% of the vote—but lost the rest of the state by 47% to 53%, a difference of twenty-two percent." (Dkt. 67 ¶ 245.)

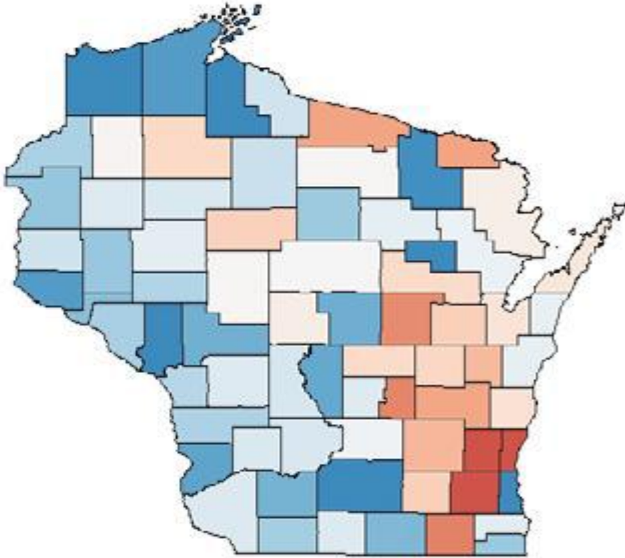
Trende uses a measure called the "partisan index" to analyze the political leanings of Wisconsin's counties over time. The partisan index is computed by subtracting the share of the two-party vote received by Republican presidential candidate in a particular area (a State, congressional district, county, etc.) from the share of the national two-party vote for the Republican presidential candidate. (Trende Rpt. (Dkt. 55) ¶ 72.) For example, even though President Reagan won 51.4% of the two-party vote in Massachusetts in 1984, the state's partisan index was 7.8 in favor of the Democrats because Reagan won 59.2% of the national two-party vote. (Trende Rpt. (Dkt. 55) ¶ 75.) Using the partisan index allows "to

control for national effects, and compare across elections." (Trende Rpt. (Dkt. 55) ¶ 77.)

In his report Trende calculated the partisan index (PI) of each Wisconsin county in 1988, 1996, 2004, and 2012. (Trende Rpt. (Dkt. 55) ¶¶ 79–85.) For each year, Trende produced a color-coded map showing the counties with pro-Democratic partisan indices in blue, with darker blue for stronger Democratic leans, and counties with pro-Republican leans in red, with darker red for stronger Republican leans. (Trende Rpt. (Dkt. 55) ¶¶ 79–80.) Trende pays particular attention to 1996, 2004, and 2012 because in these years Wisconsin's state partisan indices were similar (slightly more Democratic than the country as a whole). (Trende Rpt. (Dkt. 55) ¶ 79.) Trende produced maps showing the PI of each county, as well as the change in PI between years, to illustrate visually the change in Wisconsin's political geography.

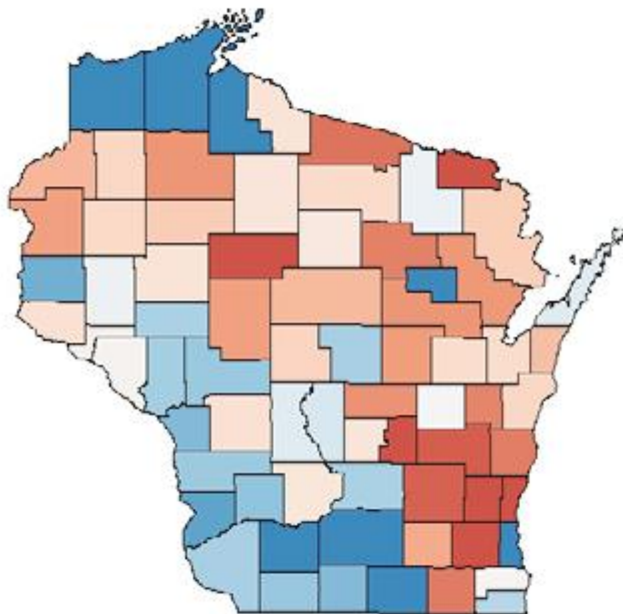
On summary judgment, the defendants submitted proposed findings based on Trende's analysis of Wisconsin in 1996 and 2012. (Dkt. 47 ¶¶ 237–45.)

Wisconsin County PI 1996



(Trende Rpt. (Dkt. 55) ¶ 80.) The 1996 map shows the State at the point the efficiency gap began to consistently favor the Republicans. The 2012 map shows the changes to the present day, with more red Republican-leaning counties and fewer blue Democratic-leaning counties. (Trende Rpt. (Dkt. 55) ¶ 84.)

Wisconsin County PI 2012



Trende's method involves producing a map based on a statistical measure of election results; it is not, as plaintiffs claim, merely an "eyeball" method. Rather, it is a method that is helpful to the Court because it is easy to understand visually. As Trende testified at his deposition, "it's pretty clear from looking at the maps where things have become more Republican and where they have become more Democratic." (Trende Dep. (Dkt. 61) 59:5–8.) In "trying to answer a question of interest for the court," Trende thought "a court can look at this and pretty clearly see what's going on in the state." (Trende Dep. (Dkt. 61) 59:14–17.)

C. The plaintiffs' objections to Trende's analysis

In their summary judgment papers, the plaintiffs did not dispute that "Trende calculates the Partisan Index for each county in Wisconsin in 1996 and 2012" and that "Trende compared the share of the two-party vote for Presidential candidates in a county to the national share of the vote in the same races." (Dkt. 67 ¶¶ 237–38.) They also do not dispute that "[t]he Diagram shown with paragraph 80 of Trende's report shows the PI by county for Wisconsin in 1996" (Dkt. 67 ¶ 241) and "[t]he Diagram shown with paragraph 84 of Trende's report shows the PI by county for Wisconsin in 2012." (Dkt. 67 ¶ 242.)

Instead, the plaintiffs dispute "the conclusion that [Trende's analysis] is a way to show the change in the partisan makeup of the state." (Dkt. 67 ¶ 237.) The plaintiffs contend that Trende's analysis "tells us which areas are more Democratic (or Republican) than the state as a whole, and which areas are less so. It tells us little about overall partisan strength, and is useful only in comparing elections at one level (here, counties or wards) to elections at another (the state)." (Dkt. 67 ¶¶ 239, 241–42.) They also contend the partisan index is inappropriate because it "is used almost exclusively by political commentators to describe congressional districts" and "used less frequently in academic research, and then largely as a basic descriptive statistic used to classify districts as competitive or not." (Dkt. 67 ¶ 239.)

D. Analysis of election results in other parts of the country

Trende also analyzed presidential election results over time in other parts of the country. Trende produced a map of the West South Central region showing which party won each county in the presidential election in 1996, 2004, and 2008. (Trende Rpt. (Dkt. 55) ¶ 66.) The plaintiffs do not dispute that Trende analyzes the votes for presidential candidates aggregated at the county level, only that "the conclusion that this proves that there is Democratic clustering in the country, or in Wisconsin, or that Democratic clustering in the country, or Wisconsin, has increased from 1996 to 2012." (Dkt. 67 ¶ 234.)[1] The plaintiffs also do not dispute that Democrats won many fewer counties in 2008 than in 1996. (Dkt. 67 ¶ 234.)

II. Trende's opinions that were not offered on summary judgment, but which will be presented at trial

Trende offered several other opinions that the defendants did not use in support of their motion for summary judgment. First, Trende computed the partisan index of the average Democratic and Republican wards from 2002 to 2014 and found that the average Democratic ward in 2014 was 2.5% more than the average ward in 2002, with no similar effect for Republican wards. (Trende Rpt. (Dkt. 55) ¶¶ 91–95.)

[1] Trende also offered facts about election results: President Clinton in 1996 carried fifty-four percent of congressional districts in this region, but that President Obama in 2008 won only twenty-three percent of the congressional districts. (Dkt. 47 ¶¶ 235-36.) The plaintiffs dispute these facts on the apparent basis that they are supported only by the county-by-county maps, rather than the actual election results in 1996 and 2012. (Dkt. 67 ¶¶ 235–36.)

Trende then calculated the median distance between wards with a similar partisan index and found that "as wards become more Democratic, the distance between them shrinks," whereas "Republican ward distances tend to be fairly stable" with the most heavily Republican wards being further away than more neutral wards. (Trende Rpt. (Dkt. 55) ¶¶ 96–100.)

In addition, Trende pointed out instances in which nonpartisan or bipartisan plans triggered the plaintiffs' efficiency gap threshold. (Trende Rpt. (Dkt. 55) ¶¶108–114, 126–29.) He also looked at some examples of districting that were seen by neutral observers as partisan gerrymanders and found that they did not present high efficiency gaps, showing the metric is underinclusive at detecting gerrymandering. (Trende Rpt. (Dkt. 55) ¶¶ 115–124.)

Trende opines on several other issues: problems with Jackman's imputation strategy (Trende Rpt. (Dkt. 55) ¶¶ 132–39), how the efficiency gap ignores many factors that can affect races (Trende Rpt. (Dkt. 55) ¶¶ 140–42), how the efficiency gap is sensitive to slight changes in votes (Trende Rpt. (Dkt. 55) ¶¶ 143–48), and how the efficiency gap does not correlate to partisan outcomes such as control of the legislature. (Trende Rpt. (Dkt. 55) ¶¶ 149–54.)

ARGUMENT

With respect to the plaintiffs' motion as it relates to summary judgment, Sean Trende is qualified to give an opinion analyzing Wisconsin's election results over time. He uses a metric, the partisan index, used by political analysts to evaluate the political parties' competitiveness in particular geographical areas. The

plaintiffs admit that academics use the partisan index "as a basic descriptive statistic used to classify districts as competitive or not" (Dkt. 67 ¶ 239) and that it "tells us which areas are more Democratic (or Republican) than the state as a whole." (Dkt. 67 ¶¶ 239, 241–42.) This is exactly how Trende uses the partisan index in this case, which shows the method is reliable even under the plaintiffs' own standards and that it will be helpful to the Court in understanding the issues in this case.

The plaintiffs' motion is premature as it relates to items in Trende's report that were not used on summary judgment. Given that any trial will be to the Court, this Court should "hear the evidence and make its reliability determination during, rather than in advance of, trial." *Salem*, 465 F.3d at 777. In any event, the plaintiffs can raise the alleged problems with Trende's analysis on cross-examination; they do not rise to the level of preventing the Court from even hearing his testimony.

I. The plaintiffs' motion reflects a misunderstanding of the governing legal standard.

The plaintiffs' motion proceeds from the mistaken view that only those who hold Ph.D.'s and publish articles in peer-reviewed academic journals are able to offer expert testimony and, even then, allowed only to employ analytical methods that have specifically been used in a peer-reviewed academic journal. This is simply not true. In a case involving the analysis of historical election results, there is room for expert testimony from both political science professors holding Ph.D.'s and from

a professional elections analyst with a Master's degree in political science who writes about elections for a living.

Expert testimony is not limited to professors at universities. Instead, Rule 702 provides that

> [a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case

Fed. R. Evid. 702.

An expert may be qualified by "knowledge, skill, experience, training, or education." *Id.* Academic experience is relevant, but not necessary. The Seventh Circuit directs that "a court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718, (7th Cir. 2000).

In "analyzing the relevance of proposed testimony, the district court must consider whether the testimony will assist the trier of fact with its analysis of any of the issues involved in the case." *Smith*, 215 F.3d at 718. Because the expert's testimony need only "help the trier of fact to understand the evidence or to

determine a fact in issue," Fed. R. Evid. 702, the expert "need not have an opinion on the ultimate question to be resolved by the trier of fact." *Smith*, 215 F.3d at 718.

The district court's "gatekeeper" function under *Daubert* "is limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound." *Smith*, 215 F.3d at 719. The test "is a flexible one, and no single factor is either required in the analysis or dispositive as to its outcome." *Id.* The court is to "use the criteria relevant to a particular kind of expertise in a specific case to 'make certain that an expert, whether basing testimony upon 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.'" *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

II. Trende's opinions offered on summary judgment are admissible under Rule 702.

The opinion evidence relied upon by the defendants on summary judgment meets the Rule 702 requirements. Trende is qualified to analyze election results; his analysis is helpful to the trier of fact; it is based on sufficient facts and data (which Plaintiffs do not even dispute); and he employs a reliable method used by both political commentators and academics.

The plaintiffs do not contend that Trende's analysis used on summary judgment is incorrect. In fact, they admit that his analysis shows what it purports to show: the relative strength of Democrats and Republicans in Wisconsin's

counties. Instead, the plaintiffs' argument focuses on the conclusions that should be drawn from Trende's analysis, but that is not a proper subject of a *Daubert* motion.

A. Trende is qualified.

Trende has the knowledge, skill, experience, and education to offer expert testimony analyzing election results in Wisconsin and other parts of the country. Trende has education: he has a Master's degree in political science from Duke University, along with an undergraduate degree in political science from Yale University and a law degree from Duke. (Dkt. 55-1.)

Trende also has knowledge and experience in analyzing elections. For the past five years, he has been employed fulltime as an elections analyst for RealClearPolitics.com, a website with over one million readers. (Trende Rpt. (Dkt. 55) ¶ 40; Trende Dep. (Dkt. 61) 14–15.) Trende's "main responsibilities with RealClearPolitics consist of tracking, analyzing, and writing about elections" and being "in charge of rating the competitiveness of House of Representatives races." (Trende Rpt. (Dkt. 55) ¶ 42.) He has "studied and written extensively about demographic trends in the country, as well as the approaches that parties use to draw lines." (Trende Rpt. (Dkt. 55) ¶ 42.) He also is a Senior Columnist for "Crystal Ball," a website run by Dr. Larry Sabato, a professor of political science at the University of Virginia. (Trende Rpt. (Dkt. 55) ¶ 44.) His work has been cited by leading political commentators like David Brooks of the *New York Times* and Michael Barone of the *Almanac of American Politics*. (Trende Rpt. (Dkt. 55) ¶ 41.)

Further, he has written a book, *The Lost Majority: Why the Future of Government Is Up for Grabs - and Who Will Take It*,[2] that argued a political science theory called realignment "should be abandoned. As part of this analysis, it conducts a thorough analysis of demographic and political trends beginning around 1920 and continuing through the modern times." (Trende Rpt. (Dkt. 55) ¶ 46.) Trende also co-authored the 2014 *Almanac of American Politics* and contributed chapters to books edited by Dr. Sabato about the 2012 and 2014 elections. (Trende Rpt. (Dkt. 55) ¶ 47.)

Trende writes about elections for a living, and his writings have a much larger audience that the academic journal articles that the plaintiffs think are the *sine qua non* of expertise. His knowledge, skill, and experience, combined with his education, make him qualified to offer an analysis of the location of partisan strengths in the 1996 and 2012 presidential elections in Wisconsin and what changes were seen between these elections. *See Smith*, 215 F.3d at 718.

B. Trende's analysis will help the Court understand the issues.

Trende's analysis is helpful to the Court in several ways. A partisan gerrymandering case involves the process of districting which, by its nature, involves subdividing the State into legislative districts. The plaintiffs admit that Trende's analysis "tells us which areas are more Democratic (or Republican) than the state as a whole, and which areas are less so" and that it is "useful only in comparing elections at one level (here, counties or wards) to elections at another

[2] *http://www.amazon.com/The-Lost-Majority-Future-Government/dp/0230116469*

(the state).” (Dkt. 67 ¶¶ 239, 241–42.) This is precisely why Trende’s analysis is helpful. Trende shows that even though the statewide split between Republicans and Democrats was stable between 1996 and 2012 (“[t]he state didn’t budge politically”), much of the state became more unfavorable to Democrats and more favorable to Republicans (“the internal movement was unmistakeable”). (Trende Rpt. (Dkt. 55) ¶ 85.) The plaintiffs do not even dispute that the share of the Democratic vote increased in Milwaukee, Dane, and Rock Counties (where the Democrats were already strong), but decreased in the rest of the State. (Dkt. 67 ¶ 86.)

This change in the internal geography of the presidential vote is undoubtedly helpful for the Court in considering the state legislative vote. Professor Mayer opines that “presidential vote is widely used as an exogenous measure of district level partisanship” and it “is, not surprisingly, an extremely strong predictor of the legislative vote.” (Dkt. 54:14.) Thus, the internal movement in the presidential vote in Wisconsin is useful in understanding why Wisconsin, over the course of two-court drawn plans, last saw a pro-Democratic efficiency gap in 1994, a pro-Republican trend start in 1996, and large pro-Republican efficiency gaps in the 2000s. (Dkt. 67 ¶¶ 191–218.) In addition, it helps explain why Jackman found that “[t]he distribution of EG measures trends in a pro-Republican direction through the 1990s, such that by the 2000s, EG measures were more likely to be negative (Republican efficiency over Democrats).” (Dkt. 67 ¶ 141.) Trende’s analysis therefore aids in considering whether the efficiency gap can be part of a judicially discernible and manageable standard for partisan gerrymandering claims.

The plaintiffs object that the analysis "tells us little about overall partisan strength." (Dkt. 67 ¶¶ 239, 241–42.) This is true, but beside the point. The Supreme Court recognizes that

> [t]here is no statewide vote in this country for . . . the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is. . . . Political parties do not compete for the highest statewide vote totals or the highest mean district vote percentages: They compete for specific seats.

Vieth v. Jubelirer, 541 U.S. 267, 289 (2004) (plurality opinion) (quoting Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory, 33 UCLA L. Rev. 1, 59–60 (1985)). A particular level of statewide support does not necessarily translate into a particular number of legislative seats; that is determined by how a party's strength extends throughout the state in a way that allows it to capture legislative districts.

Further, Trende's historical analysis is relevant because the plaintiffs' proposed legal standard is based on showing "the effect of the plan was to create a large and durable level of partisan asymmetry *relative to historical norms*." (Dkt. 68:7 (emphasis added).) If the law is to be a slave to a historical norm, then courts should receive evidence regarding the history that produced that alleged norm. Trende shows the political geography of Wisconsin looks much different today than it did in 1996. The plaintiffs have offered no evidence regarding how Wisconsin has changed between the 1990s and today, apparently hoping the Court will overlook changes that have occurred during that time frame. This should give the

Court pause in adopting a standard that assesses plans based on a "norm" that emerged in a different political era.

The plaintiffs seem to suggest that Trende must put forward an ultimate conclusion on the level of the efficiency gap caused by the increased Democratic concentration or put a precise numerical value on the increase in concentration. This is not the case. Trende's analysis need only be helpful to the Court in understanding why the efficiency gap is a flawed measure to use in partisan gerrymandering claims. As Trende made clear at his deposition, he opines that increased concentration is responsible for some portion of the efficiency gap, but "the real opinion is that it's something that the efficiency gap metric doesn't account for." (Trende Dep. (Dkt. 61) 43:21–23.)

C. The plaintiffs do not dispute that Trende's analysis is based on sufficient facts and data.

The plaintiffs concede that Trende's analysis is based on sufficient facts and data by not contesting the vote totals on which they are based. They admit "Trende calculates the partisan index for each county in Wisconsin in 1996 and 2012" and that "Trende compared the share of the two-party vote for Presidential candidates in a county to the national share of the vote in the same races." (Dkt. 67 ¶¶ 237–38.)

D. Trende's analysis is based on reliable principles and methods.

Under a proper understanding of the law, Trende employs reliable principles and methods in reaching his opinions. While the plaintiffs take issue with his use of the partisan index, they admit that it is a metric used "by political commentators to

describe congressional districts" and used "in academic research . . . largely as a basic descriptive statistic used to classify districts as competitive or not." (Dkt. 67 ¶¶ 239, 241–42.) This is how Trende is using the partisan index: to describe the competiveness of both parties in each of Wisconsin's counties in 1996 and 2012, which then allows a comparison of a change over time. The plaintiffs do not explain why a measure of competitiveness that is often applied to congressional districts cannot also be helpful in assessing the competitiveness of another geographic unit, such as a county or a ward. Thus, the method does have "general acceptance" among political commentators, and is even used by academics for the very purpose in which it is being used in this case. *Daubert*, 509 U.S. at 594.

Further, Trende's methodology can be tested. *Daubert*, 509 U.S. at 593. The plaintiffs can run the same calculations that Trende ran to determine if he made errors in his analysis. They did not find any and instead conceded "[t]he Diagram shown with paragraph 80 of Trende's report shows the PI by county for Wisconsin in 1996" (Dkt. 67 ¶ 241) and "[t]he Diagram shown with paragraph 84 of Trende's report shows the PI by county for Wisconsin in 2012." (Dkt. 67 ¶ 242.) Trende's analysis is nothing like the one employed in *Koppell v. New York State Board of Elections*, 97 F. Supp. 2d 477, 481 (S.D.N.Y. 2000), in which the expert did "not rely upon any discernible methodology" but simply issued "a compendium of [the expert]'s opinions about the elections."

The plaintiffs' main contention seems to be that the Court should not consider Trende's analysis using the partisan index because such an analysis has

not appeared in a peer-reviewed academic journal. *Daubert* itself, however, made clear that "[p]ublication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability." *Daubert*, 509 U.s. at 593. This is why "lack of peer review will rarely, if ever, be the single dispositive factor that determines the reliability of expert testimony." *Smith*, 215 F.3d at 720. Trende employs a method used by political professionals, more than academics, so the lack of peer review is not a ground for keeping his testimony from the Court. *Kumho*, 526 U.S. at 150; *Smith*, 215 F.3d at 720.

The plaintiffs' complaint is not really about Trende's methodology; it is really about how the Court should interpret Trende's analysis. The plaintiffs dispute "the conclusion that [Trende's analysis] is a way to show the change in the partisan makeup of the state," contending instead that the Court should rely on Mayer's use of Global Moran's I and the Isolation Index. (Dkt. 67 ¶ 237.) This is not a proper ground for a *Daubert* motion because "Rule 702's requirement that the district judge determine that the expert used reliable methods does not ordinarily extend to the reliability of the conclusions those methods produce—that is, whether the conclusions are unimpeachable." *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 765, (7th Cir. 2013). The finder of fact is to "weigh the strength of the expert's conclusions." *Id.* at 766.

Should the case go to trial, the plaintiffs will be free to cross-examine Trende on whatever weaknesses they think they have found in his methods. They are also free to argue to the Court why Mayer's analysis is superior to Trende's.

III. The plaintiffs' motion in limine regarding Trende's entire report is premature, but their criticisms go to the weight of the evidence and not its admissibility.

A. The Court should rule on the motion after hearing the testimony.

There is no need for the Court to rule on a pre-trial *Daubert* motion when the Court, and not a jury, will hear the evidence in this case. "Where the gatekeeper and the factfinder are one and the same—that is, the judge—the need to make such decisions prior to hearing the testimony is lessened." *Salem*, 465 F.3d at 777. In this case, "the usual concerns of the rule—keeping unreliable expert testimony from the jury—are not present." *Metavante*, 619 F.3d at 760. For this reason, the defendants request that, should this case go to trial, the Court hear Trende testify before ruling on the *Daubert* motion. This is particularly true given that the plaintiffs' criticisms are questions for cross-examination, not a valid basis for a *Daubert* motion, as discussed below.

B. The plaintiffs' criticisms of Trende's work go to the weight of his testimony, not its admissibility.

The plaintiffs appear to view a *Daubert* motion as a substitute for cross-examination of an expert witness at trial. While the defendants dispute that the plaintiffs have found any legitimate weaknesses in Trende's report, to the extent they believe otherwise, the plaintiffs can raise these issues in cross-examination and in argument before the Court. The Seventh Circuit holds that "[d]eterminations on admissibility should not supplant the adversarial process" and that even "'shaky' expert testimony may be admissible, assailable by its opponents

through cross-examination." *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir. 2010). Trende's testimony is far from "shaky," which will be shown should he need to testify at trial.

The plaintiffs primarily take issue with Trende's use of a "nearest neighbor" analysis finding that "as wards become more Democratic, the distance between the shrinks." (Trende Rpt. (Dkt. 55) ¶ 99.) The plaintiffs seem to misunderstand the point of Trende's analysis—that the distance between wards of similar Democratic partisanship shrinks as wards become more Democratic shows that strongly Democratic wards are likely to be grouped together in a compact district naturally packed with Democrats. The facts that Democratic wards are smaller in size physically than Republican wards and that Milwaukee (a bastion of Democratric strength) has wards of just 0.29 miles, (Dkt. 71:22), do not cut against Trende's analysis—they prove his point.

In any event, the plaintiffs' argument suffers from many of the issues discussed above. Again, the plaintiffs' primary contention is that the Court should not consider this analysis because it does not appear in peer-reviewed journals even though "lack of peer review will rarely, if ever, be the single dispositive factor that determines the reliability of expert testimony." *Smith*, 215 F.3d at 720.

Their other complaints are merely areas they can explore in cross-examination. They take issue with the races Trende chose to calculate the partisan index, one small aspect of his R-code, his reliance on the median distance rather than the mean, the fact that he did not perform some unnamed adjustment

to his calculation because wards changed in 2012, and his failure to state an alleged error rate (even though the plaintiffs do not say what error this rate is supposed to measure). Should this case go to trial, Trende can testify to the reasons behind his methodology, and the plaintiffs can raise these critiques on cross-examination. There is no need to exclude testimony, particularly in a bench trial, based on these methodological quibbles.

Lastly, the plaintiffs believe Trende's analysis is not helpful because their expert employed different methods for measuring concentration, the isolation index and Global Moran's I. Of note, the plaintiffs have not shown any instances where these measures have been used by political scientists in peer-reviewed journals to measure the geographic concentration of voters for purpose of legislative districting (which appears to be their standard for admissibility, at least for Defendants' expert testimony). In any event, if there is a trial, the Court will simply have to decide what to make of their respective testimony after hearing the direct and cross examinations.

The plaintiffs raise similar complaints about another of Trende's opinions that were not used on summary judgment. (Dkt. 71:27–34) These issues likewise should be addressed at trial through cross-examination because they rise nowhere near the level of exclusion of testimony. *See Gayton*, 593 F.3d at 616.

CONCLUSION

For the foregoing reasons, the Court should deny the motion in limine with regard to the evidence submitted on summary judgment. The Court should wait to rule on the motion in limine with regard to all other evidence until trial.

Dated this 16th day of February, 2016.

Respectfully submitted,

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