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

BILL 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.	)	
KEVIN J. KENNEDY, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FOREHLICH, KEVIN J. KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE,	)	No. 15-CV-421
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION *IN LIMINE* TO EXCLUDE THE TESTIMONY OF SEAN P. TRENDE

INTRODUCTION

Plaintiffs' opening brief demonstrated that defendants' purported expert Sean P. Trende is not qualified to give any of the opinions he has offered in this case and that the methodology he used to support those opinions is fundamentally flawed and would not be accepted by any reputable social scientist. In their opposition, defendants do not even attempt to defend most of the opinions Trende's Declaration offers, including his opinions (1) that the efficiency gap in favor of Republicans in the Current Plan is attributable to the "fact" that Democrats are naturally packed while Republicans are not and (2) that plaintiffs' efficiency gap test is flawed because it finds gerrymandering when it does not exist and fails to identify gerrymandering when it does. Instead, they pursue a narrowing strategy, arguing that the Court should consider Trende's opinions only to the extent that they relate to defendants' summary judgment motion. Even there,

defendants try to narrow the significance of Trende's opinions as much as possible, suggesting that they are relying on him merely for a few facts that are undisputed. As to the remainder of Trende's opinions, defendants contend that plaintiffs' criticisms should be fodder for cross-examination at trial, rather than the basis for a *Daubert* motion.

Defendants' arguments should be rejected. Defendants have not shown that Trende is qualified to offer *any* of the purported expert opinions he advances. And defendants' attempt to defend the few portions of Trende's Declaration they now claim to be relying on in seeking summary judgment is unavailing. Finally, the fact that the case will be tried to the Court, rather than a jury, is not a basis for postponing consideration of plaintiffs' *Daubert* motion with respect to the rest of Trende's opinions. Whether the case is tried to a judge or jury, the proponent of expert testimony bears the burden of establishing the admissibility of the expert's opinions by a preponderance of the evidence. *Lewis v. CITGO Petroluem Corp.*, 561 F.3d 698, 705 (7th Cir. 2009). Plaintiffs have explained in detail why defendants have not met and cannot meet that burden. There is no reason for the parties to waste time and effort preparing for Trende's trial testimony or for the Court to spend hours listening to it when defendants have not even attempt to show—and cannot show—that his methodologies meet the basic standards of reliability that *Daubert* is designed to enforce.

ARGUMENT

I. Trende Is Not Qualified to Testify as an Expert in This Case.

Sean Trende is a journalist, specializing in Congressional elections. It is undisputed that he is not educated or trained by experience to be an expert in the fields in which he offers opinions: Trende has received no advanced training and has not demonstrated any expertise in formal social science methods, demography, statistics, drawing legislative maps, Wisconsin

politics, or Wisconsin Assembly elections. Defendants nevertheless contend that Trende is qualified to offer expert opinions in this case. They argue that Trende's lack of a Ph.D. and the fact that he has not published in peer-reviewed journals are not evidence of a lack of expertise. Defs.' Br. (Dkt. 78) at 11-12. While those qualifications may not be relevant in every case—we do not expect an expert in auto repair to have published in peer-reviewed journals—they are critical here, where the kinds of opinions Trende offers require a scientific analysis of relevant data. Receiving a Ph.D. shows that an individual has been trained in the methodologies used in his field; Trende, by contrast, is not even *aware of* basic social science methodologies and did not bother to survey the literature before offering his opinions. Pl. Opening Br. (Dkt. 71) at 7, 10. And publishing in peer-reviewed journals shows that the author is capable of producing work that properly applies the standards in the field, as judged by other experts. Here too Trende fails the test: he applies his methodologies in a wholly unorthodox way that has never been subjected to peer review by Trende or anyone else. *Id*. at 5, 10-12, 15.

Defendants suggest that Trende is qualified as an expert because he writes for a popular website, has written popular articles and a book about politics for a lay audience, and his work has been favorably cited in publications like the *New York Times* and *Almanac of American Politics*. Defs.' Br. at 14-15. Trende may well be very good at what he does. But writing for a popular publication and being a popular source of subjective commentary about politics does not qualify Trende to offer a scientific analysis of election and population data. *Daubert* requires the Court to ensure that "the reasoning or methodology underlying the testimony is scientifically valid and… that reasoning or methodology properly can be applied to the facts at issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 592-93 (1993). The multiple errors in methodology in Trende's work that are described in our opening brief—and that defendants do

not even attempt to defend—show that Trende's lack of expertise has produced precisely the kind of unreliable results one would expect from a person not well-versed in the social sciences.

Unable to defend Trende's expertise to offer the broad opinions laid out in his Declaration, defendants argue that Trende is qualified to testify about the limited facts for which they cited his Declaration in their summary judgment brief and Proposed Findings of Fact. Thus, for example, defendants contend that Trende is qualified to analyze election results in some unspecified way (Defs.' Br. at 14), "to give an opinion analyzing Wisconsin's election results over time" (Defs.' Br. at 10), and to "offer an analysis of the partisan strengths in the 1996 and 2012 presidential elections in Wisconsin and what changes were seen between those elections" (Defs.' Br. at 15). This is no answer to plaintiffs' argument that Trende is unqualified to give the extensive opinions he offers. On the contrary, it is a tacit concession that Trende lacks the qualifications to give those opinions. And even the limited use defendants seek to make of Trende's Declaration on summary judgment should be precluded because (as demonstrated below) there too Trende's novel, uninformed methodology is riddled with errors that make it an unreliable basis for drawing *any* conclusions—much less a basis for granting summary judgment to defendants.

II. Defendants' Limited Defense of Trende's Work for Summary Judgment Purposes Should Be Rejected.

In their summary judgment brief, defendants cited Trende for the proposition that Democrats are becoming more concentrated in Wisconsin and, indeed, throughout the country, thus supposedly explaining the recent increase in pro-Republican efficiency gaps in Wisconsin and elsewhere. Dkt. 46 at 27-30.[1] Defendants reproduced in their brief and proposed findings

[1] Defendants note that they also used Trende's Declaration to support two observations about the efficiency gap analysis that plaintiffs do not dispute. Defs.' Br. at 3-4. That is beside the point for

two color-coded maps that Trende created based on his application of a "partisan index" analysis that supposedly show such an effect in Wisconsin. *Id.* Plaintiffs offered a variety of criticisms of Trende's methodology and conclusions in their *Daubert* motion. In response, defendants contend that Trende's "analysis" of "partisan index" (PI) scores should be insulated from review under *Daubert* because he supposedly added the numbers up correctly based on election results that are undisputed. But this argument ignores the primary basis for plaintiffs' *Daubert* challenge to Trende's maps: the "partisan index" methodology he used is simply *not* a reliable methodology for analyzing the geographic concentrations of Republican and Democratic voters. Because Trende's methodology is unreliable, it necessarily follows that his conclusions—the maps themselves and his assertion that changes in the efficiency gap can be explained by the purported fact that Democrats are becoming more concentrated in Wisconsin—must be excluded.[2]

As demonstrated in plaintiffs' opening brief (at 10-12, 15-22), county-level PI scores (and their change over time) are not a valid measure of geographic concentration (or its change). That is true for a variety of reasons. First, there is no support whatsoever in the academic literature for using PI scores to assess the spatial distributions of parties' supporters. Instead, to the extent scholars ever use PI scores, they do so simply to measure electoral competitiveness.

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purposes of this *Daubert* motion inasmuch as it is Trende's ultimate *opinions* that plaintiffs seek to exclude.

[2] Defendants argue that Trende's analysis will be helpful to the Court because it supposedly shows how geographic concentrations of Democrats and Republicans have changed over time. Defs.' Br. at 16-17. We have no doubt that an analysis of that issue based on a *reliable* methodology would be helpful to the Court. Indeed, Professor Mayer did just such an analysis in his rebuttal report and concluded that there is no evidence to support the claim that Democrats are more naturally "packed" than Republicans. *See* Pl. Opening Br. at 11. Defendants also contend (at 16) that Trende's opinions will be useful because even Professor Mayer admitted that the presidential vote is a strong predictor of the legislative vote. In so arguing, defendants quote Professor Mayer out of context: he testified that the presidential vote *can* be a strong predictor and conducted a regression analysis that showed that it in fact was a strong predictor in 2012. *See* Mayer Report (Dkt. 54) at 13-17. But that does not mean that it will *always* be a strong predictor; Trende did not do the work necessary to show that it was for any other year.

Pls.' Opening Br. at 19. Defendants respond that they too are trying to determine whether a particular county is "competitive." Defs.' Br. at 18-19. But county-level competitiveness is simply irrelevant here; how close or safe a county is for a given party has no bearing on the political geography that matters for purposes of redistricting. And while it is true that the *partisanship* of geographic units is relevant to redistricting, a partisan index does not capture this concept nearly as well as more common metrics such as the share of the presidential vote. *See* Mayer Rebuttal Report (Dkt. 64) at 4.

A second and related issue is that it is highly problematic to rely on county-wide data because counties vary enormously in population. In Wisconsin, for example, counties have anywhere from roughly 5,000 to a million residents, a ratio of about 200 to 1. But Trende's maps make no adjustment whatsoever for population size; they portray all counties identically despite their vastly different populations. A proper analysis of partisanship, like that undertaken by Professor Mayer, would rely on geographic units with approximately the same populations, such as wards or Census tracts.

Third, even plotted on a map, PI scores do not allow partisan concentrations to be quantitatively *computed*; instead, the scores can only be visually inspected, subject to all of the biases of the human eye (compounded in this case by the equal treatment of all counties). In response to this point, defendants quote Trende's comment in his deposition that "a court can look at this and pretty clearly see what's going on in the state." Defs.' Br. at 7. But that is not true. It is not at all easy to understand from simply looking at Trende's maps whether Democrats are more concentrated than Republicans, or vice versa, let alone how those concentrations changed over time. For that reason alone, Trende's methodology fails the *Daubert* test: his conclusions "can[not] be challenged in some objective sense" because he uses "a subjective,

conclusory approach that cannot reasonably be assessed for reliability"; Trende's "technique has not been subject to peer review or publication"; and "the technique has [not] been generally accepted in the scientific community." Fed. R. Evid. 702, Advisory Comm. Notes, 2000 Amendment.

This fundamental problem is highlighted by the fact that a visual inspection of Trende's maps fails to support the conclusions he draws. The color-coded county maps that Trende produced for 1996 and 2012 (Trende Decl. (Dkt. 55) ¶¶ 81 and 84) do *not* show a greater concentration of Democratic than Republican voters. To the contrary, they show that Republicans are heavily concentrated in the southeastern portion of the State, in the counties around Milwaukee and were more concentrated there in 2012 than in 1996.[3] This is yet another reason why a social scientist who was trying to analyze the geographical concentration of Democrats and Republicans (and changes over time) would use methodologies that yielded actual numeric values. Using a crude measurement taken at the wrong geographic level based on entirely different political races that, at best, would allow an observer to "eyeball" the results may be good enough for a Sunday morning talk show, but it is not the kind of evidence that belongs in a court of law. *See Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) ("the courtroom is not the place for scientific guesswork, even of the inspired sort.")

Finally, Trende's maps provide no basis for drawing any conclusions about the extent to which political geography contributed to the very large efficiency gap created by the Current Plan. Defendants contend that Trende's maps show that there is at least *some* pro-Republican bias inherent in Wisconsin's political geography. But those maps are useless unless they can be

[3] Even more startling, and more deeply conflicting with Trende's argument, is his color-coded map of Wisconsin wards. (Trende Decl. (Dkt. 55) ¶ 87.) Contrary to Trende's argument, this map shows that Republicans, not Democrats, are most heavily concentrated in a limited geographic area, in the southeastern portion of the State.

used to provide an analysis of the *magnitude* of that bias. Trende has not used and cannot use his maps to provide such an analysis: he cannot say if the purported concentration of Democrats accounts for 1% of the Current Plan's efficiency gap, or 5%, or 100%. Under those circumstances, Trende's assertion that the extremely large pro-Republican efficiency gap might be due to the clustering of Democratic voters he claims to see is nothing more than uninformed speculation. As such, it does not amount to a conclusion based on a reliable methodology, and so is inadmissible under *Daubert.*

III. Defendants Do Not Even Attempt to Defend the Wide-Ranging Opinions Trende Offers and Do Not Show That Those Opinions Will Assist the Court in Deciding the Ultimate Issue in this Case.

As defendants acknowledge, Trende offered many opinions that defendants did not rely upon in their summary judgment motion. *See* Defs.' Br. at 9-10. These opinions include Trende's so-called "nearest neighbor" analysis, which supposedly shows that Democrats are more concentrated than Republicans, his opinion that pro-Republican efficiency gaps nationwide are attributable to geography rather than partisan gerrymandering, and his numerous criticisms of plaintiffs' efficiency gap metric. Plaintiffs' motion catalogued at length the various problems with Trende's methodologies and these opinions, showing that they are idiosyncratic, inconsistent with the work of other experts in the field, untested by peer review, and riddled with methodological errors. Pls.' Opening Br. at 14-29. Defendants do not seriously attempt to rebut any of these arguments, which they characterize as "methodological quibbles." Defs.' Br. at 23. Instead, defendants argue that plaintiffs' criticisms go to the weight, rather than the admissibility, of Trende's testimony and therefore should not be considered until Trende appears at trial. Indeed, defendants go even further, suggesting that because the case will be tried to the Court, rather than a jury, the Court should not even consider defendants' *Daubert* motion.

As demonstrated in Part IV below, defendants are simply wrong about the last point: *Daubert* motions are appropriate regardless of the identity of the trier of fact. When, as in this case, the party sponsoring the expert witness cannot show that his testimony is sufficiently reliable to be admissible, his opinions not only can but should be excluded before trial. As the Supreme Court held in *Daubert*, federal judges are required to act as gatekeepers by ensuring that expert testimony "both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597. This requires "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue." *Id.* at 592-93. Here, defendants argue that Trende's remaining opinions meet that standard for admissibility, but have offered nothing to support that assertion.

Plaintiffs' opening brief demonstrated that plaintiffs' criticisms go way beyond mere quibbles. In fact, there are fundamental flaws in Trende's methods that make those methods inherently unreliable. Defendants do not even try to rebut the vast majority of plaintiffs' arguments. For example, plaintiffs spent nine pages showing that Trende's "nearest neighbor" analysis is wholly unreliable and hence inadmissible for a variety of reasons. Pls.' Opening Br. at 14-22. Defendants try to brush off plaintiffs' arguments in less than a page of their response (at 23). Defendants argue that the fact that (urban) Democratic wards are physically smaller than (suburban and rural) Republican wards somehow proves their point that Democrats are more geographically concentrated than Republicans. And they contend that the fact that Trende's methodology does not appear in any peer-reviewed journal is irrelevant. Both of these arguments miss the critical point: Trende's "nearest neighbor" analysis is an idiosyncratic measure he invented, without support and without *any* acceptance in the expert community or grounding in

standard techniques that *are* accepted by experts for measuring concentration in populations, such as Global Moran's I and the Isolation Index. *See* Mayer Rebuttal (Dkt. 64) at 16.

Furthermore, defendants' half-hearted defense of the substance of Trende's analysis makes no sense. Knowing how far apart wards of a given partisan composition tend to be says nothing about the concentration of Democratic or Republican voters *for districting purposes*. After all, districts must be drawn to have relatively equal populations, not to be of the same relative geographic size. Republican wards tend to be larger in size than Democratic wards and therefore will *always* appear to be farther apart based on simple geography. But that says nothing about their actual concentration for purposes of districting. Heavily Republican wards may well be closely clustered with other Republican wards—as much or more so than Democratic wards—yet in Trende's analysis they would appear to be farther apart simply because Republican wards tend to be larger in size. *See* Mayer Rebuttal (Dkt. 64) at 9. Defendants do not even try to respond to these or any other criticisms plaintiffs have made of Trende's nearest neighbor analysis, thus tacitly conceding their validity.

As to the remainder of plaintiffs' challenges to Trende's opinions, defendants *list* some of plaintiffs' arguments (at 22-23), but do not offer any response. Instead, they rely solely on their claim that the Court should not bother to address *Daubert* issues, but should instead allow Trende to testify at trial.

IV. The Court Does Not Have to Wait until Trial to Determine that Trende's Opinions Do Not Satisfy *Daubert*.

Defendants argue that *Daubert* has no place in a bench trial: according to defendants, purported expert testimony should be admitted and then evaluated at or after trial, even if it does not satisfy the *Daubert* standards, would not assist the Court in the determinations it has to make, and would waste trial time. Defendants argue that because this will be a bench trial, the Court

should take time at trial to hear and admit Trende's testimony, listen to cross-examination of Trende, and hear the rebuttal testimony of plaintiffs' experts in response—all recapitulating what has been said in these briefs. The Court is not required to suspend judgment, however, and should not do so. Indeed, *Daubert* and its progeny preclude the Court from doing so.

Defendants admit that "*Daubert*'s requirements of reliability and relevancy continue to apply in apply in a bench trial.'[citation omitted]." Defs.' Br. at 2. That is clearly right. *Daubert* established a gate-keeping role that is supposed to be applied by the federal courts in all cases. There is no suggestion in *Daubert* or *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or any of the cases that follow them that their rules and principles are to be applied only in jury trials. *See Bradley v. Brown*, 42 F.3d 434 (7th Cir. 1994) (affirming district court's exclusion of expert testimony in a bench trial).

Defendants cite cases that say that in a bench trial, as opposed to a jury trial, there is less need to exclude questionable expert testimony before trial. *See* Defs.' Br. at 2, *citing Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748 (7th Cir. 2010), and *In re Salem*, 465 F.3d 767 (7th Cir. 2006). Those cases do note that in a bench trial a court may choose to wait and evaluate expert testimony at the trial, if the basic standards of *Daubert* for admissibility are met. But the cases do *not* say that expert testimony may be admitted if the *Daubert* standards are not met. In fact, in both *Metavante* and *Salem* the requirements for admission were established. *Metavante*, 619 F.3d at 761-62; *In re Salem*, 465 F.3d at 777. And the cases do not say that a court *should* delay deciding a *Daubert* motion, if it is clear, as it is in this case, that the proffered expert is not qualified and the opinions offered are not methodologically sound or reliable. No case says that the Court is required to or should waste its time.

Defendants' argument is one that could be made with respect to any motion *in limine* in a bench trial. But motions *in limine* are often granted in bench trials. *See, e.g., Smith v. Chicago Transit Authority*, 2015 WL 328838 (N.D. Ill. 2015); *Abbott Laboratories v. Torpharm, Inc.*, 2003 WL 22462614 (N.D. Ill. 2003); and *Lincoln Diagnostics, Inc. v. Panatrex, Inc.*, 2009 WL 663035 (C.D. Ill. 2009). The motion *in limine* in a bench trial not only prevents the admission into evidence of testimony that should not be admitted, it also prevents the parties from wasting trial preparation time; it prevents waste of trial time; and it keeps the Court and the parties from having to discuss at length in post-trial findings of fact and conclusions of law testimony that never should have come into evidence in the first place. Thus, it conserves judicial resources and the resources of the parties by preventing them from using up time and resources on matters that cannot properly affect the outcome of the case. *See Green v. Goodyear Dunlop Tires North America, Ltd.,* 2010 WL 883653 (S.D.Ill. 2010) at *2 (excluding expert testimony in a bench trial "to ensure that valuable trial time is not taken up with resolving threshold challenges to the admissibility of expert testimony"); and *Boltar, L.L.C. v. C.I.R.*, 136 T.C. 326, 334 (2011) (observing that "rule 702 of the Federal Rules of Evidence applies to bench trials as well as to jury trials" and that "receipt of unreliable evidence is an imposition on the opposing party and on the trial process.") As a well-known treatise notes, "[t]he motion *in limine* fosters efficiency by saving time at trial and saves parties the costs of bringing witnesses to court who will not be allowed to testify or whose testimony will not be needed because the evidence they would authenticate or rebut has been deemed inadmissible." 21 Charles Alan Wright, et al., *Federal Practice & Procedure* § 5037.10, at 763-64 (2d ed. 2005) (footnotes omitted).

Defendants argue that issues about the grounds for Trende's opinions can be left to cross-examination. But cross-examination is not appropriate and should not be required if defendants

have not carried their burden of showing that Trende's work is methodologically sound and reliable and that his opinions would be helpful in resolving the issues in the case, so that they are admissible in the first place. It is defendants' burden to make that showing, *Lewis*, 561 F.3d at 705, and they have not met it.

If this case involved simply a battle of experts, each qualified to offer opinions and each with substantive arguments to be made in support of their respective approaches, a *Daubert* motion would not be appropriate. Plaintiffs believe, for instance, that the analysis of defense expert Nicholas Gaudert is incorrect, but we do not claim that he should not be allowed to offer opinion testimony. The situation with respect to Trende is different, however. He is not qualified as an expert in these areas, as shown by his lack of formal training and experience and the multiple errors he makes in methods and analysis. His work is not supported by any writings of any experts in the field; indeed, it is directly contrary to the work of other experts. It is in large part subjective (based on the "eyeball" method), has not been subject to peer review or publication, does not provide any known error rate, is not subject to standards or controls, and is not generally accepted in the scientific community—all factors to be considered under *Daubert*. Admitting this testimony, even though it does not meet the relevant *Daubert* standards, would simply drag out the proceedings and waste trial time and resources, for no purpose.

CONCLUSION

For the reasons set forth above and in plaintiffs' opening brief, the Declaration of Sean P. Trende should be stricken and he should be precluded from offering any purported expert opinions at trial.

Respectfully submitted,

s/ Michele Odorizzi
One of the attorneys for plaintiffs

Peter G. Earle
LAW OFFICE OF PETER G. EARLE
839 North Jefferson Street, Suite 300
Milwaukee, WI 53202
(414) 276-1076
peter@earle-law.com

Paul Strauss
Ruth Greenwood
Annabelle Harless
CHICAGO LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW, INC.
100 N. LaSalle St., Suite 600
Chicago, IL 60602
(312) 202-3649
pstrauss@clccrul.org
rgreenwood@clccrul.org
aharless@clccrul.org

Michele Odorizzi
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
modorizzi@mayerbrown.com

Nicholas O. Stephanopoulos
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th St., Suite 510
Chicago, IL 60637
(773) 702-4226
nsteph@uchicago.edu

Douglas M. Poland
RATHJE & WOODWARD, LLC
10 E. Doty St., Suite 800
Madison, WI 53703
(608) 441-5104
dpoland@rathjewoodward.com

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