

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

WILLIAM WHITFORD, et al.,

Plaintiffs,

vs.

Case No. 15-CV-421-bbc

GERALD NICHOL, et al.,

Defendants.

VIDEOTAPED DEPOSITION OF

ADAM R. FOLTZ

Madison, Wisconsin

March 31, 2016

9:27 a.m. to 1:28 p.m.

Laura L. Kolnik, RPR/RMR/CRR

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Adam R. Foltz**

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11 I N D E X
12 ADAM R. FOLTZ
13 By Mr. Poland 5
14 By Mr. Keenan175
15
16
17
18
19
20 (Original transcript supplied to Attorney Poland.)
21 (Original exhibits attached to original transcript.
22 Scanned copies of paper exhibits provided to attorneys.
23 CDs and flash drives were not reproduced.)
24
25

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1 P R O C E E D I N G S
2 (Exhibit No. 73 marked for identification.)
3 THE VIDEOGRAPHER: My name is Steve Peters,
4 videographer associated with Halma-Jilek Reporting,
5 Incorporated, Milwaukee, Wisconsin.
6 This is the beginning of the video deposition
7 of Adam R. Foltz on March 31, 2016; the time 9:27
8 a.m.
9 This is the case concerning William Whitford,
10 et al., plaintiffs, versus Gerald Nichol, et al.,
11 defendants, Case No. 15-cv-421-bbc pending in the
12 United States District Court for the Western
13 District of Wisconsin.
14 Will counsel now please state their appearances
15 starting with the plaintiffs.
16 MR. POLAND: Doug Poland of Rathje & Woodward
17 appearing on behalf of the plaintiffs.
18 MR. ST. JOHN: Kevin St. John, Bell Giftos St.
19 John, appearing on behalf of the deponent.
20 MR. KEENAN: Brian Keenan with the Wisconsin
21 Department of Justice appearing on behalf of the
22 defendants.
23 MR. JOHNSON-KARP: Gabe Johnson-Karp with the
24 Wisconsin Department of Justice also on behalf of
25 the deponent.

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1 THE VIDEOGRAPHER: The court reporter, Laura
2 Kolnik, will now swear in the witness.
3 ADAM R. FOLTZ, called as a witness herein,
4 after having been first duly sworn, was examined and
5 testified as follows:
6 MR. ST. JOHN: Doug, before we begin, I'd just
7 like to put on the record that in the Baldus
8 litigation there were a variety of motions that were
9 raised that related to legislative privilege. The
10 Baldus court ruled that with respect to the
11 testimony, the deposition testimony of Mr. Foltz,
12 that the legislative privilege did not apply,
13 allowed the plaintiffs to seek information that went
14 into the deliberative process as well as documents
15 that went into that.
16 We are here to produce information for the
17 plaintiffs and will testify to those matters that --
18 that relate to what was asserted as a legislative
19 privilege. I note that some courts dealing with
20 legislative privilege have looked at it as a
21 testimonial privilege, and other courts have looked
22 at the question of what would be submitted into
23 evidence as a different question as what would be
24 discoverable.
25 So without waiving those rights that may be

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1 asserted at a later time by either the defendants or
2 the deponents, we make Mr. Foltz available for your
3 deposition.
4 MR. POLAND: I understand, Kevin. I understand
5 the preservation.
6 EXAMINATION
7 BY MR. POLAND:
8 Q. Good morning, Mr. Foltz.
9 **A. Good morning.**
10 Q. Will you please state your name for the record?
11 **A. Adam Foltz.**
12 Q. And can you spell your last name, please?
13 **A. F-O-L-T-Z.**
14 Q. And Mr. Foltz, do you reside within the State of
15 Wisconsin?
16 **A. I do.**
17 Q. You're appearing here this morning pursuant to a
18 subpoena that was issued to you, correct?
19 **A. That's correct.**
20 Q. All right. And the court reporter has marked as
21 Exhibit No. 73 a subpoena. I'm giving a copy to you
22 and I'll give a copy to your -- your counsel as
23 well. I'm also will hand you a check for \$45 in
24 payment of the witness fee. I'll tender that to you
25 now for -- for the appearance this morning.

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1 Have you seen a copy of the exhibit -- of
2 Exhibit 73 before, Mr. Foltz?
3 **A. I have.**
4 Q. All right. When did you receive a copy of Exhibit
5 73, the subpoena?
6 **A. Last week at some point.**
7 Q. And you are represented by counsel here today,
8 correct?
9 **A. That's correct.**
10 Q. What did you do to prepare for your deposition
11 today?
12 **A. I met with counsel and read my prior depositions
13 from the Baldus action.**
14 Q. And when you say "counsel," who did you meet with
15 specifically?
16 **A. Gabe Johnson-Karp and Kevin St. John.**
17 Q. Did you meet with any counsel other than
18 Mr. St. John and -- and Mr. Karp?
19 MR. JOHNSON-KARP: Johnson-Karp.
20 Q. Johnson-Karp.
21 **A. No, I did not.**
22 Q. Was anyone present at the meetings that you had with
23 Mr. Johnson-Karp and Mr. St. John?
24 **A. There was a brief overlap with Tad Ottman, but the
25 meetings were not concurrent.**

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1 Q. Did you talk with anyone other than Mr. Johnson-Karp
2 and Mr. St. John about your deposition today?
3 **A. Yes.**
4 Q. Who else did you speak with?
5 **A. Senator Fitzgerald, chief of staff to Senator
6 Fitzgerald, mentioned it to my girlfriend, but
7 that's about it. Oh, also the Speaker's office.
8 Zach Bemis from the Speaker's office I also made
9 aware that I was being deposed.**
10 Q. What did you talk about with Mr. Fitzgerald?
11 **A. Just generally made him aware that I would be
12 required to give a deposition in the ongoing
13 litigation.**
14 Q. Did you talk about the substance of your testimony
15 at all at the deposition?
16 **A. No.**
17 Q. Did you talk about any of the issues that were --
18 that you thought might come up during the
19 deposition?
20 **A. No.**
21 Q. What about the chief of staff of Senator Fitzgerald,
22 did you talk about the substance at all of the --
23 your testimony of the deposition?
24 **A. No, again just generally made him aware that I would
25 be required to come in for a deposition.**

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1 Q. All right. And I think in addition to your
2 girlfriend there was one other person that you said
3 that you had talked to about the deposition or about
4 the subpoena?
5 **A. Yeah. Zach Bemis.**
6 Q. Zach Bemis. Did you talk with Zach Bemis at all
7 about the substance of the deposition or your
8 testimony?
9 **A. No.**
10 Q. Did you -- and you mentioned that you did review
11 documents to prepare for your testimony today?
12 **A. Yes.**
13 Q. What documents did you review?
14 **A. I read prior depositions and the exhibits that were**
15 **part of those depositions as well.**
16 Q. All right. And those were the -- the depositions
17 from the Baldus litigation, correct?
18 **A. That's correct, and the 30(b)(6) that followed. I**
19 **believe that was still considered part of the**
20 **Baldus, but I'm not 100 percent on that.**
21 Q. I'd like you to take a look at Exhibit A to the
22 subpoena. That's the very last page of Exhibit No.
23 73.
24 **A. Uh-huh.**
25 Q. Did you read Exhibit A when you received a copy of

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1 the subpoena?
2 **A. I did.**
3 Q. All right. And so you see that there's a request to
4 produce documents, and it requests all MS Excel
5 spreadsheets. Do you understand that MS stands for
6 Microsoft?
7 **A. I do.**
8 Q. All right. "All Microsoft Excel spreadsheets and
9 Microsoft Word documents in native format generated
10 during the redistricting process and formation of
11 the state assembly boundaries set out in Act 43 of
12 2011 that mention or evaluate potential or actual
13 partisan performance between the dates of April 1,
14 2011 and August 9, 2011." Do you see that?
15 **A. I do.**
16 Q. And did you search for those documents?
17 **A. I did.**
18 Q. And did you find any documents?
19 **A. I did.**
20 Q. All right. Do you have those documents with you
21 today?
22 **A. Yes.**
23 MR. POLAND: I'm going to have the court
24 reporter mark these as Exhibit --
25 MR. ST. JOHN: A copy for you.

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1 MR. POLAND: An extra copy?
2 MR. ST. JOHN: That would be for the court
3 reporter.
4 MR. POLAND: For the court reporter. Got it.
5 (Exhibit No. 74 marked for identification.)
6 BY MR. POLAND:
7 Q. Mr. Foltz, you've produced today and been handed a
8 CD-ROM and then a flash drive as well. Are the --
9 are there identical documents on both the CD-ROM and
10 the flash drive or are they two different
11 collections of documents?
12 **A. I produced the flash drive.**
13 Q. You produced the flash drive, okay. So the CD-ROM
14 is an exact copy of what's on the flash drive?
15 **A. That's my understanding.**
16 Q. All right. Okay. Let me ask you about where you
17 searched for documents to respond to the subpoena.
18 **A. Uh-huh.**
19 Q. Where did you search for documents in response to
20 the subpoena?
21 **A. So there were some remaining emails from the prior**
22 **litigation so my process was to sort those emails by**
23 **attachment, whether or not there was a presence of**
24 **an attachment, and then to secondarily sort that by**
25 **the date range listed in Exhibit A.**

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1 **Then I proceeded to work through just in**
2 **sequence, I can't remember if I worked from April 1**
3 **down or August 9 up, and then initially just checked**
4 **to see if the attachment was, in fact, a Word or an**
5 **Excel document. If it was, I would then more**
6 **closely examine it to see if it was something that**
7 **was enumerated here in Exhibit A that dealt with**
8 **partisan performance actual or projected.**
9 Q. Okay. So the emails that you -- those were emails
10 that you searched through; is that correct?
11 **A. That's correct.**
12 Q. Where were the emails located?
13 **A. There was a folder on my Microsoft Outlook and then**
14 **also a Gmail folder that contained the emails that**
15 **were searched.**
16 Q. All right. Was the -- is the Gmail folder, was that
17 actually on the computer that you were using?
18 **A. I mean in the sense that any Gmail folder is**
19 **available whenever you log into it at whatever**
20 **computer. Yes. I guess.**
21 Q. Okay. Let me back up a second. When you say that
22 you searched -- you searched email, was that email
23 that was actually residing on a computer that you
24 have access to now?
25 **A. The -- the Outlook would be resident on the computer**

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1 **that I work on. The -- the Google would be, you**
 2 **know, Gmail would be saved on the server but**
 3 **accessible with my login and password.**
 4 Q. So essentially web mail; is that correct?
 5 **A. Yeah.**
 6 Q. Do you -- you don't still have the computer that you
 7 used for legislative redistricting in 2011; is that
 8 correct?
 9 **A. No, I do not.**
 10 Q. And that was -- that was given to the LTSB some time
 11 ago, correct?
 12 **A. Correct.**
 13 Q. How did the -- how did files that relate to the 2011
 14 legislative redistricting make their way onto your
 15 computer that you're using now in your work?
 16 **A. I want to be very clear about the distinction**
 17 **between files and emails. The emails were available**
 18 **because you log in to your state -- your state login**
 19 **with whatever server LTSB has, and the emails are**
 20 **available across multiple machines.**
 21 Q. I understand. So there's a server that LTSB retains
 22 that has emails on it even if those emails might
 23 have been from a few years ago?
 24 **A. That's correct.**
 25 Q. All right. So even if you get a new computer, sort

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1 of like with web mail, you can go back and you can
 2 get those emails that were on the LTSB email server?
 3 **A. Yes, that's my understanding.**
 4 Q. Understood. Okay. Did you do anything physically
 5 to transfer any files from your -- from the computer
 6 that you used for legislative redistricting in 2011
 7 to the computer that you have now?
 8 **A. No, the emails just are there once you log in.**
 9 Q. Understood. The -- the email -- so what you have
 10 produced then on the flash drive and the CD-ROM,
 11 these were all attachments to emails, you said?
 12 **A. That's correct.**
 13 Q. All right.
 14 **A. One point on that, too. Two of the files were**
 15 **zipped files that in that zip file contained Excels**
 16 **so I produced both the zip and took the liberty of**
 17 **also unzipping so you have the Excel files that**
 18 **would be contained within.**
 19 Q. All right. So as I look at this, and I've just
 20 opened this up, and I'd be happy to pop -- pop the
 21 drive in or the CD-ROM into the computer if you want
 22 to look at it as well, but I've got the flash drive
 23 at least in my directory. I'm looking at it now.
 24 **A. Uh-huh.**
 25 Q. And I see one, two, three, four, five separate Excel

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1 files, and then I see two -- two zip files. Do I
 2 understand your testimony correctly that those
 3 separate Excel files are actually contained in the
 4 zip files --
 5 **A. Yeah.**
 6 Q. -- too?
 7 **A. They would be duplicative.**
 8 Q. They're duplicative?
 9 **A. Yes.**
 10 Q. Okay. Okay. So what we have -- essentially what
 11 you've produced are one, two, three, four, five
 12 separate Excel spreadsheets; is that correct?
 13 **A. Uh-huh. I believe so.**
 14 Q. All right. And we'll go into them a little bit more
 15 detail. I just want to try to get the general
 16 contours of what we have.
 17 **A. Okay.**
 18 Q. Mr. Foltz, do you know whether these particular
 19 Excel files that you've produced today were also
 20 produced in the Baldus litigation?
 21 **A. I believe they were. Yes.**
 22 Q. Okay. Do you know why these particular spreadsheets
 23 would have been saved on the email server that LTSB
 24 has?
 25 **A. The emails that they were attached to were from**

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1 **technical support staff that are employed by LTSB,**
 2 **the GIS team specifically within LTSB.**
 3 Q. I understand. Did you look any -- well, strike that
 4 question.
 5 In addition to emails stored on the LTSB
 6 server, where did you look for documents to respond
 7 to Exhibit A on -- on the subpoena?
 8 **A. The -- the Gmail account that I mentioned**
 9 **previously.**
 10 Q. Did you look anywhere else for documents that would
 11 respond to the subpoena?
 12 **A. No.**
 13 Q. Did you look at any paper files you might have had?
 14 **A. No. No.**
 15 Q. Do you know what -- did you retain any paper files?
 16 **A. I do have one copy of one of the summary sheets that**
 17 **was produced during Baldus that I have kept that I**
 18 **did not bring with me today.**
 19 Q. But that was something that was produced in Baldus?
 20 **A. That's correct.**
 21 Q. And when you say "summary sheets," was that a
 22 summary spreadsheet or --
 23 **A. Yes.**
 24 Q. All right. Does it fall within the time period that
 25 was requested in the subpoena?

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1 **A. It's a paper copy so I wouldn't really have a way of**
 2 **tracking the date.**
 3 Q. I see. The date does not appear at all in the paper
 4 copy?
 5 **A. Correct.**
 6 Q. All right. I understand. Did you look for any
 7 documents that might be stored someplace else
 8 electronically?
 9 **A. No.**
 10 Q. Did you look -- did you look at any cloud storage
 11 accounts to see whether there might be any
 12 responsive documents?
 13 **A. No. The -- the closest to a cloud where anything**
 14 **would have been would have been the Gmail or if you**
 15 **consider the LTSB Outlook web or email server to be**
 16 **a cloud, but nothing beyond the Gmail or the LTSB**
 17 **Outlook server.**
 18 **A. Do you use a Dropbox account or any other cloud**
 19 **storage account for work that you -- or strike that**
 20 **question.**
 21 **Did you use a Dropbox account or any other**
 22 **cloud storage account for work that you did on**
 23 **redistricting in 2011?**
 24 **A. No, I did not.**
 25 Q. Did you look to see if you had any flash drives that

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1 might have responsive information to the subpoena?
 2 **A. I did not.**
 3 Q. Do you know whether you have any flash drives that
 4 might contain responsive information?
 5 **A. I don't believe I do.**
 6 Q. What about CD-ROMs or DVD-ROMs. Did you look for
 7 any that might have responsive information?
 8 **A. No.**
 9 Q. Do you know whether you have any that might?
 10 **A. I don't believe I do.**
 11 Q. Who is your current employer?
 12 **A. Senator Scott Fitzgerald.**
 13 Q. All right. And so that's a -- that's a change of
 14 employment that you had since the time that you
 15 testified in the Baldus litigation; is that correct?
 16 **A. Yes and no. So the first two rounds of Baldus**
 17 **depositions I was not in the senator's employ, but**
 18 **when we got to the 30(b)(6) in the third round, I**
 19 **was working for the senator at that point.**
 20 Q. What's your current position with Senator
 21 Fitzgerald?
 22 **A. Legislative aide.**
 23 Q. Other than the files that you've produced here
 24 today, do you have access to any of the files that
 25 you created between April and August 2011 in

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1 connection with your work on Act 43?
 2 **A. I don't directly, but I know they're available as**
 3 **exhibits from prior depositions, and I have reviewed**
 4 **those exhibits.**
 5 Q. Okay. And other than the exhibits that you've
 6 reviewed, are there any documents that you're aware
 7 of that you still have access to from -- that were
 8 created between April and August 2011?
 9 **A. That paper copy may have been created sometime, but**
 10 **again that was just a paper copy of a summary**
 11 **spreadsheet that was produced during the Baldus**
 12 **discovery.**
 13 Q. Anything other than that?
 14 **A. Not that I can think of.**
 15 Q. Now, we just talked a few minutes ago about the
 16 depositions that you gave in the Baldus versus
 17 Brennan case?
 18 **A. Uh-huh.**
 19 Q. Correct? And you understand that was the lawsuit
 20 that was tried in the federal court in Milwaukee in
 21 2012 in connection with the 2011 redistricting,
 22 correct?
 23 **A. Yes.**
 24 Q. And you recall being deposed three separate times in
 25 that case?

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1 **A. Yes.**
 2 Q. Do you remember the date of the first deposition you
 3 gave in that case?
 4 **A. No, not particularly. It was sometime early twenty**
 5 **or late twenty-- late 2011?**
 6 Q. I won't make you guess.
 7 MR. POLAND: Can we mark this as Exhibit 75,
 8 please?
 9 (Exhibit No. 75 marked for identification.)
 10 Q. Mr. Foltz, I'm handing you a copy of a document that
 11 the court reporter has marked as Exhibit No. 75.
 12 Take just a minute, please, and look at the
 13 document.
 14 **A. Where should I go with exhibits that are no longer**
 15 **used? Just hand them to --**
 16 Q. That's Mr. St. John's job. It's one of the duties
 17 of counsel.
 18 MR. ST. JOHN: You'll want this one.
 19 THE WITNESS: I want this one.
 20 MR. POLAND: He'll keep you organized.
 21 MR. ST. JOHN: We miss Maria for this. Judging
 22 from the other deposition transcripts, she was the
 23 organizer.
 24 MR. POLAND: She was very -- she was very neat
 25 at depositions, that's for sure. She kept us

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1 organized.
2 BY MR. POLAND:
3 Q. Mr. Foltz, have you seen Exhibit No. 75 before?
4 **A. I have.**
5 Q. Okay. And you recognize that as a copy of the
6 transcript of your deposition taken in the Baldus
7 case on December 21, 2011?
8 **A. Yes.**
9 Q. And do you recall being deposed in -- roughly on
10 that date in 2011?
11 **A. Sounds right.**
12 Q. Now, I'm not going to go through all the questions
13 that you were asked in this deposition, but I do
14 have a few questions about it for you.
15 **A. Yes.**
16 Q. You testified a few minutes ago that you have reread
17 the transcripts of your depositions in the Baldus
18 case?
19 **A. Yes.**
20 Q. When was the last time that you read the Exhibit 75?
21 **A. Late last week.**
22 Q. And is your testimony that you gave in Exhibit 75
23 true and correct?
24 **A. It is.**
25 Q. Is there anything in your testimony that you believe

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1 needs to be changed to make it true and correct?
2 **A. It's all true and correct.**
3 Q. You can set that to the side for the moment. We
4 might come back to it.
5 **A. Okay.**
6 **(Exhibit No. 76 marked for identification.)**
7 Q. Mr. Foltz, handing you a copy of a document the
8 court reporter has marked as Exhibit No. 76, and ask
9 you to take a look at that.
10 **A. Okay.**
11 Q. Can you identify Exhibit 76?
12 **A. It appears to be the continuation or second**
13 **deposition, I'm not sure how exactly it's**
14 **classified, of my depositions.**
15 Q. Fair enough. And do you see that there is a date of
16 February 1st, 2012. It's in very tiny print in the
17 upper left-hand corner.
18 **A. I do see that -- I do see the date of February 1st.**
19 Q. All right. Do you recall being deposed on
20 February -- on or about February 1st, 2012 in
21 connection with the Baldus case?
22 **A. Yes.**
23 Q. Have you reviewed this particular transcript that's
24 Exhibit 76?
25 **A. Slightly different format, but the same -- but the**

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1 **transcript.**
2 Q. When did you do that?
3 **A. About the same time, late last week.**
4 Q. All right. And is your testimony that you gave in
5 Exhibit 76 true and correct?
6 **A. It is.**
7 Q. Is there anything in your testimony reflected in
8 Exhibit 76 that you believe needs to be changed to
9 make it true and correct?
10 **A. No, it's all true and correct first time around.**
11 Q. You can set that to the side.
12 MR. POLAND: Just for the record, these copies
13 of these transcripts, they don't have the exhibits
14 attached, these are just the transcripts themselves.
15 Q. And you testified as well that you do recall being
16 deposed a third time in connection with the Baldus
17 case?
18 **A. That's correct.**
19 **(Exhibit No. 77 marked for identification.)**
20 Q. Mr. Foltz, I'm handing you a copy of a document that
21 the court reporter has marked as Exhibit No. 77, ask
22 you to take a look at that, please.
23 **A. Okay.**
24 Q. Can you identify Exhibit 77?
25 **A. It appears to be a transcript of my third round of**

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1 **depositions related to the Baldus litigation.**
2 Q. All right. And we've been referring to it as the
3 Baldus litigation. If you look at the caption, the
4 caption actually does say Baldus versus members of
5 the Wisconsin Government Accountability Board, and
6 then it lists the members of the board there,
7 correct?
8 **A. That's correct.**
9 Q. All right. But if we refer to this as the Baldus
10 litigation, you'll know what I'm referring to?
11 **A. I will.**
12 Q. And you recently reviewed Exhibit 77 as well?
13 **A. I did.**
14 Q. When was the last time that you reviewed Exhibit 77?
15 **A. Late last week, beginning of this week.**
16 Q. Is your testimony in Exhibit 77 true and correct?
17 **A. It is.**
18 Q. Is there anything in your testimony in Exhibit 77
19 that you need -- that you believe needs to be
20 changed to make it true and correct?
21 **A. No.**
22 Q. You can set that to the side as well.
23 Now, do you understand that you've been named
24 as a witness in a new redistricting case that's
25 scheduled to go to trial in less than two months?

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1 **A. I do understand that.**
 2 Q. And that's the case that we're -- that you are
 3 appearing in today, correct?
 4 **A. That's correct.**
 5 Q. For this deposition? You understand that there is a
 6 different group of plaintiffs and the lead plaintiff
 7 is a man with the last name Whitford?
 8 **A. Uh-huh.**
 9 Q. Do you understand that?
 10 **A. Yes.**
 11 Q. So if I refer to this case as the Whitford
 12 litigation, will you know that I'm talking about
 13 this case that's been scheduled for trial in the
 14 Western District of Wisconsin this year?
 15 **A. Yes.**
 16 **(Exhibit No. 78 marked for identification.)**
 17 Q. Mr. Foltz, I'm handing you a copy of a document the
 18 court reporter has marked as Exhibit 78. I'm going
 19 to ask you to take a look at that.
 20 **A. (Witness reading.)**
 21 Q. Have you seen Exhibit 78 before?
 22 **A. I believe I have.**
 23 Q. Were you aware on or about this -- this date October
 24 7 of 2015 that's on the document that you were
 25 identified as an individual potentially having

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1 knowledge regarding the matter and as a potential
 2 witness to provide testimony?
 3 **A. I believe so. Yeah.**
 4 Q. When was the first time that you heard about the
 5 Whitford case?
 6 **A. Probably when the initial action was filed. I'm not**
 7 **recalling the specific date, but when the initial**
 8 **action was filed.**
 9 Q. Did you see -- if I represent to you on or about in
 10 July of 2015, does that sound about right?
 11 **A. Yeah, that sounds about right.**
 12 Q. Did you see a copy of the complaint in the Whitford
 13 case when it was filed?
 14 **A. I did.**
 15 Q. Have you seen copies of any other documents that
 16 have actually been filed with the court in the
 17 Whitford case?
 18 **A. Yes.**
 19 Q. Were you asked to review them by someone?
 20 **A. No.**
 21 Q. Why did you review the documents that have been
 22 filed in the Whitford case?
 23 **A. General curiosity.**
 24 Q. How did you find out that the Whitford case had been
 25 filed?

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1 **A. I don't remember exactly how I found out. I**
 2 **probably saw something in the Journal Sentinel or**
 3 **WisPolitics or something along those lines.**
 4 Q. Did anybody tell you that it had been filed?
 5 **A. Not that I can recall.**
 6 Q. Have you discussed the Whitford case with anyone
 7 other than your counsel and the people that you
 8 mentioned earlier today that you had told about this
 9 deposition?
 10 **A. Not that I can directly recall. I'm sure it's come**
 11 **up in conversation, but not that I can specifically**
 12 **recall.**
 13 Q. Have you discussed the Whitford case with
 14 Mr. Keenan?
 15 **A. Yes.**
 16 Q. When did you discuss the Whitford case with
 17 Mr. Keenan?
 18 **A. I don't know off the top of my head.**
 19 Q. Do you remember whether it was before or after the
 20 time of the Rule 26 initial disclosures where you
 21 were identified as a potential witness?
 22 **A. I'm assuming it was before, but I don't know that**
 23 **for a fact.**
 24 Q. Did you have any discussions with Mr. Keenan about
 25 the substance of the allegations in the -- in the

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1 Whitford complaint?
 2 **A. I'm sure I did. Yes.**
 3 Q. Do you recall the substance of any of those
 4 discussions?
 5 MR. ST. JOHN: I'm going to assert a
 6 attorney-client privilege objection to that. The
 7 legislature had notified the attorney general's
 8 office and requested representation from the
 9 attorneys general's office at or about or before the
 10 time to cover -- which would cover the time period
 11 in question. Mr. Foltz continues to be represented
 12 by the attorney general's office, and all
 13 communications with subordinate attorneys within the
 14 attorney general's office would fall under the scope
 15 of the privilege. I'm going to instruct you not to
 16 answer the question as to substance.
 17 BY MR. POLAND:
 18 Q. Are you going to follow your counsel's instruction
 19 not to answer the question?
 20 **A. I will.**
 21 MR. KEENAN: And I would just like to interpose
 22 and join the objection, but then also state an
 23 attorney work product objection to the extent it's
 24 not covered by the attorney-client privilege if it
 25 will get into the thought processes of an attorney.

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1 But if he's not going to answer, he's not going to
2 answer, but I just want to make a separate objection
3 on that basis.
4 BY MR. POLAND:
5 Q. Do you know, Mr. Foltz, do you know whether there is
6 any kind of a joint defense agreement between the
7 Wisconsin State Legislature and the -- the
8 defendants in the Whitford litigation?
9 **A. I'm not aware of one.**
10 Q. All right. Have you -- have you spoken with anyone
11 about a joint defense agreement?
12 **A. Not -- no, not that I can think of, no.**
13 Q. All right. Have -- do you have any kind of a
14 retainer agreement with Mr. St. John?
15 **A. I don't know if we do. I'm not exactly sure how the**
16 **mechanics of that works. I just know that**
17 **Mr. St. John is here representing me as counsel.**
18 Q. All right. And Mr. Johnson-Karp is here
19 representing you as counsel as well, correct?
20 **A. That's correct.**
21 Q. Mr. Keenan is not here representing you personally
22 as your counsel, correct?
23 **A. That's my understanding.**
24 Q. Have you discussed the Whitford case with any of the
25 legislators, members of the Wisconsin State Senate

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1 or Assembly?
2 **A. Senator Fitzgerald.**
3 Q. All right. And what did you discuss with Senator
4 Fitzgerald about -- about the Whitford litigation?
5 **A. Generally I can recall making him aware that there**
6 **was a new action out there.**
7 Q. Did you talk with Senator Fitzgerald about the
8 substance of the allegations in the Whitford
9 complaint?
10 **A. Generally. I don't remember specifically talking**
11 **about the substance of that, but I do generally give**
12 **him an overview of what is being claimed to the best**
13 **of my understanding of it.**
14 Q. All right. Do you recall what you told him about
15 the substance of the allegations in the Whitford
16 case?
17 **A. Not specifically, no.**
18 Q. All right. What did you tell him generally?
19 **A. Just that a new action had been brought against the**
20 **Act 43 map, specifically the assembly map is my**
21 **understanding.**
22 Q. Did you ever have any conversations with -- with
23 anyone at the Department of Justice, the Wisconsin
24 Department of Justice, that is, about the assignment
25 of counsel to represent you with respect to the

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1 Whitford action?
2 **A. Yeah. There were some conversations.**
3 Q. All right. Who did you talk to?
4 **A. At Department of Justice are you asking?**
5 Q. Correct.
6 **A. I believe there were conversations with Andy Cook**
7 **over there, Dave Meany. I'm trying to think who**
8 **else from DOJ. Mike Austin was probably around as**
9 **well. I believe that's everybody from DOJ that we**
10 **would have touched base with.**
11 Q. Okay. Do you know whether Mr. Keenan is
12 representing the Wisconsin State Legislature in the
13 Whitford case?
14 **A. I don't believe so.**
15 Q. Did you have any discussion with any other
16 legislative aides in either the Wisconsin State
17 Senate or Wisconsin State Assembly about the
18 Whitford case?
19 **A. Yes.**
20 Q. And who have you spoken with who are legislative
21 aides about the Whitford case?
22 **A. Tad Ottman and then Zach Bemis are the ones that**
23 **jump to -- jump to mind. I'd also point out the**
24 **forementioned girlfriend is also an employee of the**
25 **state legislature.**

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1 Q. And what's her name?
2 **A. Lauren Clark.**
3 Q. Did you speak with Mr. Ottman about the substance of
4 the allegations in the Whitford case?
5 **A. I'm sure we did. Yeah.**
6 Q. Do you recall what you talked about with Mr. Ottman
7 in terms of the substance of the allegations?
8 **A. Not specifically, no.**
9 Q. Do you recall generally?
10 **A. I mean just an overview of what they're claiming and**
11 **what the -- what the theory is behind it, my**
12 **understanding.**
13 Q. All right. Did you talk with Mr. Ottman at all
14 about any of the -- the defense theories in the
15 case?
16 **A. No, not really, not that I can recall.**
17 Q. Have you -- have you had conversations with -- with
18 Mr. Keenan about the defense theories in the case?
19 **A. Can I --**
20 MR. KEENAN: I think the objection will stand,
21 but you can answer yes or no obviously.
22 THE WITNESS: Yes.
23 BY MR. POLAND:
24 Q. When did you have conversations with Mr. Keenan
25 about the defense theories in the case?

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1 **A. I don't know if defense theories is the right label**
 2 **for it. I mean I've talked to, you know, Mr. Keenan**
 3 **in general about everything involved with this, so I**
 4 **don't know if defense theories is a proper way of**
 5 **phrasing it.**
 6 Q. Okay. How would you phrase it, what you spoke with
 7 him about?
 8 **A. I would say general discussions, general discussions**
 9 **on the process, things like that.**
 10 Q. And when you say "the process," do you mean the
 11 process of redistricting?
 12 **A. The process that led to Act 43.**
 13 Q. Okay. Was anyone else present when you had those
 14 discussions with Mr. Keenan?
 15 **A. Yeah, one time I believe Tad was -- Tad was**
 16 **involved.**
 17 Q. Anyone else present at those discussions you had?
 18 **A. No. No.**
 19 Q. What was the substance of the discussions that you
 20 had with Mr. Keenan about the process that led to
 21 Act 43?
 22 MR. ST. JOHN: I'm going to interpose an
 23 assertion of attorney-client privilege with respect
 24 to discussions that Mr. Foltz had with Mr. Keenan
 25 during a date range that you haven't -- that isn't

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1 clear to me from your question. But it's to repeat
 2 the same objection -- or I'm sorry, the same
 3 assertion of privilege as repeated -- I'm sorry, as
 4 I stated previously on the same basis.
 5 MR. POLAND: Just to clarify the date range, it
 6 would be since the filing of the Whitford complaint.
 7 THE WITNESS: Okay.
 8 MR. KEENAN: And I would just like to join in
 9 the objections and my work product objections, but I
 10 don't have an objection to him answering something
 11 that would be the equivalent of the privilege log
 12 descriptor of what a conversation was, but then
 13 getting into the substance I would have an
 14 objection.
 15 MR. POLAND: Yeah.
 16 MR. KEENAN: If that makes sense.
 17 MR. POLAND: I think so.
 18 MR. KEENAN: I think maybe your question was
 19 aimed more at that.
 20 MR. POLAND: It was aimed at the substance. I
 21 think I had the description. I think the witness
 22 testified it was a general discussion about the
 23 process that led to Act 43 so I think I know the
 24 topic.
 25 MR. KEENAN: Right.

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1 MR. POLAND: And does that -- does your
 2 objection include an instruction not to answer as
 3 well?
 4 MR. ST. JOHN: My -- the assertion of the
 5 privilege includes an instruction not to answer
 6 questions relating to the substance of the
 7 conversations between Mr. Foltz and Mr. Keenan.
 8 BY MR. POLAND:
 9 Q. All right. And will you follow your counsel's
 10 instruction not to answer the question?
 11 **A. I will.**
 12 Q. All right. You said you had conversations as well
 13 with Zach Bemis about the Whitford case?
 14 **A. Yes.**
 15 Q. And again who's Mr. Bemis?
 16 **A. He is a policy advisor and legal counsel I believe**
 17 **is his title, generally legislative aide to Speaker**
 18 **Vos.**
 19 Q. Did you talk with Mr. Bemis about the substance of
 20 the allegations in the Whitford complaint?
 21 **A. I'm sure we did at some point.**
 22 Q. Do you recall those -- the substance of those
 23 conversations?
 24 **A. Not specifically. Again probably just a broad**
 25 **overview of what -- what the complaint was.**

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1 Q. And then you mentioned you also spoke with Lauren
 2 Clark?
 3 **A. Uh-huh.**
 4 Q. And Lauren Clark is a legislative aide, too?
 5 **A. Yes.**
 6 Q. Who is Lauren Clark a legislative aide to?
 7 **A. She's chief of staff to Senator Luther Olsen.**
 8 Q. Did you speak with Ms. Clark about the substance of
 9 the allegations in the Whitford case?
 10 **A. No.**
 11 Q. Did you talk with Ms. Clark about any of the
 12 defenses in the Whitford case?
 13 **A. Defense, no.**
 14 Q. What was the nature of the conversations you've had
 15 with Ms. Clark about the Whitford case?
 16 **A. Just made her aware that there was another case out**
 17 **there.**
 18 Q. When were you first approached to be a witness in
 19 the Whitford case?
 20 **A. The date -- whatever the date of the subpoena is.**
 21 Q. All right. Well, let me back -- let me back up
 22 then. In Exhibit No. 78, you were identified as
 23 potentially testifying as a witness.
 24 MR. ST. JOHN: I object to the question. It's
 25 not -- it's a mischaracterization of what the

<p style="text-align: right;">Page 38</p> <p>1 document says.</p> <p>2 BY MR. POLAND:</p> <p>3 Q. All right. Let's just read it then. Okay. Exhibit</p> <p>4 78, do you see that this is a document -- if you</p> <p>5 turn to the third page, you'll see it was a document</p> <p>6 that was filed by -- by Mr. Keenan and</p> <p>7 Mr. Russomanno on behalf of the Wisconsin Department</p> <p>8 of Justice. Do you see that? This is on the third</p> <p>9 page.</p> <p>10 A. Yes. Yes.</p> <p>11 Q. And you see it was filed October 7, 2015, correct?</p> <p>12 A. I do see that, yes.</p> <p>13 Q. All right. Now, if you turn to the first page</p> <p>14 under -- on the very first page it states,</p> <p>15 "Defendants, by their attorneys, make the following</p> <p>16 initial disclosures," then there's a letter A. It</p> <p>17 says, "Individuals potentially having knowledge</p> <p>18 regarding this matter," and you were identified</p> <p>19 there, correct?</p> <p>20 A. It reads that way, yes.</p> <p>21 Q. Then if you look at the paragraph just below it it</p> <p>22 states, "To the extent it may become relevant if the</p> <p>23 case survives the motion to dismiss, Adam Foltz, who</p> <p>24 was involved in the 2012 districting process, may</p> <p>25 provide testimony regarding that process and the</p>	<p style="text-align: right;">Page 40</p> <p>1 that?</p> <p>2 A. I've had conversations with Mr. Keenan about the</p> <p>3 litigation in general, yes.</p> <p>4 Q. But and so I want to make sure I'm clear here. In</p> <p>5 terms of what you might testify to at trial, have</p> <p>6 you had any conversations with Mr. Keenan about</p> <p>7 that?</p> <p>8 MR. KEENAN: I'm going to object as vague. I</p> <p>9 don't understand that.</p> <p>10 MR. ST. JOHN: The --</p> <p>11 MR. KEENAN: And attorney-client privilege.</p> <p>12 MR. ST. JOHN: I'm going to -- can I have the</p> <p>13 question read back for the purpose of determining</p> <p>14 whether I should assert the attorney-client</p> <p>15 privilege?</p> <p>16 (Question read.)</p> <p>17 MR. ST. JOHN: I'm going to assert the</p> <p>18 attorney-client privilege with respect to that</p> <p>19 question. It seeks substantive communications</p> <p>20 between Mr. Foltz and Mr. Keenan.</p> <p>21 MR. POLAND: And does that include an</p> <p>22 instruction not to answer?</p> <p>23 MR. ST. JOHN: It includes an instruction not</p> <p>24 to answer.</p> <p>25 BY MR. POLAND:</p>
<p style="text-align: right;">Page 39</p> <p>1 basis for districting." Do you see that?</p> <p>2 A. I do.</p> <p>3 Q. Now, do you understand that the case did survive a</p> <p>4 motion to dismiss?</p> <p>5 A. I do understand that, yes.</p> <p>6 Q. So now this document does state that you may provide</p> <p>7 testimony regarding that -- the process actually</p> <p>8 from the 2011 districting, correct?</p> <p>9 A. That's fair.</p> <p>10 Q. And the bases for that, correct?</p> <p>11 A. Yes.</p> <p>12 Q. When were you first approached about providing</p> <p>13 testimony?</p> <p>14 A. I don't know if approached is a proper term. I</p> <p>15 don't recall any specific conversation before the</p> <p>16 filing of this document.</p> <p>17 Q. So did anybody ever call you up or talk to you and</p> <p>18 say, "Adam, would you be willing to testify for the</p> <p>19 defendants at the trial of the Whitford case?"</p> <p>20 A. Not that I recall, no.</p> <p>21 Q. All right. Have you had any conversations with</p> <p>22 anyone about what you might testify to at trial of</p> <p>23 the Whitford case?</p> <p>24 A. No.</p> <p>25 Q. Have you had any conversations with Mr. Keenan about</p>	<p style="text-align: right;">Page 41</p> <p>1 Q. Are you going to follow your counsel's advice and</p> <p>2 not answer the question?</p> <p>3 A. Yes.</p> <p>4 Q. As you sit here today, do you know whether you will</p> <p>5 be called as a witness to testify in the trial in</p> <p>6 the Baldus case?</p> <p>7 A. I don't.</p> <p>8 Q. If you are called to testify as a witness -- I'm</p> <p>9 sorry, strike that last question. I said Baldus.</p> <p>10 As you sit here today, do you know whether you</p> <p>11 will be called to testify as a witness in the trial</p> <p>12 of the Whitford case?</p> <p>13 A. I do not know that.</p> <p>14 Q. If you are called to testify, do you know what you</p> <p>15 would testify about?</p> <p>16 A. I have a general idea that I would be testifying</p> <p>17 about the redistricting process and, you know,</p> <p>18 what's enumerated here on page 1 of the document.</p> <p>19 Beyond that, no.</p> <p>20 Q. So as you sit here today, you don't know of any</p> <p>21 specific testimony that you might be asked to give</p> <p>22 during the trial of the Whitford case; is that</p> <p>23 correct?</p> <p>24 A. I think that's fair.</p> <p>25 Q. Go back to your testimony that you gave in the -- in</p>

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1 the Baldus case and just talk generally, and then
 2 we'll get a little more specific. You testified in
 3 one or more of your depositions in the Baldus case
 4 that you were one of the three people who actually
 5 drew the draft and then final legislative districts
 6 that ended up as Act 43, correct?
 7 **A. Correct.**
 8 Q. And so that would have included you, Tad Ottman, and
 9 Joe Handrick, correct?
 10 **A. That's correct.**
 11 Q. And if we need to as I ask you these questions, if
 12 we need to refer back to the testimony, we can
 13 certainly do that.
 14 **A. Understood.**
 15 Q. You also testified in the Baldus action in your
 16 depositions that in drawing the draft and final
 17 districts for Act 43, you took into consideration a
 18 concern about drawing districts that are similar in
 19 population, correct?
 20 **A. I believe that's a correct summary.**
 21 Q. And let's just go -- let's just go to a deposition
 22 transcript so we can lock that in. If you look
 23 at -- at your December 21, 2011 deposition --
 24 **A. Uh-huh.**
 25 Q. -- which is Exhibit No. 75, and if you turn to page

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1 193. Actually I think it's probably on the end of
 2 one hundred -- page 193, and then -- and then into
 3 194, there is -- there's some questions about the --
 4 the traditional criteria.
 5 **A. Okay.**
 6 Q. And there is a -- well, the question on line -- that
 7 begins on line 25, page 193, it says, "Do you agree
 8 the principles by which the map were drawn were
 9 those that were equal population, sensitivity to
 10 minority concerns, and compact and contiguous
 11 districts?"
 12 Do you see that?
 13 **A. I'm sorry, where is that?**
 14 Q. This begins at line 25 on page 193.
 15 **A. Yeah.**
 16 Q. And then it goes through the first four lines on --
 17 on page 194.
 18 **A. Okay.**
 19 Q. So there's a reference to equal population,
 20 sensitivity to minority concerns, and compact and
 21 contiguous districts. Do you see that?
 22 **A. Yes.**
 23 Q. And you answered that question, "Yes," correct?
 24 **A. I'm sorry, where is the answer? I keep on losing my**
 25 **spot here.**

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1 Q. Sure. It's -- the layout on this page is the top is
 2 193 and then 194 is directly under it so it just
 3 follows down.
 4 **A. Okay. Sorry. All right. Yeah. Yeah.**
 5 Q. All right. So this is -- this is still correct
 6 testimony as you sit here today?
 7 **A. Yep.**
 8 Q. All right. So you did take into consideration in
 9 drawing districts for Act 43 a concern about drawing
 10 those districts to be similar in population; is that
 11 correct?
 12 **A. That is correct.**
 13 Q. Did you personally analyze the similarity in
 14 population among districts that you drew?
 15 **A. It was part -- yes, it was part of what you would**
 16 **see when you were actually doing the process behind**
 17 **the computer.**
 18 Q. All right. Did anyone else assist you with that
 19 analysis?
 20 **A. I guess I'm not following the question. I mean that**
 21 **analysis was just part of the software.**
 22 Q. Part of the autoBound software?
 23 **A. Correct.**
 24 Q. So there was no separate analysis that would have
 25 been conducted in terms of trying to determine

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1 whether you've got districts that are similar in
 2 population?
 3 **A. I don't know if I would agree with that**
 4 **clarification of it that there was -- I'm sure at**
 5 **some point someone like a Dr. Gaddie took a look at**
 6 **the map and, you know, made sure that it was within**
 7 **what was deemed to be acceptable primarily for**
 8 **population equality. And if you were to deem that a**
 9 **separate analysis, I think that would be fair.**
 10 Q. As you sit here today, other than the -- using the
 11 autoBound software itself, can you identify any
 12 documents that you would have used or looked at to
 13 analyze similarity of populations of the districts
 14 that were drawn as part of Act 43?
 15 **A. The memoranda that were produced for the members of**
 16 **the legislature did contain a reference to the**
 17 **population of the districts.**
 18 Q. And they may have referred to the -- they may have
 19 referred to the populations. Did they include any
 20 kind of an analysis of -- of those -- of any
 21 differences?
 22 **A. Of the over -- of the population differences?**
 23 Q. Correct.
 24 **A. I think in the analysis in so much as there was I**
 25 **believe a baseline of what the district was with**

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1 **regard to population, over/under population and then**
 2 **where the new district landed, analysis might be**
 3 **strong because I believe it was just a sentence in**
 4 **that memorandum.**
 5 Q. And was that produced in the Baldus litigation?
 6 **A. It was.**
 7 Q. Any of the work that you performed in drawing
 8 districts for Act 43 that analyzed or took into
 9 account population -- population differences among
 10 districts, would that have been reflected in the
 11 materials that were produced in the Baldus
 12 litigation?
 13 **A. That sounds right.**
 14 Q. Now, you also took into account sensitivity to
 15 minority concerns in drawing the districts --
 16 **A. Uh-huh.**
 17 Q. -- for Act 43?
 18 **A. Yes.**
 19 Q. And did you personally do any analysis of some
 20 aspect of the sensitivity to minority concerns in
 21 the districts that you drew?
 22 **A. There's a lot in that question. Could you be a**
 23 **little bit more specific?**
 24 Q. What did you do to take into account sensitivity to
 25 minority concerns in the districts that you were

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1 drawing for Act 43?
 2 **A. Yeah. And that's where a lot of the expert help**
 3 **comes in on this is them working with you to try to**
 4 **make sure that those concerns are addressed.**
 5 Q. And Dr. Gaddie, Keith Gaddie would have been one of
 6 the people who was assisting with that analysis; is
 7 that correct?
 8 **A. Yes.**
 9 Q. There were some other people who assisted as well?
 10 **A. Not from an analysis standpoint, but, you know, as**
 11 **was discussed in the Baldus litigation, there were**
 12 **other -- there were other factors, the counsel**
 13 **working with MALDEF, various other exchanges and**
 14 **inputs that maybe don't rise to the level of**
 15 **analysis, but definitely were part of the process.**
 16 Q. And in terms of other people who were involved, did
 17 your testimony in the Baldus litigation identify any
 18 of those people who would have been involved?
 19 **A. Not -- maybe not my testimony, but I was asked**
 20 **questions related to various documents that were**
 21 **produced that reflected others that may have been**
 22 **involved in that process.**
 23 Q. Do you believe that -- that you produced in the Bal
 24 -- as part of the Baldus litigation any documents
 25 that you would have relied on in analyzing

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1 sensitivity to minority concerns in the districts
 2 that were drawn?
 3 **A. That's again a lot going on in that question. So**
 4 **could you narrow it down a little bit?**
 5 Q. Sure. So -- well, for the purpose of analyzing
 6 minority concerns or concerns to minority interests
 7 in the various districts that were drawn as part of
 8 Act 43 -- strike that question.
 9 Were there -- are there -- were there any
 10 documents or materials that you considered when you
 11 were assessing sensitivity to minority concerns as
 12 part of drawing Act 43 that to your knowledge were
 13 not produced as part of the Baldus litigation?
 14 **A. No. You would have all of those documents from the**
 15 **prior litigation.**
 16 Q. There was -- there was nothing that you recall as
 17 you sit here today that you withheld from production
 18 or at least didn't give to counsel as part of the
 19 Baldus litigation that impacted your analysis of
 20 minority concerns?
 21 **A. No.**
 22 MR. ST. JOHN: Can I have that last question
 23 and answer read back because I think there might
 24 have been a negative in there, and I'm not sure that
 25 the transcript is clear on that last answer.

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1 (Question and answer read.)
 2 BY MR. POLAND:
 3 Q. One of the other factors that you testified you took
 4 into account in drawing districts in Act 43 was
 5 compactness, correct?
 6 **A. Uh-huh.**
 7 Q. And did you personally conduct any analyses of
 8 compactness of the districts that you were drawing
 9 as part of Act 43?
 10 **A. I would take a little issue with again analysis. It**
 11 **was something that is produced by the autoBound**
 12 **software, various compactness scores and various**
 13 **measures that geographers or demographers or your**
 14 **Dr. Gaddies of the world would use.**
 15 **I would say again taking a little bit of an**
 16 **issue with the word analysis that it's more of just**
 17 **a report that is produced to be reviewed by others**
 18 **that have a greater degree of familiarity with those**
 19 **metrics.**
 20 Q. Who would have reviewed any reports produced by
 21 autoBound with respect to compactness?
 22 **A. Primarily Dr. Gaddie.**
 23 Q. Do you recall discussing with Dr. Gaddie compactness
 24 of districts that you were drawing with Act 43?
 25 **A. Not specifically, no.**

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1 Q. Did -- did Dr. Gaddie provide you with any -- any
2 feedback on the compactness of the districts?
3 **A. Not that I can recall. I'm sure he did at some**
4 **point, but I don't recall any specific guidance or**
5 **red flags or anything along those lines.**
6 Q. Do you recall any way in which you integrated any
7 comments Dr. Gaddie had into the way that you were
8 drawing the districts in Act 43?
9 **A. No.**
10 Q. Do -- do you believe that -- well, strike that.
11 Can you identify any specific documents or
12 feedback that Dr. Gaddie provided to you as -- with
13 respect to compactness of districts?
14 **A. No, not specifically, no.**
15 Q. Do you believe that to the extent that you did
16 consider compactness that would be reflected in the
17 materials produced in the Baldus case?
18 **A. I believe that's accurate.**
19 Q. And then you also testified that you took into
20 account contiguity of the districts that you drew
21 for Act 43, correct?
22 **A. Yes.**
23 Q. And I'm going to have the same string of questions
24 here.
25 **A. Right.**

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1 Q. In terms of -- in terms of analyses or assessments I
2 guess of the contiguity of districts, is that
3 something that you personally did as you were
4 drawing the districts?
5 **A. As -- in so much as there is a report. And**
6 **contiguity is a little bit of a weird one with**
7 **Wisconsin because of discontinuous areas that are**
8 **within municipal boundaries but are not necessarily**
9 **attached. So the software doesn't know prior**
10 **Wisconsin precedent on contiguity. The software**
11 **will kick back an error saying you have a**
12 **discontiguous assignment. But just knowing that we**
13 **have a precedent in Wisconsin for municipal**
14 **contiguity as opposed to a literal or geographic**
15 **contiguity, that's I guess where the report**
16 **transcends into a little bit more just an analysis**
17 **or an understanding of the districting process in**
18 **Wisconsin.**
19 Q. Are there reports then that would have been produced
20 by autoBound, would that reflect the -- any I guess
21 to the extent you call it analysis or assessment of
22 contiguity that would have existed as you drafted
23 the districts?
24 **A. I can't remember if contiguity is a report or if**
25 **it's more of an error that the software kicks back,**

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1 **so something maybe a little less formal than a**
2 **full-on report, but just maybe at some point in the**
3 **process the autoBound software jumps up and says,**
4 **"Hey, District 76 isn't entirely contiguous. Why**
5 **don't you go back and fix that."**
6 **So I don't know if it was a formal report, but**
7 **something that I'm sure the software would flag.**
8 Q. In terms of integrating any kind of feedback that
9 autoBound gave you, that's something that you're
10 essentially doing on the fly, you're changing it as
11 you go?
12 **A. I don't know if you're integrating feedback from**
13 **autoBound with regard to that because of the**
14 **different -- I don't want to say unique because I**
15 **don't know what other states are, but what the**
16 **software understands contiguity to be and what the**
17 **standard is in Wisconsin are two separate things.**
18 **So integration might not be the best way to -- to**
19 **reflect that.**
20 Q. All right. Was there anything that you would have
21 created that would have tried to bridge that gap
22 then between what autoBound is telling you in a
23 report and what you know about Wisconsin that's
24 specific to contiguity?
25 **A. How do you mean?**

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1 Q. Well, I guess if autoBound is telling you something
2 about discontinuous districts and that's not taking
3 into account what you know specifically about
4 Wisconsin, how would you translate what autoBound is
5 telling you then into how you're trying to draw
6 districts that are contiguous?
7 **A. Okay, I think if I'm following your question, if you**
8 **were to have a contiguity flag pop up, and I'm not**
9 **sure if this is the case on the current map, but I**
10 **know it was from the old map, I believe it's the**
11 **airport in Racine was discontinuous to the Racine**
12 **city boundaries but was assigned to the same**
13 **district.**
14 **So if you were to be in a situation where**
15 **autoBound, again not fully remembering if it's a**
16 **report or just an error message, if that pops up and**
17 **it, you know, jumps you over to that part of the map**
18 **and says this isn't touching, well, I'm going to**
19 **look at that, I'm going to say, okay, so this island**
20 **over here I assigned the entire city or a ward,**
21 **although we didn't really assign wards, I'm going to**
22 **make sure that that discontinuous, geographically**
23 **discontiguous area is in fact what I intended to**
24 **assign back to that main municipality.**
25 **So I guess there are certain ways to do that.**

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1 **So let's go back to the Racine airport example where**
 2 **I could click on that, you know, a group of census**
 3 **blocks or, you know, ward, or whatever level of**
 4 **geography I'm playing around with at that point and**
 5 **make sure that that is in fact a city of Racine**
 6 **census block or city of Racine ward, and that will**
 7 **be my check to see that that is in fact what I was**
 8 **intending to do.**
 9 Q. So it is -- it is changes that are made are made
 10 through the software as opposed to having some kind
 11 of -- of separate analysis that you would do and
 12 then go back and perhaps change districts for
 13 contiguity?
 14 **A. I think that's fair -- I think that's a fair**
 15 **classification.**
 16 Q. In terms of any changes that were made then for
 17 contiguity purposes to the draft districts that you
 18 were drawing for Act 43, those would have been
 19 reflected in the autoBound files themselves?
 20 **A. I don't know if that's an accurate way of**
 21 **classifying it.**
 22 Q. Okay. You don't know if they would have been
 23 reflected in -- in the autoBound files?
 24 **A. Well, if I'm understanding your question, you're**
 25 **saying is that if a contiguity error was flagged or**

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1 **any movement of a line for that matter, if that --**
 2 **once that change is made, is it reflected going**
 3 **back? I don't know.**
 4 Q. Okay. So you don't know if the change is actually
 5 recorded or the basis for the change is actually
 6 recorded?
 7 **A. Yeah. That's -- I think that's a fair -- I think**
 8 **that's a fair characterization.**
 9 Q. As you sit here today, do you know whether there
 10 were -- whether there were any kinds of analyses of
 11 contiguity that were produced, whether by autoBound
 12 or that you would have produced as you went through
 13 and drafted the maps for Act 43?
 14 MR. ST. JOHN: Let me just object to form.
 15 It's compound. You can answer the question if you'd
 16 like.
 17 THE WITNESS: Yeah, I think it goes back to the
 18 larger talk about contiguity being a little
 19 different. I don't even remember if autoBound had a
 20 contiguity report or if it was more just an error
 21 message.
 22 BY MR. POLAND:
 23 Q. Just a flag that popped up that you testified to?
 24 **A. Yeah, I don't remember the mechanics of the software**
 25 **with regard to that specifically.**

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1 Q. Would any of the work that you performed with
 2 respect to these traditional redistricting criteria
 3 that we just went over have been reflected on the
 4 computer that you used for the districting purposes
 5 in 2011?
 6 **A. I don't -- I don't understand the question, I guess.**
 7 **If you wouldn't mind reading it back or restating**
 8 **it.**
 9 MR. POLAND: Sure. We can have the court
 10 reporter read it back.
 11 (Question read.)
 12 THE WITNESS: I guess I'm not totally following
 13 the question. I mean these scores are embodied in
 14 the map itself, and the map then has a certain
 15 backhand analysis that can be done like contig --
 16 compactness reports and things like that.
 17 So the work with regard to traditional
 18 redistricting criteria is reflected in so much as
 19 that once you produce a map, you can use vari --
 20 various analytics to help you have a better
 21 understanding of the work you were doing while you
 22 were making assignments.
 23 BY MR. POLAND:
 24 Q. And all that work was performed on the districting
 25 computer that you had in 2011, correct?

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1 **A. Yes.**
 2 Q. You didn't do that on other computers or other
 3 machines, correct?
 4 **A. That's correct.**
 5 Q. And there was a lot of testimony about that
 6 obviously in your previous three depositions. That
 7 was the computer that you had in the Michael Best &
 8 Friedrich offices, correct?
 9 **A. That's correct, and it was subsequently moved over**
 10 **to the Capitol after the conclusion of at least that**
 11 **portion of the litigation and everything.**
 12 Q. Right. Yep, and I think we have quite a bit of
 13 testimony on the whole chain of custody of the
 14 computer.
 15 **A. Yes.**
 16 Q. And those files were files that you would have
 17 turned over to -- well, strike that.
 18 The files that were on the -- the computer that
 19 you used for redistricting in 2011, those you had
 20 turned over to counsel during the Baldus litigation,
 21 correct?
 22 **A. Yes.**
 23 Q. And you no longer have that computer, correct?
 24 **A. I do not.**
 25 Q. When did you last use that computer?

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1 **A. It would have been after I had come back from**
 2 **Michael Best and right about the time -- this would**
 3 **have been 2012. I'd come back to the Capitol, and**
 4 **then there was a period where I had that just in the**
 5 **Capitol.**
 6 **Then I left state service, took an unpaid leave**
 7 **of absence to work on a campaign, so that would have**
 8 **been the period. I would -- I would ballpark that**
 9 **at the latter part of August, maybe early September,**
 10 **and that would have been the last I had had any**
 11 **interaction with that computer.**
 12 Q. Of what year? August or September of?
 13 **A. Twelve.**
 14 Q. And so that was -- that was testimony I think that
 15 you gave in one of your other depositions as well, I
 16 think it was the 2013 deposition?
 17 **A. Okay.**
 18 Q. I -- I believe. But we can go back and double check
 19 that.
 20 So you have not -- to the best of your
 21 knowledge since approximately August or so of
 22 2012 --
 23 **A. Uh-huh.**
 24 Q. -- you have not had access to the computer that you
 25 used for legislative redistricting purposes?

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1 **A. That's correct.**
 2 Q. And do you know where that computer is now?
 3 **A. I don't know.**
 4 Q. Now, would you agree with me that in drafting the
 5 districts that make up Act 43, you took into account
 6 the partisan political makeup of those districts?
 7 **A. I would say it was a tool available to us.**
 8 Q. All right. And it was not only available, but you
 9 did take into account the partisan political makeup
 10 of the districts as you were drawing them, correct?
 11 **A. How -- how so?**
 12 Q. Well, let me -- let me ask you, did you take that
 13 into account in drawing the districts?
 14 **A. When you're sitting at the autoBound software and**
 15 **you make an assignment, there is the potential and**
 16 **the ability to have a slew of partisan former races**
 17 **and things like that available to you, so it is**
 18 **something that is available to you in the autoBound**
 19 **software.**
 20 Q. Okay. And you did -- you did take into account the
 21 potential partisan performance of districts as you
 22 were creating those districts in Act 43, correct?
 23 **A. I would take issue with classification of that. I**
 24 **think it's something that once you are done making**
 25 **assignments that are associated with that, then**

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1 **there is a number available to you that you can**
 2 **refer back to.**
 3 Q. All right. Is it your testimony that in drawing the
 4 districts you did not intend to actually create a
 5 partisan advantage for republicans in those
 6 districts?
 7 **A. The -- the way the -- the way the process works is**
 8 **that when you sit down with a member, and they tell**
 9 **you that they want a certain municipality in or out**
 10 **of their district, if their reasoning for that is I**
 11 **used to go to high school there and I would like to**
 12 **represent that area, I currently don't; I have**
 13 **family in that area that I would like to represent**
 14 **that I currently don't; or if it's there's a lot of**
 15 **republicans there, and I would like to get to know**
 16 **those folks, my -- my position as a legislative**
 17 **staffer isn't to pass a value judgment on what the**
 18 **motivation of a member is. My job is to try to**
 19 **accommodate that to the best of my ability and then**
 20 **to either tell my bosses I was able to accommodate**
 21 **that or make them aware that I wasn't able to**
 22 **accommodate that so when they're going through the**
 23 **vote whipping process that they have that**
 24 **information available to them.**
 25 Q. So as a legislative aide then as you're meeting with

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1 individual legislators, you're attempting to
 2 accommodate within each individual district as much
 3 as you can their preference for the makeup of the
 4 district?
 5 **A. I think that's fair.**
 6 Q. All right. And that does have a partisan component
 7 to it, correct?
 8 **A. It can. I mean if a member says -- going back to**
 9 **the kind of previous hypothetical, if the member**
 10 **wants that more republican area, it is my job to try**
 11 **to accommodate them. Or if their reasoning is that**
 12 **they used to go to high school there, I have to take**
 13 **that into account with equal weight regardless of**
 14 **the motivation behind it.**
 15 Q. All right. And but you did take into account the
 16 potential partisan performance of each of the
 17 districts on which you worked in Act 43, correct?
 18 MR. ST. JOHN: I'm going to object to that.
 19 It's vague. When you say "account," I don't
 20 understand whether you're asking as he's drawing or
 21 at some other time in the redistricting process.
 22 You can answer that question if you wish unless
 23 you wish to restate the question.
 24 MR. POLAND: Can you read back Mr. St. John's
 25 objection one more time?

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1 (Mr. St. John's objection was read.)
 2 BY MR. POLAND:
 3 Q. This is during -- this is during the drafting
 4 process is the question.
 5 **A. Uh-huh. No, to echo the -- to echo the objection of**
 6 **legal counsel, account I struggle with because it is**
 7 **there, it is available. So I mean can I see that**
 8 **once I try to accommodate a member or not able to**
 9 **accommodate a member's request, can I, you know,**
 10 **wrap up that specific district for -- again wrap**
 11 **up's a strong term, but draw a district to equal**
 12 **population that accommodates at least what I believe**
 13 **to the best of my ability their question. There is**
 14 **a number, a series of numbers that would pop up that**
 15 **reflect partisanship.**
 16 Q. Did you ever read the opinion of the -- of the
 17 Baldus court?
 18 **A. I did.**
 19 Q. All right. Let's go ahead mark this as an exhibit.
 20 What are we on now?
 21 THE COURT REPORTER: 79.
 22 (Exhibit No. 79 marked for identification.)
 23 THE VIDEOGRAPHER: We are going off the record
 24 at 10:29 a.m.
 25 (Break taken.)

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1 THE VIDEOGRAPHER: We are back on the record at
 2 10:35 a.m.
 3 BY MR. POLAND:
 4 Q. Mr. Foltz, just before we broke, I asked you if you
 5 had read an opinion that was written by the Baldus
 6 court in that case. And you said that you had read
 7 that -- read an opinion, correct?
 8 **A. Uh-huh. Yes. That's a yes.**
 9 Q. And just to be clear for the record, specific
 10 opinion that I'm talking about is one that was
 11 issued on March 22nd, 2012.
 12 **A. Okay.**
 13 Q. I'm going to hand you a copy of the document that
 14 the court reporter has marked as Exhibit No. 79, ask
 15 you to take a look at that. Copies. Sorry.
 16 MR. KEENAN: No, we've got them. Kevin.
 17 BY MR. POLAND:
 18 Q. And you have read Exhibit 79 before?
 19 **A. I believe so.**
 20 Q. Do you remember the last time that you read it?
 21 **A. It would have been a long long time ago.**
 22 Q. You've not read it lately?
 23 **A. No.**
 24 Q. I'd like you to turn to page 845, and it would be in
 25 the upper right-hand corner is page 845.

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1 **A. Okay.**
 2 Q. And I'd like -- like you to look at the second full
 3 paragraph that begins, "As we noted..." and you can
 4 let me know when you're there.
 5 **A. Okay.**
 6 Q. And I'll just start reading that. The opinion
 7 states, "As we noted, the venue of the redistricting
 8 work was the offices of Michael Best. The actual
 9 drafters included..." and it's got a number of
 10 people listed, and you're one of them, correct?
 11 **A. It appears that way, yes.**
 12 Q. Now, if we look just after that list of people, the
 13 opinion continues on to read, "The drafters relied
 14 on a computer program called autoBound to work with
 15 various district lines. They testified that the
 16 partisan makeup of the potential new districts
 17 played no part at all in their decisions. Handrick,
 18 for instance, testified that he did not know if
 19 partisan makeup was considered, that he had no
 20 access to voting data from past elections, and that"
 21 the "only," quote, "population equality, municipal
 22 splits, compactness, contiguity, and communities of
 23 interest," close quote, "were considered. Foltz
 24 testified that he worked with legal counsel and
 25 experts and that Speaker Fitzgerald, Senator

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1 Fitzgerald, Robin Vos, and Senator Zipperer advised
 2 him where to draw the boundaries."
 3 Do you see that language?
 4 **A. I do.**
 5 Q. All right. This is just to give you some context
 6 for a question I'm going to ask.
 7 **A. Okay.**
 8 Q. The next paragraph starts out, "In June and July
 9 2011, Foltz had meetings about redistricting with
 10 every single republican member of the state
 11 assembly. He did not meet with any democrats.
 12 Nevertheless, he testified that it was not," open
 13 quote, "a part of the goal to increase the
 14 republican membership in the legislature," close
 15 quote. "Before his meetings with the republicans,
 16 each person was required to sign a confidentiality
 17 agreement promising not to discuss anything that was
 18 said. Ottman had similar meetings conducted under
 19 the same cloak of secrecy."
 20 Do you see that language?
 21 **A. I do.**
 22 Q. All right. So now I'd like you to turn to page 851,
 23 please, of the opinion.
 24 **A. Okay.**
 25 Q. And I'm going to direct your attention to the second

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1 column of 851.
 2 **A. Uh-huh.**
 3 Q. And your -- the court here is talking about
 4 population deviations and so this is in the context
 5 of that discussion. I'd like you to -- to look at
 6 the sentence that's one, two, three, four, five
 7 lines down, starts out, "Numbers like these..." Do
 8 you see that?
 9 **A. Okay.**
 10 Q. All right. "Numbers like these place a very heavy
 11 burden on the plaintiffs to show a constitutional
 12 violation. In the final analysis, they have failed
 13 to surmount that burden. We come to that conclusion
 14 not because we credit the testimony of Foltz, Ottman
 15 and the other drafters to the effect that they were
 16 not influenced by partisan factors; indeed, we find
 17 those statements to be almost laughable. But the
 18 partisan motivation that in our view clearly lay
 19 behind Act 43 is not enough to overcome the de
 20 minimis population deviations that the drafters
 21 achieved at least under that theory."
 22 Do you see that?
 23 **A. I do.**
 24 Q. Do you disagree with Chief Judge Wood and District
 25 Judges Stadtmueller and Dow that partisan motivation

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1 clearly lay behind Act 43?
 2 **A. I would go back to my prior -- my prior testimony**
 3 **that my job is to accommodate the requests of the**
 4 **members of the Wisconsin State Assembly,**
 5 **particularly the republican caucus given that I was**
 6 **employed by the Speaker. My job is to accommodate**
 7 **their requests to the best of my ability and to make**
 8 **sure those requests are juxtaposed, working with**
 9 **experts and legal counsel, aren't running afoul of**
 10 **various statutory and constitutional requirements.**
 11 **Now, I'm not going to tell you that when a**
 12 **member of the state assembly sat me down and asked**
 13 **for X, Y, and Z that their motivations might have**
 14 **been partisan. But like I said earlier, it's not my**
 15 **job to place a value judgment on that and say you**
 16 **don't get to make those requests because of the**
 17 **partisan motivation, or if the motivation is that**
 18 **they want to represent their old high school.**
 19 Q. Did you -- were you aware that there was a hearing
 20 last week in the Whitford case in the federal
 21 district court here?
 22 **A. Yeah, vaguely aware; generally aware, yes.**
 23 Q. Summary -- a hearing on summary judgment motions
 24 that the defendants had brought and a Daubert motion
 25 that the plaintiffs had brought. Did you know the

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1 purpose of the motions?
 2 **A. Not knowing what a Daubert motion is, I generally**
 3 **understood it to be a motion for summary judgment.**
 4 Q. Fair enough. Did you attend that hearing?
 5 **A. I did not.**
 6 Q. Did you speak with anybody about that hearing?
 7 **A. Yes.**
 8 Q. All right. Who did you speak with about that
 9 hearing?
 10 **A. Zach Bemis, Brian Keenan.**
 11 Q. What -- what discussions did you have with
 12 Mr. Keenan about that hearing?
 13 MR. KEENAN: I'm going to assert the same
 14 objections we've been asserting before.
 15 MR. ST. JOHN: I'll join the assertion that the
 16 substance of the communication with Mr. Keenan would
 17 be covered by the attorney-client privilege. I
 18 reiterate that the basis for it is the fact that the
 19 attorney general represents Mr. Foltz today, that
 20 Brian Keenan is a subordinate employee of the
 21 attorney general's office; that there is no conflict
 22 of interest which prevents Mr. Keenan in his
 23 representation of his state clients from also
 24 providing representation.
 25 I am here specifically also representing -- I'm

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1 here specifically representing Mr. Foltz with
 2 respect to his deposition, but an attorney-client
 3 relationship continues to exist between Mr. Foltz as
 4 an employee of the legislature and the attorney
 5 general, and that the privilege would apply to all
 6 of the subordinate attorneys within the attorney
 7 general's office.
 8 MR. POLAND: And Kevin, does you -- your
 9 objection includes an instruction not to answer?
 10 MR. ST. JOHN: As to the substance of the
 11 communication, not to the fact of the communication
 12 or the general subject matter of the communication.
 13 BY MR. POLAND:
 14 Q. And are you going to follow your client -- your
 15 counsel's instruction not to answer the question?
 16 **A. Yes.**
 17 Q. What was the general topic of the conversation that
 18 you had with Mr. Keenan about the hearing in the
 19 Whitford case last week?
 20 **A. Just generally the hearing itself.**
 21 Q. All right. Did you discuss at all with -- with
 22 Mr. Keenan how anything that was said in that
 23 hearing might affect your testimony today?
 24 **A. No.**
 25 Q. Have you -- have you reviewed a transcript of the

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1 hearing of -- from last week?
 2 **A. I have not.**
 3 MR. POLAND: Would you mark this as Exhibit --
 4 THE COURT REPORTER: 80.
 5 MR. POLAND: -- 80.
 6 (Exhibit No. 80 marked for identification.)
 7 Q. Mr. Foltz, I'm handing you a copy of a document that
 8 the court reporter has marked as Exhibit No. 80, and
 9 I'll ask you to take a look at that.
 10 **A. Okay. (Witness reading.)**
 11 Q. Have you seen Exhibit 80 before?
 12 **A. No.**
 13 Q. All right. Since you haven't, then I'll just
 14 identify it for the record that it's a transcript of
 15 a hearing held in the Whitford case on March 23rd,
 16 2016 beginning at 9:30 a.m. I'd like you to turn to
 17 page 9 of the transcript.
 18 **A. Okay.**
 19 Q. And I'd like you to look at beginning at line 13 of
 20 the transcript, you'll see there's a question by
 21 Judge Crabb.
 22 **A. Uh-huh.**
 23 Q. She -- Judge Crabb says, "I have one question. For
 24 the purpose of summary judgment, are you denying
 25 that the legislature had any partisan intent when

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1 it" -- and she says, "You're not."
 2 Mr. Keenan says, "No, we're not."
 3 Judge Crabb says, "That's good."
 4 Mr. Keenan goes on to say, "Our argument is
 5 that even assuming there's partisan intent and that
 6 there was some partisan intent, the standard still
 7 doesn't work."
 8 Do you see that colloquy?
 9 **A. I do.**
 10 Q. All right. I'd like you also now to turn to page
 11 24. And I'd like you to look at page number 13 --
 12 or I'm sorry, line 13.
 13 **A. Uh-huh.**
 14 Q. See again Judge Crabb states, "You're not really
 15 disputing that the republicans drew this plan with
 16 the desire to create the best possible election
 17 process for the republicans, are you?"
 18 Mr. Keenan says, "I would say I would dispute
 19 whether it's the best possible."
 20 Judge Crabb then says, "I'm not saying it
 21 turned out to be the best, but that their intent was
 22 to do the best job they could to safeguard the
 23 common seats and to increase the number of seats
 24 that would be available to republicans."
 25 Mr. Keenan then says, "I think -- I'm not

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1 disputing that they districted with partisan
 2 advantage."
 3 Do you see that testimony?
 4 **A. I do.**
 5 Q. You wouldn't dispute those statements by Mr. Keenan,
 6 would you?
 7 MR. ST. JOHN: Objection. Form. You wouldn't
 8 dispute that Mr. Keenan made them or the content? I
 9 don't understand the question.
 10 MR. POLAND: The substance of the statements
 11 that Mr. Keenan made.
 12 BY MR. POLAND:
 13 Q. You don't disagree with those statements that
 14 Mr. Keenan made, do you?
 15 **A. I take a little issue with just the broader context
 16 of the legislature and a broader legislative intent
 17 where it's again me as a legislative staffer trying
 18 to amalgamate the individual requests of many many
 19 different legislators, I believe we were at 60 at
 20 the time, and balancing all those var -- various
 21 interests.**
 22 **So I think -- and again going back to the prior
 23 testimony, if an individual legislator asked me for
 24 a certain thing, it's my job to try to accommodate
 25 that, and that legislator obviously has a very**

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1 **parochial interest in their own district. So my job
 2 is to accommodate those.**
 3 **So I take a little bit of issue with the
 4 broader -- a broader implication of the legislature
 5 as a whole.**
 6 Q. In performing your work in Act 43, and indeed as the
 7 Baldus court identified in its opinion, there
 8 were -- there were other elected representatives who
 9 participated in the drafting process, correct?
 10 **A. That's correct.**
 11 Q. And that included your -- your boss at that time,
 12 Speaker Jeff Fitzgerald, correct?
 13 **A. Correct.**
 14 Q. And that also included Senate Majority Leader Scott
 15 Fitzgerald who you work for now, correct?
 16 **A. Correct.**
 17 Q. And that also included, I believe, Robin Vos,
 18 Senator Zipperer were two of the others that were
 19 mentioned, correct?
 20 **A. That's correct.**
 21 Q. And certainly you had the -- you had the assembly
 22 speaker, and you had the senate majority leader who
 23 were part of that process, correct?
 24 **A. That's correct.**
 25 Q. You met with both Speaker Fitzgerald and Senate

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1 Majority Leader Fitzgerald as part of the process of
2 drawing the districts in 2011, correct?

3 **A. Yeah, they were part of that broader group that you**
4 **had enumerated.**

5 Q. And so your -- you may have met individually with
6 different representatives, but you also met with
7 the -- the senate majority leader and the assembly
8 speaker with respect to drawing the districts, too,
9 correct?

10 **A. Along with Senator Zipperer, Representative Vos,**
11 **Representative Suder.**

12 Q. So the legislative leadership was a part of that
13 process, too, correct?

14 **A. Which part of the process? Because there was a lot**
15 **of different steps to this process.**

16 Q. Part of the drafting process.

17 **A. It was part of the determination of regional**
18 **alternatives. I want to be specific just because**
19 **process and drafting, there's a lot of different**
20 **ways it could go.**

21 **Their involvement was specifically the**
22 **determination of multiple regional alternatives,**
23 **which direction they would prefer to go.**

24 Q. And they did review those with you, correct?

25 **A. That's correct.**

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1 Q. You do not intend to testify at trial that you
2 didn't intend to advantage republicans in creating
3 districts that make up Act 43, do you?

4 MR. ST. JOHN: Objection to form.

5 THE WITNESS: I -- yeah, repeat the question or
6 restate the question.

7 BY MR. POLAND:

8 Q. Sure. If asked -- if asked at trial, you don't
9 intend to testify that you -- that in drawing Act
10 43, you didn't intend to advantage republicans,
11 correct?

12 **A. My testimony will be consistent with the testimony**
13 **I'm giving today that my job was to balance the**
14 **requests of individual legislators to the best of my**
15 **ability.**

16 Q. And the only legislators that you met with were
17 members of the republican caucus, correct?

18 **A. That's correct.**

19 Q. In drafting Act 43, you took into account the
20 potential partisan performance of the districts you
21 were drawing by taking previous election data and
22 calculating how the districts would perform on a
23 partisan basis, correct?

24 **A. I take issue with a few things in that question.**
25 **Your question builds in an idea of projection going**

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1 **forward that wasn't part of the process. The -- the**
2 **pro -- I mean the number available was a history of**
3 **past performance and how a new district's lines, if**
4 **you were to go back in time and put that new**
5 **district in place for a prior election, what that**
6 **performance would have been, assuming -- I think**
7 **it's also I should point out assuming that that seat**
8 **would be open at the time as well.**

9 Q. You -- as part of your work on Act 43, you worked
10 with Keith Gaddie, correct?

11 **A. Yes.**

12 Q. And you worked with Keith Gaddie on partisanship
13 analyses, correct?

14 **A. I don't specifically recall working with Dr. Gaddie**
15 **on partisanship specifically.**

16 Q. All right. You met with Dr. Gaddie several times
17 when he was in Madison, correct?

18 **A. Correct.**

19 Q. And in the -- and this is in the spring of 2011. So
20 unless I tell you otherwise, I'd like you to assume
21 a time frame between April 1st, 2011 and June 30,
22 2011, okay?

23 And you met with Dr. Gaddie in approximately
24 mid-April of 2011 in Madison?

25 **A. I don't specifically recall that time frame, but**

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1 **I'll take your word for it.**

2 Q. All right. And you met with Dr. Gaddie in Madison
3 in late May of 2011?

4 **A. Again not specifically recalling, but I would**
5 **imagine.**

6 Q. All right. Do you recall meeting with Dr. Gaddie in
7 Madison a third time in June of 2011?

8 **A. Again not specifically recalling that it was in June**
9 **or how many times we met, but I know that Dr. Gaddie**
10 **came in a few times.**

11 Q. Do you know that Dr. Gaddie was deposed in the
12 Whitford litigation?

13 **A. I do know that.**

14 Q. All right. And do you know it was earlier this
15 month that he was deposed?

16 **A. I take your word for it.**

17 Q. Did you read a transcript of Dr. Gaddie's
18 deposition?

19 **A. No, I did not.**

20 Q. Did you talk to anyone about Dr. Gaddie's
21 deposition?

22 **A. Yes.**

23 Q. Who did you talk with about Dr. Gaddie's deposition?

24 **A. Mr. Keenan.**

25 Q. All right. When did you talk with Mr. Keenan about

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1 Dr. Gaddie's deposition?
 2 **A. I don't specifically recall. Sometime after his**
 3 **deposition.**
 4 Q. Did you talk about the substance of Dr. Gaddie's
 5 testimony with Mr. Keenan?
 6 MR. ST. JOHN: You can answer that question.
 7 THE WITNESS: I don't --
 8 MR. ST. JOHN: It's a yes or no question. Did
 9 you talk about the substance?
 10 THE WITNESS: Yeah. I'd say that's fair.
 11 BY MR. POLAND:
 12 Q. All right. Did you talk with Mr. Keenan about
 13 specific testimony that Dr. Gaddie gave on
 14 partisanship analyses?
 15 **A. Not that I can specifically recall, no.**
 16 Q. What was the substance of the discussion that you
 17 had with Mr. Keenan about Dr. Gaddie's deposition
 18 testimony?
 19 MR. ST. JOHN: I'll assert the attorney-client
 20 privilege with respect to that conversation about
 21 the substance for the reasons previously stated,
 22 instruct the witness not to answer the question.
 23 BY MR. POLAND:
 24 Q. And you'll follow your counsel's instruction not to
 25 answer that question?

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1 **A. I will.**
 2 MR. KEENAN: And I'd just interpose the
 3 additional work product objection I've been making
 4 in this deposition.
 5 Q. Turning your attention back to the spring of 2011,
 6 so again between April and the end of June, each
 7 time you met with Dr. Gaddie in Madison, that was at
 8 the offices of Michael Best & Friedrich, correct?
 9 **A. Yes.**
 10 Q. And each time you met with him, you discussed with
 11 him the draft districts that were -- that had been
 12 created at the time and various aspects of those
 13 districts, correct?
 14 **A. I think that's fair.**
 15 Q. Now, one of the tasks that Dr. Gaddie had in working
 16 as a consultant in the spring of 2011 was to develop
 17 a regression model that would take data from
 18 previous elections and calculate how the draft
 19 districts that you were drawing would perform on a
 20 partisan basis, correct?
 21 **A. Yeah, I think that's fair, but there's some**
 22 **ambiguity in there which I'm sure we'll get to**
 23 **shortly here.**
 24 Q. Now, Dr. Gaddie's regression model could be used to
 25 attempt to forecast the partisan performance of

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1 districts that you were drawing based on election
 2 results from past elections, correct?
 3 MR. ST. JOHN: Can you read the question back,
 4 please?
 5 (Question read.)
 6 MR. ST. JOHN: I'll just object to that that it
 7 calls for speculation and asks for the witness's
 8 opinion on non-fact testimony.
 9 THE WITNESS: I don't know if that's a proper
 10 way of determining what Dr. Gaddie's work was. I
 11 know that there was a regression model. I don't
 12 know what the probative value is to that model going
 13 forward as opposed to a summary of past performance.
 14 BY MR. POLAND:
 15 Q. Did you ever -- did you ever use Dr. Gaddie's
 16 regression analysis or regression model to predict
 17 the partisan outcome of districts that you were
 18 drawing?
 19 **A. To be clear on this, Dr. Gaddie's regression model**
 20 **was not some -- was not information that was**
 21 **available to us during the drawing process.**
 22 Q. Did you ever give Dr. Gaddie draft district
 23 boundaries and ask him to run those through his
 24 regression model for the purpose of determining what
 25 the partisan makeup of that district would be?

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1 **A. Not that I can recall. Like I said, it's not --**
 2 **it's not a data point we had available to us during**
 3 **the drawing, but that doesn't mean that there wasn't**
 4 **a point where Dr. Gaddie used his regression model**
 5 **after, you know, more of a -- I don't want to say**
 6 **completion of the process, but once the process had**
 7 **gotten to a certain point.**
 8 Q. Is it your understanding that Dr. Gaddie's
 9 regression model could be used to forecast partisan
 10 performance in the newly configured districts that
 11 you were drawing?
 12 **A. I don't -- again I don't think that's an -- I don't**
 13 **know if academics would say that that's a**
 14 **forward-looking projection. I don't know enough**
 15 **about the nuts and bolts of the regression. So my**
 16 **understanding was it was a regression based off of**
 17 **prior elections. So I don't know if that inherently**
 18 **or if you need to do more to a regression to make it**
 19 **something that's not just backward looking but also**
 20 **forward looking. I don't understand enough about**
 21 **that.**
 22 **But again it was not, you know, it wasn't -- it**
 23 **wasn't something I had available to me as I clicked**
 24 **through and made assignments on the map. So it**
 25 **wasn't -- it just wasn't something I dealt with on a**

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1 **day-in/day-out basis.**
 2 Q. But did you -- did you take any of the draft
 3 districts that you were drawing and review them with
 4 Dr. Gaddie and get Dr. Gaddie's feedback from how he
 5 believed that those districts would perform on a
 6 partisan basis in elections going forward?
 7 **A. Not that I specifically recall. Again, not**
 8 **really -- not really understanding if his regression**
 9 **has a forward-looking component to it. That's what**
 10 **I keep on getting hung up on. I don't know if you**
 11 **were to sit down with Dr. Gaddie, which you have, if**
 12 **he would say that it's a forward projection or**
 13 **simply something that looks backward, so I don't --**
 14 **I take issue with forward projection because I**
 15 **really don't understand enough of the political --**
 16 **the social science behind it and how that would lead**
 17 **to implications or projections for future elections.**
 18 Q. Did you -- did you -- your understanding of it
 19 notwithstanding, did -- did Dr. Gaddie ever give you
 20 any feedback on the potential partisan performance
 21 of any districts that then caused you to go back and
 22 adjust the district boundaries that you were
 23 drawing?
 24 **A. No.**
 25 MR. POLAND: Would you mark this, please.

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1 (Exhibit No. 81 marked for identification.)
 2 Q. Mr. Foltz, I'm handing you a copy of a document that
 3 the court reporter has marked as Exhibit 81. I'd
 4 like you to take a look at this document, then I'll
 5 have some questions for you about it.
 6 **A. (Witness reading.) Okay.**
 7 Q. Have you ever seen Exhibit 81 before?
 8 **A. I have.**
 9 Q. When did you first see Exhibit 81?
 10 **A. I first saw this exhibit when plaintiffs were**
 11 **exploring a 30(b)(6), a second -- not to be confused**
 12 **with my prior 30(b)(6) deposition, but a new**
 13 **30(b)(6) deposition earlier in the month of March, I**
 14 **believe, maybe late February. This was attached as**
 15 **an exhibit to that.**
 16 Q. All right. And when you say March, you're talking
 17 about 2013 now, correct?
 18 **A. '16.**
 19 Q. Oh, just of this year?
 20 **A. Just of this year.**
 21 Q. So this is not -- Exhibit 81 is not a document that
 22 you saw during the Baldus litigation?
 23 **A. That's correct.**
 24 Q. All right. So you just saw this as of March 2016.
 25 Who -- who gave you a copy of Exhibit 81?

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1 **A. Somebody from DOJ. As I said, it was something that**
 2 **was attached when your clients were exploring the**
 3 **idea of a 30(b)(6) deposition. This was attached to**
 4 **that 30(b)(6).**
 5 Q. Understand. Did you -- you never saw Exhibit 81
 6 between April and June of 2011?
 7 **A. No.**
 8 Q. All right. I'd like you to take a look -- well,
 9 strike that question.
 10 Do you know who drafted Exhibit 81?
 11 **A. My understanding it was Dr. Gaddie.**
 12 Q. All right. And I'll represent to you that
 13 Dr. Gaddie did testify at his deposition that he did
 14 draft this document.
 15 **A. Okay.**
 16 Q. I'd like you to look at the first paragraph.
 17 **A. Uh-huh.**
 18 Q. Do you see that Dr. Gaddie says in this document the
 19 measure -- "The measure of partisanship should exist
 20 to establish the change in the partisan balance of
 21 the district. We are not in court at this time; we
 22 do not need to show that we have created a fair,
 23 balanced, or even a reactive map. But we do need to
 24 show to lawmakers the political potential of the
 25 district."

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1 Do you see that?
 2 **A. I do.**
 3 Q. Did you ever discuss with Dr. Gaddie the need to
 4 show to lawmakers the political potential of a
 5 district?
 6 **A. No, not that I can recall.**
 7 Q. Did you ever discuss the -- the potential
 8 political -- I'm sorry, the political potential of
 9 the district with Mr. Ottman or Mr. Handrick?
 10 **A. Political potential of the district. Are we**
 11 **referring to Dr. Gaddie's regression or are we**
 12 **saying in a broader context?**
 13 Q. Let's -- let's talk about first with respect to
 14 Dr. Gaddie's regression model.
 15 **A. Yeah. And going back to that, the regression model**
 16 **was not something that we had as a data point**
 17 **available to us when we were assigning various units**
 18 **of geography to a given district.**
 19 Q. And when you say "we," are you speaking for
 20 yourself and Mr. Ottman and Mr. Handrick?
 21 **A. I'm speaking for myself.**
 22 Q. Just for yourself.
 23 **A. But the data point of the regression output was not**
 24 **available to us as the map drawers/legislative staff**
 25 **tasked with this.**

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1 Q. Did Dr. Gaddie ever tell you the output of the
2 regression model?
3 **A. The output of the -- so the output of the regression**
4 **model when a map was completed or -- because I mean**
5 **there's a couple different ways that question could**
6 **go. There was an exchange between Joe Handrick and**
7 **Dr. Gaddie that referenced his regression. Again**
8 **though we didn't have that available on our**
9 **computers.**
10 **I believe at some point, too, Dr. Gaddie ran**
11 **some type of analysis, some type of, I don't know,**
12 **social science on it. He may have used his**
13 **regression model on that. I don't know that for a**
14 **fact, though.**
15 Q. Did you ever discuss that with Dr. Gaddie by --
16 well, strike that question.
17 Did you ever discuss with Dr. Gaddie the output
18 of his regression model with respect to any
19 districts that you were drawing?
20 **A. Maybe. Like I said, there was an analysis. I don't**
21 **know if that analysis was based off of his**
22 **regression or not. So I don't -- I can't answer**
23 **that question with any degree of certainty.**
24 Q. And what's the analysis that you're talking about?
25 **A. He did some type of curve or some types of curves**

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1 **that took the form of an Excel sheet somewhere late**
2 **in the process after -- well, again I don't want to**
3 **get too far out there, but it was later in the**
4 **process he ran some type of analysis that may or --**
5 **I don't know if he used the regression or not.**
6 Q. All right. And those -- those curves that he ran,
7 were those Excel spreadsheets -- strike that
8 question.
9 Did you discuss with Dr. Gaddie those curves
10 that he created?
11 **A. I'm sure we did at some point. I don't have any**
12 **specific recollection of the curve. Again not**
13 **knowing if it was based off of a regression or based**
14 **off of some different type of composite score, but**
15 **I'm sure at some point we talked about it, but I**
16 **don't have any specific recollection.**
17 Q. All right. I'd like to go back to Exhibit 81 and
18 look at the second paragraph. Do you see where it
19 says, "I have gone through the electoral data for
20 state office and built a partisan score for the
21 assembly districts."
22 Do you know what Dr. Gaddie is talking about
23 there when he uses the term "partisan score"?
24 **A. I'm assuming that is a reference to the regression**
25 **that we've been discussing.**

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1 Q. All right. And then he goes on to say, "It is based
2 on a regression analysis of the assembly vote from
3 2006, 2008, and 2010..."
4 Do you see that?
5 **A. I do.**
6 Q. All right. Did you have an understanding at the
7 time that that was the basis for Dr. Gaddie's
8 regression analysis?
9 **A. I don't -- I didn't remember specifically that it**
10 **was '06, '8 and '10. I know it was past partisan**
11 **analysis that was fed into the regression model, but**
12 **I don't know where Dr. Gaddie chose to draw his**
13 **cutoff or line of demarcation of what data goes in**
14 **versus what data that doesn't.**
15 Q. All right. And then that sentence goes on to state,
16 "...and it is based on prior election indicators of
17 future election performance."
18 Do you see that?
19 **A. I do.**
20 Q. Do you understand that Dr. Gaddie's regression model
21 was intended to relate to future election
22 performance?
23 **A. Based on plain language reading of this that seems**
24 **to be the case.**
25 Q. Was that your understanding at the time in 2011?

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1 **A. No, not necessarily. Like I said, I didn't know if**
2 **it was simply something that would look to past**
3 **results to give you an understanding of where things**
4 **are, you know, today, today in this context being**
5 **the -- when the map was drawn or being evaluated.**
6 **But again, evaluate is a bad word because we didn't**
7 **have this available to us to evaluate.**
8 Q. Looking at the third paragraph then of Exhibit 81,
9 Dr. Gaddie says, "I am also building a series of
10 visual aids to demonstrate the partisan structure of
11 Wisconsin politics. The graphs will communicate the
12 top-to-bottom party basis of the state politics. It
13 is evident from the recent Supreme Court race and
14 also the Milwaukee County executive contest that the
15 partisanship of Wisconsin is invading the ostensibly
16 non-partisan races on the ballot this year."
17 Do you see that language?
18 **A. I do.**
19 Q. All right. Did you ever see any visual aids or
20 graphs that Dr. Gaddie created?
21 **A. Going back to the prior testimony, there was -- like**
22 **I said, late in the process, there was some type of**
23 **analysis he ran that again I'm not sure if it was**
24 **the regression model or some different type of**
25 **composite he used. So I think that would classify**

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1 as a visual aid, but again I'm not sure how he
2 defines visual aid.

3 Q. Did you see, is there any way that you define visual
4 aid that would characterize output that Dr. Gaddie
5 gave to you?

6 A. I think I go back to that curve, although normally
7 when I think of Microsoft Excel I don't think of
8 visual aid, I think of a spreadsheet, but Dr. Gaddie
9 did create some series of curves that he used in his
10 evaluation late in the process.

11 Q. Do you recall looking at any of those curves that
12 Dr. Gaddie created?

13 A. I'm sure I did.

14 Q. Do you remember where you had looked at those?

15 A. Physically where I was?

16 Q. Correct.

17 A. It would have been at Michael Best.

18 Q. Was Dr. Gaddie there with you at the time?

19 A. He would have to have been.

20 Q. And you would have discussed those curves with him?

21 A. Again not recalling a specific conversation on the
22 curves, I'm sure we talked about them when he
23 produced them.

24 Q. Was anyone else present with you when you talked
25 about the curves with Dr. Gaddie?

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1 A. I don't specifically recall anyone being there, but
2 there was a good chance that it was Tad Ottman,
3 possibly even Joe Handrick.

4 Q. Was there a room at Michael Best that you referred
5 to or that was generally referred to as the map
6 room?

7 A. Yeah, I think that's a safe way of describing our
8 office.

9 Q. Was there -- was a discussion of these curves --
10 strike that question.
11 Did the discussion of curves that you had with
12 Dr. Gaddie occur in the map room?

13 A. Yeah.

14 Q. Were you looking at -- at potential -- well, strike
15 that.
16 Were you -- were you looking at -- at maps at
17 the same time you were discussing the curves with
18 Dr. Gaddie?

19 A. I don't know if we were or not.

20 Q. Do you recall the discussions that you had, the
21 substance of the discussions you had with Dr. Gaddie
22 about the curves?

23 A. No.

24 Q. Now, another -- another task of Dr. Gaddie's was to
25 assist you and Tad Ottman and Joe Handrick in

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1 identifying a proxy for partisan outcome; is that
2 correct?

3 A. I'm not sure what you mean by that. I think your --
4 not to assume too much in your question, but are you
5 referring to the email exchange with Handrick and
6 Gaddie on the correlation between the two?

7 MR. POLAND: Let's just mark that.
8 (Exhibit No. 82 marked for identification.)

9 Q. Mr. Foltz, I'm handing you a copy of a document that
10 has been marked at depositions before, but we're
11 going to mark it as Exhibit No. 82 here for your
12 deposition.

13 A. Okay. Many times before.

14 Q. Yes.

15 A. (Witness reading.)

16 Q. Mr. Foltz, have you seen Exhibit No. 82 before?

17 A. Yes.

18 Q. And I want you to look at the lower right-hand
19 corner of Exhibit 82. Do you see there is what we
20 refer to as a Bates stamp there that says Foltz
21 001059?

22 A. I do.

23 Q. On the first page. Do you understand that indicates
24 that this is a document that came from your files or
25 files that you produced?

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1 A. Yes, that's my understanding of the Bates numbering.

2 Q. And I will represent that this was produced as part
3 of the Baldus litigation.

4 A. Uh-huh.

5 Q. The -- is this the -- the email exchange that you
6 were referring to in your testimony a minute ago?

7 A. Yeah. I'm just reviewing it.

8 Q. Yep, no, take a minute to review it.

9 A. (Witness reading.) Okay.

10 Q. And you've seen Exhibit 82 before, correct?

11 A. I have.

12 Q. When was the last time that you saw Exhibit 82?

13 A. I would have seen it in my preparation for this
14 deposition as I reviewed prior exhibits that have
15 been produced during the Baldus depositions.

16 Q. All right. Now, turning your attention to the top
17 of Exhibit 82, you'll see there is a -- a Gmail
18 header, and it has your Gmail address there,
19 correct?

20 A. That's correct.

21 Q. And so Exhibit 82 came from your Gmail files,
22 correct?

23 A. Yes.

24 Q. And the -- just below that there is a header that
25 says -- it's got Joseph Handrick's name and it says

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1 to Adam Foltz and Tad Ottman, and the date is
2 Wednesday, April 20th, 2011, correct?
3 **A. I -- yes.**
4 Q. All right. And the message just below that, it's
5 just a single line, it says, "See Keith's comments
6 below." Do you see that?
7 **A. I do.**
8 Q. And so if we -- if we jump down to the message
9 that's directly below that, it says that it's from
10 rkgaddie@ou.edu. Do you see that?
11 **A. I do.**
12 Q. And that's Dr. Gaddie's email address, or at least
13 it was at that time?
14 **A. Yes.**
15 Q. And then this is going to joeminocqua@msn.com,
16 correct?
17 **A. Yes.**
18 Q. And that's Joe Handrick?
19 **A. Yes.**
20 Q. And the date of that is it's the same date, April
21 20th, 2011, correct?
22 **A. Uh-huh.**
23 Q. Now, do you see the body of that message states,
24 "Hey, Joe. I went ahead and ran the regression
25 models for 2006, 2008, and 2010 to generate open

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1 seat estimates on all of the precincts."
2 Do you see that?
3 **A. I do.**
4 Q. All right. What did you understand that to mean
5 when you received this forwarded email from
6 Mr. Handrick?
7 **A. Regression model -- I mean it's fairly**
8 **self-explanatory. He ran a regression on those**
9 **three election cycles and then generated some type**
10 **of model. Precinct is a bit of a -- I don't know**
11 **what he means there because in Wisconsin we don't**
12 **really refer to things as precincts so I don't know**
13 **if he's referring to like the ward level or**
14 **something bigger or smaller. I'm assuming it's the**
15 **ward level. But I don't know what data set he was**
16 **working off of so I don't know what precincts is**
17 **referring to specifically.**
18 Q. Did you talk with Dr. Gaddie at all about -- about
19 the running the regression models to generate open
20 seat estimates on all of the whether they were
21 precincts or wards?
22 **A. In so much as I knew that it was part of what he was**
23 **working on.**
24 Q. Did you talk with Mr. Handrick about this work of
25 Dr. Gaddie's?

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1 **A. I'm sure we did at some point.**
2 Q. What was the substance of your conversation with
3 Mr. Handrick about this particular work Dr. Gaddie
4 was doing?
5 **A. Yeah, I don't -- I don't remember.**
6 Q. Now, the next paragraph down -- well, actually did
7 you talk with Mr. -- Mr. Ottman about this
8 particular work that Dr. Gaddie was doing?
9 **A. I'm sure we spoke about it at some point.**
10 Q. What was the substance of your conversation with
11 Mr. Ottman about that work?
12 **A. I don't remember the specific points of the**
13 **conversation, but I'm sure we talked about it.**
14 Q. If you look at the next paragraph down, you'll see
15 that Dr. Gaddie comments "At this point" -- well, to
16 make it complete, "But at this point, if you asked
17 me, the power of the relationships indicates that
18 the partisanship proxy you are using," and then in
19 parens "all races, is an almost perfect proxy for
20 the open seat vote and the best proxy you'll come up
21 with."
22 Do you see that statement?
23 **A. I do.**
24 Q. All right. What did you understand this to mean
25 when you received this email in 2011?

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1 **A. That there was a composite of races that achieved a**
2 **certain degree of accuracy basically, or it**
3 **correlated with what Dr. Gaddie was doing.**
4 Q. Doing with his regression model, correct?
5 **A. Yeah.**
6 Q. So the intention was to come up with a proxy for the
7 output of Dr. Gaddie's regression model, correct?
8 **A. I would -- I would take issue with the phrasing of**
9 **that question because I mean this was -- it's an**
10 **attempt to have an accurate descriptor of a**
11 **district, and if you believe that a sophisticated**
12 **analysis or a more sophisticated analysis like**
13 **Dr. Gaddie's is more accurate, you're going to**
14 **strive for our lesser sophisticated composites to**
15 **try to be that. I mean you want an accurate number,**
16 **and if you -- it's predicated on believing that, you**
17 **know, Dr. Gaddie's regression is accurate, but**
18 **you're looking for something that can describe a --**
19 **a statistic that can describe the political world**
20 **basically, and you want that to be accurate. You**
21 **don't want to be working with inaccurate data.**
22 Q. Correct. But you also didn't want to have to go
23 back to Dr. Gaddie every time and have him run his
24 regression analysis every time, correct?
25 **A. I mean you just physically couldn't do that.**

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1 Q. And that's why you needed to have -- you needed to
2 have a partisanship proxy so that those numbers
3 didn't have to be generated by Dr. Gaddie's
4 regression model every time you wanted to get that
5 information, correct?
6 **A. I don't -- I don't know if that's the motivation for
7 it. I mean you're looking for a statistic to
8 describe the world around you. And it's more just
9 that there are certain limitations not only of, you
10 know, just the mathematical limitations of, you
11 know, me not being a social scientist or, you know,
12 Tad or Joe not being a social scientist, but the
13 autoBound software itself, things like that where
14 Dr. Gaddie may use something much more sophisticated
15 to develop this type of regression analysis. We
16 don't have that. We just have a fairly simple way
17 of looking at the world around us with, you know,
18 averages basically.**
19 Q. Right. And that's what the proxy was designed to
20 do, correct?
21 **A. To give us a statistic to describe a district.**
22 Q. And one of the descriptions is the partisan makeup
23 of that district, correct, or the partisan outcome
24 of that district?
25 MR. ST. JOHN: Object to form. It's compound.

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1 MR. POLAND: It is compound. Could you read
2 the question back, please?
3 (Question read.)
4 MR. POLAND: You can answer if you understand
5 the question.
6 THE WITNESS: I would take -- I'm sorry, not to
7 have you do this again, what was the question?
8 (Question read.)
9 THE WITNESS: I would have -- I would take
10 issue with outcome. I would take issue with
11 anything that purports to be forward looking. I
12 think makeup is accurate. I think it's more -- more
13 accurate to describe it because it is -- any
14 composite is an average of prior races with regard
15 to, you know, a composite, just a sum total of prior
16 races. So I think makeup is probably a little bit
17 more accurate.
18 BY MR. POLAND:
19 Q. What if I used the word potential partisan outcome
20 of that district based on past election data?
21 **A. Again I would take issue with that. I would take
22 issue with the forward looking on taking prior races
23 and just simply coming up with an average.**
24 Q. Is it your understanding, though, that both
25 Dr. Gaddie's regression model and the partisanship

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1 proxy could be used for the purpose of determining
2 the potential partisan outcome of a future election
3 based on the past election data?
4 **A. Yeah. And again, I take -- I take issue with that.
5 I mean obviously taking Dr. Gaddie's mention here of
6 the -- or, you know, from the prior exhibit on
7 forward looking at face value, the averages were
8 averages. And so I don't know if the difference
9 between the regression model is something built into
10 that, some coefficient or something in the math that
11 creates a forward-looking aspect to it and just how
12 it's structured, what the math is, where what I know
13 of the composites is that they are just simply
14 averages of prior races.**
15 So I'll leave it to the social scientists to
16 debate whether past performance is indicative of
17 future results, but this -- this metric, this
18 composite is just nothing more than prior election
19 results. And any time you get into that, the
20 individual nuances of races are going to factor in
21 because, you know, you can have very competitive
22 races that come out to be 50/50. We've seen a
23 series of wave elections in Wisconsin.
24 I mean, you know, certainly lower ticket races
25 are much more subjective -- or much more subject to

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1 **these nuances than maybe top of the ticket where
2 things maybe average out a little bit more across
3 the state. So I take issue with that because I
4 think the individual races can sometimes throw this
5 off, and I think the individual races are obviously
6 backward-looking occurrences.**
7 So I take a little bit of issue with that, and
8 I think that individual races have unique
9 characterization -- or characteristics to them that
10 don't necessarily make it something you can look
11 forward in the future because I don't know what the
12 future holds. You know, I mean obviously we're
13 going to have a much more competitive U.S. Senate
14 race this time around than when Robert Gerald Lorge
15 ran against Herb Kohl, you know, things like that.
16 Q. Did you -- did you use the partisanship proxy that
17 Dr. Gaddie identified in assessing the partisan
18 makeup of the draft districts that you were creating
19 for Act 43?
20 **A. It was an available data point to us.**
21 Q. And I understand that it was available, but did you
22 actually refer to it as you were drawing districts
23 for Act 43?
24 **A. You could have. You could have made an assignment
25 and then gone over to whatever portion of the matrix**

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1 **to look at that. That is something that was**
 2 **available to you as a map drawer.**
 3 Q. And I understand it was available, but I'm just
 4 asking a different question. So I'm asking whether
 5 you actually did that as part of the drawing
 6 process.
 7 **A. Yeah, I'm sure -- I mean I think it's safe to say**
 8 **that when assignments were made I could reference**
 9 **that and look at it, yes.**
 10 Q. But the question is a little different. I know you
 11 could, there's a potential there. But it's not a
 12 conditional question. The question is did you
 13 actually do that?
 14 **A. Yeah, it was there. It was on the screen.**
 15 Q. Did you ever modify a district that you drew after
 16 reviewing either results of an application of
 17 Dr. Gaddie's regression model or applying a partisan
 18 proxy -- partisanship proxy to that district?
 19 **A. There's a couple of different things in that**
 20 **question that's kind of required to be split out.**
 21 **As I testified to, if you make assignments, the**
 22 **partisan proxy score is there. The regression**
 23 **analysis is not something that was available to us**
 24 **as we were drawing so that's -- I think it's an**
 25 **important distinction to make.**

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1 Q. That's fair. So let's just limit the question to
 2 the partisan proxy score.
 3 **A. Right.**
 4 Q. Did you ever -- after -- after generating a partisan
 5 proxy score, looking at partisan proxy score for a
 6 draft district that you drew, did you ever
 7 reconfigure the district in a way that increased the
 8 partisan proxy score for republicans?
 9 **A. Well, and again I've got to take a little issue with**
 10 **the phrasing of that question. Because partisan**
 11 **proxy score for the republicans has certain**
 12 **implications for the broader map. Partisan proxy**
 13 **score to an individual district is a different**
 14 **thing. So again I want to make sure we're not**
 15 **crossing streams here.**
 16 **So if you draw a district and you finalize the**
 17 **assignments for it, again finalize being kind of a**
 18 **nebulous term, I can look at that partisan proxy. I**
 19 **do not recall any specific instance where I looked**
 20 **at that and said the member's requests are wrong,**
 21 **I'm going to go a different direction and overrule**
 22 **them. Again my job was to accommodate the member's**
 23 **requests for that district to the best of my**
 24 **ability.**
 25 **So if that member wanted a certain township**

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1 **that maybe was 50/50, that's their right to request**
 2 **that.**
 3 Q. Did you ever adjust the boundaries of a district
 4 based on a partisan proxy score for a specific
 5 district?
 6 **A. Not that I can specifically recall.**
 7 Q. What about for -- what about for the map overall,
 8 for the assembly districts overall in the state?
 9 **A. Well, again, not wanting to cross streams here. So**
 10 **what are you saying, that if there was an individual**
 11 **partisan proxy score?**
 12 Q. Well, let me ask the question. Was there -- was
 13 there a partisan proxy score that was generated for
 14 the act -- for the map as a whole, all the assembly
 15 districts together?
 16 **A. There was at one point a summary of the partisan**
 17 **proxy scores for all the districts. That summary**
 18 **did not exist until after the map had been basically**
 19 **finalized.**
 20 Q. Do you recall when that was, the time frame?
 21 **A. No, I don't. It would have been -- it would have**
 22 **been sometime around the drafting request, you know.**
 23 **I don't know if I ran it before that or after we put**
 24 **in the drafting request just because we were trying**
 25 **to get the drafting process going. So somewhere in**

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1 **there after all the decisions had been made I could**
 2 **take that partisan score and dump it into a**
 3 **spreadsheet, which, you know, we've talked about**
 4 **before, and I'm sure we'll talk about again.**
 5 Q. All right. Just to make sure that I'm clear on this
 6 then, is it your testimony that after reviewing a
 7 partisan proxy score for a specific district, you
 8 did not change that district in a way that increased
 9 the partisan proxy score for the republicans?
 10 **A. And again, this is the crossing of districts between**
 11 **individual and the broader context of the map. So**
 12 **the process, the leadership team did have various**
 13 **regional alternatives available to them. They would**
 14 **make a decision based on the various factors. If**
 15 **they asked me what the partisan score was of that, I**
 16 **could tell them at the time that option A is, you**
 17 **know, a certain partisan proxy score of X percent**
 18 **and another option is Y, and that option X gives the**
 19 **member everything they're asking for, but option Y**
 20 **defers to the member next door who wants the same**
 21 **piece of territory they do.**
 22 **And so, you know, they know that there is a**
 23 **competition between two members for a same township.**
 24 **And then they would also have available to them the**
 25 **scores if they asked for them, whether it be prior**

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1 **election races, you know, whether it be, you know,**
 2 **J.B. Van Hollen in 2010, or if they wanted to, they**
 3 **could also have access to that composite score, that**
 4 **amalgamation.**
 5 Q. Did it ever occur as part of the drafting process
 6 that the legislative leadership asked you for those
 7 partisan proxy scores on a regional basis?
 8 **A. On a regional basis?**
 9 Q. Correct.
 10 **A. So yeah, again going back to the testimony, if we**
 11 **put up a map -- or I don't remember exactly how we**
 12 **structured that process, but if they asked me, I**
 13 **would have that data available to me. I don't**
 14 **recall specific instances of them asking me that,**
 15 **but I'm sure at some point it was brought up or**
 16 **asked of me what the various performances were for**
 17 **the various options.**
 18 Q. All right. And did you ever have any conversations
 19 with either Tad Ottman or Joe Handrick about the
 20 partisan proxy scores of either individual districts
 21 or of regions?
 22 MR. ST. JOHN: Object to form.
 23 THE WITNESS: I mean in so much as if Tad
 24 offered an alternative that had a certain percent
 25 and I had another percent, I'm sure that's -- I'm

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1 sure that was discussed or it was data that was
 2 available. But, you know, that's reflecting where
 3 he has senators that may be asking for certain
 4 different boundaries than my representatives, then
 5 it's like well, here's where we hit -- here's where
 6 we hit the disagreement is that the senator would
 7 like the outside boundary of their district to look
 8 different than the assembly rep. Here are the
 9 various options. And, you know, with assembly
 10 districts it's a little different because you could
 11 be buried within the senate district and not affect
 12 the outer boundary potentially.
 13 So, you know, there's -- for every, you know,
 14 one that Tad -- every one member that Tad has to
 15 deal with, I have potentially three times the input
 16 so I'm balancing more concerns than Tad might be at
 17 a given -- for a given region.
 18 Q. Did you ever have any discussions with Joe Handrick
 19 about the partisan proxy scores that were generated
 20 for individual districts?
 21 **A. I'm sure we discussed it.**
 22 Q. Do you recall what you discussed with -- with
 23 Mr. Handrick about -- about those scores for
 24 districts?
 25 **A. No, not -- not specifically. But like I said, I'm**

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1 **sure it came up in the weighing of the alternatives.**
 2 Q. Did -- did you ever have discussions with
 3 Mr. Handrick in the context of where to draw
 4 boundaries for different assembly districts with
 5 respect to the partisan proxy score for that
 6 district?
 7 **A. State that again or --**
 8 Q. I can rephrase it. In other words, did you ever
 9 discuss with Mr. Handrick the partisan proxy outcome
 10 of a draft district and how those district lines
 11 could be changed to increase the republican partisan
 12 proxy score for that district?
 13 **A. Not that I can specifically recall. I think it's**
 14 **more in the context of I have an alternative, Joe**
 15 **has an alternative, and I don't want to say that in**
 16 **such a way that it limits us to one alternative**
 17 **each, but everybody has alternative or alternatives,**
 18 **and in that context I'm sure that that metric came**
 19 **up, but I don't recall specific instances of where**
 20 **there were regional alternatives and their specific**
 21 **scores.**
 22 MR. POLAND: So at this point in time we're
 23 going to -- let's take a break because we have to
 24 change the tape, and then we're going to look at
 25 some files on the computer.

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1 THE WITNESS: Sounds good.
 2 THE VIDEOGRAPHER: This ends disk number one of
 3 the video deposition of Adam R. Foltz on March 31,
 4 2006; the time 11:26 a.m.
 5 (Exhibit No. 83 marked for identification.)
 6 THE VIDEOGRAPHER: This is the beginning of
 7 disk number two of the video deposition of Adam R.
 8 Foltz on March 31, 2016; the time 11:41 a.m.
 9 BY MR. POLAND:
 10 Q. Mr. Foltz, you had testified earlier today that you
 11 used a specific computer in your redistricting work
 12 in 2011, correct?
 13 **A. That's correct.**
 14 Q. And do you recall from the Baldus case that the
 15 plaintiffs in that case obtained the internal and
 16 one external hard drive from the computer that you
 17 used for redistricting purposes?
 18 **A. Yes. I would say internal hard drives probably more**
 19 **accurately.**
 20 Q. And that's correct because there were two mirrored
 21 internal hard drives, each one was 500 gigabytes,
 22 correct?
 23 **A. That's my understanding.**
 24 Q. And do you recall that in the Baldus case, the
 25 plaintiffs, they retained a computer forensic expert

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<p style="text-align: right;">Page 110</p> <p>1 named Mark Lanterman to conduct a forensic analysis 2 of the internal and external hard drives in the 3 computer that you used? 4 A. Yeah, the name sounds familiar. 5 Q. I've had the court reporter mark as Exhibit No. 83 a 6 document that I'm handing to you right now, and I'd 7 ask you to take a look at it. For the record, there 8 is a cover letter and Amended Declaration of Mark 9 Lanterman, and Exhibit A, which is Mr. Lanterman's 10 essentially CV, and then Exhibit B there is a DVD 11 attached. 12 A. Okay. 13 Q. And I'll give you just a minute to take a look at 14 that. 15 A. (Witness reading.) Okay. I think I'm good. 16 Q. Have you seen Exhibit No. 83 before? 17 A. No, I haven't. 18 Q. All right. So you haven't seen Mr. Lanterman's 19 declaration itself? 20 A. No. 21 Q. And I know you don't yet know what's on the disk 22 because we haven't put it into the computer yet, but 23 have you seen any kind of a DVD or spreadsheets that 24 have been created by Mark Lanterman specifically in 25 the Whitford case?</p>	<p style="text-align: right;">Page 112</p> <p>1 With "WRK32586." Do you see that? 2 A. I do. 3 Q. All right. Do you -- do you know what that 4 designation -- WRK32586 designation means? 5 A. It's a tag used by LTSA internally for inventory 6 tracking and management. 7 Q. All right. If you look in paragraph 14, 8 Mr. Lanterman's declaration states, "Second, CFS 9 recovered, identified, and produced any active or 10 deleted Excel spreadsheets created, accessed, or 11 modified during the months of April, May, or June of 12 2011 from the system named," open quote, "ASM 13 Republican WRK32586," close quote, "which I 14 understand was assigned to Adam Foltz." 15 Do you see that? 16 MR. ST. JOHN: Next page. 17 MR. POLAND: This is on page 4. 18 MR. ST. JOHN: Oh, I'm sorry. 19 MR. POLAND: It's paragraph 14. 20 THE WITNESS: Yeah. I do see that. 21 BY MR. POLAND: 22 Q. Is it your understanding that the WRK32586 computer 23 was the computer that was assigned to you? 24 A. I don't remember if that was the specific tag for 25 it. I'm assuming it's accurate.</p>
<p style="text-align: right;">Page 111</p> <p>1 A. I may have, but I don't know who the author was. 2 Q. All right. I'd like you to take a look, please -- 3 or strike that question. Let me ask you this. 4 Are you aware that the plaintiffs in the 5 Whitford case retained Mark Lanterman to conduct 6 some additional analyses of the internal and 7 external hard disk drives from the redistricting 8 computer that you used? 9 A. I didn't know that you had retained Lanterman. I 10 knew that there was an image of the old computer 11 sitting there with Lanterman. 12 Q. You weren't aware though up until I just asked the 13 question that Mr. Lanterman had conducted some 14 additional analyses for the purpose of the Whitford 15 case? 16 A. I knew that additional work was happening on those 17 old images so I didn't know it was specifically 18 attributed to Lanterman. 19 Q. I understand. I'd like you to look, please, 20 beginning on page 4 at paragraph 14 of 21 Mr. Lanterman's declaration. 22 A. I'm sorry, where are you again? 23 Q. Sure, it's page 4, beginning on paragraph 14. 24 A. Okay. 25 Q. And there is a header that says Systems Associated</p>	<p style="text-align: right;">Page 113</p> <p>1 Q. All right. Do you have any reason to believe that 2 it's not accurate? 3 A. I wouldn't think so. 4 Q. All right. Mr. Lanterman continues on and says, 5 "Across the two hard drives in this system, a total 6 of 86 spreadsheets were responsive. However, the 7 majority of those were exact duplicates. After 8 identifying and removing duplicates, a total of 27 9 unique files remained." 10 Do you see that? 11 A. I do. 12 Q. All right. Mr. Lanterman then goes on in paragraph 13 15 to state, "I provided a copy of the spreadsheet I 14 created as well as the 27 responsive spreadsheets to 15 counsel for the plaintiffs. Copies of the 16 spreadsheet that I created, as well as the 27 17 responsive spreadsheets, are contained on the 18 DVD-ROM provided contemporaneously with this 19 declaration." 20 Do you see that? 21 A. I do. 22 Q. And I will just state for the record that that's the 23 CD-ROM that's -- I'm sorry, the DVD-ROM that's 24 attached as Exhibit B to Mr. Lanterman's 25 declaration.</p>

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<p style="text-align: right;">Page 114</p> <p>1 A. Okay.</p> <p>2 Q. Mr. Lanterman then goes down in paragraph 16 and</p> <p>3 says, "I also identified relevant spreadsheets from</p> <p>4 the external hard drive associated with the WRK32586</p> <p>5 system."</p> <p>6 Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. And it is your recollection that there was a hard</p> <p>9 drive that was associated with your redistricting</p> <p>10 computer, correct?</p> <p>11 A. An external hard drive, yes.</p> <p>12 Q. External. Mr. Lanterman states in paragraph 16,</p> <p>13 "This external hard drive was used in conjunction</p> <p>14 with a backup program that packaged files within</p> <p>15 compressed zip volumes that first needed to be</p> <p>16 decompressed. After that, CFS identified a total of</p> <p>17 57 spreadsheets that had been created or modified</p> <p>18 between April and June 2001. Of those 57, 11 files</p> <p>19 were duplicates, leaving a total of 46 unique</p> <p>20 files."</p> <p>21 He then continues on, "I created an Excel</p> <p>22 spreadsheet detailing the locations, dates, and</p> <p>23 other information of all responsive spreadsheets</p> <p>24 that were identified on the external hard drive</p> <p>25 associated with the WRK32586 system," and then in</p>	<p style="text-align: right;">Page 116</p> <p>1 attached to the Lanterman affidavit or declaration</p> <p>2 that was Exhibit 83, and we've put it into a laptop</p> <p>3 computer that Mr. Foltz now has access to.</p> <p>4 BY MR. POLAND:</p> <p>5 Q. And if there's any need, Mr. Foltz, during the time</p> <p>6 that we're going through this exercise that you need</p> <p>7 to refer back to Mr. Lanterman's declaration, please</p> <p>8 let me know, feel free to do that.</p> <p>9 So I'd like you to open up, please, the</p> <p>10 spreadsheet that is WRK32586 Responsive Spreadsheets</p> <p>11 File Detail Report.</p> <p>12 A. 32586.</p> <p>13 Q. Correct.</p> <p>14 A. Okay.</p> <p>15 Q. And file detail report. There's a separate one for</p> <p>16 the external hard drive, but I'd like to just stay</p> <p>17 on the 32586 for now.</p> <p>18 A. Okay.</p> <p>19 Q. All right. And are you there?</p> <p>20 A. I am.</p> <p>21 Q. All right. Now, can you identify these -- from the</p> <p>22 file names, these spreadsheets as spreadsheets</p> <p>23 that -- that you created?</p> <p>24 A. Me or the autoBound software seems to be a generally</p> <p>25 fair way of characterizing them.</p>
<p style="text-align: right;">Page 115</p> <p>1 open parens he says -- or in parens he says, open</p> <p>2 quote, WRK32586 External HD Responsive Spreadsheets</p> <p>3 File Detail Report.xlsx, close quote, close paren.</p> <p>4 And then finally he concludes, "I provided a</p> <p>5 copy of the spreadsheet I created as well as the 46</p> <p>6 unique identified spreadsheets to counsel for the</p> <p>7 plaintiffs. Copies of the spreadsheet that I</p> <p>8 created as well as the 46 unique identified</p> <p>9 spreadsheets are contained on the DVD-ROM provided</p> <p>10 contemporaneously with this declaration."</p> <p>11 Do you see that?</p> <p>12 A. I do.</p> <p>13 Q. I wanted to make sure that you saw that for the</p> <p>14 context of looking at the spreadsheets we're going</p> <p>15 to look at.</p> <p>16 A. I understand.</p> <p>17 Q. Let's go ahead then and put the DVD in the computer.</p> <p>18 We can go off the record here while we set that up.</p> <p>19 THE VIDEOGRAPHER: We are going off the record</p> <p>20 then at 11:50 a.m.</p> <p>21 (Discussion held off the record.)</p> <p>22 THE VIDEOGRAPHER: We are back on the record at</p> <p>23 11:55 a.m.</p> <p>24 MR. POLAND: For the record, I just want to</p> <p>25 note that during the break we took the DVD that was</p>	<p style="text-align: right;">Page 117</p> <p>1 Q. All right. Now, I just asked you about file names.</p> <p>2 If you scroll over to the right -- this is a pretty</p> <p>3 big spreadsheet, and if you scroll over to the</p> <p>4 right, you'll see in column F it should be there is</p> <p>5 a file path.</p> <p>6 A. Okay.</p> <p>7 Q. And you'll see a file path that says from -- I'm</p> <p>8 looking at the first about, oh, I don't know, 30 or</p> <p>9 so rows on the spreadsheet, Users\afoltz. Do you</p> <p>10 see that --</p> <p>11 A. Uh-huh.</p> <p>12 Q. -- in column F?</p> <p>13 A. Yeah. Yes, I do.</p> <p>14 Q. All right. And then if you scroll a little further</p> <p>15 over to the right, in columns H and I, you'll see H</p> <p>16 is an Author column?</p> <p>17 A. Okay.</p> <p>18 Q. Do you see that? And then I is a Last Saved by</p> <p>19 column?</p> <p>20 A. Uh-huh.</p> <p>21 Q. And you'll see in the Author column -- and we'll get</p> <p>22 into detail with specific spreadsheets, but you'll</p> <p>23 see that your name appears in some of those afoltz,</p> <p>24 correct?</p> <p>25 A. Uh-huh.</p>

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1 Q. As author? Tad Ottman's name appears as author in
2 some of those, correct? Ronald Keith Gaddie
3 appears, correct?
4 **A. Uh-huh. Yes.**
5 Q. And there are others as well. I'm just establishing
6 this as a general point. And then there is also in
7 column I an indication of who it was last saved by,
8 correct?
9 **A. Yes.**
10 Q. And then there are a few other columns in there
11 Office Created Date, Office Last Printed Date,
12 Office Last Saved Date, and then there are some
13 other columns, correct?
14 **A. Okay.**
15 Q. As we sit here, do you have any reason to doubt that
16 the spreadsheets that we have identified in the
17 WRK32586 Responsive Spreadsheets File Detail Report
18 are spreadsheets that came from your redistricting
19 computer?
20 **A. I'm sorry, was the question do I have any reason to**
21 **dispute that?**
22 Q. Yeah, to doubt it or dispute it.
23 **A. I don't see why it would. It seems --**
24 Q. I'd like to ask you then to look at -- to look at
25 row 6 in the spreadsheet that we're looking at right

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1 now.
2 **A. Okay.**
3 Q. And the file name in particular.
4 **A. Okay.**
5 Q. We had talked a few minutes ago about -- about file
6 names, and I know in one of your earlier depositions
7 we had talked about naming conventions.
8 **A. Uh-huh.**
9 Q. Do you recall generally that discussion?
10 **A. Yeah, it was reviewed as part of my deposition.**
11 Q. All right. So there is, for example, the
12 spreadsheet that's identified in row 6
13 Composite_Adam_Assertive_Curve. Do you see that?
14 **A. I do.**
15 Q. What -- what does that -- the file naming convention
16 that you use, what does that indicate with respect
17 to that specific spreadsheet?
18 **A. I take issue with the question for a couple of**
19 **reasons. One, it was created by Dr. Gaddie so he**
20 **would have been responsible for naming the file.**
21 **Secondly, my prior deposition about naming**
22 **conventions was specific to how I named autoBound**
23 **files, and this is an Excel spreadsheet.**
24 Q. Okay. So the naming convention that you used for
25 autoBound files was not a naming convention that you

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1 used for Excel spreadsheets?
2 **A. That's fair. There may be overlap where something**
3 **kicked out of a map shares the same file name as an**
4 **autoBound name plan, but the naming conventions that**
5 **were mentioned in my prior deposition was an attempt**
6 **to keep myself organized with regard to autoBound.**
7 Q. Okay. So with respect to the spreadsheet on row 6
8 that says Composite_Adam_Assertive_Curve, is it your
9 testimony that that is not a name that you created?
10 **A. Yeah. That is my testimony.**
11 Q. All right. Do you know what the -- what the term
12 "composite" in that file name refers to?
13 **A. No.**
14 Q. Do you know what the term -- what the name Adam
15 refers to?
16 **A. That would be me.**
17 Q. All right. What about the term "assertive" as used
18 in that file name?
19 **A. No.**
20 Q. All right. What about -- what about "curve" as used
21 in that file name?
22 **A. I think it's -- I think it's a red and blue and**
23 **orange curve that Dr. Gaddie -- this goes back to**
24 **the testimony of visual aids. I believe, you know,**
25 **when I was saying I don't view Excel as a visual**

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1 **aid, but Dr. Gaddie references it, I think that --**
2 **I'm pretty sure that's what this is.**
3 Q. And we'll come back and we'll pull one out and look
4 at it. I just want to make sure I understand the
5 names that are used here.
6 The -- in rows -- in rows 8 and 9, there's a
7 reference to Composite_Current_Curve. Do you see
8 those two references?
9 **A. Yes, I do.**
10 Q. All right. And as you noted, those were
11 spreadsheets that at least were authored by
12 Professor Gaddie, correct?
13 **A. Yes. Hold on, I mislicked here.**
14 Q. Sure. The --
15 **A. Edit undo.**
16 MR. ST. JOHN: Sorry. There we go.
17 THE WITNESS: Yeah, typing when I should be
18 scrolling. Let me see --
19 MR. ST. JOHN: Your keys are in a different
20 place. He's hitting delete.
21 THE WITNESS: Yeah, I'm hitting the period
22 delete instead of the scroll. There's a number pad
23 on this one. Sorry about that.
24 MR. ST. JOHN: Can we have that question
25 restated?

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1 MR. POLAND: Or just read back.
 2 THE WITNESS: Yeah, 8 and 9 is our point of
 3 reference?
 4 MR. POLAND: 8 and 9 is what we're looking at.
 5 THE WITNESS: And the question? I'm sorry.
 6 MR. POLAND: Can you read back the question?
 7 (Question read.)
 8 THE WITNESS: It appears from the data
 9 associated with the file that yes, this was
 10 Dr. Gaddie's product.
 11 BY MR. POLAND:
 12 Q. All right. And the spreadsheet also indicates that
 13 they were last saved by you, correct?
 14 **A. That appears to be the case, yes.**
 15 Q. And they were last saved on May 28, 2011 -- I'm
 16 sorry, strike that question.
 17 Column J indicates that they were created on
 18 May 28th, 2011, correct?
 19 **A. Yes.**
 20 Q. All right. Do you know is that a time when
 21 Dr. Gaddie was visiting in Madison?
 22 **A. I don't recall that specifically, but it seems to**
 23 **fit that that would be the case.**
 24 Q. Do you recall working with Dr. Gaddie on any curves
 25 or any Excel spreadsheets that had the title curve

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1 or name curve in the file name while Dr. Gaddie was
 2 visiting in Madison?
 3 **A. I think worked with. I didn't do anything with or**
 4 **to any curves. That was just Dr. Gaddie's**
 5 **production, so I want to be careful about the word**
 6 **"work." I didn't do anything on them or to them.**
 7 Q. Is it your testimony that Dr. Gaddie created these
 8 spreadsheets and then provided you with an
 9 electronic copy of them?
 10 **A. I think it's a fair summary of it.**
 11 Q. How did Dr. Gaddie provide you with the electronic
 12 copies of the spreadsheets?
 13 **A. I don't recall.**
 14 Q. All right. Do you recall whether there was a flash
 15 drive used or whether they were emailed or whether
 16 there was a Dropbox account that was used?
 17 **A. Wouldn't have been Dropbox. Probably wasn't email.**
 18 **Maybe a flash drive, maybe some type of burnable**
 19 **disk, but I don't recall.**
 20 Q. Do you recall what you did with these curves once
 21 you had saved them to your computer?
 22 **A. No, maybe printed them, but I really don't -- I**
 23 **really don't remember doing anything specific with**
 24 **these.**
 25 Q. All right. Looking again at the file name for -- on

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1 8 and 9, Composite_Current_Curve, do you know what
 2 the term "composite" refers to?
 3 **A. No, no, I don't.**
 4 Q. All right. What about the -- what about the term
 5 "current" as used in those file names?
 6 **A. I don't recall specifically, but I would assume that**
 7 **it has something to do with the map that was in**
 8 **place at this time, so this would have been the**
 9 **prior -- the redistricting plan prior to Act 43, but**
 10 **I don't know that with 100 percent certainty.**
 11 Q. All right. Just below that -- those two rows in
 12 rows 10 and 11, do you see there are file names that
 13 both say Composite_Joe_Assertive_Curve?
 14 **A. I do.**
 15 Q. Do you know what "composite" refers to in that file
 16 name?
 17 **A. No.**
 18 Q. Do you know what Joe refers to?
 19 **A. Joe Handrick.**
 20 Q. All right. And then the term "assertive," do you
 21 know what that refers to?
 22 **A. No.**
 23 Q. Then below those two rows, and now we're in rows 12
 24 and 13, you'll see a file name
 25 Composite_Joe_Base_Curve. Do you see that?

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1 **A. I do.**
 2 Q. And again do you know what "composite" refers to
 3 there?
 4 **A. No.**
 5 Q. And Joe refers to Mr. Handrick?
 6 **A. Correct.**
 7 Q. And then do you know what "base curve" refers to?
 8 **A. No.**
 9 Q. If you turn down to row 20 or scroll down to row 20,
 10 you'll see a spreadsheet that's labeled Plan
 11 Comparisons. That's the file name.
 12 **A. Uh-huh.**
 13 Q. All right. And then if you scroll across over to
 14 column H and column I, you'll see that you are
 15 identified as the author and the person who last
 16 saved that, correct?
 17 **A. Correct on both accounts.**
 18 Q. All right. And that was created on, at least
 19 according to the metadata, May 9th of 2011?
 20 **A. May 2nd of 2011?**
 21 Q. Okay. So we're on row 20, correct?
 22 **A. Yep. Office created date 5/2/11.**
 23 Q. Okay. All right. Fair enough. It does -- it does
 24 say that there. I was looking I guess in -- in
 25 column C where it says May 9th, 2011. If you look

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1 at column C.
 2 **A. Yeah.**
 3 Q. Any idea why there is a difference between those
 4 two?
 5 **A. I have no idea.**
 6 Q. All right. We might have to have Mr. Lanterman
 7 explain that.
 8 It also identifies that -- that the file was --
 9 was modified it appears on April 27th of 2012, and
 10 I'm looking in column E. Do you see that?
 11 **A. Column E line 20 4/27 of 2012.**
 12 Q. Right. So that was the year after it was created.
 13 Do you see that?
 14 **A. Yeah. Yeah.**
 15 Q. Do you know why it might have been modified in April
 16 of 2012?
 17 **A. No.**
 18 Q. All right. Do you recall the Plan Comparisons
 19 spreadsheet as you sit here today?
 20 **A. Not by name, but I believe that's the red and blue**
 21 **summary statistics.**
 22 Q. Yeah, let's just -- there are a couple that I've got
 23 hard copies of and so some of these it might be
 24 easier to take a look at them in hard copies so
 25 everyone can look at them.

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1 **A. Uh-huh.**
 2 MR. POLAND: I guess the question, Brian, a
 3 question for you on management, do we want -- if
 4 we've got documents that have been marked as
 5 exhibits already in this deposition, I've remarked a
 6 couple, should we remark them or just keep them as
 7 they are?
 8 MR. KEENAN: I haven't necessarily been doing
 9 that since it's already been marked with Gaddie.
 10 MR. POLAND: Okay.
 11 MR. KEENAN: I don't -- if you want to, feel
 12 free. I don't see the need to.
 13 MR. POLAND: Yeah, I don't see the need to
 14 either then. Let's just -- let's not do it. It's
 15 more question for management for us at trial.
 16 I'd like the record to reflect that I'm handing
 17 the witness a copy of a document that's been
 18 previously marked as Exhibit 39 Gaddie.
 19 BY MR. POLAND:
 20 Q. And I'll give you a minute to take a look at that,
 21 Mr. Foltz.
 22 **A. (Witness reading.) Okay.**
 23 Q. Is Exhibit 39 a document that you've seen before?
 24 **A. Yes.**
 25 Q. All right. And I'll represent to you that this is

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1 a -- a printout of the Plan Comparisons.xlsm file
 2 that appears in row 20 in the spreadsheet we were
 3 just looking at. We can -- we can certainly open it
 4 up as well on the DVD if you'd like.
 5 **A. I don't see a need to at this point.**
 6 Q. Okay. All right. Make sure I've got the right one
 7 here.
 8 MR. POLAND: Are you guys okay?
 9 MR. ST. JOHN: Uh-huh. Yep.
 10 BY MR. POLAND:
 11 Q. All right. Sorry if I already asked you this. Have
 12 you seen Exhibit 39 before?
 13 **A. Yes.**
 14 Q. All right. Is Exhibit 39 a document that you
 15 created?
 16 **A. Yes.**
 17 Q. All right. What is Exhibit 39?
 18 **A. It appears to be a summary of partisan scores for**
 19 **districts.**
 20 Q. And is -- was this created using the proxy that we
 21 had talked about earlier in your deposition?
 22 **A. I believe so. Yes.**
 23 Q. Why was Exhibit 39 created?
 24 **A. To create a summary as to the various changes in the**
 25 **districts.**

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1 Q. Now, up at the top of Exhibit 39 there's a label
 2 that says Milwaukee Gaddie 4_16_11_V1_B. Do you see
 3 that?
 4 **A. I do.**
 5 Q. What is the significance of that title?
 6 **A. That would probably be reflective of the autoBound**
 7 **file that would have been associated with a map that**
 8 **led to this summary.**
 9 Q. Okay. And so when you were -- when we were talking
 10 before about naming conventions for autoBound files,
 11 that's a naming convention that you would have used?
 12 **A. Yes.**
 13 Q. Okay. So if we look -- if we look over on Exhibit
 14 39, this identifies districts 1 through 99, correct?
 15 **A. Yes.**
 16 Q. And those are the assembly districts in Wisconsin?
 17 **A. For this given version of a map, yes.**
 18 Q. All right. And by the way, was this -- was this the
 19 final version of the -- of the assembly district
 20 maps that was included in Act 43?
 21 **A. No, this wouldn't have been.**
 22 Q. All right. So looking --
 23 **A. To the best of my recollection this would not be.**
 24 Q. I understand. I understand. Is it -- is it your
 25 belief that there was a -- a subsequent

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1 configuration of the assembly districts that
2 superseded this?
3 **A. Yes.**
4 Q. If we look at the -- at the column right next to the
5 District column, there's a column that's labeled
6 Assembly. Do you see that?
7 **A. Yes.**
8 Q. All right. At the top. And then across the header
9 rows it says Current, New, Delta. Do you see that?
10 **A. Yes.**
11 Q. All right. Now, if we look down the column that
12 says Current, there are a number of -- there's
13 some -- some red -- there's a red bar that fills in
14 part of that cell, and then there are percentages
15 next to that. Do you see that?
16 **A. I do.**
17 Q. All right. What does that indicate?
18 **A. I believe that is the composite score.**
19 Q. What's it a composite score of?
20 **A. We talked earlier about the composite. I don't**
21 **remember what the individual components -- this goes**
22 **back to the testimony on regression versus a less**
23 **sophisticated summary. I believe it to be that**
24 **number.**
25 Q. All right. And so that would be -- so, for example,

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1 when we look at district 1 it says Current, and it
2 says 51.15 percent, correct?
3 **A. Yes.**
4 Q. And so what is the 51.15 percent? What does that
5 number mean?
6 **A. That would be that if you applied the composite --**
7 **again I believe it's the composite -- to the first**
8 **assembly district as it existed prior to Act 43,**
9 **that would have been the composite of those races**
10 **looking back backwards in time.**
11 Q. All right. And so that would have been -- that
12 would have been the republican share in that
13 district, correct?
14 **A. I believe the composite is to republican score. I**
15 **think that's an accurate classification.**
16 Q. All right. So now if we go -- if we go directly
17 over to the right, there is a column that's labeled
18 New. Do you see that?
19 **A. I do.**
20 Q. And so in the New column sticking with the first row
21 it says 51.22 percent. Do you see that?
22 **A. I do.**
23 Q. And so what does the column that's -- that's headed
24 New, what does that indicate?
25 **A. That for this given version of the map, that that**

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1 **attempt at drawing the first assembly district is --**
2 **again assuming it's the composite, which I'm fairly**
3 **sure of, that that new district in this possible**
4 **proposed map or map that I drew of 51.22 is the new**
5 **composite for that given district.**
6 Q. All right. And that's the republican score again,
7 correct?
8 **A. I believe so. Yes.**
9 Q. And then next to that there is a column that says
10 Delta. Do you see that?
11 **A. I do.**
12 Q. And that's simply the difference, the change from
13 the current to the new?
14 **A. Yes.**
15 Q. And by "the change," I mean the change in composite
16 scores from the current to the new, correct?
17 **A. Yes. That appears to be correct.**
18 Q. And so if we look down the column that's headed
19 Delta, we can see that some of the -- some of the
20 scores go up and some of the scores go down,
21 correct?
22 **A. Uh-huh. Yes.**
23 Q. Now, if we move directly next to that, there is a --
24 a column that has an overall heading of Senate,
25 correct?

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1 **A. Yes.**
2 Q. And that's essentially the same process that we go
3 through there. We're looking at the senate
4 districts, and there's a current score, a new score,
5 and then a Delta, correct?
6 **A. Yes.**
7 Q. All right. And those are all -- those are
8 republican scores; is that correct?
9 **A. Yes.**
10 Q. Now, if we look all the way down at the bottom of
11 the first page of Exhibit 39, there are two other
12 boxes that are on the bottom. Do you see that?
13 **A. I do.**
14 Q. All right. There's one box on the left that says
15 Current Map. Do you see that?
16 **A. I do.**
17 Q. All right. Now, under Current Map there is a line
18 that says Safe GOP, and then in parens 55 percent
19 plus, and then there's a close paren. Do you see
20 that?
21 **A. I do.**
22 Q. What does that indicate?
23 **A. Generally that a district that achieves that**
24 **percentage or greater is classified as being safe.**
25 Q. All right. And what does it mean by -- what does

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1 "safe" mean?

2 **A. Generally that it's not a district that is going to**

3 **be a targeted district in an electoral process I**

4 **think is a fair way of classifying it.**

5 Q. Now, if we -- and there are numbers in the assembly

6 and senate that are associated with a safe GOP,

7 right? There's 27 under assembly and seven under

8 senate, correct?

9 **A. Correct.**

10 Q. If we look just below that line, we'll see it says

11 Lean GOP. What does the lean GOP mean?

12 **A. Again fairly self-explanatory that that district,**

13 **looking at prior elections, has a tendency to be**

14 **leaning in the direction of GOP.**

15 Q. All right. And so for assembly we see that's a 13

16 and 8 for senate, correct?

17 **A. Yes.**

18 Q. All right. And those -- those numbers there refer

19 to districts, correct?

20 **A. The total number, the count of districts.**

21 Q. As opposed to -- correct. Yes. I think we

22 understand one another.

23 So then there is a -- a tally that says Total

24 GOP Seats (safe plus lean), and that simply is a

25 tally of the previous two lines, correct?

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1 **A. Yes.**

2 Q. Moving down from there, it says Swing, 48 to 52

3 percent. Do you see that?

4 **A. I do.**

5 Q. What -- what does that indicate?

6 **A. Districts that, again using kind of**

7 **back-of-the-napkin common ways of referring to them,**

8 **are a little bit more susceptible to swinging back**

9 **and forth between the parties using this average of**

10 **races.**

11 Q. All right. And so we see 19 assembly districts and

12 five senate districts that fall under that swing

13 row, correct?

14 **A. Correct.**

15 Q. So if we look just below that then, there is a line

16 that says Lean DEM, 45.1 percent to 47.9 percent.

17 Do you see that?

18 **A. I do.**

19 Q. All right. And there are numbers that are

20 associated with that, 7 and 3, correct?

21 **A. Yes.**

22 Q. And then safe DEM is 45 percent?

23 **A. Uh-huh. Yes.**

24 Q. And then --

25 **A. Sorry.**

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1 Q. That's all right. And there's no -- there's no

2 lower number there, correct?

3 **A. No, the total lines are next.**

4 Q. Okay. And so the Total DEM seats (safe plus lean),

5 and then there are total numbers of 40 and 13,

6 correct?

7 **A. Correct.**

8 Q. So if we move to the next box over, New Map, that

9 contains the same general rows. In other words,

10 Safe GOP, New Lean GOP, Total GOP Seats, as the

11 previous box, correct?

12 **A. Correct.**

13 Q. So if we compare the two, if we look at the current

14 map and the new map, this would indicate that with

15 the district configuration on page 1, the new map

16 would yield 52 total GOP seats in the assembly

17 versus 40 under the current map, correct?

18 **A. Correct.**

19 Q. And it would yield 18 total GOP seats under the new

20 map versus 15 under the current map, correct?

21 MR. ST. JOHN: Object to -- object to form

22 or -- I'm sorry, the question is would yield -- or

23 maybe I'll object to foundation. The testimony was

24 not what would yield from that.

25 MR. POLAND: Well, you can object to the form,

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1 Kevin.

2 MR. ST. JOHN: Object -- object to form. Go

3 ahead, restate the -- may the court reporter please

4 restate the question for the witness?

5 (Question read.)

6 THE WITNESS: So for this version of a map that

7 would be reflected in these scores and how they are

8 categorized, in yield to the attorney's objection,

9 maybe has a little bit more built into it, but

10 that's the summary statistics.

11 BY MR. POLAND:

12 Q. Under the partisan proxy score that was -- that came

13 out of autoBound?

14 **A. Yes.**

15 Q. All right. Under the -- under the New Swing line of

16 the New Map, that indicates 9 assembly seats versus

17 19 assembly seats under the swing for the current

18 map, correct?

19 **A. Correct.**

20 Q. And then in the senate it's 2 for new swing under

21 the new map versus 5 under the swing line for the

22 current map, correct?

23 **A. Yes.**

24 Q. And then if we look down, just to finish this off,

25 with the DEM seats, there would be -- total DEM

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<p>1 seats under the new map, there would be 13 indicated</p> <p>2 in the senate, which is the same as under the</p> <p>3 current map, correct?</p> <p>4 A. I'm sorry, where are you again?</p> <p>5 Q. Sure. Under the New Map box, I'm under the Total</p> <p>6 DEM Seats.</p> <p>7 A. Okay.</p> <p>8 Q. And there would be 13 under -- for the senate under</p> <p>9 the new map, correct?</p> <p>10 A. Uh-huh. Yes.</p> <p>11 Q. Versus -- which is the same as under the current</p> <p>12 map, correct?</p> <p>13 A. Yes.</p> <p>14 Q. And then if you look at the assembly under the new</p> <p>15 map, it indicates 38 total DEM seats versus 40 under</p> <p>16 the current map, correct?</p> <p>17 A. Yes.</p> <p>18 Q. Now, this is -- this particular spreadsheet has</p> <p>19 several tabs to it, correct?</p> <p>20 A. I believe so. Yes.</p> <p>21 Q. So if we look at, for example, the next page, you'll</p> <p>22 see there's a header at the top that says Statewide</p> <p>23 Milwaukee Gaddie 4_16_11_V1_B?</p> <p>24 A. Okay.</p> <p>25 Q. And we can also look at the spreadsheet on Excel if</p>	<p>1 Q. Okay. All right. Would you turn to the -- to the</p> <p>2 next page or the next tab then. You'll see there's</p> <p>3 a header that says Final Map. Do you see that?</p> <p>4 A. I do.</p> <p>5 Q. All right. What does that indicate to you?</p> <p>6 A. That if -- that it was probably the final map, but</p> <p>7 it may not be. I don't know if this reflects the</p> <p>8 Baldus court's decision. I don't know if there were</p> <p>9 any subsequent changes. So it may not be the final</p> <p>10 map, but I think it's a safe assumption that very</p> <p>11 near the completion of the process.</p> <p>12 Q. All right. And I note, and again you can look at</p> <p>13 the spreadsheet on Excel if you want, I note that</p> <p>14 there's a second tab that is also -- has a header</p> <p>15 that says Final Map.</p> <p>16 A. Okay.</p> <p>17 Q. Do you know whether there's any difference between</p> <p>18 those two?</p> <p>19 A. No, not without sitting down with it more I --</p> <p>20 Q. Oh, the only difference that I have noted, and I'm</p> <p>21 not trying to testify, the only difference I've</p> <p>22 noted is that in the first of the two final maps,</p> <p>23 the districts are -- are numbered one through 99,</p> <p>24 and in the second tab they appear to be sorted in</p> <p>25 some way.</p>
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<p>1 you'd prefer to do that.</p> <p>2 A. No, I'm good.</p> <p>3 Q. Either way is fine. And so this is -- well, what</p> <p>4 does that -- the title Statewide 2 Milwaukee Gaddie</p> <p>5 4_16_11_V1_B indicate to you?</p> <p>6 A. Just the -- the name of the autoBound file that</p> <p>7 would have fed into this summary sheet.</p> <p>8 Q. And this is -- again this is a file that you -- that</p> <p>9 you created using autoBound?</p> <p>10 A. Yes.</p> <p>11 Q. And was the general description of the layout of --</p> <p>12 that you had described for the first page that we</p> <p>13 looked at tabbed, does that apply to this second tab</p> <p>14 as well?</p> <p>15 A. It appears to, yes.</p> <p>16 Q. Now, this -- do you know why Statewide 2 -- or</p> <p>17 strike that question. Does the Statewide 2 have any</p> <p>18 specific meaning to you versus the name Milwaukee</p> <p>19 that's used in the -- on the first tab?</p> <p>20 A. No. If memory serves, I normally labeled my</p> <p>21 statewide plans with statewide in them, so I don't</p> <p>22 know if there's any difference between the first</p> <p>23 page and the second page other than the file name,</p> <p>24 but I don't -- there's really no significance to me</p> <p>25 other than that.</p>	<p>1 A. Okay.</p> <p>2 Q. But not by district number.</p> <p>3 A. Okay. Yep.</p> <p>4 Q. And then the -- but the general description again</p> <p>5 that you had given for the -- the first page of</p> <p>6 Exhibit 39 applies to the final map --</p> <p>7 A. Yes.</p> <p>8 Q. -- page as well?</p> <p>9 Is it -- if we look again at the bottom then,</p> <p>10 current map versus the new map, is it fair to say</p> <p>11 that this printout indicates that under the current</p> <p>12 map there would be 40 total GOP seats in the</p> <p>13 assembly and 15 in the senate; is that correct?</p> <p>14 A. It appears that way, yes.</p> <p>15 Q. All right. And then under the new map total GOP</p> <p>16 seats there would be 52 in the assembly and 17 in</p> <p>17 the senate, correct?</p> <p>18 A. Correct.</p> <p>19 Q. And if we look at the swing under the current map,</p> <p>20 19 assembly, five in senate, correct?</p> <p>21 A. Correct.</p> <p>22 Q. And then in -- under the new map, the new swing, 10</p> <p>23 in assembly and three in senate, correct?</p> <p>24 A. Correct.</p> <p>25 Q. And if we look at under the total DEM seats there</p>

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1 are 40 total DEM seats in the -- under the current
2 map, 40 in the assembly and 13 in the senate,
3 correct?
4 **A. Yes.**
5 Q. And then under new map, 37 total DEM seats in the
6 assembly and 13 in the senate, correct?
7 **A. Correct.**
8 Q. Would you turn to the final page then, and there is
9 a header that says Kessler Map. Do you see that?
10 **A. I do.**
11 Q. What does that indicate?
12 **A. That it's a summary of -- I'm assuming this is a**
13 **summary of the map that -- I can't remember the name**
14 **of the organization, but I believe Representative**
15 **Kessler was part of a group that tried to come in**
16 **during the Baldus litigation as an amicus party. I**
17 **believe this is a summary of the partisan composite**
18 **from the autoBound plan that would have been**
19 **associated with that map.**
20 Q. Okay. If we -- and I am going to draw you back to
21 the -- back to the spreadsheet now. This is the
22 Responsive Spreadsheets File Detail Report that you
23 had been looking at.
24 **A. Okay.**
25 Q. And ask you to take a look at line 20 that says Plan

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1 Comparisons.
2 **A. Okay.**
3 Q. If you look, we had talked before about the -- about
4 the access and the modified and that it was a 2012
5 date?
6 **A. Okay. What columns are we looking at here?**
7 Q. So we're looking at columns D and E.
8 **A. Okay.**
9 Q. All right.
10 **A. Yes.**
11 Q. You're there?
12 **A. Yes.**
13 Q. So you see that there is a -- an access and a
14 modified date in April of 2012. Do you see that?
15 April 27, 2012?
16 **A. Yes.**
17 Q. All right. Do you know when Representative Kessler
18 came up with his -- with his map that he had
19 submitted?
20 **A. I don't remember.**
21 Q. Do you know whether the -- whether the revisions
22 or -- revisions that you had made to your Plan
23 Comparisons.xlsm in April of 2012 related to
24 Representative Kessler's map?
25 **A. I don't know if that's why it was flagged.**

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1 Q. I'd like you to take a look, Mr. Foltz, on -- we're
2 sticking on the Responsive Spreadsheets File Detail
3 Report right now.
4 **A. Okay.**
5 Q. There is a -- a row 33, Team Map Curve.xlsx. Do you
6 see that?
7 **A. I do.**
8 Q. And if you look -- if you scroll over to the right,
9 you'll see that -- that Dr. Gaddie is listed as the
10 author, and it's identified as being created on June
11 14th. Do you see that?
12 **A. I do.**
13 Q. Okay. Scroll -- yeah, you've got to scroll over to
14 the Office Created Date is row -- or column J.
15 **A. Yep, 6/14 of '11.**
16 Q. Yep. Right. Do you recall what the Team Map Curve
17 was or what it represented?
18 **A. Not specifically. It seems like it could be a curve**
19 **that resulted from the -- the final -- or the map**
20 **that was subsequent -- or following the regional --**
21 **the meetings with leadership where the regional**
22 **alternatives were discussed, but I don't know that**
23 **for a fact.**
24 Q. All right. I'm going to ask you to do this then on
25 your computer. Can you open up -- can you find the

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1 Team Map Curve within the folder, that's the WRK?
2 **A. Okay. So I'm at the directory. So which folder am**
3 **I looking at?**
4 Q. You're looking for Team Map Curve.
5 **A. So 32586 Responsive Spreadsheets Duplicated?**
6 Q. Right. Exactly.
7 **A. And Team Map Curve.**
8 Q. Dot.xlsx.
9 **A. I believe I'm there.**
10 Q. Okay.
11 **A. I think we're --**
12 Q. You've got it open?
13 **A. Yes, sir.**
14 Q. I'm just going to turn my screen so you can see it
15 to make sure at least it looks like we're looking at
16 the same thing.
17 **A. Yep.**
18 Q. All right. What is Team Map Curve?
19 **A. I -- again not specifically recalling when in the**
20 **process this is. I believe this is an analysis**
21 **Dr. Gaddie ran on what was the map that resulted**
22 **from the regional meetings, but again I don't know**
23 **if it's the final map or something close to it in**
24 **the -- close to the final map in kind of the**
25 **process.**

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1 Q. All right. Just generally speaking, is -- you had
2 testified previously about the curves that
3 Dr. Gaddie created?
4 **A. Yeah.**
5 Q. And what's -- what's -- this is an example of one of
6 the curves that he had created?
7 **A. Right.**
8 Q. What's your understanding of what Dr. Gaddie was --
9 why he created these curves?
10 **A. I really don't know what question he was trying to**
11 **answer with this. I don't really know what he was**
12 **attempting to -- attempting to evaluate with this.**
13 Q. Dr. Gaddie had created these curves as a visual
14 representation or a visual aid, correct?
15 **A. It appears that way, yes.**
16 Q. And you looked at printouts of these -- of at least
17 some curves with Dr. Gaddie?
18 **A. I don't know if we looked at printouts. I don't --**
19 **I don't really recall how we looked at these or**
20 **really even looking at them.**
21 Q. All right. Did you look at any of these curves with
22 Dr. Gaddie?
23 **A. I'm sure we did at some point.**
24 Q. Do you have a specific recollection of -- of viewing
25 them with Dr. Gaddie?

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1 **A. No.**
2 Q. Do you remember whether they would have been printed
3 out or would have been pulled up on a computer
4 screen?
5 **A. I don't remember. It could have been either. It**
6 **could have been both.**
7 Q. Did -- what was the nature of the discussions that
8 you had with Dr. Gaddie about the -- the curves that
9 he created?
10 **A. I don't really recall any conversations that**
11 **happened related to these curves.**
12 Q. All right. Do you remember -- do you know what
13 the -- what the file name Team Map means?
14 **A. Going back to prior testimony, I believe if -- I**
15 **believe it was maybe not the final map, but**
16 **something that was close to it and probably a map**
17 **that was following the process in which leadership**
18 **got together and made their decisions on the various**
19 **regional alternatives.**
20 Q. I'm sorry. I didn't mean to cut you off.
21 **A. No. I was done.**
22 Q. Do you know whether -- whether the word "team" has
23 any particular significance in -- in the file name?
24 **A. I think the significance is going back to the prior**
25 **testimony of I believe this was something that**

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1 **followed once leadership had made their decisions,**
2 **and then as I testified to before, they made their**
3 **decisions on various regional alternatives, but they**
4 **didn't necessarily fit together because you may have**
5 **taken an alternative that I proposed in one area and**
6 **an alternative that Joe Handrick had proposed in**
7 **another, and those two areas may crash, the puzzle**
8 **pieces might not fit together.**
9 **So after those decisions were made, there was**
10 **another process where you tried to have -- you had**
11 **to iron out those wrinkles or portions where they**
12 **didn't -- they didn't meet together well, they**
13 **didn't join together well.**
14 **So I think this curve would probably be that**
15 **map after the regional decisions were made. But**
16 **like I said, it might not be the final final product**
17 **that ultimately became Act 43.**
18 Q. If you look on the -- on the Responsive Spreadsheets
19 File Detail Report, so back out to that sort of
20 overall spreadsheet.
21 **A. Okay.**
22 Q. We had talked before about the -- on line number 6
23 or row number 6 Composite_Adam_Assertive_Curve.xlsx.
24 **A. Okay.**
25 Q. Do you see that?

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1 **A. I do.**
2 Q. All right. Can you open that file for me?
3 **A. Okay. I should be there.**
4 Q. All right. So that's the composite Adam assertive
5 curve?
6 **A. Yes.**
7 Q. All right. And you have that one open?
8 **A. I do.**
9 Q. All right. Have -- do you recall seeing this
10 particular curve before?
11 **A. Again same as with the other ones, not a specific**
12 **recollection of this curve, but I'm sure we looked**
13 **at it at some point.**
14 Q. All right. Does -- does looking at this particular
15 spreadsheet now that you have it open, does that
16 give you any -- any further indication of what
17 the -- what the file name, the "composite Adam
18 assertive" means?
19 **A. No.**
20 Q. All right. Okay. I'd like you to go now to the --
21 to the folder that has the -- has the WRK32586, the
22 external. Do you see that? And I'd like you to
23 look at the --
24 **A. I'm sorry, am I looking at a sheet or a folder here?**
25 Q. Looking at a sheet. This is WRK32586 External HD

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1 Responsive Spreadsheets File Data Report -- File
2 Detail Report.
3 **A. Okay. WRK3258 External HD Responsive Spreadsheets**
4 **File Detail Report.**
5 Q. Right.
6 **A. Yes, I'm there.**
7 Q. It's not a short name.
8 **A. Yes, but I am there.**
9 Q. You got it. Okay. Terrific. There is a -- there
10 are a number of files in here that -- file names
11 that refer to Kessler map.
12 **A. Okay.**
13 Q. Okay? And so, for example, there is -- if we look
14 on row 5, you'll see a file name that says -- it's
15 users\afoltz\desktop\workspace\Kessler\Kessler
16 Map\Data. Do you see that?
17 **A. I do.**
18 Q. And then if you go down to line -- or to row 16,
19 there's another one that says Work
20 Space\Kessler\Pass1_Key. Do you see that?
21 **A. I do.**
22 Q. All right. And there are a couple of others as
23 well. Do you know what these particular
24 spreadsheets are? And we can open them up and take
25 a look at them if you want.

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1 **A. I don't know what these particular spreadsheets are.**
2 Q. Okay. Let's do that. Let's open the first one at
3 least, the one that says Kessler Map Data asm.xls.
4 **A. External, 32586. They're labeled a little**
5 **differently here. There's a C in front of**
6 **everything.**
7 Q. Yeah, that's right. There's a C in front of mine,
8 too. Sorry. I was shortcutting that.
9 **A. And which one are you looking at specifically now?**
10 Q. This is User --
11 C:\user\afoltz\desktop\workspace\Kessler\Kessler Map
12 Data.asm?
13 **A. Data.asm. Okay. I'm there.**
14 Q. All right. You have that spreadsheet open?
15 **A. I do.**
16 Q. All right. What -- what is this spreadsheet?
17 **A. I don't know.**
18 Q. As you sit here today, do you recall where you got
19 this spreadsheet from?
20 **A. My guess is that when Representative Kessler and his**
21 **group introduced their map, I reached out to a**
22 **service agency, probably LTSB, maybe LRB, and got**
23 **the map. And, you know, autoBound files, assuming**
24 **it's an autoBound file, which I don't remember, have**
25 **a lot of associated folders and files that come with**

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1 **it. It seems like this would be something that**
2 **could have been associated with that when we**
3 **received a copy of the Kessler map.**
4 Q. Okay. Would you -- would you take a look -- and I'm
5 sorry, I'm just asking you to jump back and forth
6 here between two different things. I'm going to ask
7 you to go back out to the WRK32586 External HD
8 Responsive Spreadsheets File Detail Report.
9 **A. And I am there.**
10 Q. Okay. You're there?
11 **A. Yes.**
12 Q. So if we look at row 5 again.
13 **A. Yep.**
14 Q. And that's the entry for the spreadsheet we were
15 just looking at.
16 **A. Uh-huh.**
17 Q. It says it was created on May 2nd, 2011.
18 **A. Okay.**
19 Q. Okay. Now, if you scroll over further, if you look
20 under the -- if you look under the author, the line
21 is blank and it says last saved by TVAENDRW. Do you
22 see that?
23 **A. I do.**
24 Q. And it -- it says -- and then it says an office
25 created date of 5/24/2005. Do you see that?

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1 **A. Yeah, I do.**
2 Q. Does that give you any further indication of when
3 that spreadsheet was created?
4 **A. The date's very odd. I mean an '05 date showing up**
5 **anywhere in here is very strange so I can't explain**
6 **that.**
7 Q. All right. Do you know who -- who the TVANDERW is?
8 **A. Without knowing exactly, I would assume it's Tony**
9 **Van Der Wielen.**
10 Q. Okay. And if we -- if we go down to line or row 16,
11 that is also a file name that has a reference to
12 Kessler in there?
13 **A. Okay.**
14 Q. And you'll see that that has a created date of May
15 2nd, 2011 as well?
16 **A. Okay.**
17 Q. And if we go down to line 31, there is another entry
18 that says -- has Kessler in the title, in the file
19 name?
20 **A. 31?**
21 Q. Yep. 31.
22 **A. Okay.**
23 Q. And that also was created on May 2nd, 2011?
24 **A. Okay.**
25 Q. And then there are -- there are two more in row 35

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1 and row 42, there are two others that -- file names
2 that have Kessler in them and they both have create
3 dates of May 2nd, 2011?
4 **A. Okay.**
5 Q. Do you see those?
6 **A. I do.**
7 Q. Does that -- whether it's the file names or the
8 dates of creation, does that give you any other
9 information or jog your memory about the -- about
10 those particular files?
11 **A. No.**
12 Q. All right.
13 **A. I mean just it seems -- the only thing that jumps**
14 **out is that it appears that I got it from Tony --**
15 **one of the author changes, tag changes on 42 from**
16 **Tony Van Der Wielen or what I assume to be Tony's**
17 **name to LTSB. So it -- the only thing that jumps**
18 **out at me is it just seems to indicate that I got it**
19 **from LTSB. However, I don't know that for a fact,**
20 **and LTSB may have passed it on to LRB if it were say**
21 **introduced as a draft. I don't know if there was**
22 **any handoff between the service agencies.**
23 Q. Could -- so could this possibly have pertained to a
24 redistricting plan that Representative Kessler had
25 put together before the Baldus litigation?

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1 **A. I have no way of knowing that. I don't know when he**
2 **would have started working on the map that**
3 **eventually became their amicus brief. I mean maybe**
4 **-- and the other thing I don't know if created is to**
5 **the file or to when it was created on a local**
6 **computer so created may be when Representative**
7 **Kessler started his work on it, but then there's**
8 **another creation date when I reached out to the**
9 **service agencies and it transferred over to my**
10 **computer. I don't know, you know, what created**
11 **means in that context.**
12 Q. Okay.
13 MR. POLAND: Tell you what, give me about five
14 minutes. Leave it up there. I'm not sure if I'm
15 going to ask you about any more when we're back.
16 THE VIDEOGRAPHER: We are going off the record
17 at 12:43 p.m.
18 (Discussion held off the record.)
19 THE VIDEOGRAPHER: We are back on the record at
20 12:49 p.m.
21 By MR. POLAND:
22 Q. Mr. Foltz, I'm going to hand you a document that's
23 been previously marked as Gaddie Exhibit No. 43.
24 Have you seen Exhibit No. 43 before?
25 **A. I'm sure I have. I don't specifically recall this**

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1 **one, but I'm sure I have.**
2 Q. All right. You recall a few minutes ago we were
3 looking at a curve it said Team_Map_Curve?
4 **A. Yeah.**
5 Q. All right. And do you see at the top this page 1
6 says Team Map, second page says Team Map Ranking,
7 the third page again says Team Map again?
8 **A. I do see that. Yes.**
9 Q. All right. Do you recall ever looking at -- or
10 strike that question.
11 Is -- is Exhibit 43 a printout from -- from the
12 autoBound program?
13 **A. No.**
14 Q. Printout generated by autoBound program? How would
15 -- how would Exhibit 43 have been generated?
16 **A. I don't -- you know, they would have been an Excel**
17 **file.**
18 Q. Okay. And again, this is the same format as some of
19 the printouts that we were just looking at before,
20 specifically Gaddie Exhibit No. 39.
21 **A. Okay.**
22 Q. Correct?
23 **A. Correct.**
24 Q. One question I didn't ask you, if you look down at
25 the bottom where we've got the Current Map, and then

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1 the New Map boxes at the bottom of the page, what's
2 the purpose of comparing those numbers under the
3 current map with the new map?
4 **A. Just to get a feel for where things are after all**
5 **the decisions had been made.**
6 Q. Did you share the kinds of printouts like we see in
7 Exhibit 43 with the legislative leadership?
8 **A. There's a couple things in that question. During**
9 **the process in which the broader leadership was**
10 **making decisions on the regional alternatives,**
11 **nothing like this would have been available to them.**
12 **There may have been a point after they made their**
13 **decisions where I showed it to someone of that**
14 **leadership team. I don't specifically recall either**
15 **way, though.**
16 Q. All right. Did you -- did you discuss with any of
17 the legislative leadership the -- the changes in the
18 numbers that were -- that were identified from
19 current map to new map on any printouts from Excel
20 files like Exhibit 43 or Exhibit 39?
21 **A. Yeah. Again not that I specifically recall. Like I**
22 **said, I may have shown this to someone after they**
23 **made their decisions, but I don't specifically**
24 **recall having done that.**
25 Q. Did you have discussions at all with Mr. Ottman

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1 about the changes coming from -- or generated by
 2 looking at a comparison between the current map and
 3 the new map?
 4 **A. I'm sure I did at some point, but I don't**
 5 **specifically recall any conversation with regard to**
 6 **the team map.**
 7 Q. Were the -- were those changes from current map to a
 8 new map in different districts, was that information
 9 that you used as part of the decision of how to draw
 10 district lines?
 11 **A. No.**
 12 Q. Did there ever come a time when you looked at the --
 13 the differences in either total GOP seats as they're
 14 identified, for example, on Exhibit 43 from a
 15 current map to a new map and decided that you were
 16 going to adjust district lines to either increase or
 17 decrease the total GOP seat count?
 18 MR. ST. JOHN: Can I have that question read?
 19 Before you answer it.
 20 (Question read.)
 21 THE WITNESS: No. The -- this point in the
 22 process would have been after the regional
 23 alternatives were decided and then there was that
 24 smoothing-out process. So the changes would be more
 25 in the context of the different regions not

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1 necessarily merging together and then having to try
 2 to accommodate the fact that these didn't -- these
 3 two different regional choices didn't merge, they
 4 didn't mesh, and then, you know, trying to
 5 accommodate leadership's decision and the wishes of
 6 the members as we went through that smoothing-out
 7 process.
 8 BY MR. POLAND:
 9 Q. You can set that document to the side.
 10 There are two other spreadsheets I wanted to
 11 ask you about. These are going to be in a different
 12 folder.
 13 **A. Okay.**
 14 Q. So you can get back to the -- to the DVD directory.
 15 **A. Okay.**
 16 Q. And for this I'd like you to look at the -- I think
 17 it's on this one. Let me just make sure. Make sure
 18 I've got the right one here. So this would be the
 19 file that's the WRK32864.
 20 **A. 32864. The folder or --**
 21 Q. Yep. If you look under the Responsive Spreadsheets
 22 Duplicated.
 23 **A. Okay.**
 24 Q. All right.
 25 **A. Okay. I believe I'm there.**

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1 Q. All right. I'd like you to open up the Summary.xlsx
 2 spreadsheet.
 3 **A. Summary singular?**
 4 Q. Yeah, summary singular. You'll see there are two
 5 and it's the summary singular.
 6 **A. Okay. Okay. Summary singular xls sheet.**
 7 Q. Right.
 8 **A. Okay.**
 9 Q. All right. Are you there?
 10 **A. I am.**
 11 Q. All right. And -- I'll just take a glance over your
 12 shoulder to make sure we're looking at the same
 13 thing. Yes. I'll give you a minute to take a look
 14 at it.
 15 **A. (Witness reading.)**
 16 Q. Let me know when you've had a chance to look at it.
 17 **A. Okay.**
 18 Q. All right. Have you had a chance to look at that?
 19 **A. Yeah.**
 20 Q. Is this a -- a spreadsheet that you've ever seen
 21 before?
 22 **A. I'm sure I saw it at some point in the process, but**
 23 **I don't specifically recall seeing it.**
 24 Q. All right. Did -- did you create this spreadsheet?
 25 **A. I don't believe so.**

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1 Q. Do you know who did?
 2 **A. I don't know.**
 3 Q. Looking at the -- looking at the rows 2 and 3,
 4 you'll see it says "Statistical pickup. Currently
 5 held DEM seats that moved to 55 percent or better?"
 6 **A. Uh-huh.**
 7 Q. Do you see that? Do you know what that indicates?
 8 **A. That the seat in question's composite score moved**
 9 **from something sub 55 to something greater than 55.**
 10 Q. Okay. And this would have been an analysis of a
 11 specific plan or a specific map?
 12 **A. Yeah, it would have been. I don't know which one,**
 13 **though, and there's nothing to --**
 14 Q. That's what I was about to ask you, if there was a
 15 way of telling based on this spreadsheet which one
 16 it might have been.
 17 **A. No, there isn't.**
 18 Q. If you look just below that or just down a few rows
 19 to row 13 and 14, you see it says, "GOP Seats
 20 strengthened a lot. Currently held GOP seats that
 21 start at 55 percent or below that improve by at
 22 least one percent?"
 23 **A. I do.**
 24 Q. All right. What does -- do you know what that
 25 means?

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1 **A. It's fairly self -- I mean it seems to me that the**
 2 **composite increased by at least one percent on**
 3 **whatever map this is. And start below 55. So below**
 4 **55, and an improvement on whatever score is used**
 5 **here, I'm assuming the composite, by at least one**
 6 **percent.**
 7 Q. All right. And then if we go down below that, we
 8 see it says -- and this is rows 35 and 36 it says,
 9 "GOP seats strengthened a little. Currently held
 10 GOP seats that start at 55 percent or below that
 11 improve less than one percent."
 12 Do you see that?
 13 **A. I do.**
 14 Q. And again is that something you'd say that's fairly
 15 self-explanatory?
 16 **A. Yeah. Fairly.**
 17 Q. All right. And then rows 53 and 54, "GOP seats
 18 weakened a little. Currently held GOP seats that
 19 start at 55 percent or below that decline."
 20 Do you see that?
 21 **A. I do.**
 22 Q. Does that have any meaning beyond the explanation
 23 that's given there?
 24 **A. Yeah. Yeah, currently held seats that start at 55**
 25 **or below that decline. Yeah. I think it's fairly**

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1 **self-explanatory in that sentence.**
 2 Q. All right. Below that then we see "GOP seats likely
 3 lost. Currently held GOP seats that drop below 45
 4 percent"?
 5 **A. Okay.**
 6 Q. All right. And any specific meaning to that beyond
 7 what's written there?
 8 **A. No. Seems again to be fairly self-explanatory.**
 9 Q. All right. Below that there is a -- a 74 -- line 74
 10 and 75. It says, "GOP donors to the team.
 11 Incumbents with numbers above 55 percent that donate
 12 to the team."
 13 Do you see that?
 14 **A. I do.**
 15 Q. What does that indicate?
 16 **A. I don't know.**
 17 Q. Did you ever hear that term used before, donors to
 18 the team?
 19 **A. No. Maybe. Nothing that I recall.**
 20 Q. All right. We had -- we had looked at an Exhibit
 21 39, for example, a spreadsheet that was labeled Team
 22 Map, and we'd seen a Team Curve before.
 23 **A. Uh-huh.**
 24 Q. Does that -- the captions in those documents about
 25 team have anything -- any meaning in -- in the

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1 context of this spreadsheet that donate to the team?
 2 **A. I wouldn't think so. It may just be a broader**
 3 **reference to the caucus, not necessarily**
 4 **attributable to the map. So I don't know which one**
 5 **that could refer to.**
 6 Q. All right. And then below in rows 89 and 90 you'll
 7 see it says, "DEMS weakened. Currently held DEM
 8 seats 45 percent or better that become more GOP."
 9 Do you see those? Do you see those rows?
 10 **A. I do.**
 11 Q. All right. And is there any specific meaning that
 12 you attribute to that heading?
 13 **A. No, I mean the heading, or the subheading I should**
 14 **say, is fairly self-explanatory to what the -- what**
 15 **the numbers below seem to indicate.**
 16 Q. Okay. Does having looked at this spreadsheet at all
 17 reflect your recollection about who might have
 18 prepared this?
 19 **A. No.**
 20 Q. Do you know why it was prepared?
 21 **A. No.**
 22 Q. All right. I'd like you to take a look then at the
 23 other spreadsheet, the one that you had identified
 24 before as Summaries, plural.
 25 **A. Okay. Okay. Summaries plural within the same**

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1 **folder?**
 2 Q. Right. Yeah.
 3 **A. Yes.**
 4 Q. Should be just right there.
 5 **A. Okay.**
 6 Q. All right. Are you there?
 7 **A. I am.**
 8 Q. I'll give you a minute to take a look at it if you'd
 9 like.
 10 **A. (Witness reading.) A lot of columns here.**
 11 Q. Yeah. There are a lot of columns.
 12 **A. Okay. I think I've got -- I'm sure you'll point me**
 13 **to the columns and rows that you're specifically**
 14 **asking about.**
 15 Q. Yeah, I will.
 16 **A. There's a lot going on here.**
 17 Q. And this is the last spreadsheet I'm going to ask
 18 you about. Is this -- is this a spreadsheet that
 19 you've seen before?
 20 **A. Not that I can recall.**
 21 Q. Not one that you prepared then?
 22 **A. I don't believe so. This just doesn't feel like**
 23 **something I would prepare.**
 24 Q. Do you know who did prepare it?
 25 **A. No.**

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1 Q. If you look at the sheet one and if you're scrolled
2 all the way over to the left, so we're in columns A
3 through L, do you see that there is a -- on cell A1
4 it says Racine/Kenosha?
5 **A. I do see that.**
6 Q. All right. What does that refer to?
7 **A. I am assuming Racine and Kenosha.**
8 Q. All right. And then if you look in column A, there
9 are a number of numbers, 61, 62, 63, 64, 65, 66. Do
10 you see those?
11 **A. I do.**
12 Q. Do those refer to the assembly district numbers that
13 are in Racine and Kenosha?
14 **A. Yes.**
15 Q. And then just below that SD 21, SD 22, those are the
16 two senate districts?
17 **A. That's correct.**
18 Q. Now, if we look over in the next row, I'm sorry, the
19 next column it says Current Law, and there are some
20 numbers down that column, correct?
21 **A. Uh-huh.**
22 Q. Then in row -- in column D it says Base Map, there's
23 some numbers below that; if you look at column F it
24 says Assertive Map, some numbers below that?
25 **A. Uh-huh.**

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1 Q. And then over in column I it says Aggressive Map and
2 there are some numbers below that. Do you see that?
3 **A. Uh-huh.**
4 Q. Do you know what the numbers are --
5 **A. Yes.**
6 Q. -- that appear in those columns?
7 **A. I don't know. I would assume it's some type of**
8 **composite score but not knowing if it's the same**
9 **composite score you see in the summary sheets that I**
10 **put together with the red and the blue formatting.**
11 Q. Are those partisan scores?
12 **A. They would be partisan composite scores.**
13 Q. Are those partisan composite scores for the GOP do
14 you know?
15 **A. I believe so. Yes.**
16 Q. If you scroll over then, I'd like to look at it's
17 columns AG through AR.
18 **A. AG through AR?**
19 Q. Yeah.
20 **A. Oh, too far. Okay.**
21 Q. So you'll see that beginning in -- it's column AG,
22 row 1, it says Tale of the Tape. Do you see that?
23 **A. I do.**
24 Q. Do you know what that refers to?
25 **A. I think it's just a back-of-the-napkin way of**

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1 **referring to a summary of the overall map.**
2 Q. All right. And we see there and I'm looking here
3 now at rows 3 through 16, so just staying within the
4 assembly.
5 **A. Uh-huh.**
6 Q. This looks to me at least like we have the same
7 Strong GOP, Lean GOP, Total GOP, then Swing numbers,
8 and then Lean DEM, Strong DEM, and Total DEM as we
9 saw at the bottom of some of the xl file printouts
10 we looked at before, correct?
11 **A. Correct.**
12 Q. All right. Then if we -- if we look over at columns
13 AL through AR, you see AL has Joe Assertive, column
14 AN has Tad assertive -- or Tad Aggressive. Column
15 AP says Adam Aggressive. Do you see those?
16 **A. I do.**
17 Q. All right. Do those -- and then there are some
18 partisan scores below those as well, right?
19 **A. Yes. Or I'm sorry, no, there are counts below**
20 **those, not scores.**
21 Q. Those are counts?
22 **A. I believe so.**
23 Q. Okay. Well, yes. Okay. Understand. Right.
24 District counts in other words?
25 **A. Yes. For those various categories. This thing is**

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1 **horribly formatted.**
2 Q. And then over on the -- in column AR it says Team
3 Map. Do you see that?
4 **A. Yes.**
5 Q. And those have zero below all of those, correct?
6 **A. They do.**
7 Q. All right. Looking at -- looking at those columns,
8 Joe Assertive, Tad Aggressive, Adam Aggressive, does
9 that refresh any recollection about any meaning that
10 those -- we saw some of those file names before --
11 that those might have?
12 **A. Those are not my file names.**
13 Q. Okay. Is it your understanding that those represent
14 different district configurations?
15 **A. It appears to be that way, yes.**
16 Q. All right. Now, in the -- in the center of -- of
17 that collection of rows and columns we were looking
18 at, there's -- and this is column AK. It says
19 "Current map: 49 seats are 50 percent or better."
20 Do you see that?
21 **A. Uh-huh.**
22 Q. Do you know what that means?
23 **A. Again fairly self-explanatory. I think it's a**
24 **reflection that under the current -- or pre Act 43**
25 **redistricting plan, that using whatever composite,**

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1 **there were 49 seats that were 50 percent or better.**
 2 Q. And that would be 50 percent or better GOP, correct?
 3 **A. Correct.**
 4 Q. And then below that it says "Team Map: 59 assembly
 5 seats are 50 percent or better."
 6 Do you see that?
 7 **A. I do.**
 8 Q. And what does that mean?
 9 **A. Again I think it's fairly self-explanatory that the
 10 team map was with 59 seats that were 50 percent or
 11 better on that composite.**
 12 Q. All right. I'd like then to draw your attention to
 13 this would be columns AU through BL.
 14 **A. AU through BL.**
 15 Q. Right. And we're going to be looking at rows 2
 16 through 6.
 17 **A. Okay.**
 18 Q. And so there is -- there's a header that says Good
 19 Outcomes, and then there are some columns that are
 20 defined below that, "Statistical Pickup," and "55
 21 Percent and Below GOP Inc Strengthened," "45 Percent
 22 and Over DEM Incumbent Weakened," "GOP Donors. "
 23 Do you see that?
 24 **A. I do.**
 25 Q. Okay. Does that have any meaning for you? Do you

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1 know what that means?
 2 **A. No. I mean they're fairly self-explanatory. I mean
 3 it's -- and there's no data below it either.**
 4 Q. Right.
 5 **A. Yeah.**
 6 Q. Did you -- I was going to ask you've never seen this
 7 spreadsheet, but I'll ask the questions anyways.
 8 Have you ever seen a version of this spreadsheet
 9 that has anything filled in there?
 10 **A. Not that I can think of.**
 11 Q. All right. And then to the right of that it says
 12 Bad Outcomes, and it says, "45 Percent and Above DEM
 13 Incumbent Strengthened," next to it "55 Percent and
 14 Below GOP Weakened."
 15 **A. Uh-huh.**
 16 Q. Then next to it is "Statistical Loss," then "GOP
 17 Non-donors." Do you see that?
 18 **A. I do.**
 19 Q. Do you know what that means?
 20 **A. I mean again I think the headings are fairly
 21 self-explanatory. You know, calls back to a lot of
 22 the same language used in that summary spreadsheet
 23 from before.**
 24 Q. All right. And if you look just below -- didn't
 25 mean to cut you off there.

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1 **A. No.**
 2 Q. But if you look below that, you'll see it looks like
 3 it's sort of a -- a key or some definitions. So
 4 this begins in row 18. Just below that it says,
 5 "Statistical pickup equals seat that is currently
 6 held by DEM that goes to 55 percent or more."
 7 **A. Uh-huh.**
 8 Q. And below it says, "Example: If number 13 Cullen
 9 goes from 45 percent to 58 percent."
 10 Do you see that?
 11 **A. I do.**
 12 Q. And then below, "GOP incumbent strengthened equals
 13 positive movement on composite."
 14 **A. Yeah.**
 15 Q. Do you see that? Does that have any meaning for
 16 you?
 17 **A. Again I think it's fairly self-explanatory on
 18 various ways that this is attempting to summarize
 19 the decisions that were made.**
 20 Q. All right. So it's equating a GOP incumbent
 21 strengthened -- what does a positive movement on
 22 composite mean?
 23 **A. I think it would be a pos -- well, a positive change
 24 from current plan to new plan on whatever composite
 25 metric is being used.**

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1 Q. So it would increase the partisan score for the GOP?
 2 **A. I think that's a fair summary.**
 3 Q. And then below that "DEM incumbent weakened equals
 4 positive GOP movement on composite"?
 5 **A. Uh-huh. Sorry.**
 6 Q. And below that it says, "GOP donors equals those who
 7 are helping the team."
 8 **A. Right.**
 9 Q. Do you see that? Does that refresh your memory at
 10 all about what it means to be a donor who's helping
 11 the team?
 12 **A. Yeah, I don't -- again not knowing if that's
 13 referring to a map or to, you know, a
 14 back-of-the-napkin way of referring to the caucus, I
 15 don't know specifically what the intent was. It
 16 could be either.**
 17 Q. All right. So just below that then we see it says,
 18 "DEM incumbent strengthened equals DEM over 45
 19 percent who has negative movement on composite."
 20 Do you see that?
 21 **A. I do.**
 22 Q. And so does that indicate -- the negative movement
 23 on composite, that means it's going to be a lower
 24 composite score on the composite?
 25 **A. Yes.**

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1 Q. All right. Below that it says, "GOP incumbent
2 weakened equals those 55 percent and below who have
3 negative movement on composite." Again that's a --
4 that's going to be a loss in the partisan score?
5 **A. Uh-huh. Yes.**
6 Q. And then "Statistical loss equals seat that is
7 currently held by GOP that goes to 45 percent or
8 below," then in parens, "Example: If number 47 goes
9 all Dane County" -- or CTY. I assume that means
10 county?
11 **A. Right.**
12 Q. -- "we lose the number, but not the incumbent."
13 Do you see that?
14 **A. I do.**
15 Q. Right. And what does that indicate?
16 **A. It seems to -- well, I mean the first part is fairly**
17 **self-explanatory of there's a belief that if a seat**
18 **dips below 45, it's statistically lost. 47 goes we**
19 **lose the number, but not the incumbent. I think**
20 **this is just alluding to a remuneration where --**
21 **where an incumbent may not keep the same number, but**
22 **yet this metric is based off of the seat number.**
23 **That's how I read it.**
24 Q. All right. And then finally just below that it
25 says, "GOP non-donors equals those over 55 percent

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1 who do not donate points."
2 Do you see that?
3 **A. I do.**
4 Q. What does that mean?
5 **A. It seems to imply that an incumbent is over 55**
6 **percent and does not take a negative hit on the**
7 **composite.**
8 Q. Do you know what the -- the reference to non-donors
9 means?
10 **A. I think it's -- again I think it's a little bit more**
11 **self-explanatory that it's that they maintain or**
12 **increase on their composite.**
13 Q. All right.
14 MR. POLAND: Just a minute here. Okay. I
15 think that's all I have.
16 MR. KEENAN: I have some questions.
17 EXAMINATION
18 BY MR. KEENAN:
19 Q. We'll just start off on the document that we're on
20 now, the Summaries spreadsheet. I believe you
21 testified before this deposition you had never seen
22 this spreadsheet?
23 **A. I may have. I don't specifically recall it, though.**
24 Q. Okay. And so Mr. Poland asked you a series of
25 questions asking you to read words in the

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1 spreadsheet and then give your impression of them.
2 Do you recall those questions?
3 **A. Yes.**
4 Q. Okay. Was that -- were your answers based on any
5 preexisting knowledge of what this document
6 contained?
7 **A. No, just trying to interpret it on the -- on the**
8 **fly.**
9 Q. Okay. And then we also looked at a similar document
10 called Summary singular?
11 **A. Yes.**
12 Q. Mr. Poland also asked you a series of questions
13 about that document. Were your answers about it
14 based on any knowledge you had coming into this
15 deposition about the contents of the document?
16 **A. No. I -- like I said, I may have seen this at some**
17 **point, but my summaries were the -- the red and blue**
18 **sheets as we've talked about.**
19 Q. And so your answers where he asked you to read some
20 words on the spreadsheet and then tell what they
21 meant, that was just based on you reading them here
22 at the deposition and giving your opinion?
23 **A. Uh-huh.**
24 MR. POLAND: Object to the form of the
25 question. Leading.

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1 THE WITNESS: Yes, I was reading them on the
2 fly and trying to extrapolate based on the heading,
3 the plain language reading, plus if there were any
4 data below that what was implicated.
5 BY MR. KEENAN:
6 Q. And both the summary and the summary documents, did
7 you create those documents?
8 **A. I don't -- no, I didn't.**
9 Q. And so you don't actually know what -- do you know
10 what the author of the document intended by the
11 terms and titles that he used in them?
12 **A. No. Everybody in the process had their own way of**
13 **summarizing the decisions that were made. My**
14 **process was the red and blue spreadsheets with --**
15 **with the summary data at the bottom and the formulas**
16 **and the conditional formatting, so that's the way I**
17 **chose to summarize the decisions that were**
18 **ultimately made by the legislative leaders and**
19 **eventually the caucus as a whole, the body as a**
20 **whole.**
21 Q. Okay. And just some factual questions. Coming out
22 of the 2010 elections, how many assembly seats had
23 the republicans won?
24 **A. Sixty in the assembly I believe was where we were**
25 **at.**

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1 Q. Okay. And then in the 2012 election, how many seats
2 did the republicans win?
3 **A. 2012, 63?**
4 Q. I believe that's correct, but so there was -- in
5 2010 there were 60 republicans who won assembly
6 seats; is that correct?
7 **A. I believe so. Yes.**
8 Q. And if we look at, for example, Exhibit -- Gaddie
9 Exhibit 43 which you were shown as a Team Map
10 summary sheet.
11 **A. Yes.**
12 Q. Okay. If we look at the Current Map, that refers to
13 the -- the plan that was in place for the 2010
14 election?
15 **A. Yes.**
16 Q. Okay. And that shows that there's 40 total GOP
17 seats, safe plus lean. Do you see that?
18 **A. I do.**
19 Q. And then there's swing seats 19, 48 to 52. Do you
20 see that?
21 **A. I do.**
22 Q. Okay. So am I correct in reading this sheet that in
23 the 2010 elections the republicans won more seats
24 than that were characterized as total GOP seats and
25 all the swing seats in the current map?

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1 **A. Yeah, the sum of those two would have been 59 seats,
2 and we came out of the -- we, the republican
3 assembly caucus, came out of that election with 60
4 seats.**
5 Q. Okay. And then looking at the New Map, this Team
6 Map sheet shows there's total GOP seats, safe plus
7 lean 52, and then swing 48 to 52 of 10. That's
8 correct?
9 **A. Yes, it is.**
10 Q. And how many republican assembly people are there
11 right now?
12 **A. Sixty-three.**
13 Q. Okay. So republicans have won even more seats than
14 are listed here as total GOP seats safe and lean and
15 all the swing districts; is that correct?
16 **A. The sum of those two numbers 52 and 10 would lead
17 you with 62, and the current membership is 62, so
18 yes.**
19 Q. Okay. So I just want to go back to your deposition
20 testimony. I'm looking at Exhibit 75. This is the
21 deposition from December 21, 2011. This was the
22 first deposition from the Baldus case.
23 **A. Okay.**
24 Q. And Mr. Poland had previously shown you also some --
25 an opinion in the Baldus case that referenced some

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1 testimony about the goals of the -- the process and
2 the maps. So I'm going to point you to page 156 of
3 the deposition.
4 **A. Okay.**
5 Q. And if you look at line 16 to 18, there's a question
6 and answer, and it's -- question is, "Was it a part
7 of the goal to increase the republican membership in
8 the legislature?"
9 The answer is, "No."
10 Do you see that?
11 **A. I do.**
12 Q. Okay. And you've testified today that the tes --
13 this testimony remains correct?
14 **A. Yes. I have testified that -- to that.**
15 Q. What was the republican membership in the
16 legislature at the time you were drawing the Act 43
17 map?
18 **A. Sixty members in the assembly.**
19 Q. Okay. And then how many senators?
20 **A. Eighteen at that point?**
21 Q. Okay. So was it a part of your goal to increase the
22 republican membership in the legislature from 60 to
23 above 60?
24 **A. No.**
25 Q. Okay. We can move on to page 195.

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1 **A. Okay.**
2 Q. And there's a question starting on line 3 that says,
3 "What about maximizing republican representation in
4 the assembly?"
5 And the answer is, "No."
6 Was it a goal of yours in drafting the maps
7 that became Act 43 to maximize republican
8 representation in the assembly?
9 **A. No.**
10 Q. And why do you say that?
11 **A. My goal is to get -- well, it's the competing goals
12 of redistricting. Not only the -- you know, the
13 criteria of compactness, contiguity, sensitivity to
14 minority concerns, but there was also the other end
15 of this which is that it is a bill like any other
16 bill that requires a certain number of votes that
17 gets over the finish line in the state assembly.**
18 Q. Okay. So and by testifying that you -- your goal
19 was not to maximize republican representation in the
20 assembly, did you mean that you did not consider
21 republican partisanship at all in drawing the Act 43
22 districts?
23 MR. POLAND: Object to the form of the
24 question. Leading.
25 THE WITNESS: The -- again going back to the

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1 prior testimony that when I sat down with a member
2 of the legislature and they asked me for a certain
3 thing, my job is to try to accommodate that. If I
4 can't accommodate that, or at least partially
5 accommodate that, we run the risk of losing votes of
6 members to ultimately pass this bill.
7 So I need to be cognizant of what their
8 requests are regardless of the motivation of that.
9 And like I said, whether it be that they want to
10 represent their old high school that they don't
11 currently represent or if there are more friendly
12 republicans in that area, I have to try to
13 accommodate that to the best of my ability.
14 BY MR. KEENAN:
15 Q. In this deposition -- in this deposition today and
16 then in the other depositions there's been questions
17 asked about things you consider when drawing
18 districts.
19 **A. Uh-huh.**
20 Q. What do you understand that to mean when someone
21 asks you what you were considering when you were
22 drawing districts?
23 **A. Well, and again it goes back to traditional**
24 **redistricting criteria: compactness, contiguity,**
25 **population equality, sensitivity to minority**

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1 **concerns, and then also consideration of what that**
2 **specific member is asking for with regard to**
3 **their -- with regard to their district.**
4 Q. And I guess I kind of meant something more along the
5 lines of what -- what did you understand when
6 someone refers to drawing a district? What actually
7 were you doing when you're drawing a district?
8 **A. The mechanical process --**
9 Q. Yeah.
10 **A. -- of drawing the district? It's a matter of**
11 **assigning geography to a district, to a number, so**
12 **that that geography at its smallest can be a census**
13 **block and at its largest could be multiple counties.**
14 **And so you select that level of geography and an**
15 **associated district number, and then you basically**
16 **click something in the software that assigns Door**
17 **County to District 1 in that case. You know,**
18 **obviously Peninsula, that's always kind of been the**
19 **first assembly district. So in that case you can**
20 **very easily just assign the entirety of the county**
21 **as opposed to assigning census block by census block**
22 **or municipality by municipality.**
23 Q. And when you were working in the autoBound program
24 actually drawing a district, what kind of
25 partisanship information was available to you while

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1 engaging in the process of assigning geographic
2 areas to a particular district?
3 **A. Partisan data including the history of prior**
4 **elections under what would be if you took those**
5 **prior elections and applied it to the new lines,**
6 **those would be available. So you could look at a**
7 **prior, you know, J.B. Van Hollen from 2010 race**
8 **under a new configuration or an evolving and draw a**
9 **configuration. And then also the partisan composite**
10 **was available to look at for that individual**
11 **district as the geographic assignments were made.**
12 Q. And you used the example of drawing District 1.
13 When you were drawing District 1, what type of
14 partisanship information was available on the screen
15 in autoBound? Was it just District 1 or was it the
16 entire state?
17 **A. If other districts were assigned, it is possible**
18 **that I could see that. If District 2 had already**
19 **been -- let's say I assigned District 1 because it's**
20 **the Peninsula and it's easy to assign. I could see**
21 **the partisan numbers, whether it be the history or**
22 **the composite for that district, and then I could**
23 **see District 2, that individual districts, because**
24 **the matrix has more lines -- every district is a**
25 **line, so I could see multiple districts, and by that**

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1 **I mean multiple lines, but only so much as the**
2 **screen would show me at a given time.**
3 Q. And could you see the impact a change you're making
4 to a particular district would have on the entire
5 state's political balance?
6 **A. No.**
7 MR. KEENAN: I think I might want to take a
8 break to make sure there's no other questions in my
9 notes. I may just have a couple more, but I may be
10 done. So --
11 THE VIDEOGRAPHER: We are going off the record
12 at 1:27 p.m.
13 (Discussion held off the record.)
14 THE VIDEOGRAPHER: We are back on the record at
15 1:28 p.m.
16 MR. KEENAN: We're back on the record and I
17 have no further questions.
18 MR. ST. JOHN: I have no further questions.
19 MR. POLAND: I don't have any questions either.
20 THE VIDEOGRAPHER: This ends the video
21 deposition of Adam R. Foltz on March 31, 2016; the
22 time 1:28 p.m.
23 (Deposition ended at 1:28 p.m.)
24
25

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Adam R. Foltz**

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<p>1 STATE OF WISCONSIN } 2 } SS: 3 COUNTY OF WALWORTH } 4 5 I, LAURA L. KOLNIK, Registered Professional 6 Reporter and Notary Public in and for the State of 7 Wisconsin, do hereby certify that the foregoing 8 proceedings were taken before me on the 31st day of 9 March, 2016. 10 11 That the appearances were as noted initially. 12 13 That before said witness testified, he was first 14 duly sworn by me to testify the truth, the whole truth 15 and nothing but the truth relative to said cause. 16 17 I further certify that I am neither counsel for, 18 related to, nor employed by any of the parties to the 19 action in which this proceeding was taken; and, further, 20 that I am not a relative or employee of any attorney or 21 counsel employed by the parties hereto, nor financially 22 interested, or otherwise, in the outcome of this action. 23 24 That the foregoing proceedings are true and correct 25 as reflected by my original machine shorthand notes taken at said time and place. Dated this ____ day of _____, ____ _____ LAURA L. KOLNIK, RPR/RMR/CRR Notary Public State of Wisconsin My commission expires February 23, 2018</p>	

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AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT
for the

WILLIAM WHITFORD et. al

Plaintiff

v.

GERALD NICHOLS et al

Defendant

Civil Action No. 15-cv-421-bbc

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Adam Foltz
Office of Senator Scott L. Fitzgerald
Room 211 South, State Capitol, Madison WI 53707

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action.

Table with 2 columns: Place (Rathje & Woodward, LLC, 10 E Doty St, Suite 800, Madison WI 53703) and Date and Time (Thursday March 31, 2016 at 9am)

The deposition will be recorded by this method: Stenographic and videographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: Please see attached Exhibit A

The following provisions of Fed. R. Civ. P. 45 are attached - Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 3/22/2016

CLERK OF COURT

OR

Handwritten signature of Adam Foltz

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs, who issues or requests this subpoena, are:

Ruth Greenwood, Attorney, Chicago Lawyers' Committee for Civil Rights under Law, rgreenwood@clccrul.org (202) 560-0590

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).



AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. 15-cv-421-bbc

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

Exhibit A

Documents to be produced by Adam Foltz:

All MS Excel spreadsheets and MS Word documents in native format generated during the redistricting process and formation of the state assembly boundaries set out in Act 43 of 2011 that mention or evaluate potential or actual partisan performance, between the dates of April 1, 2011 and August 9, 2011



**A hard copy of this flash drive will be hand-delivered to the clerk.

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

WILLIAM WHITFORD, et al.,

Plaintiffs,

Case No. 15-CV-421

v.

GERALD NICHOL, et al.,

Defendants.

DEFENDANTS' RULE 26(a)(1) INITIAL DISCLOSURES

Defendants, by their attorneys, make the following initial disclosures:

A. Individuals potentially having knowledge regarding this matter.

Adam Foltz

Aide, Wisconsin State Legislature

c/o Attorneys Brian Keenan and Anthony Russomanno

Wisconsin Department of Justice

17 West Main Street

Madison, WI 53707

(608) 266-0020 (AAG Keenan)

(608) 267-2238 (AAG Russomanno)

To the extent it may become relevant if the case survives the motion to dismiss, Adam Foltz, who was involved in the 2012 districting process, may provide testimony regarding that process and the bases for districting.



Tad Ottman
Aide, Wisconsin State Legislature
c/o Attorneys Brian Keenan and Anthony Russomanno
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
(608) 266-0020 (AAG Keenan)
(608) 267-2238 (AAG Russomanno)

To the extent it may become relevant if the case survives the motion to dismiss, Tad Ottman, who was involved in the 2012 districting process, may provide testimony regarding that process and the bases for districting.

Defendants also anticipate naming one or more experts at a future time, in rebuttal or otherwise, pursuant to the schedule to be set by the court.

B. Potentially relevant documents

To the extent it may become relevant if the case survives the motion to dismiss, Defendants reserve the right to rely on documents or information previously exchanged, filed, produced, or otherwise made publically available in the previous federal litigation regarding the 2011 districting, *Baldus v. Wisconsin Government Accountability Board*, United States District Court for the Eastern District of Wisconsin, Case Nos. 11-CV-562, 11-CV-1011, which, among other things, may provide background information and data about the districting process and criteria used. Those documents are available in the files of counsel for the *Baldus* case, including attorney Peter Earle who is also counsel in the present case, and via the federal courts' PACER website.

The defendants reserve the right to supplement their disclosures with documents or individuals that become known through further discovery, or based on legal standards that the court might announce if the defendants' motion to dismiss is denied.

C. Calculation of damages.

Not applicable to the defendant.

D. Insurance agreements.

Not applicable.

Dated this 7th day of October, 2015.



BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

Attorneys for Defendants

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russomannoad@doj.state.wi.us

should be prepared to discuss how they wish to proceed.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. CAC's motion for summary judgment [D. 133] is **GRANTED-IN PART** and **DENIED-IN-PART**;
2. The JM Defendants' motion for summary judgment and for dissolution of the stipulated temporary injunction [D. 126] is **DENIED**;
3. CAC's motion to strike or disregard most of the JM Defendants' responses to CAC's proposed findings of fact [D. 182] is **DENIED** as moot;
4. CAC's motion for waiver of argument, disregard of facts, and limited waiver of attorney-client privilege [D. 184] is **DENIED** as moot;
5. CAC's motion to strike and/or disregard most portions of the affidavit of James Borneman [D. 186] is **DENIED** as moot;
6. CAC's motion to strike and/or disregard paragraph 4 of the declaration of attorneys Joseph Seifert and Evan Knupp and Exhibit I [D. 188] is **DENIED** as moot;
7. The JM Defendants' motion to withdraw its motion to dissolve the stipulated preliminary injunction [D. 191] is **DENIED** as moot;
8. The JM Defendants' motion to quash [D. 194] is **DENIED**;
9. CAC's motion to supplement the evidentiary record [D. 203] is **GRANTED**; and
10. The Court will conduct a telephonic status conference on **March 1, 2012** at

11:30 am (CST). The Court will initiate the call.

IT IS FURTHER ORDERED THAT Defendants Jeffrey Moon, JM Casting, and their officers, agents, servants, employees, attorneys, and any entity controlled by or in which they have an interest in, and all persons who are in active concert or participation with such persons, are **RESTRAINED** from directly or indirectly: (1) operating a business competitive to that of CAC; (2) further using and/or disclosing the Proprietary Process and/or confidential Business Information; (3) assisting, aiding, abetting or conspiring with any other Defendant from breaching the Non-Competition Agreement; (4) contacting any customer of CAC, including but not limited to U.S. Battery, with respect to any product manufactured or that could be manufactured by CAC using the Proprietary Process and/or the Confidential Business Information; and (5) interfering or doing business with any of CAC's suppliers, customers and/or prospective customers as it relates to the manufacture and/or sale of battery terminals using the Proprietary Process.



Alvin BALDUS, Carlene Bechen, Elvira Bumpus, Ronald Biendseil, Leslie W. Davis, III, Brett Eckstein, Gloria Rogers, Richard Kresbach, Rochelle Moore, Amy Risseeuw, Judy Robson, Jeanne Sanchez-Bell, Cecelia



BALDUS v. MEMBERS OF WISCONSIN GOVERNMENT

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Cite as 849 F.Supp.2d 840 (E.D.Wis. 2012)

Schliepp, Travis Thyssen, Cindy Barbera, Ron Boone, Vera Boone, Evanjelina Cleerman, Sheila Cochran, Maxine Hough, Clarence Johnson, Richard Lange, and Gladys Manzanet, Plaintiffs,

Tammy Baldwin, Gwendolynne Moore and Ronald Kind, Intervenor-Plaintiffs,

v.

MEMBERS OF the WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, each only in his official capacity: Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, and Kevin Kennedy, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants,

F. James Sensenbrenner, Jr., Thomas E. Petri, Paul D. Ryan, Jr., Reid J. Ribble, and Sean P. Duffy, Intervenor-Defendants.

Voces De La Frontera, Inc., Ramiro Vara, Olga Vara, Jose Perez, and Erica Ramirez, Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, and Kevin Kennedy, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants.

Case Nos. 11-CV-562 JPS-DPW-RMD, 11-CV-1011 JPS-DPW-RMD.

United States District Court,
E.D. Wisconsin.

Decided March 22, 2012.

Background: After two actions were brought to challenge newly-enacted Wis-

consin statutes establishing new legislative and congressional districts, State's Democratic members of Congress were permitted to intervene as plaintiffs, and State's Republican members of Congress were permitted to intervene as defendants, 2011 WL 5834275. The actions were consolidated, and defendants and intervenor-defendants moved to dismiss.

Holdings: The District Court held that:

- (1) new legislative districts did not violate "one-person, one-vote" principle;
- (2) voters who were moved did not thereby have their right to vote diluted;
- (3) new congressional districts did not violate "one-person, one-vote" principle; but
- (4) legislative redistricting plan violated Voting Rights Act (VRA), by "cracking" Latino community into two Latino influence districts.

Ordered accordingly.

See also 849 F.Supp.2d 862, 2012 WL 1004871.

1. Constitutional Law ⇌3658(6)

States ⇌27(5)

New legislative districts created by Wisconsin legislature did not violate "one-person, one-vote" principle despite the partisan motivation for the districts' deviations from census precise ideal population; total population deviations of 438 persons for newly adopted assembly districts, a maximum deviation of 0.76%, and 1,076 persons for newly adopted senate districts, a maximum deviation of 0.62%, were de minimis. U.S.C.A. Const.Amend. 14.

2. States ⇌27(5)

United States ⇌10

Plaintiffs had initial burden, in their action challenging newly-enacted Wisconsin statutes establishing new legislative

and congressional districts, to show (1) the existence of a population disparity that (2) could have been reduced or eliminated by (3) a good-faith effort to draw districts of equal proportion; if plaintiffs succeeded in making that showing, burden shifted to defendants to show that each significant variance between districts was necessary to achieve some legitimate goal.

3. States ⇌27(5)

Acceptable justifications for significant variance between voting districts include core retention, avoidance of split municipalities, contiguity, compactness, and maintenance of communities of interest.

4. Constitutional Law ⇌3658(3)

States ⇌27(4.1)

Wisconsin voters who were moved, during redistricting, from certain even-numbered state senate districts to odd-numbered senate districts, did not thereby have their right to vote diluted, in violation of their equal protection rights, even though they had to wait an additional two years before they could vote for a state senator; there was no evidence that any particular group would suffer more disenfranchisement than the remainder of the population. U.S.C.A. Const.Amend. 14.

5. Constitutional Law ⇌3658(6)

United States ⇌10

Absent any evidence of population deviation, new congressional districts created by Wisconsin legislature did not violate "one-person, one-vote" principle under the Equal Protection Clause. U.S.C.A. Const. Amend. 14.

6. United States ⇌10

Absent any specific proposal offering a workable standard against which to measure new congressional districts created by Wisconsin legislature, allegation that districts were created through partisan gerrymandering failed to state a judiciable complaint.

7. States ⇌27(6)

To succeed in a claim that a legislative redistricting plan violates the Voting Rights Act (VRA), plaintiffs must show that (1) the minority groups are sufficiently large and geographically compact to create a majority-minority district, (2) the minority groups are politically cohesive in terms of voting patterns, and (3) voting is racially polarized, such that the majority group can block a minority's candidate from winning. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

8. States ⇌27(4.1)

If plaintiffs make threshold showing that a legislative redistricting plan violates the Voting Rights Act (VRA), district court must evaluate the totality of the circumstances to determine whether the minority groups have been denied an equal opportunity to participate in the political process and elect candidates of their choice. Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b).

9. States ⇌27(6)

Wisconsin legislative redistricting plan denied Latinos an equal opportunity to participate in the political process and elect candidates of their choice, in violation of the Voting Rights Act (VRA), by "cracking" the Latino community into two Latino influence districts; community was sufficiently large and geographically compact to create one majority-minority district and voting in the area was racially polarized and cohesive. Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b).

10. Injunction ⇌1066, 1348, 1504

District Court lacked jurisdiction to enjoin the conduct of any special or recall elections using district lines created by newly-enacted Wisconsin statutes establishing new legislative districts; although there was pending litigation in state courts which sought to conduct upcoming recall

BALDUS v. MEMBERS OF WISCONSIN GOVERNMENT

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Cite as 849 F.Supp.2d 840 (E.D.Wis. 2012)

elections using the newly-created districts, there was no question ripe for determination by the District Court. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Douglas M. Poland, Rebecca K. Mason, Godfrey & Kahn SC, Jacqueline E. Boynton, Law Offices of Jacqueline Boynton, Peter G. Earle, Law Offices of Peter Earle LLC, Milwaukee, WI, Dustin B. Brown, Brady C. Williamson, Godfrey & Kahn SC, Madison, WI, for Plaintiffs.

Daniel S. Lenz, P. Scott Hassett, Lawton & Cates SC, Madison, WI, for Intervenor-Plaintiffs.

Colleen E. Fielkow, Patrick J. Hodan, Daniel Kelly, Joseph W. Voiland, Reinhart Boerner Van Deuren SC, Milwaukee, WI, Maria S. Lazar, Wisconsin Department of Justice, Madison, WI, for Defendants.

Kellen C. Kasper, Thomas L. Shriner, Jr., Foley & Lardner LLP, Milwaukee, WI, for Intervenor-Defendants.

Before WOOD, Circuit Judge,
STADTMUELLER District Judge, and
DOW, District Judge.

**MEMORANDUM OPINION
and ORDER**

PER CURIAM.

There was once a time when Wisconsin was famous for its courtesy and its tradition of good government. In 2006, James J. Conant was able to write that:

The most important feature of Wisconsin's society, government, and politics during the twentieth century was its progressive nature. Wisconsin had a highly developed civil society, its elected and administrative officials continuously attempted to improve the state's political

institutions, and they attempted to enhance the economic and social circumstances of the state's citizens. Throughout the century Wisconsin's politics were issue-oriented, state government institutions operated free of scandal, and the administration of state policies and programs was conducted efficiently and effectively.¹

Students of American history still read about Robert M. La Follette, Sr., an independent thinker who came to prominence at the end of the 19th century and whose views defied the partisan pigeonholes of his day. More recently, Wisconsin has been called a "purple" state—that is, a state whose people regularly elect comparable numbers of Democrats and Republicans. Over roughly the last half-century, six Republicans and six Democrats have served as governor. Over the same time, one of its two seats in the U.S. Senate has been held continuously by a Democrat, while the other one has been occupied by three Republicans and two Democrats.

This bipartisan tradition has not, unfortunately, exempted Wisconsin from the contentious side of the redistricting process that takes place every ten years in the wake of the United States Census. Before the events leading to this lawsuit, the last time the Wisconsin legislature successfully passed a redistricting plan was in 1972, following the 1970 census. See Wis. Stat. § 4.001(1); *Wisconsin State AFL-CIO v. Elections Board*, 543 F.Supp. 630, 631 (E.D.Wis.1982). After the 1980 census, however, the state was not so fortunate. Beginning with that round, decennial litigation was just as much a feature of the political scene as was decennial redistricting. See *Wisconsin State AFL-CIO*, 543 F.Supp. 630 (1980 census); *Prosser v.*

1. James J. Conant, WISCONSIN POLITICS AND GOVERNMENT: AMERICA'S LABORATORY OF DEMOCRACY at

XV (2006).

Elections Board, 793 F.Supp. 859 (W.D.Wis.1992) (1990 census); *Arrington v. Elections Board*, 173 F.Supp.2d 856 (E.D.Wis.2001) (2000 census) and then *Baumgart v. Wendelberger*, Nos. 01-121 and 02-366, 2002 WL 34127471 (E.D.Wis. May 30, 2002) (*per curiam*), amended by 2002 WL 34127473 (E.D.Wis. July 11, 2002) (also 2000 census). In 1982, 1992, and 2002, Wisconsin's legislative districts were drawn by a three-judge court. It is notable that in each of these earlier cases, the only contested matter related to the state's legislative districts; until now, no one has called on the federal court to intervene with respect to the state's congressional districts.

Now it is our turn. The U.S. Constitution, see Art. I, sec. 2, cl. 3,² requires the federal government to conduct an actual enumeration of the U.S. population once every ten years; that enumeration provides the basis for representation in the House of Representatives. Article IV, section 3, of the Wisconsin Constitution independently requires the state legislature to update its senate and assembly districts following each federal census. In 2010, the Bureau of the Census complied with its constitutional duty, and on December 21, 2010, it announced and certified that Wisconsin's population was 5,686,986 as of April 1, 2010. This represented a slight increase over the 2000 population of 5,363,675. These new numbers required Wisconsin to take a fresh look at both its state assembly and senate districts, and its eight congressional districts (the overall number of districts remained the same) to ensure compliance with the one-person, one-vote principle announced by the Supreme Court

in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Wisconsin has attempted to do so. Regrettably, like many other states, Wisconsin chose a sharply partisan methodology that has cost the state in dollars, time, and civility. Nevertheless, our task is to assess the legality of the outcome, not whether it lived up to any particular ideal.

1. The Redistricting Process

The mid-term election in November 2010 resulted in a shift in political control in the State of Wisconsin. Scott Walker, the Republican candidate for governor, defeated Tom Barrett, the Democratic candidate, in the race to replace Governor Jim Doyle, a Democrat. Control of both Wisconsin's State Assembly (its lower house) and State Senate shifted from the Democratic to the Republican party. Thus, as of the time the Census results were certified and the state was ready to begin drawing whatever new legislative and congressional district lines were necessary, all three critical players were in the hands of a single party for the first time in many years. (Throughout this opinion, when we refer to "legislative" redistricting, we mean the two state houses; we use the term "congressional" redistricting for the lines drawn for seats in the U.S. House of Representatives.) The new governor and legislators were sworn in on January 3, 2011, and the very next day the Republican legislative leadership announced to members of the Democratic minority that the Republicans would be provided unlimited funds to hire counsel and consultants for the purposes of legislative redistricting.

2. The Enumeration Clause is actually the fourth to appear in the original Constitution, but the original Clause 3, which established the infamous three-fifths rule for counting population, was abrogated by section 2 of the Fourteenth Amendment. We therefore skip over the now-repudiated clause and count the

Enumeration Clause as the third. See *Utah v. Evans*, 536 U.S. 452, 457, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 362, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999) (Stevens, J., dissenting).

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They informed the Democrats that they would not receive any funding for this process.

True to their word, the Republicans immediately began work in earnest, retaining the law firm of Michael Best & Friedrich LLP (“Michael Best”) to advise their caucus. Every effort was made to keep this work out of the public eye and, most particularly, out of the eye of the Democrats. Indeed, it was widely assumed that redistricting work would not begin until Wisconsin’s units of local government had a chance to review their ward lines. Wards in Wisconsin are the smallest unit of government. In the past, redistricting has always proceeded on a “bottom up” basis: ward lines would be redrawn based on the new census figures, villages and towns would recompute their populations, and the counties would build on those figures. The Census does not use these units of government; instead, it proceeds on the basis of “census blocks” that do not always correspond to local government boundaries. Some care must be taken, therefore, to translate the census data into information that is compatible with actual governing units.

As we noted, the venue of the redistricting work was the offices of Michael Best. The actual drafters included: Adam Foltz, a staff member to Assembly Speaker Jeff Fitzgerald; Tad Ottman, a staff member to Senate Majority Leader Scott Fitzgerald; and Joseph Handrick, a consultant with the law firm of Reinhart Boerner Van Duren s.c. Others involved in the process were James Troupis, Eric McLeod, Ray Taffora, Speaker Fitzgerald, Majority Leader Fitzgerald, Sarah Troupis, Robin Vos, Senator Rich Zipperer, and Dr. Keith Gaddie. The drafters relied on a computer program called autoBound to work with various district lines. They testified that the partisan makeup of the potential new districts played no part at all in their

decisions. Handrick, for instance, testified that he did not know if partisan makeup was considered, that he had no access to voting data from past elections, and that only “population equality, municipal splits, compactness, contiguity, [and] communities of interest” were considered. Foltz testified that he worked with legal counsel and experts, and that Speaker Fitzgerald, Senator Fitzgerald, Robin Vos, and Senator Zipperer advised him where to draw the boundaries.

In June and July 2011, Foltz had meetings about redistricting with every single Republican member of the State Assembly. He did not meet with any Democrats. Nevertheless, he testified that it was not “a part of the goal to increase the Republican membership in the legislature.” Before his meetings with the Republicans, each person was required to sign a confidentiality agreement promising not to discuss anything that was said. Ottman had similar meetings, conducted under the same cloak of secrecy. The drafters did not limit their outreach to public officials; they also held meetings behind closed doors with selected outsiders. In January 2011, they met with certain private business interests, including representatives from realtor and banking associations, and a hybrid state chamber of commerce called Wisconsin Manufacturers & Commerce.

In addition, the drafters reached out to certain members of the Latino community. They contacted Jesus Rodriguez, a co-founder and member of Hispanics for Leadership, a political organization comprised of local business people, educators, and community advocates who work toward “getting the most representation possible for the Latino community on all levels.” Rodriguez is also the President of Hispanics for School Choice, a nonprofit organization dedicated to advancing school choice for Hispanic children, notably

through school vouchers. Hispanics for School Choice, available online at <http://www.hispanicsforschoolchoice.com/> (last visited March 14, 2012). Through Hispanics for School Choice, Rodriguez developed a professional and personal relationship with former Assembly Speaker Scott Jensen (a Republican), who presently serves as a senior advisor for another school choice advocacy organization, American Federation for Children. American Federation for Children, available online at: <http://www.federationforchildren.org/> (last visited March 15, 2012). Troupis also contacted the Mexican American Legal Defense Education Fund (MALDEF), a national Latino civil rights organization, in an attempt to secure its support for the Republicans' plan. He hoped to "take the largest legal fund for the Latino community off the table in any later court battle," by courting their approval.

The process followed for the congressional districts was somewhat different. Like the state legislature, the Wisconsin congressional delegation ended up with a majority of Republicans after the 2010 mid-term elections (specifically, five Republicans and three Democrats, as we can see from the intervening parties to this case). In keeping with long-standing practice, the legislature in 2011 permitted the incumbent Wisconsin members of the House of Representatives to draft a map delineating the new congressional districts. Andrew D. Speth, chief of staff to Republican Congressman Paul D. Ryan, Jr., took primary responsibility for that task. Speth had some communications with Erik Olson, chief of staff to Democratic Congressman Ronald Kind, and later on, Congressman Ryan consulted with the three Democratic members of Wisconsin's delegation. In meetings that Speth held with the Republican members, they expressed their desire to draw districts that would maximize the chances for Republicans to be elected. (Note the contrast with the

disclaimers of partisanship offered by those who were working on the legislative redistricting process.) Speth's first complete draft was ready by May 13, 2011. That draft was shared exclusively with the Republicans. A second draft of June 1, 2011, was circulated to all members of Wisconsin's House delegation. The Democrats offered an alternative map two days later, but it was quickly rejected for failing to reflect minimal deviation from the ideal population for each district. Speth finalized a draft on June 8, 2011.

On July 8, 2011, the bills that would become Act 43 (legislative redistricting) and Act 44 (congressional redistricting) were introduced by the Republican leadership in the Wisconsin legislature. Simultaneously, the bill that became Act 39 was introduced. This was crucial, because it was Act 39 that permitted the legislature to draw new districts before Wisconsin's municipalities drew or re-drew their ward lines based on the new Census. Instead, upending more than a century of practice in Wisconsin, Act 39 required the municipalities to adjust their ward lines to the new state legislative districts. The legislature held a single public hearing on Acts 43 and 44 on July 13, 2011. On July 19, 2011, the legislature passed Act 43, and on July 20, 2011, it passed Act 44; both bills were then transmitted to the Governor. Act 39 was passed on July 25, 2011.

2. Procedural History

On August 9, 2011, Governor Scott Walker signed into law each of the three critical bills discussed here: Act 39, which enabled redistricting based only on census blocks; Act 43, establishing the new legislative districts for both the State Assembly and the State Senate; and Act 44, establishing the new lines for Wisconsin's eight congressional districts. In the meantime, correctly suspecting that something like

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the process we have described was afoot, on June 10, 2011, a group of voters filed suit against the Wisconsin Government Accountability Board (GAB) and its members in their official capacity, alleging that Acts 43 and 44 both violate federal and state law. The GAB is the state body charged with administering and enforcing all of Wisconsin's laws related to campaign finance, elections, ethics, lobbying, and contract disclosures. We refer to these voters as the Baldus plaintiffs, using the name of the lead party. On October 31, 2011, Voces de la Frontera, Inc. ("Voces"), an organization that describes itself as a grassroots group organized under the laws of Wisconsin, filed its own complaint against GAB and its members. Voces charged that Act 43 violates Section 2 of the Voting Rights Act; it did not challenge Act 44.

Because these two lawsuits qualified as actions "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body," 28 U.S.C. § 2284(a), the Chief Judge of the United States Court of Appeals for the Seventh Circuit entered an order assigning this litigation to a three-judge court and appointing this panel to serve as the members of the court. In an order entered on November 21, 2011, the court permitted the three Democratic members of Wisconsin's delegation to the United States House of Representatives to intervene as plaintiffs, and it permitted the five Republican members of that delegation to intervene as defendants. The next day, the court consolidated the Baldus and the Voces cases. Pre-trial discovery took place on an expedited basis, with the expectation that trial would begin on February 21, 2012. That morning, however, the court urged the parties to make one last good-faith effort to settle, in the interest of all citizens of the State of Wisconsin and out of respect for the role of the state legislature in redistricting

matters. See *Perry v. Perez*, — U.S. —, 132 S.Ct. 934, 940, 181 L.Ed.2d 900 (2012). Those efforts, unfortunately, were unsuccessful, and so the trial continued on February 23 and 24, 2012.

With the benefit of the full record, the panel now makes its findings of fact and conclusions of law for the case. For ease of reading, these are not presented separately. Our analysis of each of the plaintiffs' claims leads us to the conclusion that Act 43 violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a), by improperly diluting the citizen voting age population of Latinos across Assembly Districts 8 and 9. Otherwise, we find no judicially redressable injury in any of the plaintiffs' and intervenor-plaintiffs' remaining claims.

3. Analysis of Claims

3.1 Overview

Before turning to our detailed analysis of each claim, we must review what is still properly before us. For ease of reference, we begin by summarizing the claims of the Second Amended Complaint, noting the statute to which each one pertains, the current status of the claim, and, where pertinent, which parties are pursuing it:

- Claim One (Act 43): Legislative boundaries unconstitutionally sacrifice redistricting principles required by the U.S. Constitution. This claim went to trial on behalf of the Baldus plaintiffs.
- Claim Two (Act 43): The new legislative districts violate federal standards because they impermissibly disrupt local governmental boundaries. The Baldus plaintiffs were the only ones raising this, and they abandoned it at trial. Trial Trans. Vol. VI, 398–99.

- Claim Three (Act 43): The statute violates federal law because it disenfranchises 299,704 voters whose state senate districts have been moved. It does so by shifting them from an odd-numbered district to an even-numbered district; this shift means that voters in the affected districts will have to wait six years, not just four, until they have an opportunity to vote again for their state senator. This claim went to trial for the Baldus plaintiffs only.
 - Claim Four (Act 44): Congressional districts are not compact and fail to preserve communities of interest, in violation of the Equal Protection Clause. The Baldus plaintiffs abandoned this claim at trial, but the congressional plaintiff-intervenors continued to maintain it.
 - Claim Five (Acts 43 and 44): The legislative (Act 43) and congressional (Act 44) districts reflect partisan gerrymandering forbidden by both the Equal Protection Clause and the First Amendment. The Baldus plaintiffs abandoned this claim at trial; the congressional plaintiff-intervenors continued to maintain it.
 - Claim Six: (Act 43): The new legislative districts violate the Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa–6, in two ways: first, because Act 43 “packs” African-American voters in Milwaukee into six districts and thus foregoes the opportunity to create a seventh “influence” district; and, second, because the statute “cracks” the Latino community into two districts, neither one of which is a majority-minority district of *citizen* voting age Latinos. The Baldus plaintiffs abandoned at trial their challenge to the African-American districts, but they, along with the Voces de la Frontera plaintiffs in the consolidated case, pursued the second claim at trial. (Indeed, this claim consumed nearly all of the trial time.)
 - Claim Seven (Act 43): Act 43 is unconstitutional because the legislative drafters used race or ethnicity as the predominant reason for drawing certain districts, in violation of the Equal Protection Clause as explained in cases such as *Shaw v. Reno*, 509 U.S. 630[, 113 S.Ct. 2816, 125 L.Ed.2d 511] (1993). The Baldus plaintiffs abandoned this claim at trial.
 - Claim Eight (Act 43): The legislative redistricting accomplished in Act 43 violates the Equal Protection Clause because the new districts break up communities of interest. This claim went to trial.
 - Claim Nine (Act 43): This claim seeks a declaratory judgment and an injunction requiring the GAB not to use the new 2012 district lines for any recall elections that may take place in Wisconsin between the present time and the date of the general election in November. This claim, too, went to trial.
- In summary, therefore, most of this case remains before us in one way or another. Only Claim Two, part of Claim Six (dealing with the African-American districts), and Claim Seven are entirely out of the case.
- As we noted earlier, the total “official” population of Wisconsin for purposes of redistricting is 5,686,986. Using that number and applying the “one person, one vote” command, the ideal population for each of Wisconsin’s 33 senate districts is 172,333, and for its 99 assembly districts 57,444. As for the congressional districts, the ideal population is either 710,873 or 710,874. (Two of the eight congressional districts must have an additional person

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because the total population does not divide evenly by eight.) As we discuss below, there is some deviation from these ideals for the legislative districts, but, reflecting the capabilities of modern computer programs, the congressional districts from a headcount standpoint could not be improved.

The Baldus plaintiffs are seeking declaratory and injunctive relief against Wisconsin's Government Accountability Board and its members. They ask the court to bar the implementation of both redistricting plans for the reasons we have just outlined and discuss in more detail below. The intervenor-plaintiffs are still pursuing a claim against the new congressional districts drawn in Act 44. The Voces de la Frontera plaintiffs, joined by the Baldus plaintiffs, charge that Act 43 violates Section 2 of the Voting Rights Act because it dilutes the Latino community's voting strength in the 8th Assembly District. Both the GAB defendants and the congressional intervenor-defendants filed motions to dismiss both complaints on the pleadings; they have also denied that there is any cognizable federal violation in either Act.

We now turn to the merits of the case. In doing so, we say nothing about any arguments that could be understood to be based on allegations that the state officials have failed to follow state law. As defendants rightly point out, such claims are beyond our authority under the principles announced in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). We note, however, that the facts underlying some points that touch on state law may still be relevant for the federal issues that are properly before us. Thus, for example, we may examine plaintiffs' allegation that Act 43 fails to honor traditional redistricting criteria or to maintain local government boundaries, even if we refrain

from expressing any opinion on the question whether this may also state a claim for violating the Wisconsin Constitution.

3.2 Claims One and Eight: The New Legislative Districts Fail To Comply with Constitutional Standards and Are Not Justified by any Legitimate State Interest.

Claim One addresses redistricting principles in general, while Claim Eight focuses on the specific principle against breaking up communities of interest. Since the latter is subsumed within the former, we have grouped these two claims together for purposes of discussion.

Only 323,026 people needed to be moved from one assembly district to another in order to equalize the populations numerically, but instead Act 43 moves more than seven times that number—2,357,592 people—for a net change that results in districts that are roughly equal in size. Similarly, only 231,341 people needed to move in order to create equal senate districts, but Act 43 moves 1,205,216—more than five times as many. Even accepting the argument urged by the GAB that one cannot change one district without affecting another, these are striking numbers. (Physicists would remind us that the amplitude of waves, whether in water or in air, diminishes unless one is in a vacuum because energy is absorbed; so too, a “wave” of population shifts in one corner of Wisconsin is likely to dissipate long before the other corners are reached.)

[1–3] When Act 43 is compared to the 2010 census precise ideal population, the total population deviation (from the most populous to the least populous district) is 438 persons for the newly adopted assembly districts, and 1,076 persons for the newly adopted senate districts. Plaintiffs, therefore, allege that the Act violates the “one-person, one-vote” principle. *Reyn-*

olds v. Sims, 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). And indeed, it is an interesting question whether deviations that might have been acceptable in an earlier time ought to be tolerated now that—as Wisconsin proved in Act 44—it is possible for a computer to draw not one, but an unlimited number of districts with the perfect number of voting inhabitants. But putting that thought to one side, it was the plaintiffs who had the initial burden to show (1) the existence of a population disparity that (2) could have been reduced or eliminated by (3) a good-faith effort to draw districts of equal proportion. *Karcher v. Daggett*, 462 U.S. 725, 730, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983). If the plaintiffs accomplish this, the burden shifts to the GAB to show that “each significant variance between districts was necessary to achieve some legitimate goal.” *Karcher*, 462 U.S. at 731, 103 S.Ct. 2653. Accepted justifications include: core retention; avoidance of split municipalities; contiguity; compactness; and maintenance of communities of interest. *Id.* at 740, 103 S.Ct. 2653; *Wisconsin State AFL-CIO*, 543 F.Supp. at 636.

The defendants do not defend the state’s new legislative districts on the ground that they are the best that could be managed. What the three-judge court said in 1992 remains just as true today: “representative democracy cannot be achieved merely by assuring population equality across districts,” *Prosser*, 793 F.Supp. at 863; factors like homogeneity of needs and interests, compactness, contiguity, and avoidance of breaking up counties, towns, villages, wards, and neighborhoods are all necessary to achieve this end. *Id.* Nor do the defendants appear to argue that it is impossible to draw a plan that serves these democratic and neutral purposes. That is plainly not the case, since the court-drawn plans have consistently and scrupulously striven to be politically neutral. *Id.* at 867; see generally

Abrams v. Johnson, 521 U.S. 74, 98, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). Instead, defendants begin by observing that the Supreme Court has said that “state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats.” *White v. Regester*, 412 U.S. 755, 763, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). As *Abrams* pointed out, the Court has also held state legislatures to a lower standard of population equality than it imposes on courts. 521 U.S. at 98, 117 S.Ct. 1925. Although times may be changing, in the past the Court has opined that “an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations” that are insufficient to make out a *prima facie* case. *Brown v. Thomson*, 462 U.S. 835, 842, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983).

This does not mean, of course, that deviations under the 10% point are beyond challenge. It does, however, indicate that plaintiffs bear a greater burden to show a violation of their voting rights for deviations of 10% or lower. Several courts have expressed this thought by concluding that legislative population disparities under 10% are subject to a rebuttable presumption of validity, but that they may nevertheless be unconstitutional if the drafting process was arbitrary, discriminatory, or otherwise unsupported by traditional redistricting criteria. *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir.1996); *Cecere v. County of Nassau*, 274 F.Supp.2d 308, 311–12 (E.D.N.Y.2003); *Montiel v. Davis*, 215 F.Supp.2d 1279, 1285–86 (S.D.Ala.2002) (three-judge court); *Hulme v. Madison County*, 188 F.Supp.2d 1041, 1047 (S.D.Ill. 2001); *Abate v. Rockland County Legislature*, 964 F.Supp. 817, 819 (S.D.N.Y.1997); *Marylanders for Fair Representation v. Schaefer*, 849 F.Supp. 1022, 1032 (D.Md. 1994) (three-judge court). Notably, the Northern District of Georgia concluded in

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a case quite similar to ours that it “need not decide [] whether the mere use of a 10% population window renders Georgia’s state legislative plans unconstitutional, because the policies the population window was used to promote in this case were not free from any taint of arbitrariness or discrimination.” *Larios v. Cox*, 300 F.Supp.2d 1320, 1341–42 (N.D.Ga.2004). The Georgia court was appalled by the “baldly unconstitutional scheme” to protect the legislative influence of traditional communities at the expense of growing populations elsewhere and to protect incumbents in a discriminatory and arbitrary fashion. *Id.* With this case law in mind, we address the merits of the plaintiffs’ claim.

The plaintiffs’ redistricting expert, Dr. Kenneth Mayer, testified that Act 43 fails to comply with traditional redistricting principles. He was particularly concerned with the excessive shifts in population, disregard for core district populations, arbitrary and partisan motivations related to compactness, and unnecessary disenfranchisement. The defendants’ experts, in particular Professor Bernard Grofman, had little to say about these points beyond the generic comment that when an underpopulated district must seize population from a neighboring district in order to reach its optimal size, the neighboring district may need to do the same, until such time as an overpopulated district is encountered and matters balance out. Conspicuously missing from Professor Grofman’s testimony was anything precise about the magnitude of the population shifts here; Dr. Mayer, in contrast, offered testimony about many districts that could have been balanced out by moving vastly fewer numbers of people.

While we share Dr. Mayer’s concerns in many respects and find ourselves largely unpersuaded by Professor Grofman’s incomplete testimony to the contrary, we return to the degree of the deviations,

which were nowhere close to the 10% number that the Supreme Court mentioned in 1983. The maximum deviation for assembly districts is 0.76% and 0.62% for senate districts. Numbers like these place a very heavy burden on the plaintiffs to show a constitutional violation. In the final analysis, they have failed to surmount that burden. We come to that conclusion not because we credit the testimony of Foltz, Ottman, and the other drafters to the effect that they were not influenced by partisan factors; indeed, we find those statements to be almost laughable. But the partisan motivation that, in our view, clearly lay behind Act 43 is not enough to overcome the *de minimis* population deviations that the drafters achieved, at least under this theory. We therefore find no merit in Claims One or Eight and conclude that they must be dismissed.

Before leaving this point, we add a few words about communities of interest. It is important not to assume that the mere ability to elect a representative of one’s preferred political party is a perfect substitute for the ability to elect a representative who will more broadly identify with and serve his or her constituents’ needs. The two major political parties are both big tents that contain within them people of significantly different viewpoints. That is precisely why, especially when the court must also take into account the rights of minority groups as we must with Assembly Districts 8 and 9, careful attention is necessary. As we discuss in greater detail in section 3.5 below, the concept of community of interest is one that sweeps in much more than party label. Thus, for example, even if the reconfigured Assembly District 8 were seen as a reliably Democratic district, as Professor Grofman testified, that does not necessarily mean that the successful candidate would be the candidate of choice for the Latino community there. The whole point of the analysis under sec-

tion 2 of the Voting Rights Act is to ensure that qualifying minorities have an opportunity to elect representatives who will have strong voices on the topics that matter to them. Thus, the concept of community of interest will have an important role to play when we come to Claim Six. Untethered from section 2 of the Voting Rights Act, however, we do not have enough evidence before us to conclude that the remaining new districts created by Act 43 can be disturbed on that basis alone.

3.3 Claim Three: Disenfranchisement of Voters For State Senators

[4] In Claim Three, the Baldus plaintiffs assert that the movement of 299,704 voters (5.26% of all persons in Wisconsin, according to the 2010 Census) from certain even-numbered senate districts to odd-numbered senate districts deprives those voters of their constitutional right to vote for a state senator in a regular election for two years. (Obviously, as the defendants point out, those voters have the right to vote for any other office on the ballot, but we do not understand defendants to be arguing that a voter can constitutionally be deprived of the right to vote in a particular race—maybe for the House of Representatives—as long as he/she may vote for dog-catcher or the library board. The right to vote is a fundamental right for every elective office in a democracy.) Pursuant to Wisconsin Constitution Article IV, section 5, state senators serve four-year, staggered terms with half of the senators elected in presidential years and the other half during midterm years. The redistricting plan shifts voters among senate districts in a manner that causes certain voters who previously resided in an even-number district (which votes in presidential years) to be moved to an odd-numbered district (which votes in mid-term years); this shift means that instead of voting for a state senator in 2012, as they

would have done, they must wait until 2014 to have a voice in the composition of the State Senate. The number of persons experiencing this type of disenfranchisement per district ranges from 133 to 72,431, with an average of 17,630 for the 17 districts involved.

The Baldus plaintiffs argue that this disenfranchisement violates the Equal Protection Clause's requirement that "a State make an honest and good faith effort" to avoid vote dilution. *Reynolds*, 377 U.S. at 577, 84 S.Ct. 1362. Some degree of temporary disenfranchisement in the wake of redistricting is seen as inevitable, and thus as presumptively constitutional, so long as no particular group is uniquely burdened. *Donatelli v. Mitchell*, 2 F.3d 508, 515–16 (3d Cir.1993); *Republican Party of Oregon v. Keisling*, 959 F.2d 144, 145–46 (9th Cir. 1992). The Supreme Court has never articulated a hard-and-fast standard for how much of this type of disenfranchisement is too much, nor did the Baldus plaintiffs offer any concrete standard to which we might turn. Although the GAB suggested that earlier maps drawn by courts for Wisconsin have established a floor of 500,000, or even 750,000, for permissible moves, we reject that proposition. These numbers cannot be assessed in a vacuum, and we have no indication of any other factors that might have compelled these significant numbers. Each case, and each decade, should be assessed on its own record, and factors like the number of people moved, the overall population shifts in the state (both internally and from out-of-state), the impact on particular demographic groups, and comparable points, will all enter into the assessment. It is important to us here that the evidence presented at trial did not indicate that any particular group will suffer more disenfranchisement than the remainder of the population. While we are sympathetic to the nearly 300,000 voters who have lost their opportunity to vote for

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a state senator for two years, we find that Act 43 does not violate the Equal Protection Clause on this basis.

3.4 Claims Four and Five: Congressional Districts Fail Constitutional Standards for Compactness, Communities of Interest, and Partisan Gerrymandering

[5] The intervenor-plaintiffs (the three Democratic members of Congress from Wisconsin) assert that Act 44 violates *Reynolds* by focusing on population equality to the detriment of other principles, especially that of effective representation. They had no other choice, given the fact (as the parties stipulated) that Act 44 apportions the 2010 census population of the state of Wisconsin perfectly. Lacking any evidence of population deviation whatsoever, the intervenor-plaintiffs have no traction on this aspect of their Equal Protection Clause claim. Whatever else may have happened in Wisconsin, it has without a doubt preserved the one person, one vote principle for its citizens.

Second, the intervenor-plaintiffs argue that the Republican majority's legislative leadership in the Wisconsin legislature systematically created congressional districts to give their party an unfair electoral advantage in an attempt to preserve political majorities. The intervenor-defendants demur to that point, asserting frankly that there is nothing wrong with political considerations motivating redistricting. They further argue that the intervenor-plaintiffs did not offer a workable standard for the court to use in evaluating the political gerrymandering claim.

Justice Kennedy made a similar comment in his opinion concurring in the judgment in *Vieth v. Jubelirer*, 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004). Writing for a plurality, Justice Scalia had argued that *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986),

which had recognized the possibility of a constitutional claim based exclusively on the existence of partisan political gerrymandering, should be overruled. But five members of the Court did not agree with him, even though it was also the case that they could not agree on exactly what legal standard ought to apply in these cases. Interestingly, however, Justice Kennedy's pivotal opinion on this point appeared to throw the ball to the litigating parties to come up with a manageable legal standard.

Whether the parties bear full responsibility for the development of the law, or if the Court shares that duty, is a topic beyond the scope of this case. We do note that the right to vote is an individual right, not a group right, see *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (strict scrutiny is required for election laws that impose a severe restriction on an individual's right to vote). And few acts in a democracy are more expressive than the individual's marking a ballot (in whatever way it is done these days) to indicate which candidates he or she would like to see win the race. If, as the Supreme Court has held, the First Amendment protects persons from politically-based hiring decisions, see *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996), *Board of County Com'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2361, 135 L.Ed.2d 843 (1996), *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), then perhaps the Court will find some day that the First Amendment also protects persons against state action that intentionally uses their partisan affiliation to affect the weight of their vote. Legislative districts drawn behind a Rawlsian veil of ignorance would arguably give each voter the best chance to express his or her views without anyone

putting a thumb on the scale in advance. But those developments, we concede, lie in the future, and so we return to the case at hand.

[6] For now, we find that the intervenor-defendants have the better of the argument, because we are unable to discern what standard the intervenor-plaintiffs propose. Their failure to offer a workable standard means that no one has had a chance to test a suggested rule through the adversarial process. Without a specific proposal on the table, we are unable to evaluate the merits of this partisan gerrymandering claim. To the extent that the point is about process rather than results, we add that our review of the drafting of Act 44 leads us to believe that it was a significantly more bipartisan process than that associated with the drafting of Act 43. As discussed above, Speth did begin by meeting with the Republican members of Congress to discuss their priorities and concerns about redistricting. But well before the process was over, Congressman Ryan consulted his three Democratic colleagues to discuss their preferences. Speth testified that he attempted to incorporate all of the feedback (not just the Republican comments) into the draft. He avoided putting incumbents together in the same district, and he did not flip districts from majority-Democrat to majority-Republican or *vice versa*. Accordingly, we hold that the intervenor-plaintiffs cannot succeed on their partisan gerrymandering claim.

3.5. Claim Six: Voting Rights Act Claim of Latinos

[7, 8] This claim, which concerns only Act 43, is the most troubling. As matters now stand, both the Baldus and the Voces plaintiffs charge only that the legislative redistricting plan, as it applies to one particular area of Milwaukee County, violates the rights of Latino voters under Section 2

of the Voting Rights Act. To succeed, plaintiffs are required to meet the threshold requirements for such a case spelled out in *Thornburg v. Gingles*, 478 U.S. 30, 48–51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986): (1) the minority groups are sufficiently large and geographically compact to create a majority-minority district; (2) the minority groups are politically cohesive in terms of voting patterns; and (3) voting is racially polarized, such that the majority group can block a minority's candidate from winning. If plaintiffs can meet this threshold, the court must evaluate the totality of the circumstances to determine whether the minority groups have been denied an equal opportunity to participate in the political process and elect candidates of their choice. 42 U.S.C. § 1973(b); *Gingles*, 478 U.S. at 44–45, 106 S.Ct. 2752.

The defendants argue that the districts drawn in Act 43 give Latinos 60.52% of the voting age population in New Assembly District 8 and 54.03% of the voting age population in New Assembly District 9. As the trial unfolded, however, it appeared that they conceded that the relevant measure is *citizen* voting age population, at least for an ethnic group with as high a proportion of lawful non-citizen residents as the Latinos. This is correct. For the obvious reason that non-citizens are not entitled to vote, we cannot ignore citizenship status, particularly given the Supreme Court's express endorsement of the centrality of this point. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 429, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (concluding that citizen voting age population “fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates”).

The defendants' expert, Dr. Gaddie, chose not to testify on this claim. He was, however, involved in the drafting process for Assembly Districts 8 and 9. Foltz testi-

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fied that Dr. Gaddie instructed the drafters on how to draw the Latino districts in the way he believed was appropriate, but that the drafters did not follow his instructions for the final version. Rather, Foltz said, changes from Dr. Gaddie's recommendations were made in response to MALDEF's input. Ottman testified that Dr. Gaddie "looked at some of the minority district configurations that we had prepared and kind of evaluated them."

[9] Turning to the *Gingles* factors, the parties have stipulated that the Latino community in the area of Milwaukee covered by both former and New Assembly Districts 8 and 9 satisfies the first criterion (*i.e.*, the Latino group is sufficiently large and geographically compact to create a majority-minority district). Professor Grofman, the defendants' lead Section 2 expert, testified at trial that he agrees with the plaintiffs that they have also satisfied the second requirement (*i.e.*, that the Latinos in Milwaukee are politically cohesive in their voting behavior). Finally, Dr. Grofman agreed that we may accept Dr. Mayer's racial polarization analysis for the third inquiry (*i.e.*, that voting is racially polarized, such that the majority group can block the Latino candidate from winning). In fact, when asked whether "the issue in this case is more about the totality of the circumstances" than the *Gingles* factors, Dr. Grofman agreed. We see no reason to disagree with this assessment, which as far as it goes is shared by Dr. Mayer.

Inquiry into the totality of the circumstances inevitably requires us to get into the weeds and decide, based on all of the facts in the record, whether Latinos in the vicinity of New Assembly Districts 8 and 9

have been denied an equal opportunity to participate in the political process and elect candidates of their choice. 42 U.S.C. § 1973(b). The parties do not dispute that Milwaukee's Latino community bears the socioeconomic effects of historic discrimination in employment, education, health, and other areas, and that its depressed socioeconomic status hinders its ability to participate in the electoral process on an equal basis with other members of the electorate.

The dispute surprisingly centers on whether two Latino influence districts are superior to one majority-minority district.³ The defendants assert that "[t]he Latino community itself is divided on this point. . . . [S]ome members want the chance to have a second seat, they want 8 and 9 as they were prepared." There is a preliminary legal question to be answered, however, which will dictate whether this argument can prevail. It is whether, in a Section 2 claim, a state is entitled to deprive a minority group of one majority-minority district and substitute for that two influence districts. We have searched both Supreme Court decisions and those of other courts around the country, and we cannot find anything holding that this is an acceptable trade-off. In fact, the Supreme Court specified in *Bartlett v. Strickland* that "[u]nder present doctrine, § 2 can require the creation of [majority-minority] districts" but that "[t]his Court has held that § 2 does not require the creation of influence districts." *Bartlett*, 556 U.S. at 13, 129 S.Ct. 1231 (2009). We interpret the Court's language to mean that if we find a Section 2 violation, the creation of influence districts *in lieu of* a majority-

3. "In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. . . . At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its

preferred candidate cannot be elected." *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009). In light of *LULAC, supra*, we understand the Court to be referring to citizen voters, where that qualification is pertinent.

minority district is not on the menu of options for relief.

The defendants argue that “[o]thers, such as Voces, appear to want to make a 100-percent guarantee in 8 sacrificing the influence that was given to them in 9.” But this argument flies in the face of Section 2’s protection against cracking minority populations—in a sense, its assurance that a bird in the hand really is better than two in the bush, even though everyone realizes that a good hunter might actually snare both of the latter. The fundamental question for a Section 2 claim is whether the redistricting plan in Act 43 provides Latino voters with an opportunity to elect a candidate of choice. *LULAC*, 548 U.S. at 430–31, 126 S.Ct. 2594.

Dr. Mayer estimates that eligible Latinos constitute 47.07% of New Assembly District 8’s and 40.52% of New Assembly District 9’s citizen voting age population. Taking into account not only that number, but also actual voting experience in the races for the 2011 primary for Milwaukee County Circuit Judge, the 2008 State Superintendent of Public Instruction general election, the 2008 12th Aldermanic race, the 2008 Milwaukee City Attorney race, and the 2004 State Senate election, he concludes that this number is not enough to create the opportunity that Section 2 mandates. He also identified 36 elections since 1989 in which one or more Latino candidates ran against one or more Caucasian, non-Latino candidates, and showed that only four Latino candidates won over this time period, which represents only 11.1% success by Latino candidates. He proposes an alternative Assembly District 8 with a Latino voting age population of 70.07%, which he estimates amounts to 60.06% citizen voting age population.

One of the defendants’ other experts, Peter Morrison, largely agreed with Dr. Mayer’s conclusions. Mr. Morrison, a demographer, estimates that by November

2012 Latinos will constitute at least 44.9% of the citizen voting age population in New Assembly District 8; that number coincides with Dr. Mayer’s estimate. Morrison estimates that the Latino share of the citizen voting age population is increasing at a rate of at least 1.1% annually, which means Latinos will continue to lack an effective majority in New Assembly District 8 through 2018. The parties’ experts also agree that Latinos do not have an effective majority in New Assembly Districts 8 and 9, but that if the lines were drawn differently, they could immediately achieve a majority-minority district in a reconfigured Assembly District 8.

In light of this evidence, coupled with the fact that voting is racially polarized and cohesive in this area, it is apparent that Latino voters have a distinctly better prospect of electing a candidate of choice with one majority-minority district than with two influence districts. Notably, the 25,590 individuals who were added to New Assembly District 8 include a high percentage of Caucasian voters who come from neighborhoods where the effects of past discrimination are less burdensome than those experienced by the Latinos from the predecessor Assembly District 8. The newly added voters—who represent 45% of the New Assembly District 8—are approximately 41% non-Latino and are expected to continue to engage in racially polarized voting. Moreover, given the lower degree of historic discrimination, they are more likely to register and cast a ballot on election day. Dr. Mayer testified that the voter turnout rates among the newly-added Caucasian voters in New Assembly District 8 are higher by a factor of 10 when compared to Latino voters in that new district.

This is where our earlier observations about community of interest come back into play. The evidence shows that the

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new lines for Districts 8 and 9 will be disruptive to the Latino community of interest. This is so despite Professor Grofman's prediction that the voters of New District 8 are likely to support candidates from the Democratic party. But the Democratic candidate favored by the Latino community will not necessarily be the same as the Democratic candidate favored by the new non-Latino voters in the district. The latter are people who, as the record shows, have a vastly higher turnout rate than do the Latinos. In other words, we may simply have a situation in which the real race is at the primary level, not during the general election, but all of the same problems will simply be pushed back one stage. As the Supreme Court pointed out in *O'Brien v. Brown*, 409 U.S. 1, 15–16, 92 S.Ct. 2718, 34 L.Ed.2d 1 (1972), quoting from *United States v. Classic*, 313 U.S. 299, 308, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), “where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2.”

Dr. Grofman argues that Latinos in New Assembly District 8 can elect their candidate of choice because the district is more properly understood as a coalition district. In a coalition district, “two minority groups form a coalition to elect the candidate of the coalition's choice.” *Bartlett*, 556 U.S. at 13, 129 S.Ct. 1231. Dr. Grofman believes that non-Latino minorities in New Assembly District 8—specifically African-American voters—will support the Latinos' candidate of choice. This argument is more commonly presented by plaintiffs seeking to protect the minority coalition's Section 2 rights. *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir.1996) (*en banc*). That said, the Supreme Court has suggested that a proven coalition district may dodge Section 2 intervention. *Johnson v.*

De Grandy, 512 U.S. 997, 1020, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (“If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.”).

Certainly, if the GAB had offered concrete evidence demonstrating that New Assembly District 8 is a coalition district, such a showing would have supported a finding of no Section 2 violation. But Dr. Grofman did not conduct a racial polarization analysis, for Latinos or any other minority community. The only racial polarization analysis in the record is Dr. Mayer's, where he independently examined the Latino and African-American communities. While the plaintiffs have abandoned their Section 2 claim on behalf of African-American voters, we note that Dr. Mayer showed that African-Americans tend to vote nearly unanimously for African-American candidates, whereas Caucasian voters were “uniformly less likely to support the African-American candidate, often by huge margins.” Dr. Mayer also testified at trial that there is no evidence of coalition building in New Assembly District 8 among Latino, African American, or Asian voters. He concluded, in fact, that “there's quite a bit of tension” among the distinct racial groups. Testimony by Christine Neumann-Ortiz, the founder of *Voces de la Frontera*, and Pedro Colon, Milwaukee County Circuit Court Judge, support Dr. Mayer's conclusion. Presented with this record, we cannot make the leap that African-American

voters would prefer a Latino candidate to a Caucasian candidate merely because they tend to prefer African-American candidates to a Caucasian candidate. Dr. Grofman would have us rely on his hunch that African-Americans would vote for Latino candidates, but that is plainly inadequate. Section 2 rights are too valuable to be evaluated on an expert's unsubstantiated prediction.

Dr. Grofman also argues that there is no Section 2 violation because the current Assemblywoman, Jocasta Zamarripa, from the former Assembly District 8 is Latina. He did not estimate the extent of such an incumbency advantage and whether it sufficiently counteracts Dr. Mayer's concerns with low registration and low voter turnout among Latino voters. It is no matter, however, because Dr. Grofman's supposition utterly ignores the radical reconfiguration that the New Assembly District 8 imposes. Assemblywoman Zamarripa is not an incumbent with respect to fully 45% of the population of New Assembly District 8. It seems to this court that the alleged incumbency advantage tracks the racial divide, thus rendering its significance minimal.

Finally, the defendants assert that New Assembly District 8 should pass muster under the Voting Rights Act because Act 43 is, in certain ways, consistent with this court's 2002 map. The former Assembly District 8 had a Latino voting age population in 2002 of 58.3%, which is less than the New Assembly District 8's 60.52% Latino voting age population. We first point out that the Supreme Court did not highlight the importance of focusing on citizenship status until 2006. *LULAC*, 548 U.S. at 429, 126 S.Ct. 2594. Since 2006, we have been required to take real voting majorities into consideration; just as we

do not include children in those numbers, we cannot include non-citizens who do not enjoy the franchise. Second, the record shows that the Latino community's success under the 2002 map is mixed at best. We are not tied down by history when better evidence of the present and likely future is before us, and when the last decade has produced demographic changes that now make it possible to draw an effective majority-minority district. We find persuasive, in this context, the experience of the 2008 Milwaukee City Attorney race between Grant Langley (Caucasian) and Pedro Colon, in which Langley won the position. When Colon ran, he had been the Assemblyman from the former Assembly District 8 for 10 years. He was on the joint finance committee during his tenure, and had previously run for mayor, and thus was hardly an unknown to Milwaukee's voters. Colon won nearly every ward in the former Assembly District 8. He lost every ward in those areas that represent the former Assembly District 9—areas that would be added to New Assembly District 8 by Act 43. Whether or not this election result was, as Dr. Mayer put it, “a dry run of what the future holds under Act 43,” we cannot turn a blind eye to this evidence, which supports the need for a functioning majority-minority district for Milwaukee's Latino community, not just one or two influence districts.

3.6 Claim Nine: Use of the New Districts in Any Future Recall Election Before November 6, 2012

[10] Plaintiffs ask the court to declare as unconstitutional and enjoin the conduct of any special or recall elections under Act 43 prior to November 6, 2012. The defendants counter that no case or controversy exists because the GAB Board does not intend to conduct recall elections in accord

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with the legislative districts created by Act 43. At first we had trouble understanding why this claim reflected any kind of controversy between the parties, because the GAB has insisted that it intends to conduct the recall elections under the 2002 district lines, just as plaintiffs want. But the plot thickens when we realize that there is pending litigation in the state courts of Wisconsin in which some Republican plaintiffs have sued the GAB to compel it to conduct the recall elections using the 2012 districts.

This puts us in a difficult position. On the one hand, there is no authoritative statement from the state (either its legislature, or a court proceeding, or an administrative order from the GAB) with which any decree of this court would conflict. But there's the rub: there is also nothing concrete on which any such decree could operate. We have concluded, based on the GAB's formal representations to us in the present proceeding, that there is no question ripe for determination before us at this time. We take the GAB at its word that it will use the 2002 districts. This is sensible, especially in light of the command in the Wisconsin Constitution not to redistrict more than once each 10 years. *State ex rel. Smith v. Zimmerman*, 266 Wis. 307, 63 N.W.2d 52 (1954).⁴ District lines may be close to perfect from a population standpoint when they are initially drawn, but they slip away from perfection as time goes on, people are born, die, move, and become naturalized citizens. Both the state and the federal Constitu-

tions recognize that line-drawing is essential, and they have both chosen a 10-year period for that line. Taking that into account, it becomes clear that there is nothing unconstitutional at all about the 2002 districts for the period of time between the adoption of the map based on the 2000 census and the adoption of the map based on the 2010 census. We note as well that we have no authority to enjoin on-going state court proceedings, see the Anti-Injunction Act, 28 U.S.C. § 2283, and so our hands are tied with respect to the state court case. If, however, a time comes when the GAB proposes to take a different action, either on its own or by virtue of a state court ruling, and there is a live controversy, plaintiffs may return to this court and present whatever arguments they may have on this question.

4. Conclusion

In conclusion, we find that the Baldus and Voces plaintiffs are entitled to relief on their Section 2 claim concerning New Assembly Districts 8 and 9, because Act 43 fails to create a majority-minority district for Milwaukee's Latino community. Two influence districts have never been held to be an adequate substitute for such a district under the factual circumstances that we have before us. This holding is not intended to affect any other district drawn by Act 43. Indeed, to avoid disrupting other lines, the court emphasizes that the re-drawing of the lines for Districts 8 and 9 must occur within the combined outer

4. Indeed, the GAB claimed before trial that it is barred by the Wisconsin Constitution from making any amendments to the redistricting plan for the next ten years. We saw nothing in the Wisconsin Constitution or in *Zimmerman* that stood in the way of further revision by the General Assembly in the context of reaching a settlement with the plaintiffs, but

for present purposes we will take the GAB at its word that it finds its hands tied to make any changes to the plan whatsoever until 10 years has elapsed, and assume that this position will also require it to argue to a competent court that any effort on the part of the legislature to advance the effective date of Act 43 is blocked by the state constitution.

boundaries of those two districts. Recognizing as we have throughout this litigation the primary role that the state has in this area, we are giving the legislature the first opportunity to address this point, but it must act quickly given the impending elections. This should not be an impossible task, given that Dr. Mayer has prepared at least one alternative configuration that should be a useful starting point.

As for the other claims, we find that although the drafting of Act 43 was needlessly secret, regrettably excluding input from the overwhelming majority of Wisconsin citizens, and although the final product needlessly moved more than a million Wisconsinites and disrupted their long-standing political relationships, the resulting population deviations are not large enough to permit judicial intervention under the Supreme Court's precedents. Act 44 has zero population deviation, which is why we find that the intervenor-plaintiffs have no meritorious "one person, one vote" claim. The intervenor-plaintiffs' partisan gerrymandering claim never made it out of the gate because no workable standard was offered to the court.

Tempers can flare when people are excluded from the political process, whether they are shut out because of their party affiliation, because of their race, because of their economic status, or because of any other trait. Such a contentious atmosphere is neither necessary nor desirable. We know that it is not necessary, because courts hold themselves to a higher standard and have succeeded in drawing successful maps time and again. We should have learned that it is not desirable because of the rancor that it fosters. Some states, like Iowa and California, have adopted nonpartisan systems that seem

successfully to have overcome this. New York is seriously thinking right now of taking a similar step, and there has been some talk of it in Wisconsin in the wake of this litigation. But we must deal with the here-and-now, and we therefore must acquiesce in the approach that Wisconsin (not alone among the states in this circuit, we hasten to add—see *Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections*, 835 F.Supp.2d 563, 2011 WL 6318960 (N.D.Ill. Dec. 15, 2011); *Radogno v. Illinois State Bd. of Elections*, 2011 WL 5025251 (N.D.Ill. Oct. 21, 2011))—has chosen.

Before concluding, the court must finally address a number of motions that the parties have submitted and that remain outstanding, all of which may now be dispatched.

The first, the intervenor-defendants' Motion for Judgment on the Pleadings (Docket # 75), has effectively been granted by the Court's determination that all of the plaintiffs' and consolidated plaintiffs' Act 44 claims fail. Thus, the motion requires no further ruling beyond dismissing it as moot. Similarly, the Court is also obliged to deny the defendants' Motion for Summary Judgment (Docket # 128) as moot, given that, through this order, the Court has addressed the substance of all of the outstanding claims in this matter.

Further, the plaintiffs' and intervenor-plaintiffs' motions to defer a judicial decision (Docket # 117, # 119), in which they invited the Court to delay ruling on the intervenor-defendants' Motion for Judgment on the Pleadings (Docket # 75), have also become moot. Through the passage of time, allowing trial to proceed before rendering a decision on the intervenor-defendants' motion, the Court effectively deferred its decision. Therefore, the

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Court will also deny the motions to defer as moot.

A number of other motions may be taken care of administratively. At trial, the Court clarified the scope of its prior order relating to the subpoena issued to James Troupis, essentially granting Mr. Troupis's motion for clarification. (Tr. 58:14-60:4 (clarifying scope of Court's prior order, as requested by Mr. Troupis in Docket # 179)). Thus, that motion (Docket # 179) can be administratively terminated as having been granted at trial. Additionally, the defendants' motion *in limine* (Docket # 160) is hereby administratively terminated. The Court never specifically addressed the motion at trial, and the parties did not go to great lengths to elicit testimony regarding anomalies in redistricting boundaries (the subject of the motion *in limine*); further, in this order, the Court does not discuss those anomalies. Therefore, the Court has no reason to grant or deny that motion (Docket # 160), and will thus terminate it without making a decision on its merits.

Finally, the Court must also deny a request from members of the group Citizens for Fair and Competitive Redistricting to appear as *amicus curiae*. (Docket # 126). Through counsel, that group submitted a proposed brief and several maps which, taken together, urge the Court to adopt an entirely different redistricting plan than the plan adopted by the legislature. (Docket # 126). Heeding the instruction of the United States Supreme Court that "[r]edistricting is 'primarily the duty and responsibility of the State,'" the Court will not tread into the black water of re-drawing the redistricting boundaries itself. *Perry*, 132 S.Ct. at 940 (citing *Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975)). Instead, as discussed above, the Court will allow the Legislature to sort out the redistricting maps' infirmi-

ties on its own. The Court will thus deny the *amicus*' request to appear without consideration of the group's submissions.

Accordingly,

IT IS ORDERED that the plaintiffs' and intervenor-plaintiffs' Sixth Claim for relief be and the same is hereby **GRANTED**, the Court having found that New Assembly Districts 8 and 9 violate the Voting Rights Act, and, accordingly, the Government Accountability Board is hereby **ENJOINED** from implementing Act 43 in its current form;

IT IS FURTHER ORDERED that plaintiffs' and intervenor-plaintiffs' remaining claims be and the same are hereby **DISMISSED** with prejudice;

IT IS FURTHER ORDERED that the intervenor-defendants' motion for judgment on the pleadings (Docket # 75) be and the same is hereby **DENIED** as moot;

IT IS FURTHER ORDERED that the defendants' motion for summary judgment (Docket # 128) be and the same is hereby **DENIED** as moot;

IT IS FURTHER ORDERED that the plaintiffs' motion to defer a judicial decision (Docket # 117) be and the same is hereby **DENIED** as moot;

IT IS FURTHER ORDERED that the intervenor-plaintiffs' motion to defer a judicial decision (Docket # 119) be and the same is hereby **DENIED** as moot;

IT IS FURTHER ORDERED that James Troupis' motion for clarification (Docket # 179), having been granted at trial, be and the same is hereby **TERMINATED** administratively;

IT IS FURTHER ORDERED that the defendants' motion *in limine*, as related to

the presentation of evidence related to re-districting anomalies (Docket # 160), having not been addressed at trial or in this Order, be and the same is hereby **TERMINATED** administratively;

IT IS FURTHER ORDERED that the intervenor-defendants' motion to dismiss for lack of standing (Docket # 198) be and the same is hereby **DENIED**;

IT IS FURTHER ORDERED that the motion of Citizens for Fair and Public Redistricting to appear as *amicus curiae*, (Docket # 126) be and the same is hereby **DENIED**; and

IT IS FURTHER ORDERED that each party is to bear its own costs. The Clerk is directed to enter judgment accordingly.



Alvin **BALDUS**, Carlene Bechen, Elvira Bumpus, Ronald Biendseil, Leslie W. Davis, III, Brett Eckstein, Gloria Rogers, Richard Kresbach, Rochelle Moore, Amy Risseeuw, Judy Robson, Jeanne Sanchez-Bell, Cecelia Schliepp, Travis Thyssen, Cindy Barbera, Ron Boone, Vera Boone, Evanjelina Cleerman, Sheila Cochran, Maxine Hough, Clarence Johnson, Richard

Lange, and Gladys Manzanet, Plaintiffs,

Tammy Baldwin, Gwendolynne Moore and Ronald Kind, Intervenor-Plaintiffs,

v.

MEMBERS OF THE WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, each only in his official capacity: Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, and Kevin Kennedy, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants,

F. James Sensenbrenner, Jr., Thomas E. Petri, Paul D. Ryan, Jr., Reid J. Ribble, and Sean P. Duffy, Intervenor-Defendants.

Voces De La Frontera, Inc., Ramiro Vara, Olga Vara, Jose Perez, and Erica Ramirez, Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, and Kevin Kennedy, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants.

Case Nos. 11-CV-562 JPS-DPW-RMD, 11-CV-1011 JPS-DPW-RMD.

United States District Court,
E.D. Wisconsin.

March 27, 2012.

Background: After Wisconsin state legislative redistricting plan was declared to

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * *

WILLIAM WHITFORD, ROGER ALCLAM,
EMILY BUNTING, MARY LYNNE DONOHUE,
HELEN HARRIS, WAYNE JENSEN, WENDY
SUE JOHNSON, JANET MITCHELL, ALLISON
SEATON, JAMES SEATON, JEROME
WALLACE, and DONALD WINTER,

Plaintiffs,

-vs-

Case No. 15-CV-421-BBC

GERALD NICHOL, THOMAS BARLAND, Madison, Wisconsin
JOHN FRANKE, HAROLD FROEHLICH, March 23, 2016
KEVIN KENNEDY, ELSA LAMELAS, 9:30 a.m.
and TIMOTHY VOCKE,

Defendants.

* * * * *

STENOGRAPHIC TRANSCRIPT OF MOTION HEARING
HELD BEFORE the HONORABLE JUDGE KENNETH RIPPLE,
HONORABLE JUDGE BARBARA B. CRABB,
and HONORABLE JUDGE WILLIAM GRIESBACH

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9 (Proceedings called to order.)

10 THE CLERK: Case Number 15-CV-421. *William*
11 *Whitford, et al. v. Gerald C. Nichols, et al.* Court is
12 called for oral argument hearing. May we have the
13 appearances, please.

14 MS. ODORIZZI: Michele Odorizzi for plaintiffs.

15 MR. STEPHANOPOULOS: Nicholas Stephanopoulos for
16 the plaintiffs.

17 MR. KEENAN: For the defendants, Brian Keenan,
18 and with me is Anthony Russomanno.

19 JUDGE RIPPLE: Good morning to everyone. We're
20 here today to hear the arguments on the defendants'
21 motion for summary judgment, and as we have indicated, we
22 have allotted an hour to each side for their primary
23 arguments and a half hour for rebuttal for the movants.
24 You don't need to use all the time; you're masters of
25 your own time. But we thought that would be the best way
to handle things. We will take a break at some point in

1 the morning as well. Okay?

2 So with that, we'll ask the movants to please begin.

3 MR. KEENAN: May it please the Court. The Court
4 should grant the defendants' motion for summary judgment
5 because there's no genuine issue of material fact that
6 the plaintiffs' proposed standard is not a legal standard
7 by which an unconstitutional partisan gerrymander can be
8 judged. There's no issue of material fact because the
9 defendants' motion is based on the plaintiffs' own expert
10 reports and undisputed results of Wisconsin elections in
11 -- historical elections.

12 JUDGE RIPPLE: Before you get to that point, and
13 of course it's a very important one, maybe you could
14 spend a little bit of time on the first element of the
15 test that has been tendered by the plaintiffs in the
16 case, the matter of intent. There is disagreement
17 between both of you on that. Could you please describe
18 to us your position and why you think the position taken
19 by the plaintiffs is infirm.

20 MR. KEENAN: Yes, I will. The plaintiffs have a
21 standard that has three stages and the first is the
22 intent element. The plaintiffs feel that an
23 unconstitutional gerrymander, the intent element, would
24 be established by any sort of partisan intent to favor
25 the party that's districting and disadvantage the party

1 that's out of control. The defendants see that as an
2 inappropriate and infirm intent element because that type
3 of intent is not actually unconstitutional in and of
4 itself and that's been well established through Supreme
5 Court case law dating back many years to the *Gaffney*
6 decision, I believe in the 70's, and into the *Vieth*
7 decision, recently in the *LULAC* decision; that the use of
8 partisan classifications, the use of a partisan motive
9 isn't constitutional in and of itself. And the problem
10 with partisan gerrymandering claims is determining the
11 level of partisan intent that would move something from
12 being a normal and ordinary consideration, I believe was
13 the language used in *Vieth*, into something that now has
14 turned into unconstitutional.

15 The defendants don't believe that the plaintiffs'
16 intent element works because it takes just that
17 constitutional motive of partisan intent and finds that's
18 enough to meet the test, then moves it to an effects
19 element that looks at the partisan asymmetry in
20 converting statewide vote shares into seats and counts
21 that entire asymmetry as a discriminatory effect such
22 that you can have a test -- a plan becomes
23 unconstitutional with a bare partisan motive and then a
24 large effect.

25 JUDGE RIPPLE: So an intent to distinguish one

1 party from another in gerrymandering is constitutionally
2 permissible and therefore wouldn't be an intent to create
3 an invidious classification? Is that your point?

4 MR. KEENAN: Correct. And the plaintiffs'
5 standard hasn't attempted to delineate where
6 invidiousness would jump into the --

7 JUDGE RIPPLE: And then the next point, I
8 suppose, would be well then what is an invidious
9 classification and what would be -- how do we measure the
10 intent to create such an invidious classification.

11 MR. KEENAN: Well, as counsel for the defendant,
12 it's hard for me to come up with what a plaintiff's
13 standard should be. But I think invidiousness should
14 have to be measured by, as Justice Kennedy has outlined
15 in his *Vieth* concurrence, some sort of departure from
16 normal districting principles and criteria.

17 JUDGE RIPPLE: Let me see if I could help you on
18 that. Suppose the plaintiffs were able to prove that the
19 defendants had the intent to create a plan that would
20 simply not be subject to change for the entire decennial
21 period; in other words, that would be frozen in place
22 with no possibility of a flip for the entire decennial
23 period. Would that be a sufficient unconstitutional --
24 invidious -- would that be a sufficient intent to create
25 an invidious classification?

1 MR. KEENAN: No, it would not.

2 JUDGE RIPPLE: Why not?

3 MR. KEENAN: And I assume you're referring to a
4 flip of the efficiency gap and not a flip of control of
5 the legislature?

6 THE COURT: Flip of the control of the
7 legislature is what I was --

8 MR. KEENAN: Oh, control of the legislature. I
9 still think that would not necessarily show
10 invidiousness. That invidiousness would have to be shown
11 -- how does that result differ from a plan that's enacted
12 using solely traditional districting principles.

13 JUDGE RIPPLE: Well, that would be the third
14 element and one where we'd have to deal with allocation
15 of burden of proof later on. But just in terms of the
16 first element, the intent, would it be enough if we could
17 -- if the plaintiffs could prove that the intent was to
18 create a plan that would be in concrete for the ten
19 years; no possibility this thing was going to create a
20 legislature with another party in leadership.

21 MR. KEENAN: I don't think that would
22 necessarily be enough and I think it would depend on the
23 state and it would depend on the electoral circumstances.
24 I can imagine there are states where it's practically
25 impossible for one of the parties to win control of the

1 legislature if there's so much support for one of the
2 other parties in that --

3 JUDGE RIPPLE: That's the key. What would be
4 enough then in your view?

5 MR. KEENAN: I'm not sure that this is something
6 that can be solved. The *Vieth* plurality examined a
7 predominant intent test that looked at the *Vieth*
8 plaintiffs' offer that the partisan advantage outweighed
9 all the other concerns of districting like equal
10 population and Voting Rights Act and compactness,
11 contiguity, things like that, and the *Vieth* plurality
12 found that to be just completely unworkable because on a
13 statewide basis, it was just impossible to determine the
14 relative weight of all these different factors. To me
15 it's hard to see how, and this has been the problem
16 that's plagued these cases since *Bandemer*, is what -- how
17 do you establish some sort of intent where it goes beyond
18 the normal to something abnormal that's unconstitutional.
19 No one else has been able to figure it out. I don't know
20 that I can. And I think it would be challenging to
21 delineate a line anywhere that would show that.

22 And I think one of the concerns is that embedded in
23 the question was that there's an assumption that things
24 would never change and I don't know that that's even a
25 valid assumption to make about the future. For example,

1 the *Vieth* case itself, the plaintiffs allege that the
2 Democrats would never be able to win a majority of the
3 congressional districts in that case. It went up to the
4 Supreme Court. In 2004 they lost. Well, in 2006 the
5 Democrats won a majority of the congressional seats in
6 Pennsylvania, and again in 2008, they were able to secure
7 through the political process what they claimed in court
8 was going to be impossible. So I don't know that it's
9 possible to even make a prediction about the future as to
10 what the likely consequences are of a plan over a
11 ten-year period, at least with a certainty enough to say
12 something is unconstitutional.

13 JUDGE RIPPLE: Thank you for your views on
14 intent. I interrupted you. You may want to go on and
15 talk about the efficiency gap.

16 MR. KEENAN: Sure. Well, the intent was one of
17 my elements, so it just kind of leads me into my argument
18 about the plaintiffs' intent element seems to focus more
19 as a way to avoid the consequences of the efficiency gap
20 rather than actually showing how much partisanship is too
21 much. The plaintiffs, as I'll show, the efficiency gap
22 ends up capturing a large number of plans as
23 presumptively unconstitutional. The number of plans that
24 have large efficiency gaps that trip the various
25 thresholds the plaintiffs would want to establish is

1 quite large and the plaintiffs use the intent element
2 mainly as a way to try to prevent the -- to avoid the
3 consequences of this, which would be to show that a large
4 number of plans that have no partisan intent at all are
5 showing this asymmetry and thus aren't partisan
6 gerrymanders and this asymmetry is present when there's
7 no partisan intent. And the intent element mainly serves
8 as a way for them to say well hey, our test doesn't
9 actually capture the Wisconsin 2000's plan. That doesn't
10 have intent. But I mean the defendants' argument is that
11 that just shows that the efficiency gap is a poor metric
12 for measuring partisan gerrymandering.

13 JUDGE CRABB: I have one question. For the
14 purpose of summary judgment, are you denying that the
15 legislature had any partisan intent when it -- you're
16 not.

17 MR. KEENAN: No, we're not.

18 JUDGE CRABB: That's good.

19 MR. KEENAN: Our argument is that even assuming
20 there's partisan intent and that there was some partisan
21 intent, that the standard still doesn't work.

22 JUDGE GRIESBACH: For purposes of trial would
23 you even deny the Court is partisan?

24 MR. KEENAN: No, we would not plan to dispute
25 that at trial either.

1 JUDGE RIPPLE: Would you dispute the fact that
2 they had the partisan intent to attempt to create a plan
3 that would stay in place throughout the decennial period
4 that would be not capable of producing a legislature in
5 control of the other party?

6 MR. KEENAN: Yes, I think we would dispute that.

7 JUDGE RIPPLE: You would dispute that.

8 MR. KEENAN: Yeah. I mean that's not in the
9 summary judgment record, but I think at trial to the
10 extent --

11 JUDGE CRABB: You would dispute it as to whether
12 that was the intent or whether that was what actually
13 happened?

14 MR. KEENAN: I think whether it was the intent
15 and then whether it actually does happen is in the future
16 and so I wouldn't really be able to say what will happen.

17 JUDGE GRIESBACH: Is your rejection -- and this
18 may be jumping ahead and I'm sorry if I am. But is your
19 rejection of the efficiency gap -- I take it it's not
20 just the level that the plaintiffs argue. Is there no
21 efficiency gap that you think would be unconstitutional
22 if it's the result of redistricting?

23 MR. KEENAN: Yeah, I think it's a two-fold
24 thing. One is just that the efficiency gap has no tie to
25 a constitutional violation so that a high efficiency gap

1 just doesn't show a constitutional violation in and of
2 itself. But then secondarily, that even the levels that
3 the plaintiffs have suggested end up presenting
4 themselves in cases where there's no partisan intent. So
5 it's not even showing any sort of gerrymandering at all.

6 But I think one of the important things is that the
7 efficiency gap, and hopefully the brief has made clear
8 the different versions of the efficiency gap that are
9 used by the plaintiffs, that the historical analysis that
10 they've used by Professor Jackman to set their thresholds
11 is based on a seats-to-votes line that expects a party to
12 win a certain proportion of seats in a legislature based
13 on their percentage of the vote share. That's based on a
14 two-to-one slope.

15 So I mean the way to kind of understand that, I
16 think, is in simple terms that a 51 percent vote share is
17 implied that they should win 52 percent of the seats.
18 And then a 52 percent vote share is implied to win 54
19 percent of the seats. You kind of get a bump in seats
20 for each vote share. And we agree that's not saying that
21 proportional representation is required, but we think
22 it's actually worse in that it's judging plans based on
23 how they deliver hyperproportional representation. For
24 example, you could have perfectly proportional
25 representation in an efficiency gap if -- and this is

1 what happened in Wisconsin, I believe, in 2008 is the
2 Democrats won 54 percent of the vote and win 53 percent
3 of the seats roughly proportional. But the efficiency
4 gap implies that they should win 58 percent of the seats.
5 And so therefore you still get a negative 5 percent
6 efficiency gap when you're delivering roughly
7 proportional representation probably as close as you can
8 in a situation like this.

9 And so we do think that there's no tie to the
10 constitution such that the efficiency gap just has a
11 fundamental problem being used as a test irrespective of
12 the particular level that ends up being reached.

13 JUDGE RIPPLE: Isn't it a test though that at
14 least is helpful in measuring the degree to which the
15 plan might be susceptible to producing a legislature that
16 would be dominated by the other party?

17 MR. KEENAN: I would say not necessarily. It's
18 more concerned about how the vote share matches up with
19 the seat share. So for example, our expert, Sean Trende,
20 went through, and there's a list of 17 plans that were
21 unambiguously one side or the other that Professor
22 Jackman found through time. That means that they were
23 always either negative or positive every single election
24 in them. And what Sean Trende found is that in a number
25 of those plans, the control of the legislature actually

1 flipped even though the efficiency gap sign stayed the
2 same.

3 And I think some of this is illustrated by the
4 New York example which keeps appearing as an efficiency
5 gap, negative efficiency gap favorable to Republicans
6 even though the Democrats actually control the New York
7 legislature quite a bit of the time. And the reason the
8 efficiency gap presents itself is that maybe the
9 Democrats have 55 percent of the seats, but they actually
10 won 60 percent of the vote which implies that they should
11 win, you know, 70 percent of the seats. So you end up
12 with a large efficiency gap.

13 JUDGE RIPPLE: Mr. Keenan, on that point I'm
14 beginning to have a little bit of trouble keeping the
15 summary judgment matrix in place. Is that argument -- I
16 can see how that argument might be very helpful to you at
17 trial in impeaching the position taken by the plaintiffs
18 and their experts, but how is it helpful to you in
19 prevailing in this motion for summary judgment?

20 MR. KEENAN: Well, because all that information
21 is just taken straight from the plaintiffs' reports.
22 That's undisputed that this is what is happening.

23 JUDGE RIPPLE: You're talking about Professor
24 Trende and Professor Trende's views on things.

25 MR. KEENAN: Well, Professor Trende looked at

1 what Jackman had done and just looked at -- and the
2 plaintiffs haven't disputed that that's, in fact, what
3 happened in these cases. So that's an undisputed fact.

4 And so I think the efficiency gap is -- what it
5 shows is that -- is how a party can convert statewide
6 vote share into how they compare to, like, the two-to-one
7 vote curve, two-to-one seat-to-vote curve. So that's
8 what it tells you. And then it actually doesn't tell you
9 much about who's going to win control of the legislature.
10 I mean some of the examples here are 1994 is the last
11 year Wisconsin had a positive efficiency gap, which is a
12 gap that favors Democrats. Well, 1994 was the first year
13 that Republicans won control of the legislature in
14 Wisconsin -- or the Assembly in Wisconsin in a number of
15 years. So it's like in a sense, it's the worst year for
16 Democrats electorally, but it looks like under the
17 efficiency gap a good year for them. And the most
18 favorable, so to speak, year for Democrats on the
19 efficiency gap in the last plan was 2010, it was negative
20 4, and that was also a year where the Republicans did
21 very well and won 60 seats and a large vote share, like
22 54 percent, I think.

23 So the efficiency gap does not correlate necessarily
24 with who's winning control of the legislative seats.
25 It's measuring who is getting more or less seats compared

1 to what you would expect under this vote line.

2 JUDGE CRABB: I wanted to ask you about
3 clustering because I understand that you're arguing that
4 the maps are pro-Republican because Democrats naturally
5 cluster more. Is that a recent trend?

6 MR. KEENAN: We believe that it's a fairly
7 recent trend, and it shows up in the Jackman report
8 starting in the mid 90's, and that's when the efficiency
9 gaps naturally start changing in favor of the Republicans
10 and it's continued through the 2010's and -- or 2000's
11 and 2010's.

12 JUDGE CRABB: Do you have evidence that the
13 Democrats have been more clustered in recent years?

14 MR. KEENAN: Our evidence would be -- yeah,
15 would be the Sean Trende analysis that we performed.

16 JUDGE CRABB: That's your only evidence?

17 MR. KEENAN: Yes. And then just the inferences
18 from what's happened through Jackman's own report which
19 shows the trend. And I would say that I think -- it's
20 important to note that we aren't asking the Court to make
21 a finding on that basis. We don't think we need to make
22 a finding -- the Court needs to find that. The fact that
23 the high efficiency gaps present themselves in plans with
24 no partisan intent shows that it's not a discriminatory
25 effect and it shows that it's not something that's

1 necessarily inconsistent with traditional districting
2 principles. We have provided the analysis to provide
3 some context so that the Court could understand, like,
4 was this just -- is it an accident that
5 Republican-favored efficiency gaps are more durable; that
6 they're more common; that even in neutral plans that we
7 see pro-Republican efficiency gaps more commonly than
8 Democratic efficiency gaps.

9 JUDGE CRABB: But isn't it the case that there's
10 quite a bit of clustering of Republicans?

11 MR. KEENAN: There is. I mean that's true. I
12 mean there's clustering of all groups. And so the
13 question is how does that clustering then affect the
14 ability to win states on a sea wide -- seats on a
15 statewide basis. And then, for example, the clustering
16 of Republicans isn't quite at the level of the Democrats.
17 If you look at -- for example, Waukesha County is used as
18 the, you know, Republican equivalent. And if you look at
19 the City of Milwaukee, they're both fairly strong for
20 each party, but Milwaukee votes more strongly Democrat
21 than Waukesha votes Republican.

22 So when you're tallying up wasted votes district by
23 district, Republicans will win all seats in Waukesha,
24 Democrats will win all seats in Milwaukee. But Democrats
25 will just have more wasted votes because if you win the

1 district 90 to 10, you'll have more wasted votes than
2 winning at 80 to 20 or 75 to 25. And so when you do a
3 wasted vote analysis, it ends up going one way or the
4 other.

5 JUDGE CRABB: But if you have a lot of
6 clustering for both parties, you have all these counties
7 in southeastern Wisconsin that are heavily Republican and
8 you have clustering of Democrats in three cities, why are
9 the Democrats always hurt by the clustering and the
10 Republicans are not hurt by the clustering?

11 MR. KEENAN: Well, I think in some ways it's --
12 I think the answer isn't always knowable why certain
13 districts vote certain ways. But I think one of the
14 problems is that just drawing those districts in the
15 outer areas that aren't really strongly one or the other,
16 you're going to end up with fairly close districts and
17 then you end up drawing them. If you're looking at
18 statewide vote share and a big chunk of that is taken up
19 by safe seats, which is true in the case of Democrats,
20 then there just aren't as many of them in the outlying
21 areas. And the Republican vote share, if it's 75 percent
22 in Waukesha, there's still more vote share out in the
23 outlying areas where it's available to win legislative
24 seats.

25 I do want to be clear that we don't think on summary

1 judgment it is necessary to make any sort of finding like
2 this. It's something that's occurred in many different
3 neutral plans. Our main argument is that the presence of
4 a high efficiency gap doesn't show -- departure from
5 districting principles doesn't show discrimination and
6 doesn't show -- on a more fundamental level is just not
7 based on the constitution.

8 JUDGE CRABB: It could show discrimination, but
9 not a kind that has been recognized.

10 MR. KEENAN: Yes, perhaps.

11 JUDGE RIPPLE: If we were to assume for the sake
12 of argument that whoever we decide has the burden of
13 proof but nobody can show that these neutral factors of
14 political geography really impact or justify the plan,
15 impacted the plan, does the efficiency gap then take on a
16 new meaning if that's really -- if we were to determine
17 that?

18 MR. KEENAN: I don't believe so.

19 JUDGE RIPPLE: Why not?

20 MR. KEENAN: Well, the efficiency gap still is
21 just measuring how you conform to the two-to-one vote
22 share. It's still not based on the constitution. It is
23 showing how you convert a statewide vote share into
24 seats, but that's not based on the constitution. As
25 well, it is affected by a host of other factors in the

1 sense that really the legislature -- legislative races
2 come down to -- I think we've shown that in 2012 five
3 seats were decided by .1 percent of the vote, which can
4 swing the efficiency gap a lot one way or the other.
5 That in a sense, it's more important where you get your
6 votes rather than, like, what your statewide vote share
7 is when it comes to winning legislative seats. So I
8 still would think the efficiency gap doesn't provide
9 much, and even so -- I mean the last plan was enacted
10 with no partisan intent. It had certain effects that
11 were seen. Those were caused by something. We don't
12 know -- I think it's many different things: You know,
13 concentration; it's the candidates; the amount of money
14 spent; the issues that were salient at a certain point in
15 time, things like that that I'm not sure how you can
16 distinguish how much of a efficiency gap is really made
17 up of discrimination or partisanship versus other things.

18 JUDGE CRABB: So your position is that
19 efficiency gaps are not particularly helpful in deciding
20 whether there's been overly partisan redistricting.

21 MR. KEENAN: Correct. Basically, yes. Good
22 summary. Thank you. And I think a key point here is
23 that the plaintiffs style their test as partisan intent
24 and partisan effect, but it's not a partisan effect
25 that's unconstitutional; that the language used in

1 *Bandemer* and that was used by this Court in its ruling on
2 the motion to dismiss is the discriminatory effect. And
3 so we don't think that an efficiency gap can really show
4 a discriminatory effect when, for example, there was a 12
5 percent efficiency gap under a plan with no
6 discrimination at all and then now there's a 12 percent
7 efficiency gap in a plan that has partisan intent, that
8 that actually shows any sort of discriminatory effect. I
9 mean it shows an electoral effect, but it doesn't show a
10 discriminatory effect. And I'm trying to use the word
11 partisan effect as sort of like muddying the waters and
12 not actually tying this to the constitution, which is a
13 discriminatory effect.

14 And then I think a further problem is then -- we
15 talked about the intent and the fact is then this burden
16 shifting. Third step that the plaintiffs have proposed,
17 which they say is based off of the one-person, one-vote
18 cases, but the burden-shifting analysis that the
19 plaintiffs have provided is actually not at all like
20 what's done in one-person, one-vote cases. In
21 one-person, one-vote cases the court examines not whether
22 something is a necessary consequence or an unavoidable
23 consequence, which is the language the plaintiffs use,
24 it's whether the plan may reasonably be said to advance
25 the rational state policy of, for example, preserving

1 subdivision lines or county lines or whatever the
2 rationale is for the departure from the equal population.
3 And I got that from the *Voinovich v. Quilter* case.

4 And the plaintiffs, it seems that the burden
5 shifting is all that's required is then to produce an
6 alternative plan that meets a few benchmarks and then
7 you've met this, where -- I mean there's no discussion of
8 whether things advance state policy, whether the
9 justifications -- and I believe that's because once you
10 get into that realm, now we're in the judicially
11 manageable -- a problem of judicial manageability and
12 weighing who districts better, who's more complying with
13 districting principles, and that there's really no way to
14 judge that once, if you're going to do a true burden
15 shifting where there's some sort of like weighing of the
16 interests and determining whose -- like whether the plan
17 meets certain criteria, the plaintiffs basically have
18 said well, we put forward a plan that is equivalent to
19 your plan, therefore, you know, sorry, your plan is
20 unconstitutional.

21 JUDGE RIPPLE: Wouldn't you have somewhat of a
22 better idea of exactly what of the so-called politically
23 neutral elements in drawing up a plan might have been
24 used and why they were used on the other side? Isn't
25 that a good reason to put a burden on you to at least

1 make some showing with respect to -- with respect to how
2 this whole thing is explainable by these so-called
3 neutral factors?

4 MR. KEENAN: Well, I don't know that we would
5 necessarily -- the plaintiffs would be free to take
6 discovery and they can analyze the plan on all the
7 various -- whatever various factors they can analyze on:
8 compactness and equal population, things like that.
9 There was a large amount of discovery in the prior
10 litigation, the *Baldus* case, about what the process that
11 went into the districting and things like that. So I
12 mean in a sense I would say no, and then also that the
13 burden is on plaintiffs to prove a violation of the
14 constitution and I would say especially in this case
15 where there's -- it's hard for courts to find a
16 manageable standard. This process is entrusted to
17 legislative branches who have exercised that process who
18 were elected fairly under a neutral plan, even in a
19 statewide governor's race, and so I would say that no,
20 the burden should still remain on the plaintiffs.

21 THE COURT: Mr. Keenan, you touched on an
22 ancillary problem that I know concerns at least me and
23 that is to what degree can we take judicial notice of the
24 proceedings in the earlier case?

25 MR. KEENAN: By earlier case you mean the *Baldus*

1 case?

2 JUDGE RIPPLE: Yes.

3 MR. KEENAN: I would think what's in the -- what
4 is in the record in that case would be available for
5 judicial notice and then the decision itself. I would
6 also say the same would be true for the *Baumgart* and the
7 *Prosser* cases, which were the districting cases that
8 enacted the 90's plan and the 2000's plan. I mean I
9 would say, like, perhaps to the extent there's issues
10 with -- I would say, like, testimony that was given in
11 those cases might have to be regiven here in the sense
12 that there was different issues and so I don't know that,
13 and we didn't have a chance to ask witnesses followup
14 questions or things like that. So I might have a problem
15 with that kind of thing.

16 But in terms of the -- you know, things that
17 happened, I would say like the opinion in the *Baldus* case
18 or generally I don't necessarily have a problem. There
19 may be some things where we would have a problem with the
20 testimony if it wouldn't meet the criteria under the
21 rules.

22 JUDGE RIPPLE: There's an intermediate position
23 we could take on this last element of the plaintiffs'
24 case as well. Rather than saying you have the burden of
25 proof, we could say you at least have the burden of going

1 forward, of suggesting what the neutral factors that
2 might justify the plan are, keeping the ultimate burden
3 of proof on the plaintiffs. How does that sound to you?

4 MR. KEENAN: Well, it's better. I would still
5 say it's a little bit -- I'm not sure how it would work
6 given that I think we'd still need a standard by which
7 that would then be judged. I think that's where the
8 problem comes in is that we could have witnesses testify
9 about the reasons that went into the districting, but
10 then -- and the plaintiffs would have the right obviously
11 to present evidence on their opinions on that and facts
12 and then ultimately what's -- how is the decision made.

13 JUDGE CRABB: You're not really disputing that
14 the Republicans drew this plan with the desire to create
15 the best possible election process for the Republicans,
16 are you?

17 MR. KEENAN: I would say I would dispute whether
18 it's the best possible.

19 JUDGE CRABB: I'm not saying it turned out to be
20 the best, but that their intent was to do the best job
21 they could to safeguard the common seats and to increase
22 the number of seats that would be available to
23 Republicans.

24 MR. KEENAN: I think -- I'm not disputing that
25 they districted with partisan advantage. I think there's

1 a problem with saying they would -- for example, the
2 language the plaintiffs use of maximizing Republican
3 advantage or making this the best map possible in the
4 sense that -- and I guess we're going away from the
5 summary judgment record here -- but this would be at
6 trial that --

7 JUDGE CRABB: Right.

8 MR. KEENAN: -- there's competing factors here
9 that go into the districting plan which would be to have
10 a plan that passes the House and the individuals who vote
11 on that are most interested in what their individual
12 district looks like, whereas perhaps the Republican Party
13 as a whole is interested in what the overall map looks
14 like and that the best map for Republicans might be the
15 most districts at 52 percent Republican, but that the
16 individual legislators may not really want to be running
17 in a district that's only 52 percent Republican but would
18 rather be 55 percent Republican or 60 or, you know. And
19 then there's balancing of all sorts of different
20 concerns.

21 So I think after the fact you probably could reverse
22 engineer a map that's even more favorable to Republicans,
23 but -- so I would say in a sense, yes, we're not
24 disputing that there's partisan advantage being looked
25 at. But the level of it and maximizing the Republican

1 advantage or making the most favorable plan, I don't know
2 that that's really what is the case.

3 JUDGE GRIESBACH: Well, you wouldn't dispute
4 though, as going to the third prong, you wouldn't argue
5 that you were compelled by traditional factors or other
6 considerations such as population and voting rights
7 considerations to adopt the plan you did.

8 MR. KEENAN: The specific plan, no.

9 JUDGE GRIESBACH: And that's the third prong.
10 So really there is no issue on the third prong, is there?
11 If we adopt the plaintiffs' test and accept -- I don't
12 think there's a dispute on intent. And if we say 7 is a
13 sufficient efficiency gap to presume unconstitutionality,
14 they win, don't they?

15 MR. KEENAN: I mean I think they way they've
16 phrased their test, they do, because I think any
17 plaintiff that gets to make up their own test would make
18 one that they would win. But I guess our point would be
19 that --

20 JUDGE GRIESBACH: I mean at trial there's
21 nothing to try on the third prong, is there?

22 MR. KEENAN: The way they phrased it there isn't
23 and that's why we think it's --

24 JUDGE GRIESBACH: Well, is there another way of
25 phrasing that that you think would leave you something?

1 I mean once -- if we adopt 1 and 2, 3 follows
2 necessarily, doesn't it?

3 MR. KEENAN: That's been our argument. Then it
4 seems like it's not even really a burden shifting because
5 I don't know that there's any plan that's required to be
6 adopted.

7 JUDGE GRIESBACH: Right.

8 MR. KEENAN: I mean there's any number of plans.

9 JUDGE GRIESBACH: For considerations, they give
10 you a whole range of plans you can adopt and obviously
11 the intent was to adopt one that was electorally
12 advantageous to the Republican Party that was in control.

13 MR. KEENAN: Correct. And our position is that
14 there's nothing unconstitutional about that; that
15 basically there's nothing unconstitutional about the
16 Republicans winning control in 2010, deciding to enact a
17 plan that is favorable to themselves, even more favorable
18 than the prior plan had been. Conversely there would
19 have been nothing unconstitutional had Democrats won in
20 2010, unified control, and actually a plan that was more
21 favorable to themselves than what a neutral plan
22 conceivably would have been. That partisan motive just
23 isn't unconstitutional. And then moving to the
24 efficiency gap, that's not showing discriminatory effect.

25 In a sense I think you're also showing -- the

1 asymmetry here is that working off of the baseline of the
2 2000's plan, which was favorable to Republicans, the
3 Democrats could have engaged in conceivably what's
4 traditionally understood as gerrymandering, drawing
5 strange districts, kind of ignoring some districting
6 principles, and maybe end up with even still a negative
7 efficiency gap, maybe a slightly positive one. And that
8 kind of escapes review under this plan because perhaps
9 there's a limit to what -- you know, how positive an
10 efficiency gap can even be in Wisconsin if we've only
11 seen a plus two as the most favorable to the Democrats in
12 the last 20 years or 24 years. I think that's our
13 example that we showed with Illinois which, using
14 Jackman's numbers, was alleged to be a Democrat
15 gerrymander. Jackman finds that even at one year, it
16 actually was a pro-Republican bias map even though it was
17 a Democratic gerrymander. I mean Democrats would seem to
18 be -- might be able to be free to gerrymander under this
19 standard because they would just, like, escape review
20 because the efficiency gap wouldn't get to such a level.

21 Jackman finds that it's rare to have Democratic
22 efficiency gaps that exceed the 7 or 10 percent threshold
23 in the first election, or as is relatively common for
24 Republican plans, seems to be an asymmetry, which a
25 standard is going to be applied differently depending on

1 the party in control.

2 JUDGE GRIESBACH: Even the Demonstration Plan
3 here has a small Republican efficiency gap.

4 MR. KEENAN: That's true.

5 JUDGE GRIESBACH: What does that tell us?

6 MR. KEENAN: I think it tells us that the
7 natural baseline of any sort of plan is going to end up
8 being a pro-Republican plan, and in Wisconsin as of now,
9 who knows what that becomes in the future, but I mean Ken
10 Mayer's plan, the Demonstration Plan, it was a negative
11 2.2 when he did his no incumbent, every seat contested.
12 Then when he, in his rebuttal report, added back in the
13 incumbency effects, it turned into, I believe, a
14 three-and-a-half percent efficiency gap in favor of
15 Republicans, which is half the way to the presumptive
16 unconstitutionality, and this is, you know, a districting
17 by someone who's, you know, hired by Democrats to draw a
18 plan that's less -- that isn't discriminating against
19 them and his plan shows a negative three-and-a-half
20 percent efficiency gap.

21 You know, I think he doesn't determine what it would
22 be in 2014 when things change, so I mean it's conceivable
23 they would even have a negative 7 percent efficiency gap
24 under that plan in 2014.

25 JUDGE GRIESBACH: And is that a

1 reverse-engineered plan?

2 MR. KEENAN: I think it is because it's taking
3 the electoral results that happened after the fact, going
4 back and then districting to get particular results,
5 which as I said before, I mean I think you could do that
6 after the fact. You can look at what the election
7 results were, you know what they were, and then you back
8 -- kind of like work your way back to what the district
9 is going to be so then you can say well yeah, the
10 Democrats would have won the seat with 50.2 percent of
11 the vote. Ahead of time I don't think you would really
12 know one way or the other what exactly is going to
13 happen. I mean you can make predictions, but in a sense
14 Mayer is making predictions about the past about what
15 already happened. And so yeah, I think it is a
16 reverse-engineered plan when you get to district after
17 the election has already occurred. You can get the
18 result you want.

19 I think another problem with the standard here is it
20 doesn't meet what Justice Kennedy has been calling for in
21 a standard in his *Vieth* concurrence when he held out hope
22 that perhaps some day a standard would emerge that courts
23 could apply; that he wanted a limited and precise
24 rationale that could correct any existing violation of
25 the constitution. What Professor Jackman's own numbers

1 show is that at the 7 percent level, which is what the
2 plaintiffs have offered, 36 percent of all plans had an
3 efficiency gap above 7 percent in their first election.
4 So it shows a fairly common thing, you know, when over
5 one-third of plans are tripping this threshold.

6 Now, he finds that an acceptable level because out
7 of that 36 percent, he believes that they won't change
8 sign over the course of the plan. That's a key fact he
9 uses; that when you look at the first election, you see a
10 7 percent gap. It's unlikely that the plan is going to
11 then flip to have a positive EG at some point. We would
12 say that's not tied to the constitution either, to have a
13 plan that flip sign. But I think it also, I mean, shows
14 that just the level of intrusion this could be.

15 In the response, the plaintiffs say well, 16 percent
16 of those plans wouldn't actually be affected because they
17 had no partisan control. So you're down to 20 percent of
18 plans that had unified partisan control and the 7 percent
19 efficiency gap. I think that shows still that one-fifth
20 of plans are being roped into this standard which isn't
21 -- doesn't seem to me that that's what Justice Kennedy
22 envisioned in his *Vieth* concurrence.

23 But second, I think it shows that when 16 percent of
24 plans have the 7 percent efficiency gap with no partisan
25 control, it just highlights why the efficiency gap isn't

1 connecting up with any sort of discrimination or
2 discriminatory effect or constitutional violation.

3 Even upping the standard 10 percent in the first
4 election, 18 percent of plans had an EG above 10 percent
5 in their first election, so now we're talking about one
6 in five plans are above 10 percent. That's made up of 10
7 percent of plans with unified partisan control and 8 had
8 no unified partisan control. So even at 10 percent as
9 relatively common, 8 percent of all plans trigger the 10
10 percent threshold with no partisan control at all. So I
11 think it shows that even these high efficiency gaps
12 aren't really all that uncommon and so they can't really
13 be seen as outliers of extreme partisan gerrymandering
14 when they're showing up in, you know, 8 percent of --
15 like one-fifth of all plans have a 10 percent efficiency
16 gap in the first election and then it's not that
17 uncommon.

18 I think the Jackman standard too is -- I just want
19 to be clear on what he actually did -- is that he
20 examined the -- for example, you could look at the
21 Wisconsin plan. He just looks at what the first EG was
22 and then does an analysis looking at the next EG's in
23 line. So say Wisconsin in 2002 had a negative
24 seven-and-a-half EG, that would count as a negative
25 seven-and-a-half. And then he looks at the future

1 results and sees what happened. But I would say that
2 this -- it shows what happened in the future, but it's
3 not necessarily a guide to what's going to happen -- or
4 it shows what happened in the past; it's not necessarily
5 a guide to what will happen in the future in the 2022
6 election, 2030 election which is when the standard was,
7 should the Court adopt the standard, that's when this is
8 going to be applied in full. It would be in the 2022
9 election.

10 Actually, I believe it's 53 percent of plans have an
11 EG above 7 at any point in their existence, so it's like
12 half of plans are triggered in that threshold. If you
13 don't just limit yourself to the first election, you look
14 at all of them in the plan.

15 And a plan is just going to produce a range of
16 results. The first one isn't magic or anything, it's
17 just what happened to occur first. And as a necessity,
18 the plaintiffs are relying on that because that's what a
19 plaintiff would look like is the first election. But
20 where does that election fall on the spectrum of what
21 this plan could expect? You know, we don't know.

22 If you look at the Wisconsin 2000's plan, the gap
23 was negative seven-and-a-half, I believe negative 10,
24 negative 12, negative 4, negative 5, something like that.
25 Any one of those could have occurred first. So if, say,

1 the waive election of 2012 happened in 2002, well now
2 it's a negative 4 percent efficiency gap in its first
3 election escapes review, even though it goes on to
4 produce efficiency gaps of negative 10 and negative 12.
5 If those negative 10 and negative 12 show up first, well
6 now it seems like this wide extreme partisan gerrymander
7 when it did produce gaps of negative 4, negative 5, and
8 negative 7.

9 So just conditioning on the first election is a
10 little bit difficult because there's no way to know where
11 does that fall, how is that representative of the whole.
12 Jackman has done a historical analysis, but going forward
13 in the future it's hard to say how that's going to play
14 out. I mean you could even adopt the standard, have the
15 Republican waive election in 2022 and have a bunch of
16 plans escape review as gerrymanders even if they were
17 because 2010 is the lowest EG that Wisconsin saw since,
18 like, 1996 maybe, and that was actually a really good
19 Republican year. So if that year happens in the first
20 year, the efficiency gaps are low and you're evading
21 review.

22 Or conversely maybe you just have a fluke year where
23 there's a lot of high efficiency gaps that will
24 eventually move down for whatever reason in 2022. Would
25 those be unconstitutional? Everyone has to redistrict

1 when it was just a fluke election year that caused that
2 result or perhaps even a fluke election in one state that
3 caused a high efficiency gap and then you would expect
4 maybe it will normalize over the rest of the plan.

5 I just had a question about the motion in limine,
6 whether I should address that now or should I wait until
7 the plaintiffs go.

8 JUDGE RIPPLE: I think you can go right ahead
9 and address that now.

10 MR. KEENAN: Okay. On the motion in limine, our
11 point mainly is that at this point in time, the Court
12 need only resolve the parts of Mr. Trende's opinion that
13 were actually submitted on summary judgment. And those
14 aren't actually even disputed, like the opinions he
15 offered aren't disputed. What's disputed is what the
16 Court should make of those opinions. The plaintiffs
17 don't dispute that he accurately -- that he accurately
18 calculated the partisan index the way he did. They don't
19 contest that he accurately cites the vote totals that he
20 cited that we used on summary judgment. In that sense I
21 think there's really no reason to exclude that evidence
22 given that they didn't contest it.

23 JUDGE GRIESBACH: Is that expert testimony or
24 are those historical facts?

25 MR. KEENAN: In some sense they're historical.

1 I would say that the election results are historical
2 facts, but you kind of need a way to get them in. The
3 partisan index, I think, is more of an expert analysis
4 because it requires some calculation, although, I mean --
5 yeah, I would say that partisan index is more along the
6 lines. But for example, Trende's reliance on the fact
7 that Bill Clinton's election results, how his vote,
8 statewide vote share compared to Obama's in 2012, I mean
9 you could get that from the GAB website and the Wisconsin
10 Blue Book. We need a way to get that into the evidence.

11 But -- and I think the plaintiffs' motion more
12 broadly suffers from a -- stems from a false premise that
13 you need to be a Ph.D. in political science who publishes
14 in peer-reviewed journals in order to be an expert
15 witness. That's definitely not the case. Someone just
16 needs to be qualified. We believe Mr. Trende is
17 qualified, that he's a professional elections analyst
18 who's --

19 JUDGE CRABB: What would you say his
20 qualifications are?

21 MR. KEENAN: Sure. He has a master's in
22 political science from Duke University. He's --

23 JUDGE CRABB: Was he specializing in any kind of
24 election analysis?

25 MR. KEENAN: I think it's just a master's in

1 political science. I don't -- he has written now for, I
2 believe it's seven or eight years professionally as an
3 elections analyst for a website called
4 realclearpolitics.com.

5 JUDGE CRABB: There's no peer review of that.

6 MR. KEENAN: No, there not, and there doesn't
7 need to be peer review of experts when they testify.
8 That's one factor that the courts can consider, but I
9 think the *Kumho* case and the Seventh Circuit cases made
10 clear that peer review isn't required.

11 I will say that the plaintiffs rely on some things
12 that aren't peer reviewed. Everything that comes before
13 a court doesn't need to be --

14 JUDGE CRABB: But it is something to be
15 considered if it does exist.

16 MR. KEENAN: Correct. He has written a book on
17 demographic trends in politic study in American history
18 from, like, the 20's onward and the part shifts and
19 parties in their coalitions and their demographics. It's
20 called *The Lost Majority*. He's contributed to a number
21 of books and written articles. He writes professionally
22 just day-to-day on elections using statistical analysis
23 to look at election results and project elections and
24 also, like, analyze past elections.

25 So we think he's well qualified to offer for what we

1 offered him for which is to provide some context and
2 history as to elections that occurred in Wisconsin and
3 how Wisconsin has changed over time, which I mean I think
4 we also have to be clear that we're aren't offering --
5 what we're offering it for is that, not some sort of,
6 like, overarching theory of redistricting or that he's
7 going to come up with a quantifiable number as to what
8 the expected efficiency gap is going to be or anything
9 like that. We just thought given the plaintiffs'
10 analysis by Mr. Jackman is looking over time at election
11 results, someone should look at the history of how those
12 election results have actually occurred, how has it
13 changed over time, and that would be useful to the Court
14 in trying to evaluate whether the efficiency gap is
15 really a standard that should be adopted by the courts.
16 Because they use -- they're basically using historical
17 averages and what's happened in the past that without
18 context, it's really hard to determine whether someone
19 should treat what's happened in the past is what should
20 continue on in the future as a legal standard or is it
21 something that was the result of a particular moment in
22 time.

23 JUDGE CRABB: What do you understand his basis
24 is for saying that the reason that the Republicans have
25 gained more seats in state legislatures is because there

1 are just natural pro-Republican advantages?

2 MR. KEENAN: Sure. It's based of his study of
3 presidential election returns.

4 JUDGE CRABB: What kind of study did he make of
5 the actual numbers of Republicans in certain districts as
6 opposed to the number of Democrats?

7 MR. KEENAN: Well, what he does is he looks --
8 he doesn't -- you don't look at specific districts,
9 because those can change. So we need to look at --

10 JUDGE CRABB: Well then let's say the state.

11 MR. KEENAN: Yeah. So what he does is he looks
12 at election results on smaller levels, like the counties
13 or congressional districts, and then sees how has that
14 changed over time. Where was the Democratic strength and
15 the Republican strength versus now? So -- and what he
16 does is he uses presidential vote share, which is
17 recognized as an indicator of partisanship that you could
18 expect. I mean parties go above and below that, but it's
19 a baseline measure for partisanship. And then he adjusts
20 that based on the electoral conditions of that year. So
21 that the partisan index is a way to control for the fact
22 that, for example, the presidential vote in 1984 is very
23 Republican for Reagan. It's more Democratic obviously in
24 2008 or 2012 when Obama wins. But you wouldn't
25 necessarily think that's always going to be the case that

1 the presidential vote share, so you take it back to the
2 national average with the partisan index. And he just
3 compares how does that differ over time. So it's a way
4 to see what does Wisconsin look like in '88, '96 versus
5 today. Does it look the same? Does it look different?
6 And it looks very different.

7 That's basically the basis is the presidential vote
8 share and then compare using the partisan index, which is
9 controlling for the national vote share. So who is more
10 or less, you can look at it either way, Democratic or
11 Republican in the nation as a whole, what parts of the
12 state. So obviously Milwaukee ends up being more
13 Democratic than the state as a whole or the country as a
14 whole, so that shows up as a Democratic strength in all
15 years. But then you can also measure well, how much more
16 is it in each year and it's actually more strong now than
17 it was in the past. So it shows increasing
18 concentration. So that's a basis for his opinion.

19 I think -- you know, I think the plaintiffs'
20 criticisms of the opinion, they're fine to raise on
21 cross-examination. The Court can take those into
22 consideration when considering Mr. Trende's opinions. We
23 don't think they're a reason to, like, not hear him at
24 all. And we think, with respect to the motion more
25 broadly, that really now isn't the right time to rule on

1 it; that the preferred procedure would be to hear him
2 testify. We don't disagree that *Daubert* still applies in
3 a bench trial, but that the *Salem* case and the *Medavante*
4 case, I believe, are the ones that say a court -- you
5 know, let the expert witness testify and then after the
6 trial, the Court can make the *Daubert* findings after
7 hearing the expert himself explain his qualifications and
8 his reasoning and see the cross-exam and see all that and
9 then make the *Daubert* determination. We think that's the
10 process that should be followed here.

11 We think that basically if you read the plaintiffs'
12 motion, a lot of it is this quibbling about methodology
13 and it's not about what he himself did, but about what
14 should the Court make of this. They say well, this isn't
15 useful. Well, that's more an argument to the Court about
16 what usage you make of his analysis rather than not
17 letting him testify and offer the analysis in the first
18 place.

19 I guess I'd say to the extent that the Court does
20 want to rule on it, like the entirety of the motion
21 before trial, that seems like it can even still do that
22 on a more regular schedule when motions in limine would
23 come before the court -- before, like, in general when
24 most motions in limine would come rather than now. I
25 think it only needs to rule on the summary judgment

1 portion of it for summary judgment. We think you could
2 probably even avoid that because I think the plaintiffs'
3 standard fails, even assuming that none of Trende's
4 opinions that were cited in the summary judgment
5 materials are adopted.

6 So I guess I may have more to say about it in the
7 rebuttal after I hear the plaintiffs on their motion, and
8 same with -- I think I'm done with the summary -- my main
9 argument on summary judgment unless there's further
10 questions from the Court.

11 JUDGE RIPPLE: I don't think so, Mr. Keenan.
12 Thank you very much. The Court will take a ten-minute
13 recess before we hear from the plaintiffs.

14 (Recess 10:30-10:41 a.m.)

15 THE CLERK: This Honorable Court is again in
16 session. Please be seated and come to order.

17 JUDGE RIPPLE: We're ready to hear now from the
18 plaintiffs. Ms. Odorizzi.

19 MS. ODORIZZI: Thank you, Your Honor. Michele
20 Odorizzi for plaintiffs.

21 With the Court's permission, we'd like to split our
22 argument, and I'm going to talk about intent, the
23 relationship between the intent and effects prong,
24 clustering in the Trende motion, and Professor
25 Stephanopoulos is going to talk about the efficiency gap,

1 our Demonstration Plan, and our third prong.

2 JUDGE RIPPLE: That's fine.

3 MS. ODORIZZI: Okay. Thank you, Your Honor. We
4 were a little surprised to see in defendants' reply brief
5 that they argued that -- about the legal test for intent
6 because we really didn't see that in their opening brief,
7 which probably in some sense they probably waived it by
8 not raising it in their opening brief. But in any event,
9 their argument, I think, fails because it's basically an
10 argument that there can't be any intent prong. They say
11 that partisan intent is ordinary and lawful in
12 districting, and that comes from the *Vieth* case from a
13 four-person plurality, a four-justice plurality. The
14 rest of the court didn't necessarily adopt that and even
15 the plurality agrees that there is such a thing as
16 unconstitutional partisan gerrymandering in violation of
17 the Equal Protection Clause, and it is Equal Protection
18 Clause 101 that you have to have both discriminatory
19 intent and discriminatory effects.

20 Defendants throughout their briefs and throughout
21 their presentation tend to lump those two together and
22 mix them up. So they say in their reply brief that we
23 haven't shown that we can show that the partisan intent
24 was excessive. I don't know what that means to have
25 intent that's excessive. You really want to discriminate

1 against people? I don't know what it means and --

2 JUDGE RIPPLE: But the object of the intent is
3 an important one.

4 MS. ODORIZZI: Yes. Exactly, Your Honor. So
5 it's not that the intent itself has to be at a certain
6 level. We know what discriminatory intent is. *Bandemer*
7 tells us what it is. It's the intent to treat a
8 particular political group differently and to denigrate
9 them and to dilute their votes.

10 JUDGE RIPPLE: There's been a lot of water under
11 the dam since *Bandemer*. Is that still viable?

12 MS. ODORIZZI: Yes. I think the intent test
13 there is still viable. It was adopted by six justices,
14 and in later cases the court -- people have tried to make
15 the test more manageable by saying well, let's make it a
16 predominant intent. And in *Vieth*, the court really
17 didn't bite on that because they said -- the plurality
18 anyway said predominance -- it's too hard to tell what
19 motive predominates. And in *LULAC*, the plaintiffs there
20 tried the notion that if we can prove it was a sole
21 intent, then we don't have to prove effects, and the
22 Court said no, no, no. Even if it's the sole intent, you
23 still have to prove both intent and discriminatory
24 effect.

25 So I think that does put us back to *Bandemer*, which

1 in the normal equal protection standard which is partisan
2 intent, a discriminatory intent was a motivating factor
3 in the plan.

4 JUDGE RIPPLE: You can have somewhat of a
5 discriminatory intent in this area and be just fine,
6 can't you?

7 MS. ODORIZZI: You can, Your Honor, but the
8 excessiveness part of it I think comes in the effect
9 part.

10 JUDGE RIPPLE: Well, are you saying that what is
11 proven in the effect is, in fact, relevant and probative
12 evidence that one had the intent to discriminate at a
13 constitutional magnitude? Is that what you're telling
14 me?

15 MS. ODORIZZI: It can be, Your Honor.
16 Absolutely. That there is certainly a synergy between
17 the two. You can have a plan, and I'll get to this a
18 little bit later, but you can have a plan that creates
19 discriminatory effects that was not intended.

20 JUDGE RIPPLE: In other words, what you show in
21 your prong two might be able to substantiate that the
22 defendants did want it to do more than simply favor one
23 party to a permissible degree.

24 MS. ODORIZZI: That's right, Your Honor.
25 Exactly. And that's how we show that it's excessive

1 partisan gerrymandering. To show the intent, I mean the
2 state concedes that the Republican leadership had the
3 intent. And we didn't talk about the evidence because in
4 our brief --

5 JUDGE RIPPLE: Counsel was very careful to say
6 though while he'll concede they had the intent to favor
7 the Republican Party, he will not concede that they had
8 the intent to create a plan that would keep the
9 Republican Party --

10 MS. ODORIZZI: Right.

11 JUDGE RIPPLE: -- in control --

12 MS. ODORIZZI: Right.

13 JUDGE RIPPLE: -- for the entire period.

14 MS. ODORIZZI: Right.

15 JUDGE RIPPLE: Is it necessary to have such an
16 intent --

17 MS. ODORIZZI: I don't think --

18 JUDGE RIPPLE: -- to violate the constitution?

19 MS. ODORIZZI: I don't think it has to be that
20 level, Your Honor. I think the intent to discriminate
21 against an identifiable political group is enough. But
22 if the standard were an intent to maximize your advantage
23 by packing and cracking your opponents as much as
24 possible, if that's the standard, we can meet it here.
25 We can show that that happened here.

1 JUDGE RIPPLE: Can you meet the intent -- if the
2 standard is that the defendants intended to keep the
3 Democrats out of control for the entire decennial period,
4 can you prove that?

5 MS. ODORIZZI: That they wanted a durable
6 gerrymander that would last as long as it possibly could?

7 JUDGE RIPPLE: That's right.

8 MS. ODORIZZI: I think we can show that, Your
9 Honor, that they thought about that issue and that they
10 thought about it and that they went through various
11 iterations of the plan in order to absolutely maximize
12 their advantage for as long as possible.

13 JUDGE RIPPLE: My difficulty at least is in that
14 if you want wasteland where the intent was clearly to do
15 more than most state legislatures do, whatever that is.

16 MS. ODORIZZI: Whatever that is.

17 JUDGE RIPPLE: And what -- and trying to put it
18 in concrete for the whole decennial period, how would we
19 ever measure the intent in between those two extremes?

20 MS. ODORIZZI: I don't think you should be
21 measuring intent, Your Honor. I think here that it
22 should be the intent to disadvantage people based on
23 politics; that that's enough. And then you look at the
24 effects, and I think you can have kind of a synergy
25 between the two where you say good Lord, this was the

1 worst gerrymander, one of the worst in history. Yes,
2 they were planning to do something of exactly that
3 magnitude. That is constitutionally intolerable. They
4 have hit the level where they have both the intentional
5 gerrymandering is constitutionally intolerable.

6 JUDGE RIPPLE: As I read your pleadings on this,
7 I kept thinking of what would happen would be the usual
8 practice of state legislatures will just get worse and
9 worse and that that line between trying to ice it for the
10 entire decennial period and what's common, the law of the
11 shop, if you want, among state legislators, is just going
12 to increase and increase and increase.

13 MS. ODORIZZI: That's right, Your Honor. If you
14 have unified control of the redistricting process and
15 it's okay, as defendants say, basically any partisan
16 intent is okay.

17 JUDGE RIPPLE: What's the constitution -- what
18 does the constitution prohibit? If the state
19 legislatures just get, you know, raw and then more raw
20 and then more raw in the way they do things, at what
21 point is the constitution violated?

22 MS. ODORIZZI: Well, I think, Your Honor, in our
23 test in that situation where you have unified control and
24 you have proof of partisan intent that the map was drawn
25 with the intent to disadvantage your political opponents,

1 then you look at the efficiency gap to see what the
2 effects would cause and if the effects are so far out of
3 what has been previously the historical norm for the
4 efficiency gap and it's durable, it's likely to last
5 throughout the entire period, then you have a
6 constitutional violation unless the state can come and
7 show that was really the political geography of this
8 particular state and there was no other way around it. I
9 mean I think that is a discernible test because it's
10 related to the concept that people have to be treated
11 equally and it's a manageable test and it's not going to
12 create a whole raft of new litigation because there are
13 very few plans that actually would be subject to this.

14 I'd like, if I might, to address defendants' -- one
15 of their big arguments is courts, neutral parties
16 sometimes in the past have created plans with big
17 efficiency gaps. And that's true. And under our test,
18 those plans are not at risk because there's no partisan
19 intent. And counsel said well, we're using intent as,
20 you know, a way of protecting our efficiency gap
21 analysis. But we're using intent and effect because that
22 is the basic equal protection analysis. You look at
23 intent. You look at effect.

24 You have a lot of cases under the Equal Protection
25 Clause where somebody can say they are discriminatory

1 effects. Because discriminatory effects happen for a lot
2 of different reasons. But you don't have a claim that
3 the state action violates the Equal Protection Clause
4 unless you can show intent. So this is not anything
5 unusual or strange.

6 And if you go back to *Bandemer*, I think it's
7 interesting that Justice White noted, if I can find this
8 here, that if you do, if you draw a map in a -- he called
9 it a politically mindless fashion -- where you don't pay
10 attention to partisan issues and to how you're
11 districting and you're looking only at things like
12 compactness and trying to respect boundaries and making
13 sure that you have equal population, he says you can get
14 a gross partisan gerrymander out of that. He recognized
15 that.

16 And that's what happened in Wisconsin in the 2000's.
17 If you look back at the decision in that case, the court
18 looked and it rejected the plans that were tendered to it
19 because it thought they were too partisan. But then in
20 drawing its own plan, the court didn't look at these
21 partisan issues. Unlike the court in the previous decade
22 which had really tried and succeeded in coming up with a
23 map that was very balanced, the court this time around
24 said we're going to try and do as little as possible to
25 disturb the current boundaries and we're going to

1 equalize the population. And that had the unintentional
2 effect of creating a fairly large pro-Republican
3 efficiency gap. But that doesn't show that what the
4 legislature did in 2011 was somehow appropriate
5 constitutional because you had an accidental gerrymander.
6 There was nothing accidental about what happened here.

7 At one point in their reply brief defendants say
8 well, the fact that because of the lawful -- what they
9 called the *lawful partisan intent* of the legislature,
10 there just happened to be this big efficiency gap. It
11 didn't just happen to be. It wasn't an accident. They
12 planned for it and they achieved it.

13 So in that sense, the fact that we do have
14 efficiency gaps that come out of who knows why they came
15 out of those other maps, that's not relevant because
16 there was no intent in that case. But that doesn't mean
17 that you can create discriminatory effects that are
18 excessive in a case like this intentionally, just like
19 the race discrimination cases we would say.

20 JUDGE CRABB: I have a question about your
21 proposal. There seems to be agreement among the justices
22 who believe that partisan gerrymandering is justiciable;
23 that court intervention for that kind of partisan
24 gerrymandering should be very limited and it should be
25 limited to extreme situations. And you seem to say that

1 approximately 20 percent of the plans you could make a
2 prima facie case for showing that they're extreme
3 partisan gerrymandering. So how do we -- how do we
4 narrow this to the few extreme circumstances that the
5 court seems to have been willing to consider?

6 MS. ODORIZZI: Well, Your Honor, I think
7 Professor Stephanopoulos can give you the exact numbers.
8 I don't have them in my head and he does. But when you
9 take out -- when you look only at the plans where you had
10 unified control of redistricting by one party, which is a
11 good proxy for partisan intent, that cuts the number way
12 down of the plans that would be -- you could challenge.
13 And as to the rest, if they could be challenged, and
14 there's a number of current ones that could be challenged
15 under our standard, those are subject to the standard and
16 in the overall scheme of things there's not that many of
17 them.

18 So I think the standard works in that it's getting
19 really the outliers. It's getting the ones where you
20 have partisan intent and where you have an extreme
21 efficiency gap that was intentionally created and
22 intentionally discriminates against a particular
23 political group.

24 JUDGE GRIESBACH: I think, if I understand the
25 defendants correctly, they don't argue that they did not

1 have intent to benefit the Republican Party. They do not
2 argue that they were compelled to enact this plan because
3 of the traditional considerations. What's at issue here?
4 What are the facts we have to decide?

5 Is the efficiency gap, is that a standard that we
6 either adopt as a matter of law? Or -- and if so, is
7 that a factual dispute? What are the -- why do you think
8 we need a trial? Why aren't you moving for summary
9 judgment given your position?

10 MS. ODORIZZI: Well --

11 JUDGE GRIESBACH: What are the facts that you
12 think we need a trial to hear and to decide?

13 MS. ODORIZZI: They do -- well, first of all on
14 the intent prong, they've admitted some but not all.

15 JUDGE GRIESBACH: But your argument is all you
16 need to show is an intent to benefit the parties.

17 MS. ODORIZZI: Right.

18 JUDGE GRIESBACH: And you have that.

19 MS. ODORIZZI: Right. Right. But Your Honors
20 have to decide what they -- they also argue that there is
21 no standard, legal standard for intent. So I'm not sure
22 what they're asking the Court to do except grant summary
23 judgment because it doesn't matter what their intent is.

24 JUDGE GRIESBACH: My question to you is what do
25 you think are the facts that we have to decide.

1 MS. ODORIZZI: Well, they've challenged. They
2 have an expert who we haven't challenged who challenges
3 various aspects of the efficiency gap and whether it's
4 the appropriate methodology to use, and we think that,
5 you know, it's looking at those experts and hearing their
6 testimony and you have to decide whether, in fact, the
7 efficiency gap is that test that the Supreme Court has
8 been searching for that enables you to decide and where
9 the line is between, you know, kind of politics as usual
10 and unconstitutional gerrymandering.

11 JUDGE GRIESBACH: What facts do we need to
12 determine in order to make that assessment, that
13 decision?

14 MS. ODORIZZI: Well, I think first of all you
15 have to look at the efficiency gap and see if you agree
16 with the way we've used it. We have questions of
17 durability, which again Professor Stephanopoulos, if you
18 want to get into those facts, can talk more about it.
19 And the defendants have challenged those -- some of what
20 we've done on the efficiency gap, and that creates
21 questions of fact.

22 Just like on the clustering issue which they argued
23 sort of in their brief, we say Democrats and Republicans
24 -- we have expert testimony that Democrats and
25 Republicans are equally clustered in Wisconsin. So to

1 the extent they want to argue about that it's clustering
2 of adherence of various parties explains the efficiency
3 gap, we have an issue of fact for the Court to decide.

4 JUDGE GRIESBACH: It's -- I mean it is
5 demographically provable pretty -- and I doubt if there
6 would be much dispute based on whatever statistics as to
7 the density of the particular clusters, the respective
8 clusters, and I think that was the argument here that the
9 Democratic clusters are much more dense than the
10 Republican clusters. But is that -- I mean if we decide
11 that, that decides the case. I'm trying to figure out
12 and understand what specific factual issues we're going
13 to hear about at a trial that we'll need to resolve that
14 will -- that require a trial, I guess, that you think we
15 need to decide in order to determine whether or not the
16 measure you're offering, which is the efficiency gap.

17 MS. ODORIZZI: Right.

18 JUDGE GRIESBACH: There's no dispute as to what
19 it is or how it's calculated.

20 MS. ODORIZZI: Calculated; right.

21 JUDGE GRIESBACH: So I'm wondering do we need a
22 trial? And what are the facts that we have to decide at
23 such a trial? Where are we going to hear disputes as to
24 facts that aren't a matter of some historical event or
25 record that are already -- you know, that are already in

1 the record that are not --

2 MS. ODORIZZI: Well, I think, Your Honor, we
3 didn't move for summary judgment because we viewed this
4 as having a battle of the experts about the efficiency
5 gap and how it applies.

6 JUDGE GRIESBACH: So every one of these cases
7 will be a battle of the expert? Or did the Supreme Court
8 envision, you know, some -- not multiple -- I mean once
9 we arrive at the standard, now we know.

10 MS. ODORIZZI: Now we know.

11 JUDGE GRIESBACH: But I mean is it your view
12 that if, for example, this Court ends up adopting the
13 efficiency gap as a reasonable and manageable standard,
14 that will be still a factual issue in every other
15 redistricting case that comes up?

16 MS. ODORIZZI: It may or may not be, Your Honor.
17 If you adopt the efficiency gap, it's easy to calculate
18 it and so you may have issues as to intent and you may
19 also have issues on the third prong as to whether or not
20 the efficiency gap is unavoidable. Because of the
21 political geography of the state, we don't have that
22 issue in Wisconsin, but it may be in other states.

23 JUDGE GRIESBACH: Thank you.

24 JUDGE CRABB: Who do you think should have the
25 burden of proof on that last question?

1 MS. ODORIZZI: On that last question, we think
2 the burden should shift to the state. Once we've shown
3 both intent and that the gerrymander is excessive under
4 the efficiency gap, they should have to explain. They're
5 in the best position to explain. They say that's not
6 fair, you know, and that they don't like the unavoidable
7 standard, but what other standard would you use when
8 they've done this with the intent to give themselves a
9 partisan advantage.

10 JUDGE CRABB: Are you proceeding from the
11 one-person, one-vote cases when you say that the burden
12 should be --

13 MS. ODORIZZI: Yes.

14 JUDGE CRABB: -- on the defendants?

15 MS. ODORIZZI: Yes. And also, I mean, they say
16 here we've reverse engineered a Demonstration Plan. But
17 Professor Gaddie, who was their expert before the fact,
18 made the same predictions. We could have used his
19 predictions and come up with the same thing because he
20 was remarkably accurate about how the districts would
21 perform. If we translate what he did into our efficiency
22 gap, he gets the same efficiency gap that we found after
23 the election. So...

24 JUDGE CRABB: Do you know of any case in which
25 the Supreme Court or any justice of the Supreme Court has

1 said that the burden should be on the defendants to show
2 that the gerrymandering was unavoidable?

3 MS. ODORIZZI: No, Your Honor. I think that
4 this is, you know -- this is -- we proceed from the
5 one-person, one-vote cases because there there's a
6 presumption that when you are over a certain limit, that
7 it's unconstitutional. Here we think you should have a
8 presumption when you have both intent and the proper
9 amount of effect that when you've gotten to that level,
10 you have excessive partisan gerrymandering, then you also
11 should have a presumption.

12 And, you know, it's interesting because their
13 opening brief says very confidently that Wisconsin is a
14 pro-Republican state. It's just political geography.
15 And then in their reply they say well, that's too high a
16 burden. You can't put that burden on us. And it's
17 impossible and plaintiffs could always do it. But if you
18 read the Chen article, which they rely on, which talks
19 about Florida, it says in Florida it would be
20 unavoidable, because according to this article, they say
21 that the way Democrats are clustered in Florida, the only
22 way to create districts that were balanced under an
23 efficiency gap analysis would be by creating snake-like
24 districts coming out of the -- one of the cities.

25 So there would be a place for defendants in some

1 states to be able to come back and say we had to do this
2 in order to preserve ordinary districting rules.

3 JUDGE CRABB: Are you imposing a standard of
4 necessity?

5 MS. ODORIZZI: We are of being unavoidable, but
6 of course, you know, all of these standards are subject
7 to whatever Your Honors decide they should be. And
8 whatever it is, we think we can meet it on the facts of
9 this particular case.

10 On the clustering point, I think for purposes of
11 summary judgment that that's really a question of fact.
12 So to the extent defendants are still relying on
13 clustering and those maps that are in their brief, those
14 are all the question of facts. Because as I say, our
15 Professor Mayer, who does have a Ph.D. and used the kind
16 of analysis that a social scientist used -- uses to
17 decide population clustering, said Democrats and
18 Republicans in Wisconsin are equally clustered. So
19 that's really not an issue in this state. And at the
20 very least, there's a question of fact.

21 JUDGE CRABB: If I could go back to this
22 justified necessity factor. If you said that the
23 defendants had to show that the plan they are using was
24 necessary, isn't that -- anything could be necessary.

25 MS. ODORIZZI: Well, I think --

1 JUDGE CRABB: The realm of plans that they could
2 propose.

3 MS. ODORIZZI: Right. What they would have to
4 be able to show is that their supernormal, if you will,
5 efficiency gap, pro-Republican efficiency gap is really
6 inherent. And yes, they could draw different maps. But
7 no matter what map they drew, so long as it adhered to
8 the other requirements of districting, it would produce a
9 similar kind of efficiency gap. I don't think they have
10 to show that these particular district lines were
11 absolutely necessary, but what they have to show is that
12 any alternative would have resulted in roughly the same
13 kind of excessive, if you will, efficiency gap.

14 I'm going to say two words about Mr. Trende before I
15 sit down and let Professor Stephanopoulos talk. We have
16 a lengthy motion. We think the motion in limine should
17 be decided before trial so nobody wastes their time and
18 effort preparing and you don't waste your time listening
19 to something that isn't admissible under *Daubert*.
20 Mr. Trende does not have a Ph.D. But it's not just that
21 he doesn't have a Ph.D., he didn't even read the
22 literature on this issue and there is literature on how
23 you do clustering studies. He did not employ the kinds
24 of methodologies that social scientists do to decide
25 clustering. Instead he came up with his own methodology,

1 which at the end of the day doesn't show you anything
2 because it only shows geographic clusters, and when
3 you're doing districting, how far people are away from
4 each other, you know, if something is blue on a map in a
5 county really doesn't matter because the question is how
6 can you district. Where is the population. And Trende
7 doesn't deal with that at all. So... (11:11 a.m.)

8 THE COURT: Professor Stephanopoulos.

9 MR. STEPHANOPOULOS: Thank you, Your Honor. May
10 it please the Court.

11 I'd like to begin by saying a few more words about
12 defendants' principle argument which is that there's no
13 problem with or there is a problem with the efficiency
14 gap because it's not exclusively a product of partisan
15 intent, and then I'll address some other major issues
16 that have come up during the argument with respect to the
17 durability of gerrymandering, with respect to the
18 workability of the third prong of our test, and with
19 respect to the constitutional roots of our proposal.

20 So the single argument the defendants hammer at
21 throughout their briefing is that it's a fatal flaw with
22 the efficiency gap; that it has causes other than
23 partisan intent. And I think there are several things to
24 say about that. This is just an error of law on the part
25 of the defendants.

1 First of all, they're repeating the mistake that the
2 *Bandemer* plurality identified, which is to conflate, to
3 blur the intent and effect prongs. It's clear both in
4 the partisan gerrymandering context and in equal
5 protection law more generally that the discriminatory
6 effect does not have to stem exclusively from the
7 discriminatory intent that underlies a challenged policy.
8 The discriminatory effect has to stem from the policy
9 that's being challenged, which in this case is a district
10 plan, but it does not have to stem 100 percent from
11 whatever discriminatory motivation underlies that policy.
12 And the court has said so in *Bandemer*.

13 I would also point out that this supposed weakness
14 of the efficiency gap is also a weakness of any
15 conceivable measure of partisan effect in this area. So
16 whether you look at partisan bias, which is the metric
17 the court considered in *Vieth*; whether you consider
18 something cruder like simple disproportionality, all of
19 those other measures of partisan effect also are
20 functions of (a) partisan intent, (b) political
21 geography, (c) the candidates who are running. There's
22 nothing distinctive about the efficiency gap in this
23 regard.

24 I'd also point out that the partisan bias figures
25 that the court itself cited in *LULAC* did not attempt to

1 make any adjustment for the proportion of the partisan
2 bias that was attributable to the Texas legislature's
3 partisan intent. They were raw partisan bias figures.
4 There is no hint that those numbers had to be changed or
5 modified in some way to reflect only the contribution of
6 the Texas legislature's partisan intent.

7 And furthermore to the extent that causality matters
8 here, that's specifically the point of the third prong of
9 our proposed test. So if, in fact, it turns out that
10 there are innocent explanations for a large efficiency
11 gap, that's going to come out when the state tries to
12 make its showing at the third prong. So there's no need
13 for that causality question to also be intertwined with
14 the second element, the calculation of efficiency gap
15 itself. And so let me turn then to that burden-shifting
16 inquiry which has been a topic of conversation.

17 So first of all, I would say we've plucked the
18 language for that third prong directly from the Supreme
19 Court's one-person, one-vote cases. If this court wants
20 to adapt or modify the third prong, we don't have an
21 objection. But we thought that the most reliable
22 intuitive place to look to figure out how this prong
23 should operate are the court's one-person, one-vote
24 precedence like *Brown v. Thompson*, like *Connor v. Finch*,
25 like *Voinovich*. So we envision the same exact inquiry

1 taking place here at the third stage as takes place in
2 the one-person, one-vote cases at the third stage.

3 Now, is this an impossible burden for the state to
4 carry as defendants claim? Clearly not. When the same
5 precise question presents itself in the one-person,
6 one-vote context, states routinely are able to
7 demonstrate that large population deviations were the
8 necessary product of some legitimate state policy like
9 respecting county boundaries. Ohio succeeded in making
10 that showing in *Voinovich*, Virginia succeeded in making
11 that showing in *Mahan v. Howell*, and there are other
12 similar examples.

13 Moreover, it will often not be the case that a
14 Demonstration Plan like Professor Mayer's will be
15 possible. So my co-counsel mentioned the example of
16 Florida where if you credit Chen and Rodden's analysis,
17 it would not be possible to come up with a map that has a
18 low efficiency gap and that complies with traditional
19 redistricting criteria as well as the actual map in
20 Florida. That's because Florida's geography prevents
21 this kind of map from being drawn.

22 Judge Crabb asked whether there's any precedent in
23 partisan gerrymandering law specifically for this kind of
24 burden-shifting inquiry, and the answer actually is yes
25 to that. So when Justice Stevens first addressed

1 partisan gerrymandering in *Karcher*, he suggested that if
2 a state could produce legitimate justifications for its
3 plan, and this again is a plan that is intentionally and
4 significantly discriminatory against a particular group,
5 those legitimate justifications would rescue the plan.

6 The *Bandemer* plurality said the same thing, that
7 once you finish with the intent and effect prongs, you
8 also ought to consider what potential legitimate
9 justifications might underlie the plan. And Justice
10 Souter more recently in *Vieth* also said the same thing,
11 that the fifth of his five stages in his proposal was
12 whether there happened to be -- whether the state can
13 show that there happened to be legitimate justifications
14 underlying its plan. So there is precedent for this sort
15 of burden-shifting inquiry, not only in one-person,
16 one-vote law, but also in partisan gerrymandering law,
17 including in a plurality opinion in *Bandemer*.

18 Let me address the issue of durability which has
19 come up in Judge Ripple's comments in particular. We
20 agree that the durability of a gerrymander is a very
21 significant consideration in this area. The *Bandemer*
22 court clearly said that durability was central. In fact,
23 durability featured in the specific legal test that the
24 *Bandemer* plurality adopted. You know, was there a
25 consistent degradation of a group of voters' influence on

1 the political process. And so we think that the partisan
2 effect that has to be demonstrated in these cases is that
3 a plan both significantly and durably disadvantages the
4 supporters of a particular party.

5 We think if there's evidence that the bias would not
6 be durable, that ought to be considered and it ought to
7 weigh heavily against the plaintiffs in this kind of
8 case. And so we've presented evidence that Wisconsin's
9 Act 43 is extremely likely to retain a very large
10 pro-Republican bias throughout the decade, no matter what
11 sorts of changes in the electoral environment take place.

12 In fact, the plan is skewed enough and durably
13 skewed enough that it would give Republicans a lockhold
14 on the legislative majority even if Democrats are able to
15 win a substantial majority of the popular vote. This is
16 one of the scenarios that Professor Mayer tackled in his
17 rebuttal report and he found that the -- that Act 43
18 retains its large efficiency gap and retains a Republican
19 majority even in the face of a Democratic waive election
20 like that of 2006 or 2008. So we think durability
21 matters and we think it's clearly demonstrated here.

22 On the intent side as well, we would have no
23 objection to taking durability into account. And here
24 also its present. There is overwhelming evidence that
25 the drafters of Act 43 did not only intend to

1 significantly benefit the Republicans, they also intended
2 to durably benefit the Republicans. And we'll be
3 presenting explicit evidence to that effect at trial,
4 that they considered both the magnitude of the expected
5 bias and the durability of the expected bias when they
6 were crafting Act 43.

7 Let me turn to an argument that defendants' counsel
8 made repeatedly which is that there are no constitutional
9 roots to plaintiffs' proposed approach, and let me
10 outline what I see as the constitutional roots of the
11 approach. The proximate constitutional foundation is the
12 principle of partisan symmetry in which five justices
13 expressed interest in *LULAC*. So a majority of the court
14 expressed at least some interest in that principle.
15 Partisan symmetry again is just the idea that the
16 electoral system has to treat the major parties
17 symmetrically when it comes to the conversion of their
18 popular support in the state into legislative
19 representation.

20 Now, that principle of partisan symmetry didn't come
21 out of nowhere in *LULAC*. It's also implicit in all of
22 the court's partisan gerrymandering decisions. Every
23 time the court defines the practice of partisan
24 gerrymandering, it does so in language that is clearly
25 consistent with the principle of partisan symmetry.

1 That's true in *Vieth*, it's true in *Bandemer*, it's true in
2 the more recent Arizona state legislature decision, it's
3 true throughout.

4 And furthermore, this principle of partisan symmetry
5 itself has clear constitutional roots in well-established
6 doctrines under the First Amendment and the Fourteenth
7 Amendment. So it's very clear that there's an individual
8 right for the voter not to be discriminated against based
9 on the voters' political views or partisan affiliation.
10 That's true in the First Amendment context, in the
11 political patronage cases like *Elrod v. Burns*, and it's
12 also true in the Fourteenth Amendment right-to-vote
13 context in cases like *Harper* and *Crawford* where the court
14 explicitly says that partisan justifications are not a
15 valid reason to burden the exercise of the franchise.

16 So I think here we have a principle recognized in
17 *LULAC* that is just an articulation of an idea that's been
18 floating around all of the Supreme Court's partisan
19 gerrymandering decisions and that is just the obvious
20 corollary at the party level of the fundamental
21 individual principle that you can't discriminate against
22 somebody based on their political views or party
23 affiliation.

24 Now, defendants say how in the world could you
25 constitutionalize something like a two-to-one

1 seat-to-vote relationship, and they return to that point
2 numerous times. And of course you wouldn't
3 constitutionalize a two-to-one seat-to-vote relationship
4 or any other seat-to-vote relationship. With the full
5 method for calculating the efficiency gap, there is no
6 necessary seat-to-vote relationship that's implied. With
7 the simplified method for calculating the efficiency gap,
8 there is also no seat-to-vote relationship implied
9 whenever the efficiency gap is not precisely equal to
10 zero. And if we allow, for example, the efficiency gap
11 to vary between, say, plus or minus 7 percent, that
12 allows any of myriad different seat-to-vote relationships
13 to occur. So the Court would absolutely not be
14 entrenching or constitutionalizing any particular
15 seat-to-vote relationship by adopting our approach.

16 And moreover, to the extent that the efficiency gap
17 prods or encourages states to move toward the two-to-one
18 relationship, that's a positive consequence. This is the
19 historical norm for generations in American elections at
20 both the state legislative and the congressional level.
21 The fact that this is the norm is precisely why the
22 defendants' own expert uses a measure effectively
23 identical to the efficiency gap in his own analyses. He
24 recognizes that the efficiency gap is really measuring
25 the deviation of a particular plan from historical norms

1 and that's the same appeal that we see for the efficiency
2 gap, that it really captures the extent to which a plan
3 is more gerrymandered than you would expect based on the
4 historical norms that have applied for generations in
5 American elections.

6 JUDGE CRABB: Excuse me. Can I intervene?

7 MR. STEPHANOPOULOS: Sure.

8 JUDGE CRABB: At one point in your brief you say
9 the court could use partisan bias in addition to the
10 efficiency gap if the court thinks the efficiency gap is
11 not as sufficient. How would that work?

12 MR. STEPHANOPOULOS: So we envision that working
13 sort of as a robustness check. So we have these two
14 different measures of partisan symmetry out there:
15 There's the older measure partisan bias and there's the
16 more sophisticated newer measure of the efficiency gap.
17 We might worry if partisan bias tells us that a plan is
18 completely fair when the efficiency gap tells us that a
19 plan is manifestly unfair. There are reasons in that
20 conflict scenario to prefer the reading that's given by
21 the efficiency gap. But to the extent that both of the
22 metrics are consistent, that provides a court with even
23 more of a basis for concluding that a particular plan
24 really does have a very lopsided partisan impact.

25 And here that's absolutely the case. So the Act 43

1 had nearly identical partisan bias scores in both 2012
2 and 2014, as it did efficiency gap scores. So here both
3 the older metric and a newer metric are completely
4 consistent in the message that they're sending, which is
5 that Act 43 is one of the most egregious and most tilted
6 plans that had been observed over the last 40 odd years
7 or so.

8 JUDGE CRABB: Do you know any other measures for
9 determining partisan symmetry other than these two?

10 MR. STEPHANOPOULOS: These are the two that are
11 featured in the literature. I suppose even older than
12 partisan bias would be just literally to compare the seat
13 share and the vote share for a party and just to look at
14 the difference between the two. But that is literally a
15 measure of the deviation from perfect proportionality.
16 And so it's clear that that measure is prohibited by the
17 court's precedence. That would tell you how much a plan
18 is disproportional relative to perfect one-to-one
19 proportionality. That can't be the test in this area.

20 But I can tell you though that -- so since the
21 concept of partisan symmetry emerged, partisan bias was
22 the first and the only scholar-designed measure of
23 partisan symmetry up until the last few years when the
24 efficiency gap also emerged in order to address some of
25 the deficiencies that had been identified with partisan

1 bias. I'm happy to address those deficiencies if that's
2 of interest to the Court.

3 JUDGE CRABB: That's okay.

4 JUDGE GRIESBACH: I want to ask you the same
5 question I asked Ms. Odorizzi, Mr. Stephanopoulos. What
6 facts do you think we need to decide in order to make the
7 judgment, arrive at a judgment that the efficiency gap is
8 that elusive standard that the Supreme Court has been
9 seeking all these years? What factual disputes do you
10 think exist here that would -- we'll be resolving at a
11 trial in this case?

12 MR. STEPHANOPOULOS: Sure. So I think there are
13 factual disputes related to Wisconsin's own facts, but I
14 take Your Honor to be addressing the more general
15 question of what facts are in dispute with respect to the
16 efficiency gap and with respect to setting a general
17 standard as opposed to the particular case at hand.

18 So defendants have made a host of factual arguments
19 that the efficiency gap is too volatile, too changeable
20 from election to election; that a 7 percent threshold is
21 not reasonable. Maybe the threshold has to be calibrated
22 up or down. They've argued that the clustering of
23 Democratic and Republican voters has some impact on the
24 efficiency gap, but we don't know yet how much of an
25 impact. And we also don't know whether that's a legally

1 significant fact or not.

2 The question of avoidability, so was a large
3 efficiency gap avoidable, is also, I think, a
4 quintessentially factual question on which the parties
5 differ.

6 JUDGE GRIESBACH: I thought that was conceded
7 here.

8 MR. STEPHANOPOULOS: What's that?

9 JUDGE GRIESBACH: I thought that was conceded
10 here. I mean as I see this, intent and avoidability are
11 really not in dispute.

12 MR. STEPHANOPOULOS: Well, I don't believe, if
13 we went to trial, the defendants would concede those two
14 points. Maybe they would and we would be happy to accept
15 those concessions. I think that they would likely offer
16 justifications, reasons for the large efficiency gap that
17 we observed. I think it's likely they would claim that
18 Act 43's large efficiency gap is the result of a
19 pro-Democratic -- I'm sorry, pro-Republican political
20 geography in the state of Wisconsin. Certainly they've
21 argued at length in their briefing that Wisconsin has a
22 natural pro-Republican geography and this accounts for
23 large efficiency gaps. I take that to be specifically an
24 argument about whether a large efficiency gap is or is
25 not inevitable in Wisconsin.

1 So without knowing what particular stipulations
2 defendants would make, I think it's hard to answer the
3 question, but certainly their brief suggests that there
4 are disputed factual issues at the third prong as well.

5 JUDGE GRIESBACH: Thank you.

6 MR. STEPHANOPOULOS: Let me address now one of
7 Judge Crabb's questions from earlier about the volume of
8 plans affected. So when defendants comment on the volume
9 of plans affected, they completely overlook the first
10 prong of our test. They assert that you would have to
11 jeopardize all plans that are over "X" percent in their
12 efficiency gap, whether that's in the first election or
13 in any election over the course of the cycle. That's
14 incorrect because our test does have these multiple
15 prongs. You would also have to make sure that partisan
16 intent was present.

17 Once we take partisan intent into account, at least
18 by proxy by looking at how many cases are there where a
19 single party had unified control over redistricting, the
20 number of potentially affected cases drops dramatically
21 to a few dozen all time, and only roughly ten today. And
22 these numbers, I think, ought to be taken in perspective
23 relative to the enormous volume of redistricting
24 litigation that has taken place in the past and that
25 currently takes place.

1 So in a world where the one-person, one-vote
2 principle led to hundreds of plans being invalidated and
3 in a world where Section 2 of the Voting Rights Act has
4 prompted hundreds upon hundreds of lawsuits over the
5 years, in a world where in every cycle there are hundreds
6 of cases in almost every state resulting in roughly two
7 dozen plans being either invalidated or drawn by the
8 courts, it's only an incremental increase if another ten
9 plans might be in some jeopardy under plaintiffs'
10 proposed test. So this is not a dramatic increase in the
11 degree of judicial intervention in this area. We think
12 it's a degree of judicial intervention that's perfectly
13 consistent with current practice.

14 We'd also point out that to the extent the numbers
15 of problematic plans still seem high, that's because the
16 practice of partisan gerrymandering is ubiquitous and
17 very severe. So if you have a clearly undemocratic
18 practice taking place around the country, it doesn't
19 strike us as a bad thing if there are a number of cases
20 that emerge to tackle that undemocratic practice and to
21 curb that undemocratic practice.

22 Let me also address one of counsel's arguments about
23 the changeability of the efficiency gap. So counsel
24 rightly points out that the efficiency gap can vary
25 somewhat from election to election. That's because

1 different candidates run. National trends go in
2 different directions in different years. But empirically
3 this was one of the principal things that Professor
4 Jackman examined in his two reports, just how volatile is
5 the efficiency gap. What he found is that the vast
6 majority of variability of the efficiency gap is across
7 plans, not within plans. So within plans, you have a
8 relatively high level of stickiness of the efficiency
9 gap. Across plans, you see significant differences in
10 the efficiency gap consistent with different plans being
11 more or less symmetric in their treatment of the parties.

12 Professor Jackman also included a great deal of
13 evidence on the dependability of the first score that you
14 observe under a plan. And what he found confirms the
15 plaintiffs' view that the efficiency gap is a
16 sufficiently robust and reliable metric to be used in
17 litigation. So he found that the first efficiency gap
18 recorded predicts with a quite high degree of precision
19 the lifetime average efficiency gap of the plan. So if a
20 plan opens with a great deal of asymmetry, we can be
21 quite confident that this plan over its lifetime will end
22 up averaging out to have been a quite a symmetric plan.

23 He also arrived at extremely high confidence rates
24 associated with the 7 percent threshold that he
25 recommended. He further found that the rate of false

1 positives would be extremely low with a 7 percent
2 threshold. So in other words, with a 7 percent
3 threshold, the volume of cases where you might have
4 thought based on the first efficiency gap that the
5 lifetime average of the efficiency gap would be in the
6 same direction, but it turns out that the lifetime
7 average actually was in the opposite direction. There
8 are very few of those cases, lower than 5 percent, with
9 an efficiency gap threshold of 7 percent.

10 And he further found that if you take all of the
11 current plans in effect around the country and you shift
12 them by up to 5 percentage points in either direction,
13 the original efficiency gaps end up being overwhelmingly
14 highly correlated with the efficiency gaps that you get
15 after you do the shifting. So this again addresses Judge
16 Ripple's concern about durability and it shows us that
17 current plans with large efficiency gaps have very
18 durably very large efficiency gaps. They're going to
19 preserve their current level of asymmetry under just
20 about any electoral environment that you can
21 realistically conceive of over the remainder of the
22 decade.

23 I'm coming to the end of my points so I'll be happy
24 to sit down soon. With respect to the changeability,
25 defendants complain that it's arbitrary to focus on the

1 first election and instead any analysis ought to take
2 into account all of the elections under a plan. But
3 there are good reasons for focusing on the first
4 election. First of all, based on Justice Kennedy's
5 comments in *LULAC*, it appears that lawsuits before the
6 first election are not allowed because those would be
7 based on a counterfactual state of affairs. So the first
8 election represents the moment at which lawsuits are
9 allowed to be filed.

10 Second, plaintiffs are going to have every incentive
11 to file suit as soon as they're allowed to. If they
12 wait, that's another election that they have to endure
13 under a plan that they consider to be fundamentally
14 unconstitutional. And moreover, if plaintiffs wait until
15 two or three or four elections have occurred under a
16 plan, they won't be able to cherrypick the efficiency gap
17 scores that look best for them. They'll have to accept
18 the record as they find it, which will include all of the
19 efficiency gaps that have been produced by that plan.

20 So here, for example, we absolutely could not ignore
21 the 2014 efficiency gap score of Act 43. That's played a
22 central role in our litigation and we think the same
23 would be true any time that plaintiffs sue after multiple
24 elections have taken place. They'll have to accept and
25 work with and deal with all of the observed scores that

1 the plan has generated.

2 I think I've covered the points I wanted to hit, so
3 let me close with two final brief observations. The
4 first is how factual most of defendants' arguments are.
5 So in their opening brief in particular, they've raised
6 the issues of how geographically clustered are the
7 two-party supporters in Wisconsin? How geographically
8 clustered are the two-party supporters in the nation as a
9 whole? How many plans would be jeopardized by
10 plaintiffs' proposed test? How variable are efficiency
11 gap scores from election to election? Did Professor
12 Mayer and Professor Jackman make certain methodological
13 mistakes or did they rely on certain problematic
14 assumptions in carrying out their analyses? These are
15 exactly the kinds of contested factual issues that can't
16 be resolved at this stage and that require a trial to be
17 decided.

18 And the second point is just to reiterate the
19 defendants don't even try in their briefs to argue that
20 Act 43 would be valid under plaintiffs' proposed test.
21 And I think that's for good reason. There's overwhelming
22 evidence that the plan was devised in order to maximize
23 the number of districts the Republican candidates would
24 win. Prior to the current cycle, there wasn't a single
25 map in American history or modern American history that

1 was as severely asymmetric as the current plan in its
2 first two elections. And it's also clear that this
3 extreme level of asymmetry was immanently unavoidable.
4 The Wisconsin Legislature easily could have, but chose
5 not to, devise a plan that would have been much more fair
6 to both parties and also would have accomplished all of
7 its legitimate objectives just as well.

8 So our view is that if the courts are ever going to
9 curb the deeply undemocratic practice of partisan
10 gerrymandering, this case presents as good a place as
11 could be imagined to begin that project.

12 Thank you, Your Honors. (11:42 a.m.)

13 JUDGE RIPPLE: Thank you, Professor. And we'll
14 hear now in rebuttal Mr. Keenan.

15 MR. KEENAN: Well, I'll start by saying that the
16 plaintiffs' argument assumes what the definition of
17 fairness in a districting plan is is equal results of
18 elections in converting votes to seats. But that's not
19 what the Supreme Court has said that fairness in
20 districting is. Both the federal courts in the District
21 of Wisconsin in 1990 and 2000 were trying their utmost to
22 be fair in districting. Those plans have resulted in
23 very asymmetric results.

24 Now in 2010 when Republicans win control of the
25 legislature, what the plaintiffs would demand is that the

1 Republicans enact a plan that's actually less favorable
2 to themselves than the one that's been in place for 20
3 years.

4 This just can't be the standard for partisan
5 gerrymandering claims to have a standard that would
6 require such results when partisan motivation just isn't
7 unconstitutional. I would say that that's not just a
8 finding of or a holding of the *Vieth* plurality. The
9 appropriateness of considering political factors is also
10 in *Gaffney v. Cummings*, which is a majority decision of
11 the Supreme Court.

12 I think the problem is that the plaintiffs say this
13 is extreme or an outlier or -- I'm trying to see some of
14 the other terms used, but it's not. The elections that
15 were seen in Wisconsin are actually entirely consistent
16 with what just happened last decade. Mr. Stephanopoulos
17 says well, the first two elections in this plan are just
18 as, you know, have the highest efficiency gaps of any
19 plan prior to this cycle. Well, that's true in the first
20 two elections, but if you look at last time in Wisconsin,
21 there is efficiency gaps of negative 10 and negative 12.
22 They happened to occurred in 2004 and 2006 so they aren't
23 the first two elections in the cycle, but they were two
24 elections in that plan. And so to the defendants, you
25 can't look at the first two elections under this plan and

1 then conclude that there's extreme partisan
2 gerrymandering going on when we saw the exact same
3 results under the last plan which was enacted by
4 disinterested federal judges.

5 I think that's the key is they say it's out of the
6 norm. Well, the norm of what? The norm in Wisconsin as
7 seen is what was seen in the last two plans. Why is
8 Wisconsin being judged against the norm of all the other
9 states dating back to the 1970's and 1980's when the
10 political conditions were quite different? Frankly, I
11 don't know that it is possible to have a standard like
12 this that would apply to every single state equally
13 because each state is different.

14 They also say that it would affect relatively few
15 plans, but that's just not true. I mean in this last
16 cycle, their own expert says when you consider partisan
17 intent, 25 percent of plans are being implicated at the 7
18 percent threshold and 16 percent at the 10 percent
19 threshold.

20 I think some of this is like what is a partisan
21 plan. Well, they just say a partisan plan is one with a
22 asymmetrical result, but if you look at the *Baumgart*
23 case, it rejected the Democrat's plan as too partisan,
24 not because of the results but because, in their words,
25 they said the plan -- the district in Madison by starting

1 at the state capitol and lines radiating out in the shape
2 of a pizza, kind of a pizza-mander, that it's a way to
3 maximize their seats. It wasn't -- that was partisan
4 because it was ignoring traditional districting
5 principles to create more Democratic seats. It wasn't --
6 but under the plaintiffs' standard that might be totally
7 appropriate if statewide you end up with a more balanced
8 map. But the districting decisions aren't judged just on
9 the pure statewide vote as the Supreme Court makes clear
10 that there's individual districts that candidates have to
11 win, not just a statewide vote total yielding into a seat
12 chair.

13 Mr. Stephanopoulos said that the efficiency gap
14 doesn't make a particular seats-to-votes relationship
15 constitutional, but it does. I mean the way they've
16 structured their test is based on the one-person,
17 one-vote, and the one-person, one-vote takes that
18 deviation from equal population. You get to a certain
19 point and then you're presumptively unconstitutional.
20 Well, the reason that is is because that is actually the
21 constitutional rule is equal population and that is what
22 is normalized. Well here, you're going to take the
23 efficiency gap and make that your baseline and see how
24 far you deviate from it. Well, if that's not
25 constitutionalizing the seats-to-votes relationship, then

1 I don't even really know what it's doing.

2 And I think just to reiterate the durability point,
3 I would just like to clarify that their expert examined
4 the durability of the efficiency gap, not the durability
5 of party control of the House. Judge Ripple had asked
6 about whether I was getting into a dispute of
7 Findings-of-Facts land about how the efficiency gap did
8 not translate, but our proposed finding 185 was not
9 disputed. The plaintiffs say it's undisputed that the
10 sign of the efficiency gap does not necessarily correlate
11 to control the state legislature or that in five of the
12 seven plans enacted under unified party control -- this
13 is from the Jackman chart -- the party in control of the
14 state House changed despite the fact that the efficiency
15 gap remained the same sign.

16 So the efficiency gap in all the tests Jackman has
17 done are looking at the efficiency gap, they're not
18 necessarily looking at control of the state House and
19 showing that that is durable. In the uniform swing they
20 do, that's the same thing in that his analysis looks --
21 well, say you shift the votes from 50 percent to 51
22 percent. That will change seats, but what he's measuring
23 is then on the 51 percent line, how does that compare to
24 the expected 52 percent share, not whether it's giving
25 you control of the legislature.

1 And I think the main problem here is that the
2 plaintiffs say this is a traditional equal protection
3 case, but if that's really the case, then there is no
4 protected class here. Shouldn't we just be in
5 rational-basis review? Shouldn't the defendants just be
6 able to say there is a rational basis for our plan? The
7 plaintiffs have another plan, which they say is equally
8 rational with a better result for the Democrats, but in a
9 rational-basis review, that wouldn't be enough to
10 invalidate a plan.

11 And I think going to Judge Griesbach's point, I also
12 am not sure what we would try in terms of establishing
13 the efficiency gap as a standard. We've put forward what
14 I think is a fair view of what the plaintiffs' experts
15 did as the basis for our motion and our argument is that
16 that just isn't enough to constitutionalize the standard.
17 I'm not sure what more you get by having Professor
18 Jackman or Professor Mayer get up on the stand and
19 testify to that.

20 I think to the extent the way this third part of the
21 test works, I guess I would want to be able to meet the
22 test if it truly isn't satisfied by the mere presence of
23 the Demonstration Plan. I'm a little bit confused by the
24 wording unavoidable and necessary. It seems like it's
25 impossible to meet for a state. But to the extent it's

1 not, I guess I would like to put in evidence on that.

2 JUDGE GRIESBACH: Why don't you think that the
3 factual assertions that Mr. or Professor Stephanopoulos
4 mentioned aren't proper factual issues that this Court
5 needs to determine in order to assess whether the
6 efficiency gap is that elusive standard the Supreme Court
7 has been looking for?

8 MR. KEENAN: Sure. And I think that the facts
9 that we've used are not disputed, it's what the Court
10 wants to make of those facts. I mean we've just tried to
11 accurately lay out what the plaintiffs' experts have
12 done --

13 JUDGE GRIESBACH: Apparently there's a
14 significant dispute over clustering.

15 MR. KEENAN: And I say that clustering, you
16 don't need to make a finding on that. So that could just
17 be avoided. But in terms of what the plaintiff -- we're
18 relying primarily on the --

19 JUDGE GRIESBACH: Isn't clustering part of your
20 argument as to why efficiency gap isn't a fair measure?

21 MR. KEENAN: It's context to explain why we've
22 seen efficiency gaps in Wisconsin. I think, one, they
23 haven't actually disputed the evidence we've offered on
24 that. But further, I don't think it's necessary to make
25 a particular finding on that. It is undisputed that

1 their proposal of it --

2 JUDGE GRIESBACH: If it exists, then it does
3 skew that type of thing.

4 MR. KEENAN: It's something that would have to
5 be considered in a standard it would seem; that it's
6 recognized in Supreme Court case law that the geographic
7 distribution of your voters is going to affect how you
8 translate a statewide vote into seats. So that's
9 something that should be considered in a legal standard
10 that's trying to show partisan gerrymandering. The
11 plaintiffs' first two steps don't look at it at all. We
12 think that's a weakness.

13 JUDGE GRIESBACH: Do you think there are factual
14 disputes as to the intent of the legislature?

15 MR. KEENAN: I would say for purposes of the
16 summary judgment motion, I don't think so. I think there
17 might be --

18 JUDGE GRIESBACH: At trial are there going to be
19 factual disputes?

20 MR. KEENAN: Depending on what this intent
21 element ends up being, there could be. The way the
22 plaintiffs have phrased it where you just needed like a
23 bare intent --

24 JUDGE GRIESBACH: You're not going to admit you
25 intended to violate the constitution.

1 MR. KEENAN: Yeah. And I think as we discussed
2 earlier, there's not going to be an admission that -- I
3 think the witnesses would testify that they did not
4 intend to maximize Republicans seats; that there was
5 other concerns that would limit how much you really could
6 maximize the seats.

7 JUDGE GRIESBACH: Nor would the individual
8 members?

9 MR. KEENAN: The legislators, you know, just a
10 host of different things, that would just -- the
11 individual legislators, demands from the legislature what
12 their districts should be, things like that.

13 JUDGE GRIESBACH: So there's no dispute they
14 wanted an advantage.

15 MR. KEENAN: Yeah, there's no dispute on that,
16 to that point. Now, to the extent this element goes
17 other ways, maybe there's disputes to the extent --

18 JUDGE GRIESBACH: And there's really no dispute
19 that they could have designed a plan that would have
20 given them less advantage.

21 MR. KEENAN: Yeah.

22 JUDGE GRIESBACH: And consistent with the rules
23 governing traditional redistricting.

24 MR. KEENAN: Yeah. I think there's no dispute
25 that a different plan could have been enacted that had a

1 better or less advantageous results for the Republicans.
2 There's probably -- I think that there's probably also no
3 dispute that there probably could even enacted a plan
4 that would be more favorable to them. So like depending
5 on how the third prong goes, if it really is truly like
6 the one-person, one-vote, that test is about whether you
7 were advancing a legitimate state policy, not about
8 whether it's necessary and unavoidable. So if that's it,
9 then we would need to put in evidence to show, like, that
10 there is, you know, legitimate reasons behind the
11 decisions that were made.

12 But in terms of using the efficiency gap and using
13 the intent element as the plaintiffs have described it, I
14 don't know what facts we're going to be trying at a trial
15 on that. We've, I think, made a fair representation of
16 what the plaintiffs' experts -- what the support is for
17 using those standards. And there's no dispute about what
18 they did and what they didn't do. It's just like what to
19 make of that as a legal matter, which is a question of
20 law for the Court, not really a political science issue.

21 And I guess I would just like to close with, like,
22 the partisan bias and partisan symmetry. The plaintiffs
23 act as if that's been constitutionalized and it's been
24 accepted as a constitutional principle, and it hasn't.
25 Justice Kennedy says he wouldn't use it alone. He didn't

1 say that his problems with it were like very specific,
2 that he really likes it. But, you know, just address
3 these few concerns. It was like skepticism about it.
4 But maybe in the future it would provide some guidance.
5 But there is no holding that that type of analysis really
6 should guide -- should be what determines these claims.

7 I think that's all I have. Unless there's any
8 further questions, I'll sit down.

9 JUDGE RIPPLE: Thank you, Mr. Keenan. The Court
10 would like to express its deep thanks to all counsel for
11 elucidating the very complex issues that we have to wade
12 our way through in this case. It's been a very
13 informative morning and we very much appreciate it and
14 we'll take the motion under advisement.

15 The Court will rise and determine a date depending
16 on a decision.

17 (Proceedings concluded at 11:55 a.m.)
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1 I, LYNETTE SWENSON, Certified Realtime and
2 Merit Reporter in and for the State of Wisconsin, certify
3 that the foregoing is a true and accurate record of the
4 proceedings held on the 23rd day of March 2016 before the
5 Honorable Barbara B. Crabb, the Honorable William
6 Griesbach and the Honorable Kenneth Ripple, in my
7 presence and reduced to writing in accordance with my
8 stenographic notes made at said time and place.
9 Dated this 25th day of March 2016.

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_____/s/_____

Lynette Swenson, RMR, CRR, CRC
Federal Court Reporter

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apply to any reproduction of the same by any means unless
under the direct control and/or direction of the
certifying court reporter.

The measure of partisanship should exist to establish the change in the partisan balance of the district. We are not in court this time; we do not need to show that we have created a fair, balanced, or even a reactive map. But, we do need to show to lawmakers the political potential of the district.

I have gone through the electoral data for state office and built a partisan score for the assembly districts. It is based on a regression analysis of the Assembly vote from 2006, 2008, and 2010, and it is based on prior election indicators of future election performance.

I am also building a series of visual aides to demonstrate the partisan structure of Wisconsin politics. The graphs will communicate the top-to-bottom party basis of the state politics. It is evident, from the recent Supreme Court race and also the Milwaukee County executive contest, that the partisanship of Wisconsin is invading the ostensibly non-partisan races on the ballot this year.



2/19/11

Gmail - from prof gaddie



Adam Foltz <adamfoltz@gmail.com>

from prof gaddie

Joseph handrick <joeminocqua@msn.com>
To: adam foltz <adamfoltz@gmail.com>, tad ottman <tottman@gmail.com>

Wed, Apr 20, 2011 at 7:34 AM

SEE Keith's comments below.

From: rkgaddie@ou.edu
To: joeminocqua@msn.com
Subject: RE: Milwaukee county elections
Date: Wed, 20 Apr 2011 03:47:20 +0000

Hey Joe-

I went ahead and ran the regression models for 2006, 2008, and 2010 to generate open seat estimates on all of the precincts. They expected GOP open seat assembly vote using the equations correlates at .96 with the 2004-2010 composite, and at a .93 level with the 2006-2010 state constitutional office composite. Both of them are running a little strong relative to one cluster of precincts -- I'll look and see if they are up north.

But, at this point, if you asked me, the power of the relationships indicates that the partisanship proxy you are using (all races) is an almost perfect proxy for the open seat vote, and the best proxy you'll come up with.

This seems to pretty much wraps up the partisanship measure debate.

Have Jim call me if he needs anything. Otherwise, I'll be tweaking the polarization analysis.

Best,
Keith

Ronald Keith Gaddie
Professor of Political Science
Editor, Social Science Quarterly
The University of Oklahoma
455 West Lindsey Street, Room 222
Norman, OK 73019-2001
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<http://socialsciencequarterly.org>



From: joseph handrick [joeminocqua@msn.com]
Sent: Tuesday, April 19, 2011 9:33 PM
To: Gaddie, Ronald K.
Subject: RE: Milwaukee county elections

We looked at the different combos today.



https://mail.google.com/mail/?ui=2&ik=726f5e4dccc&view=pt&q=from prof g...

1/



Foltz001059

2/19/11

Gmail - from prof gaddie

The 2006 and 2010 races combined tilt too much to the GOP. I thought 06 and 10 would balance but they don't. The northern seats were especially out of whack.

So I had Tad do a composite with the 2006 and 2010 state races and all the federal races from 04 to 2010 (in other words, all statewide races from 04 to 2010). This seems to work well both in absolute terms as well as seats in relation to each other.

From: rkgaddie@ou.edu
To: joeminocqua@msn.com
Subject: RE: Milwaukee county elections
Date: Wed, 20 Apr 2011 02:18:46 +0000

Good. I am close to having a partisan baselining for you.

Ronald Keith Gaddie
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CHICAGO
LAWYERS'
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FOR CIVIL RIGHTS UNDER LAW, INC.

CHICAGO'S PARTNERSHIP FOR EQUAL JUSTICE

March 24, 2016

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Re: William Whitford, et al. v. Gerald Nichol, et al.
Case No. 15-CV-421

Dear Sirs,

In accordance with the Stipulation Regarding 30(B)(6) Depositions of the Legislative Technology Services Bureau and Wisconsin State Senate and Assembly dated March 18, 2016, I enclose the Amended Declaration of Mark Lanterman dated March 18, 2016.

I will forward a copy of this letter and the enclosed exhibits (including a DVD for Exhibit B) by U.S. Mail.

Sincerely,

Ruth Greenwood
Lead Attorney, Voting Rights Project
e: rgreenwood@clccrul.org | t: (312)-888-4194

Encl.

Cc. Douglas M. Poland

Cc. Peter G. Earle



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.

AMENDED DECLARATION OF MARK LANTERMAN

I, Mark Lanterman, declare, under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the Chief Technology Officer for Computer Forensic Services, Inc. (“CFS”) in Minnetonka, Minnesota. I have personal knowledge of all facts set forth in this declaration. A copy of my curriculum vitae has been attached as Exhibit A for reference.

SUMMARY OF PREVIOUS INVOLVEMENT

2. In 2012, I was retained as a consulting expert by counsel for the plaintiffs in the action captioned *Baldus, et al. v. Brennan, et al.*, case number 11-CV-562, then pending in the U.S. District Court for the Eastern District of Wisconsin. I was retained to provide computer forensic consulting services and opinions, including forensic examination and analyses, with respect to three state-owned computers in the custody of the Legislative Technology Services Bureau (“LTSB”).

3. My work and opinions in the *Baldus* case were set forth, in part, in two declarations that I submitted in that action. One of those declarations is dated March 11,

2013, and the other is dated April 10, 2013. Copies of those declarations are attached to this declaration as Exhibit B and Exhibit C. I hereby reaffirm and adopt the statements made in those declarations as my truthful testimony, made under penalty of perjury and pursuant to 28 U.S.C. § 1746, as my testimony in this action.

4. In both of my declarations made in 2013, I stated that I had received a total of three computers used for the purpose of legislative redistricting in 2011. Each one of those computers contained two internal hard drives for a total of six. Additionally, each computer had associated with it one external hard drive. In all, CFS received a total of nine hard drives for preservation and analysis. Upon receipt, one of the three external hard drives was physical damaged and therefore could not be preserved. As stated in my previous affidavits, the data contained on eight of these nine hard drives were preserved according to industry standards by creating what is known as a “forensic image”.

5. Upon the termination of the *Baldus* litigation in June 2013 and the conclusion of my work in that action, I determined that the most cost-efficient way to preserve and store the “forensic images” created in connection to that case was to transfer them from CFS’s production environment to archival quality magnetic storage tape. The storage tape is created for the express purpose of storing data for long periods of time with no degradation or loss of data, and it is a common and generally accepted practice to store data for long periods of time on magnetic storage tape.

CURRENT DISPUTE AND SCOPE OF REQUEST

6. On January 30, 2016, I was retained as a consultant in this action by counsel for the plaintiffs. I was asked to recover, identify and produce any Excel

spreadsheets created, accessed or modified during the months of April, May, or June of 2011 from the three workstation computers, and the three associated external hard drives.

7. To conduct the requested searches, I first had to restore the data on the hard disk drives from the magnetic storage tape on which it had been stored since June 2013.

8. Upon restoring the data on the hard disk drives from the backup tape, I verified the integrity of the data. Upon creation, the data contained within each forensic image was assigned a “hash value”, which was subsequently logged. Hash values act as digital fingerprints, unique alphanumeric values. At the outset, these hash values show that the forensic image is an exact duplicate of the original media (hard drive). In order to verify that no data was changed, corrupted or otherwise altered after being stored on the backup tapes, the data within the forensic images was “hashed” a second time. The original hash value is compared with subsequent hash value. If the hash values are different, the data was changed, corrupted or otherwise altered. If the hash values are a perfect match, then the data is verified, sound, and original.

9. All eight of the forensic images CFS was asked to review were verified.

10. CFS noted that all three provided workstations contained internal two hard drives. Each hard drive was a member disk in what is known as a “mirrored RAID”. Such a configuration duplicates, or backs up the data from one drive by copying it to the other. Despite the high probability of file duplicates between the two hard drives, CFS was asked to analyze each regardless.

SYSTEMS ASSOCIATED WITH “WRK32864”

11. First, CFS recovered, identified and produced any active or deleted Excel spreadsheets created, accessed or modified during the months of April, May, or June of 2011 from the system named “Sen Republican WRK 32864”, which I understand was assigned to Joseph Handrick while employed by LTSB. Across the two hard drives in this system a total of 48 spreadsheets were responsive. However, the majority of these were exact duplicates. After identifying and removing duplicates, a total of 14 unique files remained.

12. I created an Excel spreadsheet detailing the locations, dates and other information of all responsive spreadsheets that were identified from WRK32864 system. (“WRK32864 Responsive Spreadsheets File Detail Report.xlsx”). I provided a copy of that spreadsheet, as well as the 14 unique spreadsheets, to counsel for the plaintiffs. Copies of the file detail spreadsheet that I created, as well as the 14 unique spreadsheets, are contained on the DVD-ROM provided contemporaneously with this declaration.

13. As noted in paragraph four above, the external hard drive associated with WRK32864 had been damaged before CFS took possession. This damage rendered the device unreadable, thus thwarting attempts to preserve the data and identify relevant files.

SYSTEMS ASSOCIATED WITH “WRK32586”

14. Second, CFS recovered, identified and produced any active or deleted Excel spreadsheets created, accessed or modified during the months of April, May, or June of 2011 from the system named “ASM Republican WRK 32586”, which I understand was assigned to Adam Foltz. Across the two hard drives in this system, a total of 86 spreadsheets were responsive. However, the majority of these were exact

duplicates. After identifying and removing duplicates, a total of 27 unique files remained.

15. I provided a copy of the spreadsheet I created, as well as the 27 responsive spreadsheets, to counsel for the plaintiffs. Copies of the spreadsheet that I created, as well as the 27 responsive spreadsheets, are contained on the DVD-ROM provided contemporaneously with this declaration.

16. I also identified relevant spreadsheets from the external hard drive associated with the WRK32586 system. This external hard drive was used in conjunction with a backup program that packaged files within compressed ZIP volumes that first needed to be decompressed. After that, CFS identified a total of 57 spreadsheets that had been created or modified between April and June 2011. Of those 57, eleven files were duplicates, leaving a total of 46 unique files. I created an Excel spreadsheet detailing the locations, dates and other information of all responsive spreadsheets that were identified on the external hard drive associated with the WRK32586 system (“WRK32586 External HD Responsive Spreadsheets File Detail Report.xlsx”). I provided a copy of the spreadsheet I created, as well as the 46 unique identified spreadsheets, to counsel for the plaintiffs. Copies of the spreadsheet that I created, as well as the 46 unique identified spreadsheets, are contained on the DVD-ROM provided contemporaneously with this declaration.

SYSTEMS ASSOCIATED WITH “WRK32587”

17. Third, CFS recovered, identified and produced any active or deleted Excel spreadsheets created, accessed or modified during the months of April, May, or June of 2011 from the system named “Sen Republican WRK 32587”, which I understand was

assigned to Tad Ottman. Across the two hard drives in this system, a total of 364 spreadsheets were responsive, being created between April and June 2011. However, the vast majority of these were exact duplicates. After identifying and removing duplicates, a total of 35 unique files remained.

18. I created an Excel spreadsheet detailing the locations, dates and other information of all responsive spreadsheets that were identified on the WRK32587 system (“WRK32587 Responsive Spreadsheets File Detail Report.xlsx”). I provided a copy of that spreadsheet, as well as the 35 unique spreadsheets, to counsel for the plaintiffs. Copies of the file detail spreadsheet that I created, as well as the 35 unique spreadsheets, are contained on the DVD-ROM provided contemporaneously with this declaration.

19. I also identified relevant spreadsheets from the external hard drive associated with the WRK32587 system. This external hard drive was used in conjunction with a backup program that packaged files within compressed ZIP volumes that first needed to be decompressed. After that, CFS identified a total of 431 spreadsheets that had been created or modified between April and June 2011. Of those, the vast majority were found to be duplicates, leaving a total of 77 unique files. I created an Excel spreadsheet detailing the locations, dates and other information of all responsive spreadsheets that were identified on the external hard drive associated with the WRK32587 system (“WRK32587 External HD Responsive Spreadsheets File Detail Report.xlsx”). I provided a copy of the spreadsheet I created, as well as the 77 unique identified spreadsheets, to counsel for the plaintiffs. Copies of the spreadsheet that I

created, as well as the 77 unique identified spreadsheets, are contained on the DVD-ROM provided contemporaneously with this declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 18, 2016

A handwritten signature in black ink, appearing to read "Mark Lanterman", with a stylized flourish at the end.

Mark Lanterman

Exhibit A



Mark Lanterman

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Title

Chief Technology Officer

Professional Biography

Mr. Lanterman has over 25 years of experience in computer forensic investigations. Prior to joining CFS, Mark was a sworn investigator for over eleven years at both state and federal law enforcement agencies. During his last three years in law enforcement, he was assigned to the United States Secret Service Electronic Crimes Task Force as its senior computer forensic analyst. The Director of the U.S. Secret Service has recognized Mark for his contributions to law enforcement.

Mark has successfully led thousands of computer forensic investigations, collaborating and supporting large legal organizations, corporations and government entities, and has provided expert witness testimony in over 2,000 matters. The Honorable Michael J. Davis, Chief Judge and the Honorable Magistrate Judge Tony Leung, United States District Court-Minnesota, as well as the Honorable Chief U.S. Bankruptcy Judge Gregory Kishel have previously appointed him as their Courts' neutral computer forensic analyst. The Honorable Mel Dickstein, the Honorable John Borg, the Honorable Michael O'Rourke, the Honorable Ann Poston (Hennepin County, MN) and the Honorable A.P. Fuller (Pennington Country Seventh Judicial Circuit, SD) have also appointed Mark as a neutral computer forensic analyst.

Mark is a sought-after speaker in the United States and abroad, and has presented for several government offices as well as private organizations representing a variety of different industries. Among these venues, Mark has spoken at the Minnesota Criminal Justice Institute, the Minnesota Employment Law Institute, the Minnesota Intellectual Property Institute, the Minnesota Family Law Institute, the Minnesota Private Investigators Conference, the Minnesota Judicial Conference, the Association of Certified Fraud Examiners, the International Association of Financial Crime Investigators, the American Society for Industrial Security, Hamline Law School, and the University of Minnesota Law School. Mark has also been a featured speaker for the State Bar Associations of Minnesota, California, Wisconsin, New York, and Tennessee. He represented the U.S. Secret Service at the International Association of Chiefs of Police National Conference. He conducts over forty CLE classes annually. Additionally, Mark is adjunct faculty of computer science at the University of Minnesota's Technological Leadership Institute, and is currently teaching in the Master of Science Security Technologies (MSST) program.

Mark provides frequent commentary about cyber security issues for national print and broadcast media, including ABC, Al Jazeera, Bloomberg, BusinessWeek, CBS, FOX News, NBC, The New York Times, NPR, and The Wall Street Journal.

Education and Certifications

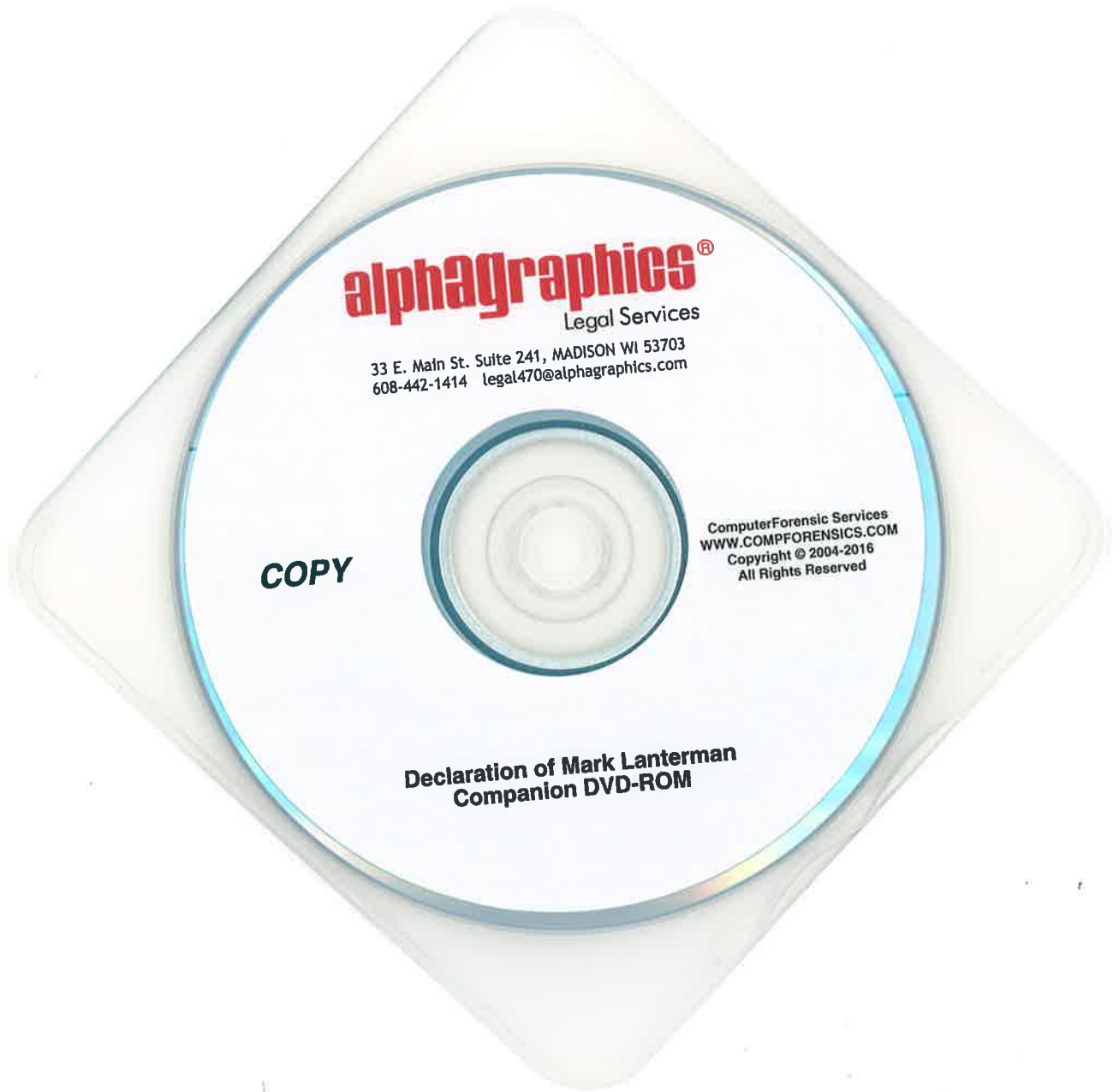
Upsala College - B.S. Computer Science (1988); M.S. Computer Science (1990)
Department of Homeland Security - Seized Computer Evidence Recovery Specialist
Minnesota Bureau of Criminal Apprehension - Management Series Certification
National White Collar Crime Center - Advanced Computer Forensics
International Information Systems Forensics Association
Pennsylvania Municipal Police Officer Training
John Reid Advanced Interrogation Training
SEARCH Internet Investigation Training

Publications

"What You Don't Know Can Hurt You: Computer Security for Lawyers," *Bench & Bar of Minnesota*.

"Elephant in the Room" – Case Studies of Social Media in Civil and Criminal Cases," *Next Generation eDiscovery Law and Tech Blog*.

Exhibit B



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**Declaration of Mark Lanterman
Companion DVD-ROM**