

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

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

No. 15-cv-421-bbc

Plaintiffs,)

v.)

GERALD C. NICHOL, THOMAS BARLAND,)
JOHN FRANKE, HAROLD V. FROEHLICH,)
KEVIN J. KENNEDY, ELSA LAMELAS, and)
TIMOTHY VOCKE,)

Defendants.)

**MOTION FOR LEAVE TO FILE SECOND DECLARATION
OF DR. KENNETH MAYER**

Plaintiffs William Whitford, et al., in accordance with the Preliminary Pretrial Conference Order entered October 15, 2015 (Dkt. 33), respectfully move the Court for leave to file a Second Declaration of Dr. Kenneth Mayer, a copy of which is attached hereto. Dr. Mayer’s second declaration addresses information the Court specifically requested during trial, namely a comparison of the vote distribution of Wisconsin’s wards in the 2000s to post-Act 43 using accurate data. Trial Tr. Vol. IV at 253-55. Although the parties have been able to stipulate to and jointly submit certain data that the Court requested, plaintiffs believe that because of potential errors in the raw, non-verified data submitted by the parties from publicly available sources, and given the context of the Court’s request for that data, further explanation of the data is necessary. Plaintiffs seek to provide that explanation through a short additional declaration of Dr. Mayer

that is consistent with the opinions he expressed at trial regarding the very same vote total data from different years. In support of this motion, plaintiffs state as follows:

1. In Dr. Mayer's expert report and rebuttal report, and during his testimony at trial, Dr. Mayer provided analyses using various years of the U.S. Presidential vote totals in Wisconsin by ward. Tr. Exs. 2 at 8-12, 19-28; 107; 114 at 5-6, 9-12; Trial Tr. Vol II at 151-52, 160; Trial Tr. Vol. III at 10, 56.

2. In the expert report of defendants' expert Professor Nicholas Goedert, and during his testimony at trial, Professor Goedert also provided analyses using the Presidential vote totals in Wisconsin by ward. Tr. Ex. 136 at 21-23; Trial Tr. Vol. IV at 181-82, 253.

3. On the fourth and final day of trial, during the redirect examination of Professor Goedert, the Court, by Judge Griesbach, asked if the actual vote totals by ward for the 2000s wards and post-Act 43 wards were part of the record in this case. Trial Tr. Vol. IV at 253-55. Judge Griesbach noted that since the wards were redrawn, it would be helpful to compare the wards both pre- and post-Act 43. *Id.* at 253-54. Professor Goedert explained that he and Dr. Mayer had used the 2012 Presidential vote totals by ward for their expert reports but not the vote totals by ward for the districting plan that was in effect during the 2000s. At the Court's request, the parties agreed to obtain the data for the 2000s wards and present it to the Court.

4. Beginning on June 3, 2016, counsel for the parties conferred in an attempt to reach agreement on the data to provide to the Court in response to the Court's request. In addition to providing the raw data available on the Legislative Technology Services Bureau ("LTSB") website, plaintiffs' counsel expressed to defendants' counsel that they believed the Court was seeking information that would allow the Court to make a meaningful comparison of the vote totals by ward before and after the passage of Act 43. Plaintiffs' counsel provided

defendants' counsel with an Excel spreadsheet containing the 2008 and 2012 vote totals by ward, which Dr. Mayer had prepared from data available on the LTSB website and he had verified and corrected as necessary. Plaintiffs' counsel also provided a one-page explanation of the data that Dr. Mayer had prepared, which they proposed the parties jointly submit to the Court.

5. Defendants' counsel did not agree to submit either the spreadsheet of vote totals assembled by Dr. Mayer, or Dr. Mayer's summary of the comparison of the 2008 and 2012 data. Rather, defendants' counsel would agree to submit to the Court only spreadsheets containing non-verified vote totals taken directly taken from the LTSB's website, vote totals taken from the Government Accountability Board's ("GAB") website, and links to a page on the LTSB's website where the Court may access GIS maps of the wards as they were configured in 2008 and 2012, which defendants' counsel asked LTSB to prepare and post on its website. This information was provided to the Court as a Stipulation (Dkt. 152), filed on June 10, 2016, containing the publicly available raw data from the LTSB and the GAB.

6. Plaintiffs do not believe that the raw data defendants' counsel agreed to provide to the Court sufficiently responds to the Court's request, nor does it allow the Court to make the comparison that plaintiffs believe the Court was seeking to make. Indeed, along with the raw data provided in the Stipulation (Dkt. 152), for several reasons, Dr. Mayer's analysis and comparison of the data is essential to provide the Court with complete information and to answer Judge Griesbach's questions.

7. *First*, there are several problems with looking at the raw data alone. The LTSB dataset, because it is large, has known errors which usually require correction before the data can

be used.¹ Thus, the best practice would be to validate the data first for errors and then correct errors that are found. The 2008 and 2012 LTSB data provided in the Stipulation (Dkt. 152) have not been validated or corrected for errors, because the defendants would not stipulate to corrected and/or validated versions prepared by Dr. Mayer. In contrast, Dr. Mayer's second declaration starts out by validating the 2008 data before use.²

8. In addition, the raw GAB data also does not answer Judge Griesbach's questions about the vote distribution in Wisconsin wards, because it provides the vote totals for *reporting units*, not wards. Reporting units often combine multiple wards together and therefore do not provide insight into what is happening in specific wards in the state. This is why both Dr. Mayer and Professor Goedert used the LTSB data when performing ward-level analyses in their reports.³

9. *Second*, even if the raw data did not have these issues, comparing the 2008 actual vote totals to the 2012 actual vote totals by ward alone would not be useful. The ward names and boundaries are not the same for the 2000s wards and the post-Act 43 wards. Further, the overall number of wards, and the number of wards in some municipalities, does not remain constant between the 2000s wards and the post-Act 43 wards. The result is that a direct comparison of a specific ward from the 2000s to post-Act 43 would be extremely difficult, if not impossible.

10. Rather, plaintiffs interpret the heart of Judge Griesbach's line of questioning as seeking information that will allow the Court to compare the vote distributions in the 2000s

¹ Dr. Mayer found numerous errors in the 2012 LTSB dataset while preparing his original report in this case. Dr. Mayer corrected these errors before utilizing the dataset for his report. *See* Dkt. 54, Tr. Ex. 2 at 11, 59-62.

² *See* Trial Tr. Vol. IV at 254:24-255:1, where plaintiffs' counsel suggests that the data would need to be validated before being submitted to the Court.

³ *See* Dkt. 54, Tr. Ex. 2 at 10; Trial Tr. Vol. IV at 253:7-11.

wards to the vote distributions in the post-Act 43 wards. As detailed above, it would be extremely difficult to extract this information solely from looking at the raw data alone. Dr. Mayer's second declaration provides exactly this analysis by determining the two-party vote share for each ward in 2008, applying a uniform swing to each ward to estimate the Democratic vote share in a tied election, and then plotting the 2008 vote distribution curve on a graph with the 2012 vote distribution curve.⁴ This allows for a direct comparison between the vote distributions in the 2000s wards and the post-Act 43 wards, which is the exact information requested by Judge Griesbach.

11. Beyond the fact that Dr. Mayer's analysis responds directly to a request from the Court, the Court should also grant leave for plaintiffs to file Dr. Mayer's second declaration because the defendants, too, submitted post-trial work performed by a third party in response to the Court's request for the ward-level data. Defendants' counsel, Brian Keenan, asked the LTSB to add map versions of the 2001 and 2011 wards to the LTSB ArcGIS website he utilized during trial to show the Assembly districts for Act 43 and the Demonstration Plan. If Mr. Keenan can use the LTSB to provide extra analysis of the 2001 and 2011 wards, plaintiffs see no reason why Dr. Mayer cannot provide an analysis of the same data in furtherance of information requested by the Court.

12. Finally, defendants will not suffer any undue prejudice if the Court grants leave for plaintiffs to file Dr. Mayer's second declaration. Dr. Mayer's declaration serves to answer a question posed by the Court, and does not provide testimony for the plaintiffs' case-in-chief or raise new theories. Defendants have already seen the bulk of Dr. Mayer's declaration and

⁴ Dr. Mayer had already performed the analysis for 2012 in his rebuttal report. *See* Dkt. 95, Tr. Exs. 107, 114.

analysis, and thus will not be caught off guard. Finally, because plaintiffs are submitting Dr. Mayer's second declaration simultaneously with their post-trial brief, defendants will have an opportunity to respond to the declaration in their response brief.

WHEREFORE, for the reasons identified above, plaintiffs respectfully request that the Court grant their motion for leave to file the second declaration of Dr. Mayer, and that Dr. Mayer's second declaration be admitted in the record of this action.

Dated this 10th day of June, 2016.

Respectfully submitted,

/s/ Douglas. M. Poland

Douglas M. Poland
State Bar No. 1055189
RATHJE WOODWARD, LLC
10 East Doty Street, Suite 507
Madison, WI 53703
Phone: (608) 960-7430
Fax: (608) 960-7460
dpoland@rathjewoodward.com

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

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SECOND DECLARATION OF DR. KENNETH MAYER

Pursuant to 28 U.S.C. § 1746, I, Dr. Kenneth Mayer, hereby declare as follows:

1. I am one of the plaintiffs’ expert witnesses in the above captioned case. I make this declaration based on my personal knowledge and in order to provide a further analysis and comparison of the 2002-2010 and 2012 vote distribution by ward data requested by and filed with the Court on June 10, 2016 (Dkt. 152). This report is a true and correct statement of my opinions and conclusions, applying the principles of my academic discipline and scholarship in the field to a reasonable degree of scientific certainty.

2. I had previously gathered the 2012 Presidential vote totals by ward from the LTSB for the original expert report I authored in this case (Dkt. 54, Tr. Ex. 2; Dkt. 152-2).

Defendants' expert Professor Goedert then used the 2012 data I gathered to create Figure 1 in his expert report (Dkt. 51, Tr. Ex. 136 at 22).

3. To gather the data for Wisconsin wards as they were constituted prior to being redrawn for the purposes of Act 43, I downloaded the 2008 Presidential vote totals by ward (representing the wards as they existed 2002-2010) as a zip file titled "2008 Election Data by Ward" from the Legislative Technology Services Bureau ("LTSB") website at <https://legis.wisconsin.gov/ltsb/gis/data/>.

4. Upon downloading the zip file, the next step was to validate the 2008 LTSB data. This was necessary because the 2012 LTSB data contained a number of errors that required correction, as detailed in my original expert report (Dkt. 54, Tr. Ex. 2, at 11, 59-62). I validated the 2008 data by looking for vote percentages above 100% and examining reporting unit data in several municipalities that had inaccuracies in the 2012 data. I found no material errors.

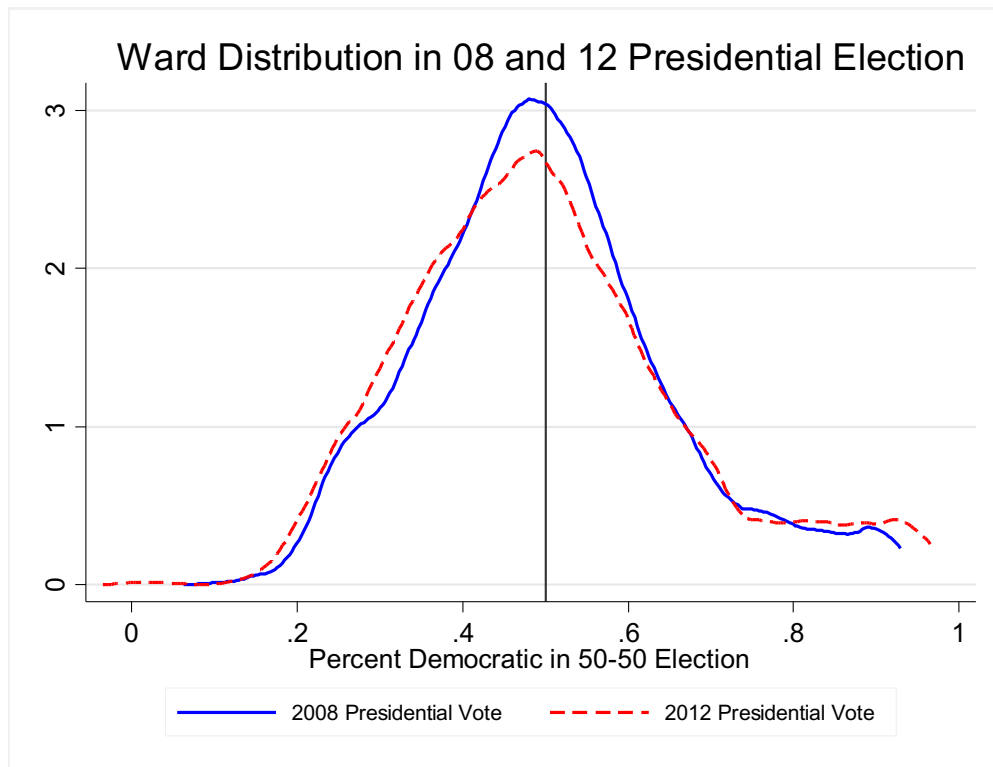
5. After validating the 2008 data, I gathered the 2008 Presidential vote totals by ward and the 2012 Presidential vote totals by ward in a spreadsheet. However, comparing the 2008 vote totals and the 2012 vote totals alone does not provide useful information, because the ward boundaries and names are not the same. In addition, the total number of wards in the 2000s and post-Act 43 are not the same, and the number of wards in some municipalities also changes. To make a more useful comparison between the data, I needed to compare the ward vote *distributions*.

6. Thus, I next determined the ward-level percentage of the two-party vote that the Democratic presidential candidate Barack Obama received in the 2008 presidential election for each ward in the LTSB data.

7. I then applied a uniform swing to each ward, based on the Democratic statewide percentage in that election (which Obama won with 57.1% of the statewide two-party vote), subtracting 7.1% from each ward's Democratic vote percentage. This results in an estimate of the 2008 Democratic vote by ward in a 50-50 election, and is identical to the method that Professor Goedert and I previously used to analyze the 2012 presidential election results by ward.

8. Next, I used the estimate of the 2008 Democratic vote by ward in a 50-50 election to generate a kernel density curve in Stata, replicating what I did in Figure C of my Rebuttal Report (Dkt. 95, Tr. Exs. 114, 107). Each ward was weighted by its share of the total number of votes cast in the presidential election (which has the effect of placing more emphasis on wards with more votes).

9. For the sake of comparability, I then plotted this kernel density curve in the same chart as the kernel density curve for the 2012 presidential election results by ward. This allows for a direct comparison of the ward vote distribution between the 2008 curve (using the 2000s wards) and the 2012 curve (using the current wards).



10. The first important point about the 2008 and 2012 distributions is that their shapes are relatively similar. Both distributions are quite symmetric. Both have peaks near the 50% Democratic point. And both have Democratic and Republican tails of comparable size.

11. However, it is also evident that the 2008 distribution is *more* symmetric than the 2012 distribution. In the region between 40% Democratic and 60% Democratic, the 2008 distribution is modestly to the right of the 2012 distribution, indicating a more equal number of wards on either side of the 50% point. The 2008 distribution also has a less pronounced Democratic tail than the 2012 distribution.

12. These differences between the distributions are exactly what we would expect given the ways in which the wards were designed in each decade. In the 2000s, as in all previous decades, the wards were drawn prior to the Assembly districts, and thus more accurately reflect the State's underlying political geography. But in the 2010s, for the first time in Wisconsin's

history, the wards were drawn *after* the Assembly districts. The 2010s wards therefore reveal some of the same pro-Republican bias that characterizes the current Assembly districts.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 10th day of June, 2016.

A handwritten signature in black ink that reads "Kenneth Mayer". The signature is written in a cursive style with a long horizontal stroke at the end.

KENNETH MAYER