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

WILLIAM WHITFORD, et al.,

Plaintiffs,

v. No. 15-cv-421-jdp

BEVERLY R. GILL, et al.,

Defendants;

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL DEPOSITION AND PRODUCTION OF DOCUMENTS BY ROBIN J. VOS

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INTRODUCTION

After years of careful, limited, and necessary fact-gathering by Plaintiffs and four days of trial, in November 2016, this Court issued an opinion holding that Plaintiffs had proven their claims of unconstitutional injury by demonstrating that the Wisconsin legislature intended to provide Republicans with a state-wide partisan advantage through Act 43; that Act 43 had a state-wide pro-Republican effect in subsequent elections; and that Act 43 was not justified by neutral redistricting criteria. In June 2018, the U.S. Supreme Court vacated the judgment in favor of Plaintiffs, holding for the first time that standing in a partisan gerrymandering case must be proven on a district-by-district basis, rather than the state-wide basis as alleged and proven by Plaintiffs at the 2016 trial. *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018); *see also* Pls.' Br. in Opp'n to the Assembly's Mot. to Dismiss, dkt. 229, at 9-10. In concurrence, Justice Kagan also for the first time identified the elements of a possible claim of constitutional injury to associational rights caused by partisan gerrymandering. Pls.' Br. in Opp'n to the Assembly's Mot. to Dismiss, dkt. 229, at 11-12. In accordance with that ruling, on remand Plaintiffs have sought to discover evidence to address at trial three areas identified by the Supreme Court: "standing, stating and proving a district-specific test for partisan vote dilution, and mounting an associational claim." *Id.* at 2.

As Plaintiffs established in their opening brief, Speaker Vos's testimony is plainly relevant to two key issues in the remand phase of this case: the intent behind the 29 Assembly districts challenged by Plaintiffs as causing unconstitutional vote dilution, and the intended and actual effects of Act 43 on Plaintiffs' associational rights. Speaker Vos's testimony is also necessary because none of the witnesses who testified in either the *Baldus* case or this case have been able to offer evidence on those two issues. Legislative aides Adam Foltz and Tad Ottman testified about related topics (state-wide intent evidence), the veracity of which this Court has

rightly questioned. *See infra* 12-14. But neither Foltz, Ottman, nor any other witnesses have testifed to the intent behind the configuration of any individual districts. The documentary record is also lacking: the *Baldus* hard drives provide an incomplete set of records because one of the drives, capabale of housing one terabyte of data, was damaged while in the legislature's custody and could not be read by Plaintiffs' forensic expert; the hard drives showed evidence that document wiping software had been downloaded onto them; and the Legislative Technology Services Bureau ("LTSB') destroyed the hard drives themselves in 2015, before this action was filed. *See infra* 12-14. And just last week, the corporate representative designated by the Wisconsin State Assembly (hereafter "Assembly") under Fed. R. Civ. P. 30(b)(6) could not offer any testimony of substance on any of the topics about which Plaintiffs seek to depose Speaker Vos. *See infra* 3-6.

In their opposition to Plaintiffs' motion, Speaker Vos and the Assembly respond to Plaintiffs' arguments as to why Speaker Vos has waived or cannot invoke legislative privilege by citing only to legal authorities considering that issue in general civil cases, avoiding entirely the well-established law of legislative privilege in *redistricting* cases that clearly supports Plaintiffs' right to depose Speaker Vos. Speaker Robin J. Vos's Opp'n to Pls.' Mot. to Compel Dep. and Produc. of Docs., dkt. 265, at 8-20 (hereafter "Opposition Brief").[1] As demonstrated below, the effort to distinguish Plaintiffs' authorities fails. *See infra* 7-10. And when Speaker Vos and the Assembly finally address the applicable test – the determination of the need for Speaker Vos's

[1] Intervenor-Defendant Wisconsin State Assembly adopted the reasonsing of Speaker Vos's brief. *See generally* Wisc. State Assembly's Opp'n to Pls.' Mot. to Compel Disc. of Wis. State Assembly Speaker Robin J. Vos, dkt. 266. Defendant Wisconsin Elections Commission took no position on this motion. *See* Defs.' Resp. to Mot. to Compel Dep. and Produc. of Docs., dkt. 263. This Reply Brief will therefore address the Opposition Brief adopted by both Speaker Vos and the Assembly.

testimony under the five *Rodriguez* factors – it speaks only to the relevance and necessity of Speaker Vos's evidence—arguments that are easily refuted by the evidence. *See infra* 10-16.

By attempting to entirely foreclose discovery of Speaker Vos – who has hands-on, contemporaneous knowledge of facts that the U.S. Supreme Court has ruled are necessary for Plaintiffs to prove at trial but that no other witnesses or documents have provided – Speaker Vos and the Assembly seek to continue the effort they began eight years ago "to hide from both the court and the public the true nature of exactly what transpired in the redistricting process." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 959 (E.D. Wis. 2012). This Court should allow Plaintiffs to seek relevant and necessary testimony from Speaker Vos so that this Court can make a determination as to the constitutionality of the 29 challenged districts and Act 43 as a whole, with a full set of facts before it.

BACKGROUND

One additional significant factual development has arisen since Plaintiffs filed their motion on March 19: Plaintiffs have now taken the deposition of the corporate representative designated to testify for the Assembly under Fed. R. Civ. P. 30(b)(6) in response to Plaintiffs' subpoena. That deposition testimony only strengthens Plaintiffs' position that they are entitled to take discovery of Speaker Vos because – just like every other witness's testimony and every response to discovery requests that Plaintiffs have served – the Assembly's designated representative was unable to offer any information about the reasons why the boundaries for specific Assembly districts were drawn in 2011, or information responsive to any of the categories of discovery sought from Speaker Vos.

In designating a witness under Fed. R. Civ. P. 30(b)(6), a governmental entity must identify a witness to "testify about information known or reasonably available to the organization." The Assembly designated Chief Clerk, Patrick Fuller, but he was unable to answer

any questions of substance throughout his deposition. *See generally* Dep. Tr. of Patrick Fuller, Mar. 29, 2019, dkt. 267. Clerk Fuller noted throughout his testimony that he had not discussed the production request or topics of the deposition with any individual members of the Assembly – including Speaker Vos – explaining that "the Assembly would not know what goes on in individual legislators' offices." *Id.* at 62:2-3. Clerk Fuller testified that "it's not for me to make [the] decision" as to whether Act 43 is a gerrymander. *Id.* at 75:18-19. Further, when asked about why the boundaries for specific districts were drawn in Act 43, Clerk Fuller stated, "The Assembly would not know why they did that. The Assembly has no knowledge of that. The Assembly just has the bill when it came over from the Senate." *Id.* at 79:4-13. Given these answers, the sworn testimony of the Assembly – an intervenor, and thus a party to this lawsuit by its own affirmative motion to this Court – is that it cannot offer testimony as to the reason for the boundaries of any of the 29 challenged districts (though in its Answer it denies those districts were drawn with partisan intent), nor can the Assembly support its denial that Act 43 is a partisan gerrymander. *See* Defs.' Answer, dkt. 207, at ¶¶ 19, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 70, 73, 76, 79, 82, 85, 88, 91, 94, 97, 100, 103, 113, 114, 165.[2]

In a lengthy soliloquy at the outset of the deposition, counsel for Clerk Fuller (Attorney St. John, also counsel for Speaker Vos) asserted, in relation to the requests as to the associational activities of legislators, that "the Wisconsin State Assembly has no discoverable knowledge about campaign activities. Whatever campaign related associational activities are engaged in by Assembly members or staff in their unofficial capacity, regardless of their party affiliation, such activities are not performed for the benefit of or on behalf of the Wisconsin State Assembly." Dep. Tr. of Patrick Fuller, dkt. 267, at 7:10-18. Clerk Fuller supported this position with his

[2] The Assembly adopted Defendants' Answer. *See* Wis. State Assembly Mot. to Intervene Pursuant to FRCP 24(A) & (B), dkt. 209, at 2.

answers, explaining that he has no knowledge of whether Assembly members or their staff engage in any associational activities when they are not on state time. *Id.* at 146:4-12. The complete lack of responsive information and documentation provided by the Assembly about Act 43's effects on the associational rights of the Plaintiffs, only heightens their need to gather this testimony from Speaker Vos.

The Assembly now finds itself in a strange position. It essentially admitted through the testimony of its designated representative in the 30(b)(6) deposition that, as an entity, it cannot articulate its defense to Plaintiffs' claims (let alone offer evidence to support any defense), yet in moving this Court to allow it to intervene as a party defendant in this case, it represented to this Court that "the Wisconsin State Assembly has an interest in this litigation, as a body, ***and as a representative of its members***." Br. in Supp. of Wis. State Assembly's Mot. to Intervene Pursuant to FRCP 24(A) & (B), dkt. 210, at 15 (hereafter "Assembly's Intervention Brief") (emphasis added). In granting the Assembly's motion for leave to intervene as a party defendant, this Court found that "the legislators had distinct interests in defending the legislative map." Op. & Order, Nov. 13, 2018, dkt. 223, at 3. Given that the Assembly, as an entity and as a party defendant, cannot articulate the nature of any defenses it has to Plaintiffs' claims, it falls to the members to sustain this claim (the alternative is the entry of summary judgment against the Assembly). And the member that can articulate the defense, because he was involved in every step of the bill drafting and now speaks for the Assembly, is Speaker Vos. Yet the Assembly seeks to block Plaintiffs' access to his testimony.

This is, again, a case where the Assembly seeks to have it both ways. Federal law is clear: when a person or entity decides to intervene in a case, it cannot use that intervention as a sword with respect to some testimony and as a shield with respect to others. *Powell v. Ridge*, 247 F.3d

520, 525 (3d Cir. 2001). The Assembly – an intervening party defendant – must either participate in full as a defendant and submit to the usual discovery procedures, or withdraw as a defendant and leave the defense of Act 43 to the original party defendants, the Wisconsin Elections Commission members.

ARGUMENT

There are three reasons why the arguments made by Speaker Vos and the Assembly should be rejected. ***First***, Speaker Vos and the Assembly ignore the applicable redistricting case law and instead base their arguments on generalized cases of legislative immunity from civil actions, a line of authority that simply does not apply here. ***Second***, when Speaker Vos and the Assembly finally discuss the application of the correct legal test, the five *Rodriguez* factors, they largely focus on the Assembly's assertion that evidence as to district-specific partisan intent is not required in the remand phase of this case. Although Plaintiffs agree with the Assembly that they already have proven intent sufficient to sustain their claims, under the Supreme Court's ruling, Plaintiffs must demonstrate partisan intent on a district-by-district basis to establish liability. *See* Pls.' Opp'n Br. to Mot. to Dismiss, dkt. 229, at 2, 16-22. Speaker Vos and the Assemmbly also assert that testimony from legislative aides, or information from the *Baldus* hard drives, are duplicative of Speaker Vos's testimony. That simply is not the case, for the reasons outlined in Plaintiffs' Opening Brief, and as further explained below. *See* Pls.' Br. in Supp. of Mot. to Compel Dep. and Produc. of Docs., dkt. 258, at 12-14.

Third, Speaker Vos and the Assembly assume that one of the primary architects of Act 43 can offer no relevant evidence as to the predicted and actual effect of a partisan gerrymander on the associational rights of active Democrtic voters and members of the Democratic Party. But, the Courts have recognized that politics is a "zero sum" enterprise, and as such, any efforts to

denigrate the position of one's political opponents is necessarily part of a plan to advance one's own political interests. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 747, (2011).

I. There Is No Absolute Legislative Immunity In a Redistricting Case.

The application of legislative immunity and privilege doctrine cannot be understood without looking specifically to the redistricting case law. This is because, for over fifty years, the Supreme Court has recognized that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). As such, in case after case the courts have found that when it comes to redistricting, "[w]hile legislative privilege is undoubtedly robust, the Supreme Court's decisions make clear that the privilege does not *absolutely* protect state legislative officials from discovery into communications made in their legislative capacity." *Benisek v. Lamone*, 241 F. Supp. 3d 566, 574 (D. Md. 2017); *see also* Pls.' Br. in Supp. of Mot. to Compel Dep. and Produc. of Docs., dkt. 258, at 14-15; Mem. & Order, *Benisek v. Lamone*, 1:13-cv-03233-JKB (D. Md. Mar. 16, 2017), ECF No. 168, Second Decl. of Ruth M. Greenwood, April 10, 2019 (hereafter "Greenwood Decl"), Ex. 1 (denying motion to quash subpoena for deposition of Gov. Martin O'Malley); Order Granting in Part and Den. in Part Non-Party Movants' Mots. to Quash, *League of Women Voters of Mich. v. Johnson*, 2:17-cv-14148-ELC-DPH-GJQ (E.D. Mich. May 23, 2018), ECF No. 58, Greenwood Decl., Ex 2 (non-party legislative personnel that were required to comply with parts of the subpoena included the Speaker of the House at the time the redistricting plans were enacted).

The authorities relied on by Speaker Vos and the Assembly to argue that Speaker Vos is entirely immune from offering testimony by virtue of his position as a legislator are almost

exclusively from outside the sphere of redistricting cases.[3] Speaker Vos and the Assembly rely on the following, non-redistricting, cases: *Biblia Abierta v. Banks,* 129 F.3d 899 (7th Cir. 1997) (a claim by churches alleging religious discrimination by Chicago alderman in a zoning decision); *Bogan v. Harris*, 523 U.S. 44 (1998) (action by an individual alleging her First Amendment rights had been violated by the enactment of an ordinance by the City of Fall River); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (plaintiff accused officers of the United States Senate of violating the Fourth Amendment); and *Schlitz v. Virginia*, 854 F.2d. 43 (4th Cir. 1988) (a case brought by a judge against the state alleging age discrimination).[4]

In a particularly interesting turn, one of the cases cited in by Speaker Vos and the Assembly found that legislative immunity completely barred a party from obtaining the testimony of legislators because the statute at issue required photo ID for voting. But the Court clearly contrasted that challenge with redistricting cases, where it agreed that complete legislative immunity *would not* apply: "'[l]egislative redistricting is a *sui generis* process.'….Ultimately, based on the unique nature of redistricting cases, the… *Bethune-Hill, Page*, and *Schaefer* courts held that a flexible, qualified privilege analysis was required with regard to legislative privilege." *Lee v. Va. State Bd. of Elections*, No. 3:15CV357 (HEH-RCY), 2015 WL 9461505, at *5 (E.D. Va. Dec. 23, 2015) (internal citations omitted). The Court also

[3] Speaker Vos continues to assert that *Powell v. Ridge* is inapplicable because Vos is not a party to the suit, yet the 30(b)(6) deposition confirmed that the Assembly was not involved at all with negotiating or signing the contract with Bartlit Beck to represent the Assembly in this case. Dep. Tr. of Patrick Fuller, dkt. 267, at 50:6-10. The Chief Clerk of the Assembly had not even seen a copy of the contract, which was signed by Speaker Vos, until well after he started paying the invoices sent to him by Speaker Vos's staff. *Id.* at 51:9-20. Though Plaintiffs find the claim that Vos is not a party to this suit to be at odds with reality, Plaintiffs nevertheless assume *arguendo* in this section that Speaker Vos is not a party to refute the Assembly and Speaker Vos's arguments as to why legislative immunity applies *even if* Speaker Vos were not a party to the case.

[4] Speaker Vos and the Assembly allude to the *Arlington Heights* case, which arose from the 7th Circuit, as another example where legislative privilege was not breached even in a case involving an important federal interest being at stake, yet they ignore the fact that in that case, "Respondents were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision."*Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977).

noted that gerrymandering cases warrant special treatment because redistricting presents a situation in which "the natural corrective mechanisms built into our republican system of government offer little check upon the very real threat of legislative self-entrenchment." *Id.* (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323 (4th Cir. 2015)).

When Speaker Vos and the Assembly finally find a redistricting case where a court held that legislative privilege prevented the depositions of legislators, that court's reasoning was not that legislative immunity applies generally in redistricting cases, but rather that "the factual record in this case falls short of justifying the 'substantial intrusion' into the legislative process." *Lee v. City of Los Angeles,* 908 F.3d 1175, 1188 (9th Cir. 2018). In that case, the Court found "Plaintiffs[']call for a categorical exception whenever a constitutional claim directly implicates the government's intent" to be too broad. *Id*. That is, the plaintiffs should have presented evidence as to why, based on those particular facts, legislative privilege did not apply to the claims of individuals from whom they sought testimony.

Despite the posturing by Speaker Vos and the Assembly, the Assembly earlier admitted to this Court that the federal judiciary treats redistricting cases differently when it comes to legislative privilege. In its briefing to support the Assembly's Motion to Dismiss, the Assembly explained that "partisan gerrymandering claims pose a uniquely potent threat to legislative autonomy. . . they provide plaintiffs with such an easy way to pierce the legislative privilege" Br. in Supp. of Wis. State Assembly's Mot. to Dismiss, dkt. 225, at 73. The Assembly is correct, in that courts have recognized that when it comes to redistricting, "state legislative privilege must yield to Plaintiffs' requests aimed at discovering the intent of those who participated in the formulation of the… redistricting map" Mem.& Order, *Benisek v. Lamone*, 1:13-cv-03233-JKB,

at 1 (D.Md. March 16, 2017), ECF No. 168, Greenwood Decl., Ex. 1. This Court should apply the on-point redistricting authority to this motion.

Given that complete legislative immunity does not apply in a redistricting case, the Court must review the Assembly and Speaker Vos's arguments about the application of the *Rodriguez* factors in this case. When the Court does so, it will find that those arguments do not prevent Plaintiffs from taking the discovery they seek of Speaker Vos.

II. The *Rodriguez* Factors Are Satisfied Because Speaker Vos's Claims That His Testimony Is Neither Relevant Nor Unique Are Incorrect.

The *Rodriguez* factors include the following five inquiries: "(i) the relevance of the evidence sought to be protected; (ii) the availability of the other evidence; (iii) the seriousness of the issues involved; (iv) the role of the government in litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011) (citing *Rodriguez v Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003)), *cited with approval* in *Baldus v. Brennan*, Nos. 11-CV-562-JPS-DPW-RMD & 11-CV-1011-JPS-DPW-RMD, 2011 WL 6122542, at *3 (E.D. Wis. Dec. 8, 2011), *order clarified*, 2011 WL 6385465 (E.D. Wis. Dec. 21, 2011). As demonstrated below, the responses from the Assembly and Speaker Vos as to each factor are without merit.

A. District-Specific Intent Claims Are Relevant to Plaintiffs' Case on Remand.

In applying the *Rodriguez* test, the first issue a Court looks to is "the relevance of the evidence sought to be protected." *Rodriguez*, 280 F. Supp. 2d at 101. The Assembly and Speaker Vos argue that Speaker Vos's testimony is not relevant to the case on remand because "[f]or Plaintiffs' claim to proceed, they must marshal evidence about Act 43's 'effect, not intent.'"

Opp'n Br., dkt. 265, at 23 (citing *Gill v. Whitford*, 138 S. Ct. 1916 (2018)) .[5] Though this statement is true with respect to Plaintiffs' *standing* arguments, there are two other issues that Plaintiffs seek to prove on remand: a district-specific test for partisan vote dilution, and that their associational rights were harmed by Act 43. Pls.' Opp'n Br. to Mot. to Dismiss, dkt. 229, at 2, 16-22.

The contours of the district-specific intent claim were outlined in the Plaintiffs' Opposition Brief to the Assembly's Motion to Dismiss, filed in December 2018. *Id.* at 16-18. Principally, "[t]o satisfy this requirement, a particular district would have to be drawn *purposefully* to crack or pack the targeted party's voters and thus to dilute their electoral influence." *Id.* at 16. Though there is circumstantial evidence in the record as to the intent behind each of the 29 districts challenged as intentionally causing vote dilution to the Plaintiffs, and though this Court has found that "from the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were drawing," Speaker Vos's testimony is sought to provide direct evidence with respect to the district-specific claims. Pls.' Br. in Supp. of Mot. to Compel Dep. and Prod. of Docs., dkt. 258, at 12-14 (citing *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016)), *vacated and remanded,* 138 S. Ct. 1916 (2018)).

Plaintiffs have explained that they are are willing to withdraw their subpoena to the extent it seeks testimony as to one category of discovery sought from Speaker Vos[6] if the Defendants will stipulate that the record evidence already admitted at trial establishes that the

[5] This claim is made multiple times in the Opposition Brief, including on page 1 ("any information [Speaker Vos] might have is…irrelevant"), page 27 ("Plaintiffs do not need such testimony to establish they have suffered a cognizable injury in fact, which turns on evidence of Act 43's "effect, not intent." *Gill*, 138 S. Ct. at 1932."), and page 31 ("*see also Gill*, 138 S. Ct. at 1932 (stating evidence of intent was not pertinent to Plaintiffs' establishing an injury in fact)").

[6] Namely, "testimony relating to how the Legislature reached its decision on the boundaries for each district in the 2011 redistricting maps (Act 43), including its motives, objective facts it relied on, and the involvement of others in the process, including the Redistricting Majority Project (REDMAP), the Republican National Committee, or other national Republican Party entities." Br. in Supp. of Mot. to Compel Dep. and Prod. of Docs., dkt. 258, at 3.

Assembly acted with intent to gain partisan advantage in each of the 29 challenged Assembly districts. *Id.* at 3-4.

B. Evidence From Legislative Aides and The *Baldus* Hard Drives Cannot Substitute for Direct Testimony From Speaker Vos.

The second issue the Court must address when applying the *Rodriguez* test is "the availability of other evidence." *Rodriguez*, 280 F. Supp. 2d at 101. The Assembly and Speaker Vos argue that there is sufficient alternative evidence to substitute for testimony from Speaker Vos. Opp'n Br., dkt. 265, at 3-5. They posit that evidence from other witnesses involved with the legislature's redistricting process (including Adam Foltz, Tad Ottman, Joseph Handrick, Jeff Ylvisaker, and Dr. R. Keith Gaddie) and from the redistricting computer hard drives recovered during the *Baldus* discovery are sufficient substitutes for the testimony sought from Speaker Vos. What the Assembly and Speaker Vos do not explain is that Mr. Handrick lied during his December 20, 2011 deposition; that the Court had little confidence in the authenticity of Mr. Foltz's testimony; that one of the *Baldus* hard drives displayed evidence of tampering that rendered the drive unreadable; that wiping software was loaded onto one of the hard drives and might have been used to delete files; and that the LTSB destroyed the hard drives in 2015 before this action was filed. By the actions of the legislature's agents, the testimony of Speaker Vos is left as the only remaining (and best) source of direct evidence of district-specific partisan intent.

Mr. Handrick's testimony does not render Speaker Vos's testimony irrelevant or duplicative because this Court has evidence that Mr. Handrick lied under oath. Mr. Handrick testified at his deposition on December 20, 2011 that when he was working during the redistricting process, he did not have access to voting data from past elections. Dep. Tr. of Joseph Handrick, dkt. 119, at 217:15-18. Yet, during the first trial in this case, multiple spreadsheets were identified showing that Mr. Handrick and the other drafters of the maps did in

fact have access to voting data from past elections. *See, e.g.*, "Wisconsin_Election_Data.xlsx" and "Joe map assert.xlsx" that were created and/or accessed by Mr. Handrick on April 15, 2011, and May 27, 2011, respectively. Tr. Ex. 225, folder WRK32864, Responsive Spreadsheets File Detail Report.

Similarly, Mr. Foltz's testimony does not render Speaker Vos's testimony irrelevant or duplicative because this Court has already identified Mr. Foltz as a person in whose credibility they have "less confidence", and explained that his testimony at trial in this case in May 2016, was "rehearsed and guarded." *Whitford*, 218 F. Supp. 3d at 890. Further, Mr. Foltz himself has testified that he was not the person making decisions in the regional or individual district meetings. Pls.' Br., dkt. 258, at 12-14.

In addition to these problems with the testimony of Mr. Handrick and Mr. Foltz, none of the other witnesses connected to the legislature can testify to the district-specific partisan intent for the 29 challenged Assembly districts because the evidence shows that the decision-maker on the final district boundaries was Speaker Vos. *Id.* at 12-14.

The information on the redistricting hard drives recovered in *Baldus* also is not a substitute for Speaker Vos's testimony. Plaintiffs' forensic expert, Mark Lanterman, found with respect to the ninth hard drive, an external hard drive capable of holding one terabyte of data, that it

> bore marks, including scratches and denting of the external metal housing and a stripped screw, indicating that the housing previously had been removed from the drive in a manner that damaged the outer housing. Moreover, this external hard drive could not be read. Although the disk will spin when the drive is powered up, it is unable to be read, indicative of damage, physical or otherwise.

Decl. of Mark Lanterman, *Baldus,* No. 2:11-cv-00562-JPS-DPW-RMD (E.D. Wis. Mar. 11, 2013), ECF No. 297, at ¶ 3. In addition, Mr. Lanterman found, with respect to some of the hard

drives, "that software designed to 'wipe' data – that is, to permanently destroy data on a hard drive, overwrite free space, or permanently delete files so that they can no longer be recovered – was downloaded onto some of the hard drives within the last year." *Id.* at ¶ 5.

Speaker Vos is the only witness who can speak to the intent behind the district lines for each of the 29 challenged districts because he was at both the regional meetings to discuss multiple districts, and the individual legislator meetings, where individual districts were discussed. Pls.' Br., dkt. 258, at 12-14. This Court should not allow the Speaker and the Assembly to restrict acess to this key witness.

C. The Assembly and Speaker Vos's responses to the Remaining Three Rodriguesz Factors are Slim and Unconvincing.

The third *Rodriguez* factor is "the seriousness of the issues involved." *Rodriguez*, 280 F. Supp. 2d at 101. The Assembly and Speaker Vos claim that the rights at interest in this case are not serious because they "may not even be justiciable" and, in any case, invidious partisan intent is surely not as serious as invidious racial intent. Opp'n Br., dkt. 265, at 23-24. This Court has ordered the parties to proceed with discovery on the assumption that partisan gerrymandering claims may be found justiciable in the *Rucho* and *Lamone* cases. Op. & Order, dkt. 243 (Jan. 23, 2019). Additionally, many other courts have reviewed this *Rodriguez* factor in the context of a partisan gerrymandering claim and found such a claim to be a serious issue. Mem. & Order, *Benisek v. Lamone*, 1:13-cv-03233-JKB at 5 (D. Md. Jan. 31, 2017), ECF No. 132, Greenwood Decl., Ex. 3 ("The Court finds no significant question as to the seriousness of both the litigation and the issues involved"); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011) ("There can be little doubt that plaintiffs' allegations are serious. Plaintiffs raise profound questions about the legitimacy of the redistricting process and the viability of the 2011 Map."); Order Granting in Part and Den. in

Part Non-Party Movants' Mots. to Quash, *League of Women Voters of Mich. v. Johnson*, 2:17-cv-14148-ELC-DPH-GJQ, at 12 (E.D. Mich. May 23, 2018), ECF No. 58, Greenwood Decl. Ex. 2 ("The third and fourth factors also weigh in favor of disclosure. This case involves questions regarding the impact of Michigan's current apportionment plan on the constitutional rights of Michigan citizens under the Equal Protection Clause and the First Amendment").

The fourth *Rodriguez* factor is "the role of the government in litigation." Plaintiffs' maintain that Speaker Vos's involvement in this case as a party is voluntary because he is the representative of the Intervenor-Defendant, the Assembly. Pls.' Br., dkt. 258, at 16. Even if this Court does not see Speaker Vos as a voluntary party to the suit, this factor still weighs in favor of a witness not being able to claim legislative privilege in the redistricting context. Mem.& Order, *Benisek v. Lamone*, 1:13-cv-03233-JKB, at 5-6 (D. Md. Jan. 31, 2017), ECF No. 132, Greenwood Decl., Ex. 3 ("As earlier indicated, this suit is not brought against individual state legislators… [nevertheless] the legislature's decision-making process lies at the core of Plaintiffs' case, and the legislature's direct role in the precipitating events of the instant litigation supports overcoming the legislative privilege."); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011) ("Moreover, the legislators' role in the allegedly unlawful conduct is direct. The General Assembly, through its members, aides and consultants, was primarily responsible for drafting, revising and approving the 2011 Map. These actions are under scrutiny. This is not, then, 'the usual 'deliberative process' case.") (internal citations omitted)).

The final *Rodriguez* factor is "the possibility of future timidity by government employees who will be forced to recognize that their secrets are voilable." This was not addressed in detail by the Assembly and Speaker Vos and so the arguments made by Plaintiffs – that future

legislative deliberation will not be chilled by testimony from Speaker Vos because the district-specific evidence will simply augment evidence as to statewide motivations that have already been adjudged in open court – still support this Court finding that Speaker Vos cannot invoke legislative privilege.

III. Discovery requests with respect to Plaintiffs' associational claims are within the bounds of permissible discovery.

The Speaker and Assembly claim that the testimony sought in category two and production requests 6 through 15 are either irrelevant to the Plaintiffs' claims, or a fishing expedition for information.[7] Opp'n Br., dkt. 265, at 29-30, 32. As set out above, one of the issues that Plaintiffs intend to prove at trial is that Act 43 burdened their associational rights, and so this evidence is plainly not irrelevant.

The Speaker and Assembly claim that Speaker Vos "cannot be Plaintiffs' first stop" in this inquiry, and he is not. Plaintiffs have and will continue to produce to Defendants extensive expert and lay evidence as to the associational effects of Act 43 on the Democratic Party of Wisconsin, as a whole, and as to individual Plaintiffs. Plaintiffs now seek information from one of the architects of Act 43 and the current leader of the Wisconsin Republican Assembly Campaign Committee (an entity that has records relating to the effects of Act 43 on the associational rights of Republicans in Wisconsin) regarding the intended and actual effects of Act 43 on the Plaintiffs' associational rights.

Speaker Vos and the Assembly assert that "Plaintiffs' claims cannot be predicated on the successes or failures of Democrats vis-à-vis Republicans," Opp'n Br., dkt. 265, at 29, but this is

[7] Production requests 6 through 15 are listed in the Declaration of Ruth M. Greenwood dated March 19, 2019, Ex. 1, dkt. 259-1, at 5-6. The requests concern communications with national Republican entities about the drafting of Act 43, and documents related to associtional acrtivites of the Republican Party of Wisconsin and the Wisconsin RepublicanAssembly Campaign Committee from 2002 to the present.

exactly the kind of inquiry that Justice Kagan contemplated when she set forth the associational theory of gerrymandering in her Whitford concurrence. She explained that when party members are "deprived of their natural strength by a partisan gerrymander," they "may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). By the same token, members of the gerrymandering party may be advantaged in all these ways, finding it easier to fundraise, attract volunteers, recruit candidates, and so on. After all, as the Court has recognized, in a two-party system like ours, "electoral debate is zero sum." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. at 747. As the victimized party's associational functions are impeded by gerrymandering, the line-drawing party's associational activities are necessarily promoted.

Speaker Vos is ideally placed, as a creator of Act 43 and the current head of the RACC, to offer testimony as to the effects of Act 43 on the associational rights of the Plaintiffs.

CONCLUSION

Nothing in Speaker Vos and the Assembly's Opposition Brief changes the facts and law as laid out in the Plaintiffs' Brief. Plaintiffs are entitled to take discovery of Speaker Vos that is limited, necessary, and uniquely held by the witness to aid the Court in its determination as to the specific intent behind the drawing of each of the 29 challenged Assembly districts in Act 43, and as to the burden Act 43 placed on the Plaintiffs' associational rights.

Dated: April 10, 2019

Respectfully submitted,

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