UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.

Plaintiffs,

v.

Case No. 3:15-CV-00421-jdp

BEVERLY R. GILL, et al.,

Defendants,

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

THE WISCONSIN STATE ASSEMBLY'S
MOTION TO EXCLUDE TESTIMONY FROM KENNETH R. MAYER
REGARDING LEGISLATIVE INTENT

Plaintiffs retained Professor Kenneth R. Mayer "to determine whether evidence exists of packing and cracking of Democratic voters." Mayer Report at 2, ECF 222. Mayer concludes that such evidence exists in various districts. To the extent this conclusion rests on an opinion about the intent of the Act 43 map drawers (as compared to the effect of the Act 43 districts), the Wisconsin State Assembly respectfully requests that this Court exclude that opinion because it fails to satisfy Federal Rules of Evidence 702 or 403. Plaintiffs' expert is no more qualified to opine on the Act 43 map drawers' state of mind than this Court is as the fact finder.

I. Inferences about the intent of individual legislators or legislative aides are inferences to be made by the fact finder, not by Plaintiffs' expert.

Expert testimony is admissible if it is based on "scientific, technical, or other specialized knowledge" that "will help the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702(a). "This condition goes primarily to relevance." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591-93 (1993); *see also Clark v. Takata Corp.*, 192 F.3d 750, 756 (7th Cir. 1999) (expert testimony must "be both relevant and reliable"). As courts in this and other circuits have concluded, expert testimony about an individual actor's state of mind does not qualify.

Permitting expert testimony on another's "state of mind" invades the fact finder's role. *See DSM IP Assets, B.V. v. Lallemand Specialties, Inc.*, No. 16-CV-497-WMC, 2018 WL 1950413, at *2 (W.D. Wis. Apr. 25, 2018). Experts are "no more skilled than a lay juror" to determine an individual's intent. *Id.* For example, in *United States v. Long Grove Manor, Inc.*, the district court excluded testimony about whether defendants committed fraud because such testimony "requires an inference about a defendant's mental state, and it is counsel's job—not an expert witness's—to establish a link, through argument between the evidence and the defendant's intent." 315 F. Supp. 3d 1107, 1118 (N.D. Ill. 2018). Similarly in *Securities and Exchange Commission v. Lipson*, the district court held that an expert's training and experience as an accountant did not "specially equip him to divine what [the defendant] truly

believed" about reliability of financial reports and that any opinions offered in that regard were either "rank speculation" or "credibility choices that are within the province of the jury." 46 F.Supp.2d 758, 763 (N.D. Ill. 1998); *see also*, *e.g.*, *Steadfast Ins. Co. v. Auto Mktg. Network, Inc.*, No. 97-cv-5696, 2004 WL 783356, at *6 (N.D. Ill. Jan. 28, 2004) (deciding experts were "in no better position than the jury to assess [a party's] subjective intent" and that expert testimony about a party's intent "would be little more than telling the jury what result to reach" (alterations and quotation marks omitted)).

Here, too, Mayer's training as a political scientist does not give him any special insight into what was inside of the minds of the Act 43 map drawers eight years ago. Plaintiffs may present their theory of the case about the supposed intent behind Act 43 through its lawyers. But it is improper to do so through the testimony of an "expert" who will be brought to trial only to "lend their credentials and reputation to the party who calls them without bringing much if any relevant knowledge to bear on the facts actually at issue" in the case. *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 538 (S.D.N.Y. 2004). Such testimony has "no basis in any relevant body of knowledge or expertise" and concerns "lay matters which a [fact finder] is capable of understanding and deciding without the expert's help." *Id.* at 546-47 (quotation marks omitted).

But it appears that Mayer intends to do just that—plumb the minds of the Act 43 drafters and opine on their allegedly discriminatory intent. Mayer

has defined the terms "packing" and "cracking" themselves in terms of intent. *See* Mayer Report 13. "Packing," he says, "occurs when *those in charge of redistricting* set out to minimize the number of seats that the minority can win…." *Id.* (emphasis added and quotation marks omitted). And "cracking," he says, cannot occur if a map is "not drawn with partisan intent." Mayer Dep. 193:5-13, ECF 307; *see*, *e.g.*, *id.* 183:6-11 ("[I]f you draw a map according to *neutral* criteria, the mere fact that there are going to be Republican voters in a Democratic district or Democratic voters in a Republican district, that would not be sufficient evidence to infer packing and cracking." (emphasis added)). Similarly, Mayer defines a "neutral" plan as that term is used throughout his reports as a plan "drawn without the intent of imposing a partisan effect, and/or without reference to underlying partisanship data." *Id.* at 146:4-11. Elsewhere, Mayer describes certain district lines as "carefully drawn" to crack voters, Mayer Report at 24, and he concludes his rebuttal report by describing Act 43 drafters' intention "to insulate Republican candidates from shifting electoral tides and changing voter preferences." Mayer Rebuttal Report at 23, ECF 308.

Mayer may not provide testimony such about "intent, motive, or state of mind, or evidence by which such state of mind may be inferred." *AstraZeneca LP v. Tap Pharm. Prods., Inc.*, 444 F. Supp. 2d 278, 293 (D. Del. 2006) (quotation marks omitted); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) (quotation marks omitted) ("nothing in either *Daubert* or the

Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert"). Even assuming evidence of a map drawer's intent were relevant, such evidence is not "outside [the] grasp" of the fact finder. *Lipson*, 46 F. Supp. 2d at 763. Any such "expert" opinions "may not be used merely to repeat or summarize what [the fact finder] independently has the ability to understand." *Id.* It is unfounded and improper and should be excluded.

II. Even if state-of-mind testimony was proper expert testimony, such evidence distracts from the real issues in this case.

Alternatively, evidence of an individual map drawer's intent should be excluded under FED. R. EVID. 403. Testimony at trial regarding the inner workings of a map drawer's mind will be a waste of judicial resources.

The Supreme Court has already instructed Plaintiffs that their case cannot proceed until they establish Article III standing. And evidence of subjective motivations of an individual legislator is irrelevant to that principal task on remand. Whether Plaintiffs have suffered a cognizable injury-in-fact turns on Act 43's "effect" and not its "intent." *See Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018).

Even if Plaintiffs were able to establish standing and even if the Supreme Court were to decide that the intended purpose of a redistricting act was relevant, evidence of an individual legislator's or legislative aide's intent ought to be excluded. The subjective motivations of a single legislator (or his

staff member) cannot be imputed to the legislature as a whole: "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it and the stakes"—invalidating a statute as unconstitutional—"are sufficiently high for [the court] the eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); *see also Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810) (stating "a court of law[] cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law"); *see, e.g.*, *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Comm'n*, 536 F. Supp. 578, 586 (E.D. Pa. 1982) (deciding discriminatory statements made by redistricting committee chairman were insufficient to prove discriminatory intent absent a showing that the state legislative body adopted the chairman's views); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (concluding that "the articulated purpose of the Act is its actual purpose," not the aspirations of some individual legislators). There is therefore no reason to spend scarce trial time on such matters.

Subjective-motivation evidence is not central to the questions to be decided in this proceeding, and the probative value of such evidence is outweighed by Rule 403's considerations. The purpose (let alone the effect) of Act 43 is not to be determined by evidence of the supposed motivations of individuals, but by the public evidence of the statute's goals and effect.

Plaintiffs respectfully request that this Court limit expert testimony to Act 43's alleged effect and exclude testimony regarding the supposed intent of individual legislators or legislative aides involved in drawing the Act 43 map.

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Respectfully submitted,

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