

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

COMMITTEE FOR A FAIR AND BALANCED)	
MAP, <i>et al.</i> ,)	
)	Case No. 11-C-5065
Plaintiffs,)	
)	Hon. John D. Tinder
v.)	Hon. Joan H. Lefkow
)	Hon. Robert L. Miller, Jr.
ILLINOIS STATE BOARD OF ELECTIONS,)	(3-judge court convened
<i>et al.</i> ,)	pursuant to 28 U.S.C. § 2284)
)	
Defendants.)	

**MOTION IN LIMINE #1 TO BAR ANY REFERENCE TO THE PARTISAN VOTING
INDEX AT THE HEARING AND MOTION TO STRIKE ALL REFERENCES TO PVI
IN PLAINTIFFS' PERMANENT INJUNCTION MOTION AND SUPPORTING
MARSHALL AFFIDAVIT AND EXHIBITS**

Defendants, the ILLINOIS STATE BOARD OF ELECTIONS, *ET AL.*, by their attorneys, and pursuant to Federal Rules of Evidence (“FRE”) 402 and 702 and Federal Rule of Civil Procedure (“FRCP”) 26, respectfully move this Court for an order in *limine* to strike the Partisan Voting Index (“PVI”) exhibits attached to Plaintiffs’ Motion for Permanent Injunction and to strike references to PVI in the Motion and attached Edward Marshall Affidavit, as well as for an order in *limine* to bar use of PVI exhibits at the hearing and to preclude any testimony regarding PVI. In support of this motion, the Defendants state as follows:

INTRODUCTION

On Friday, November 4, 2011, the Plaintiffs filed a Motion for Permanent Injunction, in which they alleged that Public Act 97-14, which instituted a new Congressional district map pursuant to the recent U.S. census (the “2011 Congressional districting map”), violated §2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and was an unconstitutional racial and partisan gerrymander.

Attached to the Permanent Injunction Motion was the Affidavit of Edward D. Marshall, who was identified by the Plaintiffs in the November 7, 2011 Pre-Hearing Order as a “may call” fact witness.¹ However, Plaintiffs are effectively attempting to present expert testimony on their partisan gerrymander claims (Counts V and VI) by Marshall’s affidavit and attached exhibits purportedly measuring the partisanship of districts under a Partisan Voting Index (“PVI”). Plaintiffs never disclosed an expert on their partisan gerrymander claims, and Rule 701 does not permit a lay witness, such as Marshall, to offer expert testimony. Because Plaintiffs did not disclose an expert witness on the partisan gerrymander claims, Defendants did not disclose an expert on Counts V and VI. In addition, because Plaintiffs produced their PVI documents for the first time as attachments to the Permanent Injunction Motion on November 4, 2011, Defendants’ expert, Allan Lichtman or any other expert Defendants may have disclosed, did not have the opportunity to rebut or respond to the PVI documents in defense expert reports. In summary, without providing any notice whatsoever to Defendants that Plaintiffs are attempting to prove their partisanship claims through PVI, in their permanent injunction motion Plaintiffs now rely extensively on the PVI documents and testimony to prove their claims.

Even were this Court to construe the PVI evidence as appropriate for lay opinion testimony, the PVI evidence produced for the first time on the eve of trial violates this Court’s discovery order, which set September 17, 2011 as the date for Plaintiffs to have responded to written discovery and October 19, 2011 as the last date for fact depositions. Defendants propounded written discovery to Plaintiffs on September 7, 2011, which the Court’s Scheduling Order provided 10 days for Plaintiffs to respond. Defendants asked specific interrogatories and

¹ In their responses to the Defendants’ First Set of Interrogatories, the Plaintiffs also identified Marshall as an Independent Contractor. The Defendants chose not to depose Marshall only after confirming with the Plaintiffs’ counsel on September 21, 2011 that Marshall had provided only technical consulting services regarding mapping.

document requests about Plaintiffs' partisan gerrymander claims. Plaintiffs' responses to Defendants' discovery requests included no PVI data.

For these reasons, all references to PVI in Plaintiffs' permanent injunction memorandum and supporting affidavit of Marshall and exhibits attached thereto should be stricken. In addition, Plaintiffs should be barred at the hearing in this matter from referencing or eliciting testimony on the PVI evidence or offering any exhibits on PVI.

I. PVI Portions of Marshall's Affidavit

When it came time to disclose their expert witnesses, the Plaintiffs never identified Marshall. Instead, they listed him in their discovery responses as an Independent Contractor, and never provided additional information. Yet, now, in their permanent injunction motion, the Plaintiffs are attempting to offer him up for essentially expert testimony regarding partisan voting. Fact witnesses may speak to those facts that are in the witness's first-hand knowledge. *U.S. v. York*, 572 F.3d 415, 420 (7th Cir. 2009); *Sunstar, Inc. v. Alberto-Culver Co., Inc.*, 2006 WL 6505615 (N.D. Ill.), *quoting U.S. v. Conn*, 297 F.3d 548, 553-54 (7th Cir. 2002); *see also Ancho v. Pentek Corp.*, 157 F.3d 512, 515, 519 (7th Cir. 1998). However, an expert, using his/her "scientific, technological, or other specialized knowledge," may speak to opinions or inferences that are drawn from facts outside of his/her first-hand knowledge. *Id.*; FRE 702. Such opinions are not admissible as lay testimony from a fact witness. *York*, 572 F.3d at 420; FRE 701(c). Furthermore, a party seeking to use an expert must timely disclose him/her, along with a written summary of his/her opinion, prior to trial. *York*, 572 F.3d at 420; FRCP 26(a)(2)(D).

The PVI portions of Marshall's affidavit that should be stricken are paragraph 24 through 34 on pages 7 through 9. (Dkt 106-7). In these paragraphs, Marshall introduces PVI scores for

the 2001 Congressional Districts, 2011 Congressional Districts, and the Plaintiffs' proposed Congressional Districts, based on a methodology developed by Charlie Cook of the Cook Political Report. These scores, reflected in Tables B – D of the Affidavit on page 8, measure to what extent a district leans towards one political party or the other. Marshall does not explain the necessity of a PVI score nor whether the Cook PVI formula is accurate and reliable, but rather simply adopts another person's methodology to publish calculations. *See* Marshall Affidavit, ¶¶ 24 – 25. For these reasons, paragraphs 24 through 34 of Marshall's affidavit should be stricken. In addition, were Plaintiffs to elect to call Marshall as a fact witness at trial, he should be precluded from testifying about the PVI data.

II. PVI Documents Attached To Permanent Injunction Motion and Submitted as Trial Exhibits

In their permanent injunction motion, Plaintiffs cite to the following PVI documents, which are also included in their proposed pretrial order. The documents are cited differently in the brief and pretrial order and are identified as followed:

Motion Exhibit No.	Trial Exhibit No.
A54 (Dkt 106-5 at pp. 51-60)	P-44 (Dkt 108 at p. 10 of 23)
A63 (Dkt 106-6 at pp. 30-37)	P-53 (Dkt 108 at p. 11 of 23)
B20 to B27 (Dkt 106-9 at pp. 5-20)	P-80 to P-87 (Dkt 108 at pp.12 of 23)

B20 to B27 are analytic maps created by Marshall and are exhibits to his affidavit. The maps visually represent the scores of the Partisan Voting Index as measured by Marshall for certain cities and districts in Illinois under the Adopted Plan. Marshall's expert analysis in these maps is not lay opinion testimony, and the exhibits therefore should be stricken from the permanent injunction motion and barred from use at trial. Moreover, were the analytic maps construed as factual data, its disclosure on the eve of trial is untimely and would severely prejudice

Defendants were they to be admitted. The cherry picking of a limited area in Illinois under these maps should not be admitted when Defendants have not had the opportunity to rebut the PVI evidence or to present maps of areas not covered by Plaintiffs. If the PVI documents would have been produced during discovery in response to Defendants' discovery requests on the partisanship claims, Defendants at least would have had an opportunity to rebut the evidence.

This Court should also strike A54 and A63, which respectively are the Cook Political Report and the Almanac for American Politics' definition of the Cook Partisan Voting Index. The Cook Political Report provides the PVI Index for all of the districts in Congress. Plaintiffs never produced this document or raw data during discovery, and have proffered no witness to opine about it at trial. A54 and A63 were attached to the affidavit of one of Plaintiffs' attorneys, who is not a witness disclosed for trial. For these reasons, A54/P-44 and A63/P-53 should be stricken from the permanent injunction motion and barred from use at trial.

III. PVI References in Permanent Injunction Motion

On pages 35-37 and pages 42-43 of Plaintiffs' memorandum in support of their Permanent Injunction Motion, Plaintiffs attempt to prove their partisanship gerrymander claims by offering an "effect" standard based on the PVI data. As Plaintiffs failed to disclose the PVI evidence and theory during fact and expert discovery, their arguments on PVI in the aforementioned pages of their memorandum should be stricken, and further, Plaintiffs, Plaintiffs' witnesses and Plaintiffs' counsel should be precluded from referring to or testifying about PVI during the hearing in this matter.

WHEREFORE Defendants respectfully request that any reference to the Partisan Voting Index in Plaintiffs' Permanent Injunction Motion be stricken and that Plaintiffs be precluded

from presenting testimony or exhibits regarding the Partisan Voting Index at the hearing in this matter as specifically requested above.

Dated: November 10, 2011

Respectfully submitted,

THE ILLINOIS STATE BOARD OF ELECTIONS, ET AL.

/s/ Brent Stratton

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