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

COMMITTEE FOR A FAIR AND BALANCED MAP, *et al.*,	)	
	)	
	)	Case No. 1:11-cv-05065
Plaintiffs,	)	
v.	)	Judge Joan Humphrey Lefkow
	)	Judge John Daniel Tinder
ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,	)	Judge Robert L. Miller, Jr.
	)	
	)	(3-judge court convened pursuant
Defendants.	)	to 28 U.S.C. § 2284)

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION IN LIMINE #3 TO BAR AND MOTION TO STRIKE PLAINTIFFS' PROPOSED EXHIBITS P-42, P-44, P-51 THROUGH P-58, AND P-109

In Motion in Limine # 3 (Doc. 117), Defendants ask the Court to bar Plaintiffs from using at the hearing and to strike from Plaintiffs' Memorandum in Support of their Motion for a Permanent Injunction ("Injunction Memorandum") three categories of exhibits: 1) socio-economic studies establishing the severe disadvantages in housing, education, and employment experienced by Latinos in Illinois; 2) directories and data compilations from the Cook Political Report and the Almanac of American Politics;[1] and 3) press releases and news articles, including a press release describing Congressman Dan Lipinski's poor voting record on issues important to the Latino constituents in his district.[2] Defendants' motion is meritless. In the first place,

[1] In the parties' November 15, 2011 Joint Stipulation of Facts, Documents, and Data, Defendants stipulated to the admissibility of one of the data compilation exhibits originally challenged in Motion in Limine #3—exhibit P-109—which shows demographic breakdowns in districts with Latino members of Congress. Joint Stip. Facts, Docs., Data ¶ 7. Defendants' objection to exhibit P-109 is therefore moot.

[2] Defendants also challenge two news articles addressing the process by which the Adopted Map was enacted (exhibits P-56 and P-57), but Plaintiffs do not plan to use these exhibits to prove the

Defendants' objections are premature, and premised upon misguided speculation about the intended use of the challenged exhibits. For that reason alone, Defendants' motion must be denied. In any event, each of Defendants' objections fails on the merits because the challenged exhibits were timely produced, are directly relevant to this case, and fall within well-recognized exceptions to the hearsay rule. The Court should deny Defendants' Motion in Limine #3.

ARGUMENT

I. Defendants' Motion Must Be Denied As Premature.

Defendants' motion should be denied outright because the objections it raises are premature. A "court has the power to exclude evidence *in limine* only when evidence is clearly inadmissible on all potential grounds." *Hawthorne Partners v. AT&T Tech., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). But Defendants object to the admissibility of exhibits on specific grounds and for specific purposes, without knowing the context or the purpose for which each exhibit will be offered into evidence. Simply stated, the exhibits standing by themselves are not objectionable if and until they have been offered into evidence. For example, Defendants' hearsay objections are beside the point if Plaintiffs introduce an exhibit at the hearing for impeachment purposes, or for any purpose other than proving the truth of the matter asserted. *See* FED. R. EVID. 801(c); *United States v. Burt*, 495 F.3d 733, 736-37 (7th Cir. 2007) (testimony offered for impeachment purposes is not hearsay). Similarly, Defendants' relevance objections are grounded in speculation about the purposes for which Plaintiffs will offer the challenged exhibits. *See* Doc. 117 at 1, 4-5; *see also* Sec. III *infra*. Accordingly, the Court should deny Defendants' motion and rule on their admissibility objections as each exhibit is offered into evidence, when the Court can properly evaluate whether the exhibit is admissible for its intended

---

relevant facts about the enactment process at the hearing. Accordingly, Defendants' objections to these exhibits are now moot.

purpose. *See Jonasson v. Lutheran Child & Family Serv.*, 115 F.3d 436, 440 (7th Cir. 1997) (if evidence "cannot be evaluated accurately or sufficiently" in a motion in limine, "it is necessary to defer rulings until during trial"); *see also Greenwich Indus., L.P. v. Specialized Seating, Inc.*, 2003 WL 21148389, at *1 (N.D. Ill. May 16, 2003) ("Motions *in limine* are disfavored; admissibility questions should be ruled upon as they arise at trial.").

II. Defendants' Motion Also Must Be Denied On The Merits.

If the Court chooses to consider Defendants' timeliness, relevance, and hearsay objections now despite their prematurity, the Court should still deny Defendants' motion because these objections are meritless.

A. Defendants' Timeliness Objections Are Unfounded.

Defendants repeatedly contest the timeliness of Plaintiffs' disclosure of the challenged exhibits, suggesting alternatively that the exhibits should have been disclosed before the deadline for Plaintiffs' initial expert reports on September 14, 2011, or that they should have been disclosed before the close of fact discovery on October 19, 2011. *See* Doc. 117 at pp. 3-4. Both suggestions are wrong, and ignore the fact that Defendants themselves, as recently as the night of Sunday, November 13, 2011, have added exhibits to their exhibit list.

The hypocrisy of Defendants' position is underscored by the reality that they have not suffered any prejudice by Plaintiffs' compliance with the November 7, 2011 disclosure of hearing exhibits. The challenged exhibits are not documents upon which Plaintiffs' experts relied in their reports or plan to rely at the hearing, but documents that fall within recognized hearsay exceptions or other Rules of Evidence as set forth below and about which this Court can take judicial notice. And, as Defendants themselves concede, the documents that were in Plaintiffs' possession at the close of discovery were in fact disclosed at that time. *See* Doc. 117 at p. 3 (admitting that some of the challenged exhibits were produced on October 19, 2011).

All of the challenged exhibits disclosed after October 19, 2011 are publicly-available articles, studies, and data compilations obtained as part of Plaintiffs' legal research in preparation for the upcoming hearing. Pursuant to this Court's order, Plaintiffs' pre-hearing disclosures were due on November 7, 2011, *see* Doc. 100 at 2, and Plaintiffs disclosed each of the challenged exhibits on or before that date. Moreover, because the challenged exhibits are not documents on which Plaintiffs' experts plan to rely and on which Defendants' experts should therefore have a chance to comment, Defendants' claims of prejudice are meritless.

B. All Of The Challenged Exhibits Are Relevant, And The Relevance Of Individual Exhibits For Specific Purposes Cannot Be Assessed Until The Hearing.

Defendants also make the bold assertion that the challenged exhibits are wholly irrelevant to Plaintiffs' case. As Defendants themselves acknowledge, relevance is not a high threshold. *See* Doc. 117 at 4. "The Rules define relevance broadly as evidence having any tendency to make the existence of a fact more probable or less probable," and a party is not limited to presenting "the most probative evidence." *United States v. McKibbins*, 656 F.3d 707, 711 (7th Cir. 2011) (quotation marks omitted). The first set of exhibits challenged by Defendants—socio-economic studies reporting the disadvantages and discrimination in education, employment, and housing suffered by Latinos in Illinois (exhibits P-42, P-51, P-52, P-54, and P-55)—are highly relevant to the totality of the circumstances analysis of intentional vote dilution in Districts 3, 4, and 5, as this Court has recognized. *See* Doc. 77 at 7 (listing "depressed socio-economic status attributable to inferior education and employment and housing discrimination" as relevant factors under the totality of the circumstances test).

In addition, the description of the Cook Partisan Voting Index in exhibit P-53 and the table containing the Cook Partisan Voting Index for the 111th Congress in exhibit P-44 are directly relevant to determining whether the Adopted Plan complies with Plaintiffs' proposed

effect standard for judging partisan gerrymander claims. Finally, exhibit P-58, a press release from the Illinois Coalition for Immigrant and Refugee Rights reporting that Congressman Luis Gutierrez withdrew his endorsement of Congressman Dan Lipinski because of his poor voting record on immigration issues, is also highly relevant in light of arguments made by Defendants that Congressman Dan Lipinski is the candidate of choice for Latinos. This absurd conclusion is contradicted on many fronts, not the least of which is Lipinski's rebuke by many members of the Latino community, including Congressman Gutierrez. Should Defendants persist in arguing that Congressman Dan Lipinski is the candidate of choice for Latinos, evidence to the contrary is highly relevant impeachment material. Thus, all of the challenged exhibits are clearly relevant to the legal and factual issues in this case.

Furthermore, the appropriate occasion to determine the relevance of individual exhibits is at the time they are introduced at the hearing and can be considered in context. *See, e.g.*, *Hawthorne Partners*, 831 F. Supp. at 1400 ("[u]nless evidence meets th[e] high standard" of being "clearly inadmissible on all potential grounds," "evidentiary rulings should be deferred until trial so that" issues such as "relevancy . . . may be resolved in proper context"); *Casares v. Bernal*, 790 F. Supp. 2d 769, 755 (N.D. Ill. 2011) (by deferring rulings on motions in limine "until trial, . . . decisions can be better informed by the context, foundation, and relevance of the contested evidence within the framework of the trial as a whole"). Challenging the relevance of these exhibits now is premature and unnecessary, particularly in a bench trial. Moreover, Plaintiffs' "proposed" exhibit list is, as its name makes clear, a list of exhibits Plaintiffs *might* use at the hearing. The purposes for which Plaintiffs may use the exhibits will depend on the progression of the hearing—undoubtedly some will be used for cross-examination purposes, but Plaintiffs cannot know which ones or how they will be used until the need arises, and neither can

Defendants. Indeed, Defendants' relevance objections are based on nothing more than speculation and conjecture as to potential uses for the challenged exhibits, which is proof in and of itself that their objections are premature. *See, e.g.*, Doc. 117 at 1 ("some of the exhibits *appear* to be offered to support conclusions that require expert analysis . . ."); *id.* at 5 ("*To the extent* that these articles are being offered as a basis for an opinion on the totality-of-the-circumstances test without the analysis of an expert, they must be barred from use in this case."). The law is clear that if a motion in limine threatens to exclude even "potentially relevant" evidence, the relevance of an individual exhibit *must* be considered in context at the time it is introduced at the hearing. *See Payne v. Schneider Nat. Carriers, Inc.*, 2011 WL 1575422, at *1 (S.D. Ill. Apr. 26, 2011); *see also Jonasson*, 115 F.3d at 440; *Hawthorne Partners*, 831 F. Supp. at 1400.

C. Hearsay Exceptions Apply To All Relevant Portions Of The Challenged Exhibits.

Defendants further argue that no hearsay exceptions or exemptions apply to render the challenged exhibits admissible. The inherent weakness of Defendants' position is illustrated by the fact that they cite only the definition of hearsay for this sweeping proposition, without considering the effect of the many hearsay exceptions, and without any attempt to engage meaningfully with the content of individual exhibits. *See* Doc. 117 at 3. A proper hearsay analysis reveals that one or more exceptions to the hearsay rule plainly apply to the relevant portions of each exhibit.

Data Compilations and Directories. The exhibits containing data compilations and directories from well-recognized sources (exhibits P-44 and P-53) are clearly admissible. First, they fall under the hearsay exception in Rule 803(17) of the Federal Rules of Evidence, which applies to "[m]arket quotations, tabulations, lists, directories, or other published compilations,

generally used and relied upon by the public or by persons in particular occupations." FED. R. EVID. 803(17). Exhibit P-44 is a table published by the Cook Political Report setting forth the Partisan Voting Index for all Districts of the 111th Congress, an index widely relied upon by political scientists and by the general public to compare the competitiveness of Congressional districts.[3] Similarly, Exhibit P-53 is a publication by the National Journal describing the Cook Partisan Voting Index as part of the Almanac of American Politics, one of the definitive directories for data on congressional districts, congressmen, and state senators.[4] As directories and compilations generally relied upon by the public and by political scientists, these exhibits qualify under Rule 803(17). *See, e.g., United States v. Johnson*, 515 F.2d 730, 732 n.4 (7th Cir. 1975) (finding a book published by National Market Reports listing the wholesale and retail values of cars admissible under Rule 803(17)).

Second, exhibit P-44, the table displaying the Cook Partisan Voting Index, also qualifies as a summary chart admissible under Federal Rule of Evidence 1006. Rule 1006 provides that "[t]he contents of voluminous writings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." FED. R. EVID. 1006. Exhibit P-44 summarizes voluminous data in a way that makes it accessible for the Court, and thus falls under Rule 1006. *See United States v. Alwan*, 279 F.3d 431, 440 (7th Cir. 2002) (rejecting defendant's argument that an agent's summary of his review of multiple transcripts "was hearsay," because "Fed.R.Evid. 1006 specifically permits voluminous writings as a practical matter to be summarized").

---

[3] *See* The Cook Political Report, "*The Cook Political Report* Partisan Voter Index Explained," available at: http://cookpolitical.com/node/4201.

[4] *See* NationalJournal.com, "The Almanac of American Politics," available at: www.nationaljournal.com/almanac.

Third, Defendants' objections to exhibits P-44 and P-53 are conclusively undermined by the fact the Supreme Court routinely relies on data compilations and directories from sources like the Almanac of American Politics in election law cases.[5] The Supreme Court's reliance on these sources demonstrates that they were appropriately cited in Plaintiffs' Injunction Memorandum and should be admitted for the Court's consideration at the hearing.

Socio-Economic Studies. Defendants also object on hearsay grounds to the publicly-available studies providing statistics regarding the socio-economic conditions of Latinos in Illinois (exhibits P-42, P-51, P-52, P-54, and P-55). The statistics in these studies plainly fall within the scope of Rule 803(17) as tabulations and compilations generally relied on by the public.[6] *See* FED. R. EVID. 803(17); *see also, e.g.*, *Johnson*, 515 F.2d at 732 n.4; *In re Sulfuric Acid Antitrust Litigation*, 235 F.R.D. 646, 653 (N.D. Ill. 2006) (finding pricing data published in a weekly newsletter admissible under Rule 803(17)). Moreover, courts routinely take judicial notice of statistics and facts from documents on public websites that are capable of ready determination and not subject to reasonable dispute, further undercutting Defendants' argument

[5] *E.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410-11, 439 (2006) (citing the Almanac of American Politics); *Abrams v. Johnson*, 521 U.S. 74, 80 (1997) (same); *Bush v. Vera*, 517 U.S. 952, 965, 973 (1996) (plurality opinion) (same); *id.* at 1041 n.37 (Stevens, J., dissenting) (same); *Miller v. Johnson*, 515 U.S. 900, 909 (1995) (same); *see also Cao v. FEC*, 688 F. Supp. 2d 498, 521-22 (E.D. La. 2010) (citing the Cook Political Report).

[6] Defendants speculate that Plaintiffs might argue that these exhibits qualify as learned treatises under the hearsay exception in Federal Rule of Evidence 803(18), which, as Defendants emphasize, only applies if the statement is called to the attention of an expert witness. *See* FED. R. EVID. 803(18). Defendants are correct that these articles are not discussed in Plaintiffs' experts' reports, and Plaintiffs do not intend to call these exhibits to their experts' attention at the hearing. But Rule 803(18) also applies when learned treatises are "called to the attention of an expert witness upon cross-examination." *Id.* While Plaintiffs' primary argument is that relevant portions of the socio-economic exhibits qualify as tabulations and compilations under Rule 803(17), several might be used during cross-examination of Defendants' expert, in which case Rule 803(18) would also apply.

that the socio-economic studies should be stricken from the Injunction Memorandum and barred at the hearing.[7]

Press Release. Finally, Defendants challenge exhibit P-58, the press release published by the Illinois Coalition for Immigrant and Refugee Rights describing Congressman Dan Lipinski's poor voting record on immigration issues. Rule 803(21) of the Federal Rules of Evidence excuses statements of "[r]eputation of a person's character among associates or in the community" from the hearsay rule. FED. R. EVID. 803(21). The press release in exhibit P-58 reports that Congressman Dan Lipinski's voting record so damaged his reputation that it lost him the support of his colleague, Illinois's lone Latino Congressman, Gutierrez. Because this exhibit bears on Lipinski's reputation in his district and among his fellow congressmen for failing to represent his Latino constituents effectively, it qualifies under the hearsay exception in Rule 803(21). *See, e.g.*, *United States v. Penson*, 896 F.2d 1087, 1092-93 (7th Cir. 1990) (evidence that a defendant performed similar acts in the past and could therefore be trusted by his co-conspirators qualified under Rule 803(21) as evidence of the defendant's "'good' reputation in the drug-trafficking community"). Moreover, it is commonplace for the Supreme Court in election law cases to cite press reports and newspaper articles, underscoring the appropriateness of this exhibit's use at the hearing and its citation in Plaintiffs' Injunction Memorandum.[8]

---

[7] *E.g.*, *Dudum v. Arntz*, 640 F.3d 1098, 1102 n.6 (9th Cir. 2011) ("we grant Dudum's request for judicial notice of the City's official election results as posted on the department website" as a fact "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") (quotation marks omitted); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of information posted on a governmental website, the authenticity of which was undisputed); *Barnett v. Daley*, 32 F.3d 1196, 1198 (7th Cir. 1994) (finding in a voting rights case that statistics like "census population figures" were proper subjects of judicial notice).

[8] *E.g.*, *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181, 219 n.23 (2008) (Souter, J., dissenting) (citing articles from the Fort Wayne J. Gazette, the South Bend Tribune, and the Post-Tribune); *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) (citing an

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion in Limine #3 (Doc. 117), except with respect to Defendants' objections to exhibits P-56, P-57, and P-109, which are now moot.

Dated: November 15, 2011

Respectfully submitted,

/s/ Lori E. Lightfoot

Tyrone C. Fahner
John A. Janicik
Lori E. Lightfoot
Joshua D. Yount
Dana S. Douglas
Thomas V. Panoff
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
(312) 701-7711 – fax
Attorneys for Plaintiffs

article from the Winston-Salem Journal); *Shaw v. Reno*, 509 U.S. 630, 635 (1993) (citing a Wall Street Journal article).