FILED
5th JUDICIAL DISTRICT COURT
Lea County
9/25/2023 5:25 PM
NELDA CUELLAR
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STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

REPUBLICAN PARTY OF NEW MEXICO,
DAVID GALLEGOS, TIMOTHY JENNINGS,
DINAH VARGAS, MANUEL GONZALES, JR.,
BOBBY and DEE ANN KIMBRO, and
PEARL GARCIA,

      Plaintiffs,

      v.

MAGGIE TOLOUSE OLIVER, in her official capacity
as New Mexico Secretary of State, MICHELLE LUJAN
GRISHAM, in her official capacity as Governor of New
Mexico, HOWIE MORALES, in his official capacity as
New Mexico Lieutenant Governor and President of the
New Mexico Senate, MIMI STEWART, in her official
capacity as President Pro Tempore of the New Mexico
Senate, and JAVIER MARTINEZ, in his official
capacity as Speaker of the New Mexico House of
Representatives,

      Defendants.

Cause No.
D-506-CV-2022-00041

PLAINTIFFS' REPLY IN SUPPORT OF THEIR OPPOSED MOTION TO EXCLUDE EXPERT REPORT AND EXPERT TESTIMONY OF DR. JOWEI CHEN

As Plaintiffs the Republican Party of New Mexico and a bipartisan group of New Mexico voters (collectively, "Plaintiffs") explained in their Opposed Motion To Exclude Expert Report And Expert Testimony Of Dr. Jowei Chen, this Court should exclude the entirety of Dr. Chen's expert report and expert testimony under Rule 11-702 of the New Mexico Rules of Evidence because Dr. Chen agreed to counsel for Legislative Defendants' demands to draw his 1,000 simulations using certain "Oil Well Considerations"—that no more than 60% of the State's active oil wells are included in a single district in his simulated maps—which necessarily cracks the Southeast region of the State into two or more districts, the region of the State that

also has the highest concentration of Republican voters. Pls. Mot. To Exclude Expert Report & Expert Testimony Of Dr. Jowei Chen 8–14 (Sept. 22, 2023) ("Pls.Mot."). Dr. Chen's agreement to use the "Oil Well Consideration[ ]" infects all of his 1,000 simulated maps because that consideration is obviously partisan, given that it is supported *only* by floor statements made by the very same Democrats whose partisan intent is at issue in this case—rather than by anything in New Mexico law, history, or even in any request from a meaningful number of voters (or, indeed any voter), and it lines up precisely with what a gerrymanderer would have done in Senate Bill 1 to "substantially dilut[e] [Republican] votes" in the State. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting) (citation omitted); Pls.Mot.10–14. So, given this reliance on the obviously partisan "Oil Well Considerations," Dr. Chen's expert report and expert testimony are unhelpful to the Court, and this Court should exclude them in their entirety under Rule 11-702. Pls.Mot.14; *accord McConchie v. Scholz*, 577 F. Supp. 3d 842, 868–69 (N.D. Ill. 2021) (per curiam).

Legislative Defendants' Response To Plaintiffs' Opposed Motion To Exclude Expert Report And Expert Testimony Of Dr. Jowei Chen (Sept. 25, 2023) ("Leg.Resp.") fails to rebut Plaintiffs' straightforward showing that Dr. Chen's agreement to use the "Oil Well Consideration[ ]" renders his expert report and expert testimony fundamentally unhelpful to the Court, in violation of Rule 11-702.

First, Legislative Defendants do not dispute that Dr. Chen's testimony would be inadmissible as wholly unhelpful under Rule 11-702 if the "Oil Well Considerations" were an impermissible factor to include in his 1,000 simulations.

Compare Pls.Mot.9–10, *with* Leg.Resp.4–7. That admission by silence is well taken, since both Justice Kagan's dissenting opinion in *Rucho* and Dr. Chen's own deposition testimony in this case show that for the "extreme outlier approach" to demonstrate the partisan effect of an enacted redistricting map, the simulated maps must adhere only to the State's partisan-neutral redistricting "criteria." *Rucho,* 139 S. Ct. at 2517–18 (Kagan, J., dissenting); Deposition Of Jowei Chen, Ph.D., at 22:24–25 (Sept. 10, 2023) ("Chen Dep.") (explaining that "it is important" that the algorithm used for the analysis "is a partisan-blind algorithm"); Pls.Mot.9–10. Accordingly, the counsel-imposed introduction of an impermissible, partisan factor into the simulated-map-drawing process destroys the simulated maps' partisan-neutral baseline upon which the simulation analysis depends. *See* Pls.Mot.9–10.

Second, Legislative Defendants' *only* justification for the "Oil Well Considerations" is a few floor statements from the very Democratic lawmakers that Plaintiffs allege to have partisan gerrymandered Senate Bill 1 here, *see* Leg.Resp.2 (citing legislator statements from Leg.Defs.Ex.27)—even as Plaintiffs repeatedly criticized Legislative Defendants for failing to ground the "Oil Well Considerations" in New Mexico law, New Mexico history, or even in a request from a meaningful number of voters (or, indeed, any voter), Pls.Mot.1, 10–11. Although Legislative Defendants are correct that the Legislature "is not bound to any 'traditional redistricting principles' when drawing congressional districts," Leg.Resp.1, 4 (citing Opinion, ¶ 46, *Grisham v. Van Soelen,* No.S-1-SC-39481 (N.M. Sept. 22, 2023)), for a simulation analysis like Dr. Chen's to provide any value to the Court as it judges

whether Senate Bill 1 has egregious partisan effects, *the non-partisan baseline for the analysis' simulations must be partisan neutral.* Pls.Mot.8–10. That is why Justice Kagan described this analysis as requiring simulated maps that "incorporate the State's physical and political geography and meet its declared districting criteria, *except for* partisan gain," *Rucho,* 139 S. Ct. at 2518 (Kagan, J., dissenting), and why Dr. Chen stated at his deposition that "it is important" that the algorithm used for the analysis "is a partisan-blind algorithm," Chen Dep.22:24–25.

Here, every indicator shows that the "Oil Industry Considerations" are a criterion designed for "partisan gain," *Rucho,* 139 S. Ct. at 2518 (Kagan, J., dissenting); *accord* Chen Dep.22:24–25, as Plaintiffs explained in their Motion and as Legislative Defendants fail to rebut. *Compare* Pls.Mot.10–14, *with* Leg.Resp.2, 4–6. First, the "Oil Well Considerations" have no grounding in New Mexico's history, Pls.Mot.10–11, and Legislative Defendants have no answer, Leg.Resp.4–6. Second, the "Oil Well Considerations" have no basis in New Mexico law, Pls.Mot.10–11, and Legislative Defendants have no answer, Leg.Resp.4–6. Third, the "Oil Well Considerations" failed even to garner the support any meaningful number of voters, Pls.Mot.10–11, and Legislative Defendants have no answer, Leg.Resp.4–6— remarkably failing to cite even one voter calling for Senate Bill 1 to adhere to such considerations, *see* Leg.Resp.2 (citing only legislator statements from Leg.Defs.Ex.27, as opposed to any statements from voters). Fourth, the "Oil Well Considerations" run contrary to the traditional manner of respecting communities of interests by uniting them in districts, rather than cracking them, Pls.Mot.12—indeed, Legislative

Defendant's citation of *Kennedy v. Yates Petroleum Corp.*, 1986-NMSC-064, ¶ 9, 104 N.M. 596, only highlights the importance of the oil industry to the State, which would counsel *against* cracking this industry across districts, not support cracking it, *see* Leg.Resp.1—and Legislative Defendants have no answer, Leg.Resp.4–6.* Fifth, the "Oil Well Considerations" only received support from partisans on one side of the political spectrum—the Democrats—during the politically contentious redistricting process, Pls.Mot.13, and Legislative Defendants have no answer, Leg.Resp.4–6. And Sixth, the "Oil Well Considerations" create the exact same impermissible partisan effects in Senate Bill 1 that Legislative Defendants sought to achieve: cracking the heavily Republican-concentrated Southeast region among multiple districts, Pls.Mot.1–2, 13–14, and Legislative Defendants have no answer, Leg.Resp.4–6. Accordingly, it is beyond serious dispute that the "Oil Well Considerations" are partisan criteria, as understood by Justice Kagan's explanation of the "extreme outlier approach," *Rucho*, 139 S. Ct. at 2517–18 (Kagan, J., dissenting), that cannot be part of a reliable simulation analysis.

Third, Plaintiffs properly presented *McConchie*, 577 F. Supp. 3d 842, in their Motion, *contra* Leg.Resp.5–6, which case rests on the straightforward proposition that an expert's inclusion of an impermissible factor into his methodology destroys

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* Moreover, during the Senate Bill 1 floor debates, Senator Cervantes claimed that "the oil- and gas-producing parts of [the] state" were "*a unifying community of interest* that's represented well on this map" because, while "the oil patch or the eastern part of the state" was not unified in Senate Bill 1, Senate Bill 1 did "go[ ] up in the San Juan area and bring[ ] that around" to unify other parts of "the oil- and gas-producing parts of [the] state." Leg.Def.Ex.27 at 55 (emphasis added). The Legislature cannot simultaneously defend the cracking *and* the packing of the oil industry in Senate Bill 1 with a bona fide respect for this community of interest. Such conflicting justifications just reveal the partisanship that underlies the "Oil Industry Considerations."

the usefulness of his expert report. There, the three-judge district court concluded that Dr. Chen's expert report was unhelpful to determine issues related to minority voting in Cook County, Illinois, because "Dr. Chen's analysis examines elections chosen according to the [P]laintiffs' counsel's arbitrary and biased criteria provided to him." *McConchie*, 577 F. Supp. 3d at 869 (citation omitted). Here, Dr. Chen chose to include the "Oil Well Considerations" at the behest of counsel for Legislative Defendants, although those considerations have an obvious partisan bias, which even more clearly destroys the helpfulness of his report than in *McConchie*. Pls.Mot.13–14. And while Legislative Defendants claim that, in both *McConchie* and here, Dr. Chen simply "followed the instructions of counsel regarding criteria for scientific analysis," Leg.Resp.6, that does not excuse Dr. Chen's decisions here, as "[t]he party retaining the expert may not . . . control the expert witness," *Selvidge v. United States*, 160 F.R.D. 153, 156 (D. Kan. 1995), and "[t]he hired expert has no special duty to the lawyer who hires him," *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 416 (N.D. Cal. 1965).

Finally, Legislative Defendants raise multiple technical arguments related to the validation of Dr. Chen's methodology, Leg.Resp.2–3, 7, in an effort to distract the Court from the flaw in Dr. Chen's expert report that Plaintiffs raise here—namely, that Dr. Chen's report relies upon the "Oil Well Considerations," which Legislative Defendants have supported with nothing beyond a few floor statements from the partisan legislators who gerrymandered Senate Bill 1. The validation concerns that Legislative Defendants discuss are not the basis of Plaintiffs' Motion To Exclude Dr.

Chen here—Plaintiffs only discussed validation issues with Dr. Chen's algorithm in two sentences in the Statement section of their Motion, Pls.Mot.5, while noting in their Introduction that they intend to explore these concerns at trial, unless this Court excludes Dr. Chen's expert report and expert testimony, *id.* at 1. That is, if this Court concludes that Dr. Chen's reliance on the "Oil Well Considerations" is improper, then there is no need to consider any validation concerns with Dr. Chen's methodology, since doing a simulation analysis with maps drawn according to a partisan criterion would require exclusion of Dr. Chen's testimony, as Legislative Defendants concede by silence.

CONCLUSION

This Court should exclude the expert report and expert testimony of Dr. Chen.

Dated: September 25, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing will be served

on all counsel via the e-filing system.

Dated: September 25, 2023

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