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

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

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION *IN LIMINE* TO BAR PLAINTIFFS' FACT WITNESSES

Defendants' Motion in Limine ("Motion *in Limine*", Dkt. 111) asks this Court to grant the extraordinary relief of barring named Plaintiffs from testifying about their claims. In so doing, Defendants misquote this Court and paternalistically argue in effect that Plaintiffs' case in chief would be better served without the addition of any fact witnesses—ignoring of course their own stated intent to call two fact witnesses. Defendants' Motion *in Limine* highlights one of the key differences between the parties in this lawsuit. Plaintiffs seek to vindicate the rights of individual voters and to let them speak for themselves while Defendants have engaged in a litany of tactics aimed at emphasizing that the rights of individual citizens and voters do not matter to the State. This case is about the voters of Illinois, and those very voters who stepped up to act as plaintiffs in this litigation should be allowed to tell their story.[1] Defendants' Motion *in Limine* is wholly without merit and should be denied.

ARGUMENT

It is well-settled that a motion *in limine* should be granted only if the evidence clearly is not admissible for any purpose. *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2005 WL 289967, at *1 (N.D. Ill. Feb. 4, 2005). Moreover, the party seeking the exclusion of evidence *in limine* bears the burden of showing the propriety of such exclusion. *Juracek v. City of O'Fallon, IL Police Dep't*, 2007 WL 3407367, at *2 (S.D. Ill. Nov. 14, 2007) (denying motion *in limine* to exclude witness testimony).

Defendants cite no case where a Court has granted a motion *in limine* precluding a plaintiff from testifying in his or her own case. As explained in greater detail below, the testifying Plaintiffs (collectively the "Testifying Plaintiffs") possess personal knowledge directly related to one or more of Plaintiffs' claims.[2] Accordingly, the Court should deny Defendants' Motion *In Limine* and rule on any objections as they are raised during the Testifying Plaintiffs' trial testimony, when the Court can properly evaluate whether the testimony is admissible for its intended 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

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[1] Plaintiffs clearly are mindful of the time limitations imposed by this Court. Plaintiffs plan to manage their presentation of evidence and cross-examination of Defendants' witnesses accordingly.

[2] As set forth in the Pre-Hearing Order, Plaintiffs will call four Latino citizen Plaintiffs to testify: Lou Sandoval, Ralph Rangel, Michelle Caballero, and Luis Sanabria (collectively the "Citizen Plaintiffs"). Pre-Hr'g Order at 2, Nov. 13, 2011 (Dkt. 126). In addition, Plaintiffs will call four Congresspeople Plaintiffs to testify: Representative Judy Biggert, Representative Peter Roskam, Representative John Shimkus, and Representative Donald Manzullo (collectively the "Congressional Plaintiffs"). *Id.*

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.").

I. The Basic Premise Of Defendants' Motion Is Flawed.

Defendants' Motion *in Limine* is laced with rank speculation and labors under the incorrect assumption that somehow Defendants should dictate how Plaintiffs present their case-in-chief, demanding that Plaintiffs rely only upon expert testimony. Defendants base their arguments in favor of exclusion on limited deposition testimony in response to one-sided questioning posed by the Defendants' own attorneys. Defendants also complain that Plaintiffs have disregarded their "requests to [P]laintiffs' counsel to limit fact witnesses" during this "short hearing" (Mot. at 2) while ignoring that this is the *Plaintiffs'* case and the *Plaintiffs'* burden of proof.[3] While complaining about the number of fact witnesses in their Motion *in Limine*, it is telling that Defendants' counsel never asked Plaintiffs during the lengthy meet and confer process about the subjects of the testimony we expect to elicit from the Testifying Plaintiffs.

Plaintiffs recognize that expert testimony will be of significant importance to prove their claims, and they have allocated their 6 hour time allotment appropriately. That does not mean, however, that the Testifying Plaintiffs should be barred from taking the stand. "The Rules define

[3] Defendants' counsel conveniently fails to acknowledge that Plaintiffs' counsel consistently has endeavored to conduct this hearing in an efficient manner in line with the Court's admonition that the parties should stipulate to as much as possible. Plaintiffs' counsel has received little cooperation from Defendants' counsel in this regard. For example, Plaintiffs' counsel proposed stipulating to the admissibility of everything in each side's productions. Defendants' counsel said no. Plaintiffs' counsel agreed to stipulate to each side's exhibit lists and again were rebuffed. Plaintiffs' counsel further agreed to stipulate to all deposition exhibits; Defendants' counsel refused. Defendants can hardly now claim that it is the Plaintiffs who are wasting this Court's time. Plaintiffs have every intention to be as efficient as possible in keeping with the Court's six hour time limit, but it should be Plaintiffs (and not the Defendants') who choose how to use that time.

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 only "the most probative evidence." *United States v. McKibbins*, 656 F.3d 707, 711 (7th Cir. 2011) (quotation marks omitted). Moreover, and contrary to Defendants' assertions otherwise, fact witness testimony has been used in prior redistricting cases. *See, e.g.*, *United States v. Brown*, 561 F.3d 420, 427 (5th Cir. 2009) (voters testified to vote manipulation); *Sanchez v. State of Colo.*, 97 F.3d 1303, 1321 (10th Cir. 1996) (public official testified to his appeal among Latino voters). It is these Testifying Plaintiffs who are harmed by the Illinois Congressional redistricting process and the Congressional reapportionment plan signed into law (hereinafter the "Adopted Plan"), so their testimony is unquestionably relevant.

The case law relied on by Defendants demonstrates the weakness of their position. Defendants cite *Barnett v. Daley*, 1995 WL 59229 (N.D. Ill. Feb. 10, 1995), and *Illinois Legislative Redistricting Commission v. LaPaille*, 786 F. Supp. 704 (N.D. Ill. 1992) to claim that fact witness testimony is insignificant in re-districting cases. While the *Illinois Redistricting* court observed that reliance on expert testimony was common in redistricting cases, 786 F. Supp. 708-09, nowhere did the court state that fact witness testimony could not also be important. Moreover, in *Barnett* the court explicitly stated that fact witness testimony could be material to the outcome. 1995 WL 59229, at *3 (observing that fact evidence consisting of "witnesses' observations of particular incidents bearing on a fact in issue" and "witnesses who participated in the negotiations with defendants in developing the map at issue [observations] regarding the defendants' intent (such as why particular boundaries were drawn)" were proper areas of inquiry).

Similarly, Defendants resort to quoting this Court blatantly out-of-context to support their unsupportable position that the Testifying Plaintiffs should be barred from giving testimony. Defendants assert (at 1) that this Court stated that "I have already told (you) – we have told you that we don't think these witnesses are going to make a heck of a lot of difference." Contrary to Defendants' suggestion that this quote relates to the individual Plaintiffs, the Court actually was discussing Plaintiffs' intended depositions of *third parties* Rockford Mayor Lawrence J. Morrissey, former Congressman William Lipinski, and Congressman Jesse Jackson, Jr. *See* Report of Proceedings dated Oct. 20, 2011 at 15-16. Also, Defendants' Motion *in Limine* neglects to inform this Court that Defendants intend to call William Lipinski as a fact witness, as reflected in their witness list (Pre-Hr'g Order at 3), along with Juan Rangel who already has affirmatively testified that he knows nothing about the matters at issue in this case. Defendants' hypocritical request thus seeks the extraordinary relief of barring named Plaintiffs from testifying—while permitting Defendants to call non-party fact witnesses at the same time—and invites this Court to take an overly paternalistic and unnecessary role in micromanaging Plaintiffs' case. The Motion *in Limine* should be rejected out of hand. Plaintiffs should be free to present relevant fact testimony by witnesses who possess requisite personal knowledge, and Defendants' attempt to prohibit such evidence is ludicrous.

II. The Testifying Plaintiffs Possess Knowledge Of The Allegations In The Amended Complaint And Therefore Should Be Permitted To Testify.

Consistent with Federal Rules of Evidence 602 and 701, the Testifying Plaintiffs only will testify to matters about which they possess personal knowledge. *See* FED. R. EVID. 602 ("Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."). Fact witnesses clearly "may offer testimony based on their personal observations." *Norton v. Schmitz*, 2011 WL 4984488, at *4 (N.D. Ill. May 27, 2011) (denying motion *in limine* to preclude fact witnesses from testifying to personal knowledge); *see also U.S. v. Williams*, 81 F.3d 1434, 1442 (7th Cir. 1996) (testimony of witness was admissible without "expert" designation because it was based on personal knowledge); *see also* FED. R. EVID. 701.

Defendants have cited snippets of testimony from the various depositions in an effort to establish that the Testifying Plaintiffs do not possess relevant knowledge while ignoring that fact that Defendants controlled the questioning, much of which was objectionable for a variety of reasons. In particular, many questions lacked any foundation whatsoever. For example, in Luis Sanabria's deposition, without *any* prior questions or testimony regarding Mr. Sanabria's knowledge of or involvement with any interest groups, the following exchange took place:

> Q: What did Latino interest groups from your congressional district -- first I think starting with five -- request of the state legislature during the mapping process?
> MS. DOUGLAS: Objection, foundation, vague and ambiguous.
> BY THE WITNESS:
> A. I didn't understand the question.
> BY MS. POMPER:
> Q. What position did Latino interest groups take on congressional -- how the congressional districts were drawn in your area?
> MS. DOUGLAS: Objection, foundation, vague and ambiguous. I don't think we've established that he's involved in any interest groups to have a basis to answer.

Sanabria Dep. 16:16-17:4, Oct. 14, 2011 (Mot. Ex. I). This style of ineffectual questioning was consistent throughout the depositions of the Citizen Plaintiffs. *See, e.g.*, Sandoval Dep. 43:14-44:21, Sept. 30, 2011 (Mot. Ex. L); *see also* R. Rangel Dep. 24:16-26:14, Sept. 28, 2011 (attached as Exhibit A[4]); Caballero Dep. 31:21-32:19, Oct. 24, 2011 (Mot. Ex. J). Quite clearly, Plaintiffs are not responsible for Defendants' failure to elicit relevant testimony from the witnesses at their depositions. *See Schmutte v. Resort Condominiums International, L.L.C.*, 2006

[4] Defendants attached the deposition transcript for Juan Rangel rather than Ralph Rangel to their Motion *in Limine*. *See* Mot. Ex. K. For the Court's reference, Plaintiffs attach the entirety of Ralph Rangel's deposition transcript as Exhibit A hereto.

WL 3462656, at *7, *9 (S.D. Ind. Nov. 29, 2006) (denying motion to strike declaration testimony that was not elicited at deposition, and noting that "[plaintiff] is not responsible for providing [defendant] with information [about which defendant] made no effort to question" and "[plaintiff] cannot respond to questions that [defendant] failed to ask"). Indeed, Defendants' deposition questions appeared to be aimed at establishing that the Testifying Plaintiffs are not redistricting experts, which Plaintiffs do not assert. Nor do Plaintiffs have any intention of eliciting expert testimony from the Testifying Plaintiffs. The Testifying Plaintiffs should, however, be free to testify about any relevant matters about which they possess personal knowledge. Defendants cannot predict, based on generic, largely objectionable, and one-sided deposition questions, precisely what the Congressional Plaintiffs or Citizen Plaintiffs will testify to. Thus, their Motion *in Limine* is improper and should be denied.

A. The Congressional Plaintiffs Should Be Free To Testify About The Redistricting Process, The Adopted Plan, And The Adopted Plan's Ramifications To The Extent They Possess Personal Knowledge.

As demonstrated in their deposition testimony and as will be further set forth in the hearing, the Congressional Plaintiffs have personal knowledge about various aspects of the redistricting process, including their exclusion from the process, the creation of the Adopted Plan, and the ramifications arising from the Adopted Plan.

1. The Congressional Plaintiffs Possess Relevant Knowledge Regarding The Redistricting Process And Creation Of The Adopted Plan.

The Congressional Plaintiffs each possess knowledge of the redistricting process and should not be barred from giving such testimony. In particular, Congressman Shimkus has personal knowledge of the redistricting process based on the work that he did with Congressman Costello in a failed effort to create a bipartisan map as well as knowledge regarding the participants in the Illinois map making process. Shimkus Dep. 55:8-62:7; 67:9-74:20, Sept. 29, 2011 (Mot. Ex. E). Furthermore, Defendants' claim that the "whole topic area" related to Congressmen Costello and Shimkus' work with respect to the redistricting process "is irrelevant" is farcical. *See* Mot. at 7. This Court has made it clear that circumstantial factors from which courts may infer discriminatory intent "include the historical background of the decision; the specific sequence of events leading up to the challenged decision; [and] departures from the normal procedural sequence . . . ." Op. and Order at 7-8 (Dkt. 77); *see also Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 267-68 (1977). The interactions between Congressmen Shimkus and Costello during the redistricting process establish the "sequence of events" as well as "departures from the normal procedural sequence," making that evidence relevant to the intentional discrimination inquiry.

Likewise, Congressman Roskam has significant knowledge of the redistricting process based on interactions with Illinois Senate President John Cullerton. In particular, Congressman Roskam has knowledge of the DCCC's and Mr. Cullerton's involvement in the process as well as Congressman Costello's draft Congressional reapportionment plan. Roskam Dep. 14:1-14, Sept. 29, 2011 (Mot. Ex. D). Congressman Roskam also has knowledge that the Democratic forces behind the drafting of the Adopted Plan intended to place an insurmountable hurdle in Congresswoman Biggert's path to reelection. *Id.* at 14:13-14 (Congresswoman Biggert was "gone under any version of the map" that the Democrats planned to implement). Congresswoman Biggert, like Congressman Manzullo, will testify specifically about how the important redistricting principle of "community of interest" has been obliterated in the Adopted Plan based on her first-hand knowledge. In addition, Congresswoman Biggert has knowledge of Congressman Costello's involvement with the redistricting process, Biggert Dep. 9:16-10:4, Oct. 10, 2011 (Mot. Ex. F), as well as the lack of involvement of Republican members of the Illinois

Congressional delegation. Congresswoman Biggert also will testify about an important element of the manner in which the drawers of the Adopted Plan deviated from normal practices in the disclosure of the Congressional redistricting plan for the first time publicly. Therefore, the Congressional Plaintiffs should be permitted to testify to these matters related to the redistricting process and creation of the Adopted Plan about which they have personal knowledge.

2. The Congressional Plaintiffs Can Testify About How They Were Excluded From The Redistricting Process.

Citing only one inapposite case to support their position, Defendants further assert that the Congressional Plaintiffs should be foreclosed from testifying about how they were excluded from the redistricting process and how or why the Adopted Plan was created. In *Alston v. King*, 231 F.3d 383, 387 (7th Cir. 2000), the case on which Defendants rely, the court—*at trial,* not on a motion *in limine*—upheld the exclusion of testimonial evidence where the plaintiff repeatedly "failed to lay a proper foundation for testimony, or attempted to introduce testimony that called for speculation or was based on hearsay" and thus failed "to adhere to basic principles of evidence in eliciting the testimony." *Id*. at 387-88. Here, Defendants' only basis for challenging future testimony from the Plaintiffs' fact witnesses is their responses to one-sided deposition questions posed by the very party seeking to bar them. While Defendants guess that the Congressional Plaintiffs will provide only speculative, unfounded testimony, the Congressional Plaintiffs actually will testify with respect to topics on which they have personal knowledge, which is perfectly proper. *See* FED. R. EVID. 602, 701. Defendants cannot simply assume that Plaintiffs will not first lay the proper foundation before seeking testimony from the Congressional Plaintiffs. Rather, Plaintiffs will present "competent, admissible testimony" from these witnesses at trial. *Alston*, 231 F.3d at 387-88.[5]

Defendants also mischaracterize the testimony of the Congressional Plaintiffs regarding their purported lack of attempts to participate in the redistricting process. Mot. at 5-6. The Congressional Plaintiffs are seasoned public officials, some of whom are former state legislators, and are well-aware of fruitless political endeavors, particularly when it comes to dealing with Springfield Democrats. As Congressman Shimkus testified, despite his diligent efforts to work with Congressman Costello to create a bipartisan map, he did not speak to Senator Durbin, President Cullerton, or Congresswoman Schakowsky regarding the map because "they are known to be highly-partisan Democrats who are focused on shifting the majority of Congress by the gaining of six Congressional seats." Shimkus Dep. 54:14-17. In addition, Congressman Roskam stated that "based on the conversations that I had with Senator Cullerton, it was clear that there was an agenda to move a map forward that was going to create a great advantage to the Democrats and they weren't interested in substantive input into it . . . . So could I have offered input? I could have. I think the political reality was that decisions had largely been made at that point and it wasn't fruitful." Roskam Dep. 38:4-15. The Congressional Plaintiffs' acknowledgement of the reality that the Springfield Democrats could force through any map they wanted due to their control of the Illinois House, Senate, and Governor's mansion should in no way foreclose them from testifying to such facts, particularly in light of Defendants' intent to offer affirmative evidence of some purported failure to access the "public" portion of the redistricting process. *See* Shimkus Dep. at 62:16-19 ("[E]veryone knows that the Democrat majority in Springfield has carte blanche authority to pass legislation through both chambers and

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[5] Defendants also seek to bar the Congressional Plaintiffs from testifying regarding the Plaintiffs' proposed Fair Map. Mot. at 7-8. Plaintiffs do not intend to seek any testimony from the Testifying Plaintiffs regarding the Fair Map.

get a governor to sign it.”).

Moreover, Defendants’ efforts to prevent the Congressional Plaintiffs from explaining why they did not participate in the farcical redistricting process is ironic. Defendants’ counsel extensively questioned each Congressional Plaintiff on this very topic. Furthermore, Defendants insisted on the following stipulations: “No plaintiff ever appeared before any of the above redistricting committees or participated in any redistricting hearings the committees held” and “[n]o plaintiff ever submitted to any legislator or redistricting committee any proposed or suggested map.” Joint Stip. Facts, Docs., Data ¶¶ 13-14. In light of this record indicating that Defendants themselves have made this topic an issue, they have no good faith basis to preclude Plaintiffs from defending against this specious and misleading argument.

3. The Congressional Plaintiffs Should Be Free To Testify About The Ramifications Of The Adopted Plan Based On Their Knowledge And Perceptions.

Despite the Defendants’ objections, the Congressional Plaintiffs also should be permitted to testify to the “ramifications” of the Adopted Plan to the extent that the various communities of interest about which they have intimate knowledge will be harmed as a result of the Adopted Plan. *See Von der Ruhr v. Immtech International, Inc.*, 570 F.3d 858, 862 (7th Cir. 2009) (business owner could testify about expected harm to business because testimony was tied to witness’s personal knowledge). Such testimony falls within Federal Rule of Evidence 701 because it is opinion or inference testimony limited to those opinions or inferences which are “(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge.” FED. R. EVID. 701.

Congresswoman Biggert, for example, need not speculate to competently testify about the obvious harm that the Adopted Plan causes her constituents and the various communities of interest in her current district. Her district was eviscerated under the Adopted Plan (Biggert Dep. 50:11-51:6), dividing towns and separating communities in ways that are nonsensical and contrary to core redistricting principles. Congresswoman Biggert has testified that the Adopted Plan "cut" the community located within former District 13 "into six different districts" despite that district having maintained almost the same shape for 20 years. Biggert Dep. 50:24-51:5.

The same is true of the Rockford area from which Congressman Manzullo hails. For example, Congressman Manzullo testified, ("I can give first-hand knowledge. I was born and raised in Rockford . . . . The way the map was drawn divides and segregates the . . . community in Rockford . . . . by roughly going down the Rock River on the west side and then reaching into the east side and purposely grabbing those areas where Latinos and Africans live."). *See, e.g.*, Manzullo Dep. 17:13-21, Oct. 7, 2011 (Mot. Ex. B). In addition, Congressman Shimkus has testified that "Madison County has historically, for 20 years, had two members of Congress. This new map created three." Shimkus Dep. 75:12-14. The Congressional Plaintiffs' testimony clearly is relevant because the preservation of communities of interest is one of several factors by which courts assess the motives behind a Congressional reapportionment. Thus, the Congressional Plaintiffs' intended testimony with respect to the "ramifications" of the Adopted Plan will be based on personal knowledge from the impact that they already have experienced as a result of the Adopted Plan's passage.

B. Defendants' Hearsay Objections To The Congressional Plaintiffs' Testimony Are Meritless.

Defendants' also improperly claim that the Congressional Plaintiffs should be precluded from testifying about out-of-court statements made by non-parties. As a threshold matter, Defendants ignore the fact that the Congressional Plaintiffs are entitled to testify about their side of the conversation as well as any understanding and impressions they had as a result of the conversations. Moreover, these out-of-court statements fall within well accepted exceptions to the hearsay rules.

1. The Statements Fall Within The "Then Existing State Of Mind" Hearsay Exception.

Under Federal Rule of Evidence 803(3), out of court statements about a declarant's "[t]hen existing state of mind, emotion, sensation, or physical condition . . . such as intent, plan, motive, design" are not excluded by the hearsay rule. FED. R. EVID. 803(3). In *Catalan v. GMAC Mortgage Corp.*, 629 F.3d 676, 694 (7th Cir. 2011), the Seventh Circuit held that testimony describing a bank loan officer's statements that the bank would not approve a loan until the applicant resolved foreclosure issues was an "expression of the intention of the bank" and so even if hearsay, "the Rule 803(3) hearsay exception would apply."[6] The complained of statements that Defendants reference all constitute evidence of intent, plan, motive, or design related to the redistricting process and the creation of the Adopted Plan that clearly fall within the hearsay exception. For example, Congressman Roskam's deposition testimony that Illinois Senate President Cullerton told him that "he had been in contact with the Democratic Congressional Campaign Committee, and . . . in his opinion, Judy Biggert, Congresswoman Biggert, was gone under any version of the map," clearly conveys a plan regarding redistricting. *See* Roskam Dep. 14:10-14. Likewise, when Congressman Costello told Congressman Shimkus that he was "trying to have a less partisan map," Costello clearly was speaking of his intentions or motive. *See* Shimkus Dep. 56:19-20.

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[6] Defendants' reliance on *United States v. Lane*, 323 F.3d 568 (7th Cir. 2003) is hardly helpful. There, the court affirmed a ruling excluding hearsay evidence, but the issue was whether the evidence was properly categorized as hearsay. *Id*. at 384. The statements at issue here are admissible not because they are not hearsay, but rather because they fall under the hearsay exceptions of FED. R. EVID. 803.

2. The Statements Also Fall Within The "Present Sense Impression" Hearsay Exception.

The Congressional Plaintiffs' testimony regarding statements made by non-parties also are admissible under Rule 803(1) as present sense impressions. "[A]n out-of-court statement is not excludable as hearsay, whether or not the declarant is available to testify, if the statement 'describ[es] or explain[s] an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.'" *U.S. v. Ruiz*, 249 F.3d 643, 646 (7th Cir. 2001) (quoting FED. R. EVID. 803(1)) (affirming admission of witness testimony as to out of court statements describing events under Rule 803(1)). "The underlying rationale of the present sense impression exception is that substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication." *United States v. Parker*, 936 F.2d 950, 954 (7th Cir. 1991) (internal quotation marks omitted) (affirming admission of witness testimony to out of court statement as present sense impression). The challenged testimony related to discussions with non-party individuals describes their perceptions of the redistricting process *as it was unfolding*. In particular, Congressman Shimkus testified that during the time that they were trying to promote a bipartisan agreement, Congressman Costello told him that "Congressman Durbin, Schakowsky, and Cullerton look like they're taking over the map process." Shimkus Dep. 74:2-4; *see also id.* at 74:18-20 (testifying regarding Costello's perception after his meeting in Springfield with legislative leaders that it "looked like Madigan was walking away which confirmed [that] Cullerton [was] taking over the process"). Such in-the-moment descriptions are not excludable as hearsay.

D. The Citizen Plaintiffs Should Be Permitted To Testify About Matters To Which They Have Personal Knowledge.

Without citing a *single case* in support of their extraordinary request, Defendants also seek to bar the Citizen Plaintiffs from testifying on their own behalf, claiming that the Citizen

Plaintiffs "have as little knowledge about the issues raised in the amended complaint as do the Congressional [P]laintiffs." Mot. at 9. Defendants' assertions are baseless.

Plaintiffs cannot help but observe that Defendants continue to mischaracterize the deposition testimony of the Plaintiff fact witnesses in an effort to bolster their arguments. For example, Defendants claim that "without any analysis whatsoever, [Ralph] Rangel testified that he is not really aware of the adopted map, but that it would create a potential of Spanish block other than District #4." Mot. at 10. Mr. Rangel actually was testifying in response to a line of questions posed about *the Fair Map*, and not the Adopted Plan, stating that his understanding was that the Fair Map had the potential of creating a Spanish bloc in addition to the adopted Fourth District. R. Rangel Dep. 30:22-31:3.

Indeed, Defendants maintain that the Latino Plaintiffs who live in the very neighborhoods at issue have no ability to testify about the impact of the redistricting in their respective communities. Laughably, Defendants point to the fact that these Latino Plaintiffs have not studied the demographics of these neighborhoods, apparently forgetting that these individuals are part of the demographics. For that matter, Defendants have represented that they will call Juan Rangel as a fact witness, and Mr. Rangel certainly is not poring over demographic data in preparation for any testimony ostensibly based on his personal knowledge as a Latino.[7] *See* Pre-Hr'g Order at 3.

That the Citizen Plaintiffs have not relied upon "demographic data" is utterly irrelevant to their abilities to testify to their personal knowledge and the dilution of their votes due to the

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[7] Plaintiffs have moved *in limine* to exclude testimony by Juan Rangel on other grounds, namely that he repeatedly testified that he has no actual factual knowledge of anything concerning the Illinois Congressional redistricting process or the Adopted Plan which would make him competent to provide any testimony regarding the issues in this case. *See* Plaintiffs' Motion In Limine To Exclude Juan Rangel (Dkt. 121).

packing and fracturing of them and their neighbors. *See Casares v. Bernal*, 2011 WL 1988788, at *1 (N.D. Ill. May 20, 2011) (denying motion *in limine* to exclude lay opinion testimony based on personal knowledge); *see also* FED. R. EVID. 701. Moreover, the Citizen Plaintiffs have established – and will testify that – they have personal knowledge of their experiences as Latino citizens and voters as well as knowledge of their neighborhoods. For example, Mr. Rangel testified in his deposition that his knowledge was based on his "awareness of what has been happening in my [Third] district with respect to the number of Hispanics that have been moving into it." R. Rangel Dep. 31:13-15. Likewise, Lou Sandoval testified that he based his knowledge not only upon review of the Adopted Plan but also "from living in the neighborhood and knowing my community as to where individuals reside, it's very apparent that selection was being done of Hispanic residents to place them in a specific district, namely the fourth congressional district . . . ." Sandoval Dep. 21:14-18. As explained by Mr. Rangel, these Citizen Plaintiffs "live in the city" and are "aware of what is going on in the various neighborhoods." R. Rangel Dep. at 31:19-20. Based on this knowledge and experience, Citizen Plaintiffs can testify with respect to their observations of the changes within their communities as well as how they have been impacted by the redistricting process and the Adopted Plan. The Citizen Plaintiffs should be free to testify.

CONCLUSION

For the foregoing reasons Plaintiffs respectfully request that the Court deny Defendants' Motion *in Limine* to Bar Plaintiffs' Fact Witnesses.

Dated: November 15, 2011

Respectfully Submitted,

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