

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

LEAGUE OF WOMEN VOTERS)	
OF MICHIGAN, et al.,)	Case No. 2:17-cv-14148
)	
Plaintiffs,)	Hon. Eric L. Clay
)	Hon. Denise Page Hood
)	Hon. Gordon J. Quist
v.)	
)	
)	
RUTH JOHNSON, in her official)	
Capacity as Michigan)	
Secretary of State, et al.,)	
)	
Defendants.)	

PROPOSED JOINT AND FINAL PRETRIAL ORDER

The parties respectfully submit the following proposed joint and final pretrial order terms as required by the Court’s May 9, 2018 Case Management Order No. 1 (ECF 53) and E.D. Mich. LR 16.2. The parties do not intend hereby to dismiss or otherwise amend or alter any allegation of their respective pleadings.

1. Jurisdiction

Plaintiffs:

Plaintiffs allege federal court jurisdiction based upon 28 U.S.C. §2201; 28 U.S.C. §2202; 42 U.S.C. §1983; 28 U.S.C. §1331; 28 U.S.C. §§1343(a)(3) & (4); 28 U.S.C. §1357; 28 U.S.C. §2284; and 42 U.S.C. §1988.

Defendant:

Defendant Johnson agrees that Plaintiffs have properly alleged federal court jurisdiction under the referenced statutes. She contests subject matter jurisdiction for the same reasons stated by Congressional Intervenors.

Congressional Intervenors:

Congressional Intervenors contest subject-matter jurisdiction on four grounds:

First, Plaintiffs do not have standing to bring their claims pursuant to *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Plaintiffs do not adduce district specific evidence to show that each individual Plaintiff suffered an injury in fact. Additionally, Plaintiffs do not adduce evidence that each individual Plaintiff could have been placed in a district that would redress that individual Plaintiff's asserted injury. Accordingly, Plaintiffs do not have standing.

Second, Plaintiffs do not have standing to bring their claims because they have suffered no injury-in-fact that is redressable by this Court as a consequence of the 2018 elections. The State of Michigan now has near proportional representation. And the current distribution of Democrats and Republicans is in line with Plaintiffs experts expected seat share.

Third, Plaintiffs claims are now moot as a result of the 2018 elections.

Fourth, this Court does not have jurisdiction because Plaintiffs have not adduced any judicially manageable standard to evaluate their claims. Accordingly, Plaintiffs' claims are non-justiciable. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality op.); *id.* at 308

(Kennedy, J., concurring) (“The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept.”).

2. Plaintiffs’ Claims

The state legislative and congressional districting maps (“Plans”) for the State of Michigan constitute unconstitutional partisan gerrymanders and violate Plaintiffs’ First Amendment and equal protection rights. The Michigan legislature intentionally drew those maps to dilute the votes of, and otherwise punish, Democratic voters in the following nine Congressional districts: 1, 4, 5, 7-12; the following ten Senate districts: 8, 10-12, 14, 18, 22, 27, 32, 36; and the following fifteen House Districts: 24, 32, 51, 52, 55, 60, 62, 63, 75, 76, 83, 91, 92, 94, and 95 (collectively, “Challenged Districts”). The legislature’s action treats voters differently based on their political views and behavior, in violation of the Equal Protection Clause. The legislature’s action also violates the voters’ First Amendment rights in two ways. First, the Plans penalize voters for expressing certain viewpoints while at the same time rewarding other voters for expressing opposing viewpoints, violating voters’ representational rights to cast their votes fully and effectively. Second, the Plans violate voters’ rights of association under the First Amendment by intentionally burdening and retaliating against voters who exercise their right to affiliate with like-minded persons and express themselves about politics, and to carry out an organization’s activities and objectives.

The Plans were not narrowly tailored to further a legitimate government objective. Republicans, whose party then controlled the Michigan Legislature and Governor's office, enacted the Plans with the specific intent to burden Democratic voters in the Challenged Districts and to favor Republicans in the same districts. The gerrymander affects all voters statewide, including Plaintiffs, members of the League of Women Voters of Michigan, and the League itself.

The result is harm to individual voters and to the League. The League is harmed in its mission of educating voters and supporting democracy in a variety of ways that will be proven at trial. Individual voters are harmed by the dilution of their votes, decline in participation of the members of their party, lack of enthusiasm or waning interest and apathy among members of their party, confusion of party members, difficulty in recruiting volunteers or other similar consequences.

Plaintiffs seek generally a declaration that the current Plans are unconstitutional, an injunction against administering an election under the Plans, the institution of neutrally drawn maps by the legislature or by the Court, a special Senate election, and their reasonable attorneys' fees, costs and litigation expenses.

3. Defendant's and Congressional Intervenors' Defenses

Defendant:

Plaintiffs cannot meet their burden, *inter alia*, to show that (i) the Plans violate the Plaintiffs' First Amendment and/or equal protection rights, (ii) the Michigan legislature drew maps with the predominant intent to dilute the votes of or punish Democratic voters

in the Challenged Districts (rather than, e.g., with the predominant intent to follow Michigan's traditional redistricting criteria), (iii) the Plans have the effect of working an unconstitutional burden with respect to Plaintiffs' protected rights, or (iv) any Plaintiff has suffered individualized redressable harm necessary to support standing with respect to any of the Challenged districts. The Secretary intends to show that Plaintiffs' proofs on these matters are insufficient or untrue.

Plaintiffs further cannot meet their burden to show a prospective harm in the 2020 election that would justify the intrusion of the Federal Courts in the disruption of Michigan's Current Apportionment Plan. Nor can Plaintiffs support the extreme remedy of this Court's ordering special elections for the Michigan Senate, which will not be elected again under the Current Apportionment Plan.

The Secretary further intends to show that Plaintiffs' delay in initiating their suit has caused prejudice to the Secretary and others such that laches should bar Plaintiffs' claims. Such prejudices are both evidentiary and equitable in nature.

The Secretary also adopts and joins the defenses stated by the Congressional Intervenor.

Congressional Intervenor:

In addition to the jurisdictional defenses listed in Section 1 above, namely that Plaintiffs' lack standing and that Plaintiffs' claims are not amenable to judicially manageable standards, Congressional Intervenor present the following defenses:

At the outset, Congressional Intervenors join and hereby adopt the Secretary's defenses.

First, there is no constitutional right to proportionality between statewide vote totals and a political party's share of seats in the legislature. *Vieth v. Jubelirer*, 541 U.S. 267, 287-88 (2004) (plurality op.); *id.* at 308 (Kennedy, J., concurring) (“The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept.”); *id.* at 338 (Stevens, J., dissenting). Plaintiffs' proposed tests to evaluate their claims—*inter alia* partisan asymmetry and the efficiency gap—all presuppose that there must be some proportionality between the statewide vote totals and the number of congressional representatives. *See Davis v. Bandemer*, 478 U.S. 109, 159-160 (1986) (O'Connor, J., concurring).

Second, a political party does not have a constitutional right to translate statewide support into legislative representation.

Third, the efficiency gap does not provide a judicially manageable standard for the Court to evaluate Plaintiffs' claims. Instead it measures only statewide averages and does not “address the effect that a gerrymander has on the votes of particular citizens.” *Gill*, 138 S. Ct. at 1933. The efficiency gap also neglects the fact that elections for United States Congress are on a district-by-district basis. This conscious decision by the Framers is a rejection of empowering political parties to put forward a slate of candidates to be voted on statewide. Accordingly, the efficiency gap presupposes a norm that does not exist,

namely, the ability to determine the appropriate amount of party voter strength based upon statewide vote totals for a political party. *See Bandemer*, 478 U.S. at 159-160 (O'Connor, J., concurring).

Fourth, Plaintiffs have not proffered a standard to determine how much partisanship in drawing a congressional district map is too much partisanship.

Fifth, Plaintiffs' proposed standards to evaluate Plaintiffs' claims are not limited and precise. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

Sixth, Plaintiffs have not demonstrated an unconstitutional effect. Plaintiffs must prove that they suffered an "actual discriminatory effect." *Bandemer*, 478 U.S. at 127. This requires adducing evidence demonstrating a "strong indicia of lack of political power and the denial of fair representation." *id.* at 139. This means that Plaintiffs must demonstrate that they were "denied [their] chance to effectively influence the political process." *Id.* at 132-33. This requires proof that Plaintiffs are not adequately represented by their congressional representative or, stated differently, the Plaintiffs' congressional representatives entirely ignore the interests of Democratic Voters. *Id.* at 132. Furthermore, Plaintiffs must adduce evidence that Plaintiffs could not participate in party deliberations over the slating and nominating of candidates or the ability to register to vote. *Id.* at 133. Additionally, Plaintiffs must show that they represent the majority of citizens in Michigan and that the will of the majority is continually frustrated under the enacted Congressional Map. *Id.* This is especially true in light of the results from the 2018 elections that resulted in an evenly split congressional delegation, 7 Republicans and 7 Democrats. This is precisely

what Plaintiffs' expert, Dr. Chen, said the composition of Michigan's congressional map should be.

Moreover, in addition to proving a "strong indicia of lack of political power and the denial of fair representation" *id.* at 139, Plaintiffs must also prove disproportionate election results. *Id.* at 139-40. None of Plaintiffs' expert opinions considered the impact of the November 2018 elections in their analyses. The November 2018 elections demonstrate that the 2011 Congressional Map did not entrench Republicans nor is it a durable gerrymander. Accordingly, Plaintiffs cannot prove discriminatory effects.

The test adopted by the court in *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861, 864 (M.D.N.C. 2018)¹ (three-judge court) is improper. The court there grafted the predominance standard from the U.S. Supreme Court's racial gerrymandering jurisprudence for use in the partisan gerrymandering context. In doing so the Court committed two errors. The first is that racial classifications—unlike political classifications—are always suspect. Because political motivations have been recognized as a valid defense in racial gerrymandering cases, *see generally Easley v. Cromartie*, 532 U.S. 234 (2001), the burden to prove discrimination based upon politics must therefore be higher.

¹ Additionally, the U.S. Supreme Court will determine whether to set *Common Cause v. Rucho* for merits within the next few weeks. *See Rucho v. Common Cause*, No. 18-422 (U.S. Nov. 20, 2018) (docket entry noting that the case is set for conference on December 7, 2018). If this Court wishes to adopt the *Rucho* standard, and the U.S. Supreme Court sets *Rucho* for argument, likely this term, Congressional Intervenors may file a Motion to Stay the case pending the Supreme Court's ruling. Furthermore, the State defendants just filed their jurisdictional statement in *Lamone v. Benisek*, No 18-_____ (U.S. Dec. 3, 2018). That case raises similar issues including the defense of laches.

Second, politics—unlike race—is mutable. *Bandemer*, 478 U.S. at 156 (O’Connor, J., concurring) (“[W]hile membership in a racial group is an immutable characteristic, voters can -- and often do -- move from one party to the other or support candidates from both parties.”). People change who they vote for between elections and often will vote for candidates from different political parties in the same election, i.e. split ticket voting. Accordingly, the test to prove a racial gerrymander is inadequate to determine a partisan gerrymander.

Seventh, Plaintiffs cannot state a claim for First Amendment harm because permitting a free speech claim “would render unlawful all consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy-level government jobs.” *Vieth*, 541 U.S. at 294 (plurality op.). This concern is especially present in redistricting because partisan intent is inevitable. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.”); *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (“[W]hile some might find it distasteful, our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering...” (internal quotations and alterations omitted) (Alito, J., Roberts, C.J., and Kennedy, J., dissenting).

Furthermore, even courts that have examined free speech and expression claims in redistricting cases have held that there is no independent violation of free speech and association rights absent a violation of equal protection rights. *See Whitford v. Gill*, 218 F.

Supp. 3d 837, 884 (W.D. Wis. 2016) (three-judge court) (stating that elements to prove an unconstitutional partisan gerrymander under the First Amendment or the Equal Protection Clause are the same) *vacated and remanded on other grounds Gill v. Whitford*, 138 S. Ct. 1916 (2018); *see also Republican Party v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) (“This court has held that in voting rights cases no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim.”); *Pope v. Blue*, 809 F. Supp. 392, 398-99 (W.D. N.C. 1992) *sum. aff.’d* 506 U.S. 801 (1992) (“[W]e hold as in *Washington* that the plaintiffs’ freedom of association claim is coextensive with the equal protection claim....”).

Eighth, even if a First Amendment claim does exist, Plaintiffs cannot state a First Amendment harm because they are not prevented from registering individuals to vote, campaigning on behalf of candidates, volunteering on behalf of campaigns and political organizations, circulating literature in support of candidates and political organizations, speaking in favor of candidates and political organizations, and making political contributions. Accordingly, Plaintiffs’ First Amendment rights are not harmed. *See, e.g., League of Women Voters v. Quinn*, No. 1:11cv-5569, 2011 U.S. Dist. LEXIS 125531 *12-13 (N.D. Ill. Oct. 28, 2011) (“The redistricting plan does not prevent any LWV member from engaging in any political speech, whether that be expressing a political view, endorsing and campaigning for a candidate, contributing to a candidate, or voting for a candidate.”); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011); *Pope*, 809 F. Supp. at 398-99 (rejecting freedom of association claim because there is no “device that directly inhibits participation in the political process.”); *Badham v.*

March Fong Eu, 694 F. Supp. 664, 675 (N.D. Cal. 1988) (three-judge court) *sum aff'd*. 488 U.S. 1024 (1989) (“Plaintiffs here are not prevented from fielding candidates or from voting for the candidate of their choice. The First Amendment guarantees the right to participate in the political process; it does not guarantee political success.”).

Ninth, assuming that a First Amendment claim does exist, the burden to prove a First Amendment harm is high. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016) (three-judge court). Plaintiffs must prove that “those responsible for the map redrew [the congressional district lines] with the specific intent to impose a burden” on Plaintiffs and those similarly situated because of how Plaintiffs voted or the political party to which Plaintiffs belong. *Id.*

Accordingly, Plaintiffs must show more than political considerations and the use of partisan data “reflecting citizens’ voting history and party affiliation” impacted the drawing of Michigan’s congressional districts. *See id.* at 597. Furthermore, it is insufficient for Plaintiffs to show that the Michigan legislature was aware of the “likely political impact” of the 2011 Plan or that certain districts were “safe” for a Democrat or “safe” for a Republican. *Id.* On the contrary, to successfully prove specific intent, Plaintiffs must show that this data was used with the specific intent to make it more difficult “for a particular group of voters to achieve electoral success because of the views they had previously expressed.” *Id.* Plaintiffs must also demonstrate that the 2011 Plan diluted Plaintiffs’ votes in a “sufficiently serious” manner producing a “demonstrable and concrete adverse effect.”

Id. at 598 . Finally, Plaintiffs must prove that absent the legislature’s intent to burden Plaintiffs’ vote, “the concrete adverse impact would not have occurred.” *Id.* at 597.

Tenth, Plaintiffs knew of their constitutional injuries as early as 2011. Yet Plaintiffs, without justification, waited nearly six years to bring this lawsuit. This delay has prejudiced the ability of Congressional Intervenors to mount a vigorous defense of the map.

Therefore, Plaintiffs’ claims should be dismissed for laches.

4. Stipulation Of Facts

Counsel for Plaintiffs and counsel for Defendant have discussed stipulation of facts and agreed generally to stipulate as to the facts as to which there is no good faith dispute.

They further agree to consider stipulation as to other facts that may reduce the needed trial time in this matter. .

5. Issues Of Fact To Be Litigated

Plaintiffs:

- A. Did the Michigan Legislature take the political preferences of voters into account in preparing the Plans?
- B. Did the Michigan Legislature draw the Challenged Districts with an intent to discriminate against Democrats?
- C. Did the Michigan Legislature draw the Challenged Districts with partisan animus?
- D. Did the Michigan Legislature draw the Challenged Districts with intent to entrench one political party?
- E. Did the Michigan Legislature engage in a secretive and hurried process in enacting the Plans?
- F. Are the Plans fair and equitable?

- G. Are the votes of voters in the Challenged Districts diluted?
- H. Are the Challenged Districts cracked or packed?
- I. To what extent are the Plans asymmetric, i.e., do they treat the voters of different parties differently by making the votes of one party materially more difficult to translate into seats than the votes of the other?
- J. Were the Plans successful in advancing the interests of Republicans and burdening the interests of Democrats?
- K. Was the gerrymander durable?
- L. How do the Plans compare against other redistricting plans in Michigan and United States history?
- M. Did the Republican caucuses and/or committee chairs threaten Democratic representatives with unfavorable districting to procure their votes for the Plans?
- N. Are there alternative districts for each voter and/or League member in which their votes would be less diluted?
- O. Are there alternative plans, drawn without reference to political criteria, more symmetrical and more fair?
- P. Do any legitimate government interests justify the gerrymander?
- Q. Were the Plans narrowly tailored to advance the government's legitimate interests?
- R. Did Michigan legislators or their staffs wrongfully delete or otherwise destroy documents relevant to the issues in this case?
- S. What impact do gerrymanders in general, and this gerrymander in particular, have upon voter behavior, policy implementation, and voter attitudes towards government?
- T. In what ways were Plaintiffs harmed by the gerrymander?
- U. What remedy is appropriate?

Defendant:

Without conceding that any of Plaintiffs' identified issues of fact to be litigated are relevant or appropriate, and in addition to the issues identified by Plaintiffs and Congressional Intervenors:

- A. Were viable alternative plans presented to the Legislature in 2011?
- B. What factors did the Legislature consider in adopting the Plans?
- C. Are Plaintiffs' proposed alternatives neutrally drawn?
- D. What cognizable harms, if any, will Plaintiffs suffer if the Plans are used to conduct the 2020 election?
- E. What is the impact of the 2018 election on Plaintiffs' proofs?
- F. Would the use of any of Plaintiffs' proposed alternatives in 2020 redress cognizable harm?
- G. Is a remedial plan possible if more than one district is found to be invalid?
- H. Did the Legislature and its staff appropriately seek to follow the Apol guidelines?
- I. Has Plaintiffs' delay in filing suit caused prejudice to the Secretary or others such that laches should apply?

Congressional Intervenors:

- A. Does the 2011 Congressional Map prevent Plaintiffs from associating together to advocate Congress to support Plaintiffs' policy preferences?
- B. Does the 2011 Congressional Map prevent Plaintiffs from associating together to register voters?
- C. Does the 2011 Congressional Map prevent Plaintiffs from, individually or associating together, to campaign for candidates they support.
- D. Does the 2011 Congressional Map prevent Plaintiffs from speaking in favor of or against candidates Plaintiffs support or oppose?

- E. Does the 2011 Congressional Map prevent Plaintiffs from making political contributions to candidate they support?
- F. Does the 2011 Congressional Map prevent Plaintiffs from volunteering on the campaigns of candidates they support?
- G. Does the 2011 Congressional Map shut out Plaintiffs from the political process?
- H. Does the 2011 Congressional Map prevent Plaintiffs from having adequate representation in Congress?
- I. Do the Congressional Intervenors “entirely ignore” the interests of Plaintiffs such as to rebut the presumption that “[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.”²
- J. Does the 2011 Congressional Map produce disproportionate election results?
- K. Have Plaintiffs surpassed the presumption that all laws, including redistricting statutes, are constitutional?
- L. Did geographic considerations drive the contours of Michigan’s Congressional Map?
- M. When did Plaintiffs realize that the Congressional Map violated their constitutional rights?
- N. Was the delay between Plaintiffs’ realization that their rights were violated and when they filed this lawsuit justified?
- O. Did Plaintiffs unjustifiable delay prejudice Congressional Intervenors and the Secretary in mounting a defense to the Congressional Map?

6. Issues Of Law To Be Litigated

Plaintiffs:

² *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality op.).

- A. Do Plaintiffs have standing?
- B. Did the Legislature violate the First Amendment? What is the applicable legal test?
- C. Did the Legislature violate the Equal Protection Clause of the Fourteenth Amendment? What is the applicable legal test?
- D. What is the correct remedy?

Defendant:

- A. What standard applies to the parties' respective burdens of proof?
- B. Are Plaintiffs' claims subject to the defense of laches?
- C. How is adherence to traditional redistricting criteria measured, and what is the impact of such adherence on Plaintiffs' ability to satisfy their burdens?

Congressional Intervenors:

- A. Do Plaintiffs present a judicially manageable standard for this Court to evaluate their claims?
- B. What is the correct remedy?

7. Evidence Problems Likely To Arise At Or Before Trial

Plaintiffs:

Plaintiffs are filing herewith a motion seeking a ruling under F.R.E. 104 that certain documents as to which recipient Jeffrey Timmer has claimed privilege are not in fact privileged, and seeking production of those documents. Mr. Timmer's log is attached hereto at Attachment G.

Plaintiffs continue to discuss with counsel for the Legislative Bodies the production of several thousand pages of documents ("Map Data") pursuant to the Court's August 17, 2018 Order (ECF 94) in an unreadable format. That discussion began shortly after the Map

Data were produced. To preserve their rights Plaintiffs list that data as Exhibit 791 on the attached Exhibit list, Attachment D hereto. Defendant and Intervenor reserve their objections to the Map Data until the data can be reviewed in readable manner. Plaintiffs respectfully advise the Court of potential motion practice on this issue if it is not resolved among the parties in the near future.

Defendant:

The Secretary intends to file a Motion in Limine seeking to exclude the expert report of Dr. Chen and a separate Motion in Limine to exclude testimony on the proffered gerrymandering metrics contained in Plaintiffs' proposed expert reports. The bases for these motions will be made apparent by the Secretary's filings, but briefly (i) Dr. Chen deleted his source code file containing the instructions for his computer software, and the Secretary is for this reason not able to verify (or refute) Dr. Chen's claims concerning his simulated plans, including that they were neutrally drawn, and (ii) none of the five tests employed are generally accepted or reliable.

The Secretary also anticipates that there will be issues at trial concerning Plaintiffs' presentation of their proofs on standing, in particular as there are multiple Challenged districts in which no Plaintiff resides. The Secretary intends to challenge Plaintiffs' proofs to the extent they rely on witnesses who were not specifically identified during discovery, including in particular the purported League members listed in ECF No. 129-39.

The Secretary also anticipates evidentiary problems concerning the presentation of alternative plans given the volume of simulated plans previously served by Plaintiffs. To

the extent Plaintiffs intend to rely on more than one alternative, each alternative will have to be presented and testimony taken.

The Secretary has stated objections to exhibits in the context of the attached Exhibit list. The Secretary, however, expressly reserves the right to object at trial to any exhibit offered by Plaintiffs (e.g., as to relevance and/or lack of foundation) depending upon the purpose for which it is offered and the personal knowledge of the witness through which Plaintiffs seek to admit the document.

Congressional Intervenors:

Congressional Intervenors respectfully request that this Court rule on its Motion to permit Dr. Trey Hood to testify as an expert witness on behalf of the Congressional Intervenors.

8. Witnesses

The parties attach hereto at Attachments A, B and C their lists of witnesses whom they may call and whom they will call at trial. No party by listing a witness hereunder commits to call that witness. Any party may call a witness listed by another party.

The parties preserve for trial their objections to the calling of any witness listed by another party.

9. Exhibits

The parties attach hereto at Attachments D, E and F their respective lists of exhibits as described above and stated objections. Unless otherwise noted, the parties stipulate only to the authenticity of the listed documents. The Defendant's and the Congressional

Intervenors' objections are set forth at Attachments D-1 and D-2 respectively. Each party reserves its right to object to admission of exhibits on its own list.

The parties have agreed that demonstrative exhibits (i.e. those exhibits summarizing, visualizing, or organizing information contained in another designated exhibit) need not be listed presently but instead must be exchanged no later than 10 business days before trial (i.e., by January 22, 2019). Objections as to demonstratives are preserved for trial.

The parties have stated their objections in the context of the attached exhibits. As the lists may contain duplicates of the same or parts of the same exhibit, if a party objects to an exhibit once in whole or in part, that objection will be deemed preserved as to any duplicate entries for that same exhibit regardless of how named or presented.

The Secretary adds to her list the exhibits attached to her two above-referenced Motions in Limine, including the declarations of Jeff Timmer and Yan Liu and attachments thereto. Plaintiffs reserve their objections on these exhibits until those documents are received and reviewed.

10. Damages

Plaintiffs do not seek damages. Plaintiffs do seek compensation of fees, costs and expenses pursuant to applicable statutes.

11. Trial

The trial will be by the Court. The parties estimate that absent significant fact stipulations or agreement on written submission of direct testimony for certain witnesses

which the parties continue to discuss, the trial will last 15 to 20 trial days. The Secretary anticipates that the direct testimony of her witnesses will require approximately 3 days.

Congressional Intervenors join in the Plaintiffs' and Defendant's request for 15-20 days. Additionally, Congressional Intervenors request three days to put on their case.

12. Settlement

The parties have conferred regarding settlement and are so far unable to reach any agreements.

* * *

The remaining deadlines established by the Court in its Case Management Order No. 1 remain in full force and effect.

APPROVED this _____ day of _____, 2018.

Signed for and on behalf of the panel:
HONORABLE ERIC L. CLAY
United States Circuit Judge
HONORABLE DENISE PAGE HOOD
United States District Judge
HONORABLE GORDON J. QUIST
United States District Judge

ECF Distribution to:

jay.yaeger@FaegreBD.com
harmony.mappes@FaegreBD.com
kevin.toner@FaegreBD.com
jeff.justman@FaegreBD.com
mbrewer@goodmanacker.com
pellsworth@dickinsonwright.com
rshannon@dickinsonwright.com
macarvin@jonesday.com
jtorchinsky@hvjt.law
bshekell@clarkhill.com