

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

**PROPOSED SUPPLEMENT TO THE PROPOSED
JOINT AND FINAL PRETRIAL ORDER**

Pursuant to the Court’s Order of December 14, 2018 (ECF #159) (“December 14th Order”) regarding a supplemental proposed order, the parties respectfully submit the following:

1. Disputed Issues of Fact and Law

The Parties mutually identify the following relevant issues of fact and law¹ in dispute. The subparts of each issue are intended to be illustrative, not exclusive. The parties do not by joining in these lists amend their pleadings or waive any rights.

¹ The Secretary, Congressional Intervenors, and Legislative Intervenors, contest justiciability and whether there is a workable standard that applies to partisan gerrymandering claims. Assuming that Plaintiffs’ claims are justiciable and without waiving that issue, and because this Court has determined that Plaintiffs’ claims are justiciable in its November 30, 2018 Opinion and Order (ECF No. 143), the Secretary lists the above facts and issues as being relevant for trial.

a. Disputed Issues of Fact.

1. DISCRIMINATORY INTENT

- a. Whether the Legislature’s predominant purpose in map drawing was to subordinate the interests of supporters of the Democratic Party and entrench a representative from the Republican Party in power, or otherwise dilute Democratic votes, or whether the predominant purpose was otherwise, (e.g., to follow traditional redistricting criteria (the “Apol Criteria”) and federal law). Op. 34-35.²
- b. Whether the legislature had the specific intent to burden individuals or entities that support the Democratic Party. Op. 38.

2. DISCRIMINATORY EFFECT

- a. Whether the current lines of a particular district will, if used in 2020, have the effect of discriminating against—or subordinating—voters in that district who support candidates of a disfavored party, if the district dilutes such voters’ votes by virtue of cracking or packing. Op. 35.
- b. Whether the current districting plan will, if used to conduct elections in 2020, burden the political speech or associational rights of individuals or entities that support the Democratic Party. Op. 38.
- c. Whether, absent the mapmakers’ intent to burden Democratic voters by reason of their views, an alternative plan exists such that, if adopted, concrete adverse impact would not occur in 2020. Op. 38.

3. STANDING

- a. Whether Plaintiffs, including the League as derivative of its members, will suffer injury in fact in each challenged district as a result of cracking or packing if the Current Apportionment Plan is used in 2020. Op. 9, 22, 23.

² “Op.” refers to this Court’s Opinion and Order on various motions for summary judgment. (ECF No. 143.)

- b. Whether the interests at stake here are germane to the purposes of the League of Women Voters of Michigan (“League”). Op. 22-23.
- c. Whether the injury is traceable to defendant’s actions in each challenged district. Op. 9.
- d. Whether the use of the challenged maps in 2020 will burden the ability of voters and the League to affiliate with like-minded people across the state to carry out political activities and objections. Op. 27-30.
- e. Whether the injury can be cognizably remedied by implementation of an alternative configuration as to each challenged district for the 2020 elections. Op. 9.
- f. Whether Plaintiffs’ case is moot in light of the November 2018 elections. *Vieth v. Jubelirer*, 541 U.S. 267, 287 n. 8 (2004) (plurality op.).

4. JUSTIFICATION

- a. Whether a legitimate state interest or other neutral factor justified such discrimination. Op. 34.

5. LACHES

- a. Whether Voters unreasonably delayed in bringing this action. *Sanders v. Dooley County, GA.*, 256 F.3d 1289 (11th Cir. 2001) (*per curiam*); *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018)
- b. If so, whether that delay materially prejudiced the Secretary or the Congressional Intervenors with respect to evidentiary burdens or the imposition of a remedy for the 2020 election. *Id.*

b. Disputed Issues of Law.³

1. ELEMENTS

- a. Are partisan gerrymandering claims justiciable *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality); *Davis v. Bandemer*, 478 U.S. 109 (1986).
- b. What are the elements of partisan gerrymandering claims under the Fourteenth Amendment and under the First Amendment? *Id.*
- c. What standard applies to the parties' relative burdens of proof? *Miller v. Johnson*, 515 U.S. 900, 915-916 (1995); *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596-98 (D. Md. 2016) (three-judge court)

2. DISCRIMINATORY INTENT

- a. What if any discriminatory intent must be shown to sustain a claim that partisan gerrymandering violates the Fourteenth Amendment or the First Amendment? *LULAC v. Perry*, 547 U.S. 399 (2006).

3. DISCRIMINATORY EFFECT

- a. What if any discriminatory effect must be shown to sustain a claim that a redistricting scheme violates the Fourteenth Amendment or the First Amendment? *LULAC v. Perry*, 547 U.S. 399 (2006); *Common Cause v. Rucho*, 318 S. Supp 3d 777 (M.D.N.C. 2018).

³ Plaintiffs believe some or all of these issues are no longer disputed as they have been resolved by the Court's prior rulings, including the Court's November 30, 2018 "Opinion and Order" denying all parties' summary judgment motions (ECF #143). The Secretary acknowledges that the Court has decided some of these issues on an interlocutory basis. However, the Secretary reserves these issues for appeal and the Court may always revisit its prior decisions following the close of evidence (or otherwise). *See Deitz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) ("[T]he Court has recognized that a district court ordinarily has the power to modify or rescind its orders at any point prior to final judgment in a civil case.").

Intervenors and Defendant propose the following additional illustrations of Discriminatory Effect:

- a. Whether there is a well-accepted standard for measuring discriminatory effect that is not based on the “proper” relationship between seats and votes. *Vieth v. Jubelirer*, 541 U.S. 267, 307-308 (2004) (Kennedy, J. concurring); *LULAC v. Perry*, 548 U.S. 399, 419-420 (2006) (opinion of Kennedy, J.).
 - b. Whether Plaintiffs’ proposed standards to evaluate Plaintiffs’ claims are limited and precise. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).
 - c. Whether Plaintiffs’ proposed standard defines how much partisanship is too much partisanship. *Vieth*, 541 U.S. at 286, 296-97 (plurality op.); *id.* at 344 (Souter, J., and Ginsburg, J., dissenting).
4. STANDING
- a. What must a plaintiff show to demonstrate standing to assert a partisan gerrymandering claim? *Gill v. Whitford*, 138 S. Ct. 1916 (2018).
5. JUSTIFICATION
- a. What facts if any would justify a partisan gerrymander? Op., 34-35.
6. LACHES
- a. Does laches apply in partisan gerrymandering cases and if so what are the elements? *Sanders v. Dooly County, GA.*, 256 F.3d 1289 (11th Cir. 2001) (*per curiam*); *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018)

c. Anticipated Disputed Evidentiary Issues.

The Secretary states as follows:

The Secretary has filed motions in limine and briefs including authority seeking to exclude the report of Dr. Chen and to exclude testimony on various proffered gerrymandering metrics employed by Plaintiffs' experts. She is filing an additional motion in limine seeking to exclude testimony of 50 individual, non-party members of the League of Women Voters on the basis that these persons were not disclosed during discovery, and to exclude testimony on two topics for which Plaintiffs refused to provide a Rule 30(b)(6) witness.

Subject to the preservation of her objections as stated with respect to Plaintiffs' proposed exhibits, at this time, the Secretary does not anticipate additional evidentiary issues other than those identified in the referenced motions.

Congressional Intervenors and Legislative Intervenors, subject to the motions in limine filed by the Secretary, do not anticipate any evidentiary issues at this time.

2. Exhibits

The parties submit herewith the lists identified below of exhibits they may offer at trial, as required by § 2 of the Court's December 14th Order. The parties agree that these lists are not required to include exhibits that will be used solely for impeachment or rebuttal. The parties agree further that unless the Court directs otherwise, these exhibits may be admitted, subject to ruling on any stated objections, if and when offered by a party at trial. Any party may offer an exhibit from any list.⁴ Finally, the parties agree that subject to any other directions from the Court, the documents and

⁴ The parties do not propose, by this statement, to modify the Rules of Evidence concerning hearsay (e.g., Expert deposition testimony may be admissible if offered by an opposing party but may be inadmissible if sought to be admitted by the party sponsoring the expert.)

things intended for demonstrative rather than evidentiary purposes will be exchanged no later than 10 business days before trial, as set forth in in § 9 of the Proposed Joint and Final Pretrial Order submitted to the Court on December 4, 2018.

- a. **Exhibit Lists.** The parties submit herewith at Attachments A, B and C their respective supplemental exhibit lists. No party consents to the accuracy of any other party's descriptions of its exhibits.
- b. **Agreed Upon/Stipulated Exhibits.** The parties have identified in their respective Exhibit Lists, Attachments A, B, and C hereto, those exhibits as to which there is no objection, admissibility of which is thereby stipulated. The Parties agree that no exhibit will be used in post-trial briefs or in closing argument unless the exhibit was offered and admitted into evidence during trial.
- c. **No Overlapping Exhibits.** The parties have identified overlapping exhibits to which none of the parties object and that all parties would include on their respective lists, as required by § 2(c) of the Court's December 14th Order.
- d. **Exhibit Binders.** The parties will deposit with overnight carriers seven exhibit binders addressed to the Court, with two copies to Judge Quist, two copies to Judge Hood, and three copies to Judge Clay. Each party is providing binders containing the exhibits that appear on its respective list.

3. Witnesses

- a. **Witness Lists.** The parties submit herewith at Attachments D, E and F witness lists as set forth in paragraph 3(a) of the Court's December 14th Order. Any party may offer a witness on another party's list.
- b. **Expert Witness Reports.** Plaintiffs provide copies of the reports of their expert witness reports within their seven binders containing their exhibits, at Tabs 33 (Chen), 53 (Mayer), 126 (Mayer Rebuttal), 129 (Warshaw), 157 (Warshaw Rebuttal).

The Secretary has provided copies of the expert reports she served in this case within the seven binders containing her Exhibits. Those reports are located in the submitted Exhibit Binders as follows:

- Tab 6. Expert Report of Jeff Timmer
- Tab 13. Expert Report of David Doyle
- Tab 14. Expert Report of Douglas Johnson
- Tab 16. Expert Report of Yan Liu
- Tab 19. Expert Report of Thomas Brunell

Congressional Intervenors submit the expert report of Dr. Trey Hood. That report is in Congressional Intervenors exhibit binder as Exhibit 15.

4. Privilege Log

Secretary's Statement: Consistent with the Court's footnote 1, the Secretary does not intend to avail herself of Mr. Timmer's privilege log at trial. The Secretary states further that, respectfully, the privileges asserted by nonparty, Mr. Timmer (as well as the records themselves), do not belong to the Secretary but to Mr. Timmer's clients, and relate to communications between non-parties that occurred long before this litigation commenced. For the same reason, the Secretary also does not have the ability to waive those privileges (nor, logically, does Mr. Timmer have the ability to waive privileges belonging to his clients).

Plaintiffs' Statement: Each of Mr. Timmer logged documents should be produced or submitted to the Court as ordered. Mr. Timmer's counsel was served with the December 14th Order and has responded to Plaintiffs' Rule 104 Motion on

behalf of the Secretary and of Mr. Timmer. To the extent Mr. Timmer claims that someone else's privilege protects the documents, the Legislature bodies' counsel was also served with the December 14th Order.

5. Trial Proceedings

a. Opening and Closing Statements.

Secretary's Statement: Given the number of districts at issue and the need to summarize district specific evidence as well as the testimony of multiple experts, the Secretary anticipates that she will require approximately 60 minutes for opening statements and 60 minutes for closing statements.

Congressional Intervenors' Statement: Because Congressional Intervenors represent interests that are distinct from the Secretary's, Congressional Intervenors need time to develop their own case. Congressional Intervenors therefore estimate that they will need 30 minutes for opening statements. Congressional Intervenors estimate that they will need 30 minutes for closing statements.

Legislative Intervenors' Statement: Because Legislative Intervenors represent interests that are distinct from the Secretary's and Congressional Intervenors, Legislative Intervenors need time to develop their own case. Legislative Intervenors therefore estimate that they will need 30 minutes for opening statements. Legislative Intervenors estimate that they will need 30 minutes for closing statements.

Plaintiffs' Statement: It is Plaintiffs' position that the Court should divide a total time of one hour equally between (a) Plaintiffs and (b) the Secretary and Intervenors as a group. Plaintiffs may reserve time for rebuttal.

b. District-Specific Evidence.

Plaintiffs anticipate district specific evidence of the following nature and character:

- One or more plaintiffs or League members in each challenged district will testify as set forth in Plaintiffs' witness list.

- Dr. Chen will identify the following challenged districts as cracked or packed “partisan outliers” based on his examination of the enacted district as compared to his neutral maps: Congressional Districts 1, 4, 5, 8, 9, 10, 11, and 12; Senate Districts 8, 18, 22, 27, and 32; House districts 32, 51, 52, 55, 60, 62, 63, 75, 76, 91, 92, and 94.
- Dr. Warshaw and Trial Exhibit 278 will demonstrate that at least one plaintiff or League member is cracked or packed into the following districts to such a degree that the district falls entirely outside the range of Dr. Chen’s 1,000 hypothetical neutral districts for this same voter. Packed Congressional Districts 5, 9, and 12; Cracked Congressional Districts 8 and 10; Packed Senate District 18; Cracked Senate Districts 10, 14, 22, 36; Packed House Districts 55, 60, 75; Cracked House Districts 24, 32, 51, 52, 63, 76, and 94.
- Dr. Warshaw and Trial Exhibits 278 and 570-72 will also demonstrate that at least one plaintiff or League member is cracked or packed into the following districts to such a degree that, while not outside *all* of Dr. Chen’s hypothetical districts, are at the extreme edge of that range. Stated differently, for those in cracked districts, for example, Trial Exhibit 278 shows that at least one plaintiff or League member would have resided in a more Democratic leaning district in an overwhelming majority of the alternative, neutral districts. Cracked Congressional Districts 1, 4, and 7; Packed Senate Districts 11, 27; cracked Senate District 8; Packed House Districts 62 and 92; Cracked House Districts 83 and 91.
- Mapdrawers, Mssrs. Timmer, Marquardt, McMaster, and Began, along with political operatives and funders (e.g., Mssrs. LaBrant, Lund, Schostack, Bolger, & Hune) will provide testimony with respect to the secretive mapdrawing process including the use of political data. Portions of this evidence is expected to be district specific.
- As one example of this type of district-specific evidence from the mapdrawers, Mr. Marquardt, drawer of the Senate map, prepared a demonstrative one-page handout showing the 2001 district as compared to the proposed 2011 district for each Republican caucus member. These documents (Trial Exhibits 330, 331, 332, 335, 342, 354) show population and political data for both the 2001 and 2011

iterations of the districts. Mr. Marquardt will presumably testify about these documents consistent with his deposition testimony: that each caucus member was shown this data “because the senators obviously would be interested in whether their district” got more Republican or less Republican.

- As another example of district-specific evidence from the mapdrawers, Mr. Timmer, paid consultant and drawer of the Congressional map, produced documentary evidence that will be used to explain the gerrymandering in certain districts. For instance, Trial Exhibits 399, 400, 401, 409, and 411 will demonstrate that Mr. Timmer caused Congressional District 11 to lose significant Democratic territory from its 2001 incarnation (Garden City, Redford Twp., Wayne, and Westland), that he avoided adding areas trending Democratic (Farmington Hills and most of W. Bloomfield Twp.), and that he added substantial GOP territory (Birmingham, Bloomfield Hills City, and Troy). Several draft maps and emails will provide district-specific evidence of this type demonstrating reliance on political data for purposes of drawing districts, communicating with incumbents and their staffs about the draft districts and their partisan tilt, making revisions to specific districts, and otherwise preserving and increasing the existing Republican advantage. *See, e.g.*, Trial Exhibits 395, 396, 399, 400, 401, 404, 406, 408, 411, 412, 422, 425, 426, 432.
- As set forth in Plaintiffs witness list, Senate staffer Mike Vatter will provide testimonial and documentary evidence showing that the challenged districts are packed or cracked, failed to follow the Apol criteria, and otherwise provide political context regarding certain districts and discuss the secretive map drawing process.
- In addition, Drs. Chen, Mayer, and Warshaw along with Mr. Dillon and Ms. Smith and the mapdrawers will provide state-wide evidence regarding the existence of the gerrymander and its impact, which is relevant to every challenged district.

It is not possible to estimate the time needed to present on each district with precision, because Plaintiffs do not expect to present evidence on a district-by-district basis. Rather, Plaintiffs expect evidence to come in on a witness-by-witness basis (see witness time estimates included in the witness list), with many individual witnesses (particularly the experts and the mapdrawers) addressing many districts during their

testimony. In addition, with respect to the Plaintiffs and the experts, the first district discussed may take more time whereas the subsequent districts will take less time, since the evidence (for example with respect to vote dilution or methodology for measuring cracking/packing) will be of a similar nature for each district. The foregoing notwithstanding, Plaintiffs' best estimate is that Plaintiffs' district-specific evidence will cumulatively total between 30 minutes and 60 minutes per district.

The Secretary anticipates district-specific evidence of the following nature and character:

The Secretary intends to rebut the district-specific evidence presented by the Plaintiffs and present affirmative evidence on a district-specific basis as well. The time she will need to do so depends in large part on the amount of time and content of Plaintiffs' presentation. Notwithstanding that uncertainty, the Secretary intends to present district-specific evidence as is subsumed within the Expert Report of Jeff Timmer (which describes how each district was drawn relative to complying with Apol or other criteria). Mr. Timmer's direct testimony—which will include a description of the process used to draw each challenged district and the manner in which each challenged district complies with Michigan's traditional redistricting criteria—is anticipated to take 1.5 days. The Secretary may also elicit district-specific testimony from Terry Marquardt concerning the drawing of each challenged Senate district or other districts (Congressional or House) Mr. Marquardt reviewed or assisted in drafting. She anticipates that Mr. Marquardt's testimony will take approximately 4-5 hours.

Congressional Intervenors and Legislative Intervenors anticipate district-specific evidence of the following nature and character:

Congressional Intervenors and Legislative Intervenors agree with the Secretary and will examine Mr. Timmer and Mr. Marquardt concerning the district specific evidence. Congressional Intervenors and Legislative Intervenors also intend to examine Dr. Trey Hood and ask Dr. Hood to evaluate and critique the district specific evidence Plaintiffs adduce. Congressional Intervenors and Legislative Intervenors need approximately 1.5 trial days to conduct these examinations. Congressional Intervenors and Legislative Intervenors reserve the right to call the other witnesses on the Parties' witness lists to offer testimony concerning specific districts.

c. Simulated and/or Alternative Maps.

Plaintiffs' Statement: Plaintiffs will offer detailed evidence regarding the three alternative maps evaluated by Professor Kenneth Mayer in his report. Plaintiffs anticipate that absent stipulations to the contrary Professor Mayer's testimony will consume in total 90 minutes of direct examination of which approximately half will relate to the alternative maps he evaluated. Plaintiffs intend to offer testimony from Professor Jowei Chen and/or Professor Christopher Warshaw regarding the characteristics of universe of 3,000 simulated maps reflected in Professor Chen's simulations. Plaintiffs will also offer physical (and at the Court's instruction electronic) renderings of several alternative maps of the Senate, House and Congressional plans. Demonstrative renderings of those maps including the maps Dr. Mayer evaluated, printed from the Chen simulations produced to the Secretary in June 2018, are included in Plaintiffs' exhibit binder at Tabs 520-569. Plaintiffs anticipate Professor Chen's and/or Professor Warshaw's testimony regarding the additional simulated maps will consume no more than two hours of direct examination time. Plaintiffs may also offer draft maps, if any, yet to be collected from legislative Republican Caucus laptop computers. See § 6 below. Finally, Plaintiffs expect to offer an alternative map provided to the legislature during the redistricting process, and Mike Vatter's testimony regarding that map and the legislature's response.

Secretary's Statement: The Secretary will cross-examine as to each plan presented and discussed by the Plaintiffs; the time she will need to do so depends in large part on the amount of time and content of Plaintiffs' presentation. The Secretary also intends to present testimony by Jeff Timmer concerning the hypothetical congressional plan he drew to demonstrate that a 10R-4D congressional delegation is possible while adhering equally as well (or better) to Dr. Chen's version of the Apol Criteria (i.e., in comparison to Dr. Chen's simulated plans).

Congressional Intervenors and Legislative Intervenors state as follows: The Congressional and Legislative Intervenors will also cross-examine Dr. Chen and Dr. Mayer. The time needed for this cross-examination will depend on Plaintiffs' presentation. In addition to conducting direct examine of Mr. Timmer and his alternative plan, Congressional Intervenors and Legislative Intervenors intend to call Dr. Liu to critique Dr. Chen's methods. Congressional Intervenors and Legislative Intervenors also intend to call Dr. Hood to critique both Dr. Chen's

methods and Dr. Warshaw's methods, as well as provide direct testimony concerning the composition and shape of Michigan congressional and legislative districts and why the enacted map is superior to any of Plaintiffs' simulated maps. Congressional Intervenors and Legislative Intervenors anticipate needing 3 hours to examine Dr. Hood, 3 hours to examine Dr. Liu, and approximately 2 hours to examine Mr. Timmer.

Additionally, Congressional Intervenors and Legislative Intervenors reserve the right to use their other witnesses listed on the Parties' witness lists to offer testimony to refute Plaintiffs' testimony concerning the simulated maps. Congressional Intervenors and Legislative Intervenors make this reservation because it depends on the testimony that Dr. Chen and Dr. Warshaw offer.

d. Daubert Objections.

Plaintiffs' Statement: Plaintiffs do not presently contemplate any *Daubert* objections absent the Court granting leave to Congressional and Legislative Intervenors to submit additional experts.

Secretary's Statement: The Secretary has filed two motions *in limine* that contain her *Daubert* objections and which detail the basis for her requests to exclude the testimony of Dr. Chen and the testimony of Plaintiffs' experts concerning five different proffered gerrymandering metrics. Apart from these filed motions, the Secretary does not presently foresee additional *Daubert* objections, assuming that Plaintiffs' proposed experts offer no other, further, or different conclusions than what is in the reports they have previously served.

Congressional Intervenors and Legislative Intervenors Statement: Congressional Intervenors and Legislative Intervenors concur with the Secretary's Motions and join them in full.

6. Additional Pretrial Motions.

Plaintiffs' Statement: As reported at the pretrial conference, Plaintiffs do not contemplate any further pretrial motions, assuming the Republican legislative caucuses' promised production of laptop computers is timely completed. Plaintiffs reasonably anticipate those laptops will be reviewed on or before January 8, 2019.

Secretary's Statement: The Secretary has filed a pre-trial motion seeking to exclude the testimony of 50 individual members of the League of Women Voters who are not parties to this case and who were not disclosed as witnesses in the course of discovery. In the same motion, she has requested the exclusion of testimony at trial on two topics identified by her in a Rule 30(b)(6) Deposition Notice and for which Plaintiffs refused to provide a witness. These topics include: (i) the alternative districts for members or Plaintiffs who are alleged to have been harmed, and (ii) the manner in which implementation of the districts would remedy the alleged harm. The factual details and authority supporting these motions are included in those separate filings.

Congressional Intervenors and Legislative Intervenors Statement: Congressional Intervenors and Legislative Intervenors concur with the Secretary's Motions and join them in full.

Additionally, Congressional Intervenors and Legislative Intervenors respectfully remind the Court that the Congressional Intervenors Motion to Alter

Case Management Order No. 1 (ECF 137) (filed Nov. 1, 2018) (Page ID# 5135-5202)
is still pending a decision from the Court.

Legislative Intervenors anticipate filing a similar Motion to permit an expert to
file a similar expert report that would focus on Michigan's legislative districts.

7. Trial Proceedings.

As instructed the parties will seek to agree among themselves regarding
allocation of trial time and inform the Court of division of time prior to the
commencement of trial.

8. Additional Efforts to Narrow the Scope of the Issues for Trial.

The parties have discussed and will continue to discuss stipulations and other
efforts to narrow the scope of issues for trial.

Plaintiffs' Statement: Plaintiffs have offered to stipulate the great majority of
exhibits and Defendant and Congressional and Legislative Intervenors are considering
the offer.

Plaintiffs have also offered to stipulate to the following for expedition of the
trial:

- a. Limitation of voter direct and cross examination to 15 minutes each except for
four voters to be chosen by the parties in advance.
- b. Stipulation of the admissibility of deposition testimony of Republican
legislators and staff.
- c. Limits on the expert testimony to 90 minutes direct and 45 minutes cross.

Absent agreement on these matters, it is Plaintiffs' position that the Court should consider adopting them and other time constraints pursuant to its inherent power to manage trial.

The Secretary's further statement.

The Secretary notes that Plaintiffs' challenge is necessarily district specific, and she does not believe there is such thing as a "representative voter" that will cover all 34 districts under challenge. As such, unless Plaintiffs are stipulating to dismiss their claims as to all but four challenged districts, Plaintiffs proposal to stipulate under (a) above is not reasonable or in keeping with the Secretary's right to an adversarial process. The Secretary further states that none of the Individual League Member witnesses identified in the witness list by Plaintiffs were disclosed as potential witnesses during discovery in this matter; she has filed an evidentiary motion with respect to that issue. If the Court grants that motion, Plaintiffs' proposal is moot.

The Secretary has proposed that the parties agree to require the submission of written direct testimony for all or some subset of witnesses, with parties reserving time only for cross examination and re-direct, which time may be limited by stipulation or the Court if necessary.

The Secretary will require significant opportunity to cross Plaintiffs' expert witnesses given the nature of their claims and the types of opinions they seek to present. The number of districts at issue—34—also counsels against limitation of

expert testimony, though the need for trial time again may be truncated if written direct testimony is stipulated as proposed by the Secretary.

The Secretary will consider and discuss with Plaintiffs whether some or all of particular non-party depositions may be admitted at trial. Deposition transcripts, however, are hearsay, the non-party witnesses are anticipated to be available, and the depositions did not cover all of the topics the Secretary intends to present on direct examination of the relevant witnesses.

Congressional Intervenors' and Legislative Intervenors' further statement:

The Congressional Intervenors and Legislative Intervenors agree with the Secretary's position above and insofar as is necessary adopts the same as their own. Forty-five minutes is simply not enough time to cross-examine Plaintiffs' expert witnesses. Other than the limitations imposed by the Federal Rules of Evidence, the Secretary and Intervenors should not be limited in the time they need to examine Plaintiffs' experts.

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

INDEX OF ATTACHMENTS

| | |
|---|---|
| A | Plaintiffs' Exhibit List |
| B | Secretary's Exhibit List |
| C | Congressional Intervenors' Exhibit List |
| D | Plaintiffs' Witness List |
| E | Secretary's Witness List |
| F | Congressional Intervenors' Witness List |