

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

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, ROGER J. BRDAK,  
FREDERICK C. DURHAL, JR.,  
JACK E. ELLIS, DONNA E.  
FARRIS, WILLIAM "BILL" J.  
GRASHA, ROSA L. HOLLIDAY,  
DIANA L. KETOLA, JON "JACK" G.  
LASALLE, RICHARD "DICK" W.  
LONG, LORENZO RIVERA and  
RASHIDA H. TLAIB,

Plaintiffs,

v.

JOCELYN BENSON, in her official  
Capacity as Michigan  
Secretary of State,

Defendant.

No. 2:17-cv-14148

Hon. Eric L. Clay  
Hon. Denise Page Hood  
Hon. Gordon J. Quist

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*Attorneys for Defendant Secretary of State*

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**DEFENDANT'S MOTION TO AMEND THE PROPOSED SUPPLEMENT  
TO THE PROPOSED JOINT AND FINAL PRETRIAL ORDER**

NOW COMES Defendant Jocelyn Benson, in her official capacity as Michigan Secretary of State, by her counsel MILLER, CANFIELD, PADDOCK and STONE, PLC, and hereby respectfully requests leave to amend the portions of the Proposed Supplement to the Proposed Joint and Final Pretrial Order (ECF 172) that relate to the Secretary's intended presentations at trial, in accordance with this Court's directive of January 22, 2019, as well as the provisions that have become moot as a result of this Court's intervening Orders and the parties' stipulations.

1. Under this Court's Case Management Order No. 2, the parties' joint and final pretrial order was due on December 4, 2018 (ECF 140).

2. On December 14, 2018, the Court ordered supplementation of the parties' proposed joint and final pretrial order, including witness and exhibit lists (ECF 159), which the parties duly submitted on December 22, 2018, as their Proposed Supplement to the Proposed Joint and Final Pretrial Order (ECF 172) ("Proposed Supplement").

3. In that Proposed Supplement, Ruth Johnson, the former Michigan Secretary of State, submitted extensive witness and exhibit lists and briefing on Defendant's anticipated trial strategy, including plans for presentation of witnesses and evidence.

4. On January 1, 2019, Jocelyn Benson was duly sworn in as Michigan Secretary of State and was automatically substituted, in her official capacity, as a party Defendant. *See* Fed. R. Civ. P. 25.

5. The Secretary has reviewed fully all of the briefings and proceedings in this litigation; her staff and current counsel met with previous counsel from Dickinson Wright; and the Secretary has reviewed the merits of this litigation with her current counsel from Miller Canfield, which has been appointed as Special Assistant Attorneys General.

6. After due deliberation and consideration of the merits, costs, and risks in this action, the Secretary has her own perspective on the facts and the law that differs from her predecessor in office, and the Secretary believes that it is in the best interests of the people of the State of Michigan for Plaintiffs and the Secretary to resolve this case through a consent decree.

7. Contemporaneously with this Motion, the Plaintiffs and the Secretary have in fact filed a Joint Motion to Approve Consent Decree (ECF 211).

8. As the principal Defendant in this case and the State officer charged with administering elections in Michigan under its Constitution, the Secretary has her own district interests that are not fully aligned with either Plaintiffs or Intervenors.

9. The Secretary has therefore significantly altered her anticipated strategy for defending this case in the weeks since the parties submitted their Proposed Supplement (ECF 172).

10. At the Status Conference convened on January 22, 2019, counsel for the Secretary advised the Court that the Secretary's anticipated plan for presenting witnesses and evidence had changed significantly, and the Court directed the Secretary to submit a proposal for amending the Proposed Supplement accordingly.

11. The Secretary therefore submits the Proposed Amended Supplement to the Proposed Joint and Final Pretrial Order attached as Exhibit A.<sup>1</sup> An amended exhibit list is attached as Exhibit C,<sup>2</sup> and an amended supplemental witness list is attached as Exhibit D.<sup>3</sup>

12. The proposed amendments to the Proposed Supplement reflect the Secretary's intended changes to her trial strategy, if trial occurs, as well as issues that have become moot since the Proposed Supplement was submitted. The proposed amendments also note where the parties have since reached agreement on

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<sup>1</sup> For the Court's reference, a redline from the Proposed Supplement (ECF 172) to Exhibit A is attached as Exhibit B.

<sup>2</sup> Due to the file type, counsel is not able to submit a redlined exhibit list but notes that the only changes from the exhibit list submitted with the Proposed Supplement (ECF 172-2) are the Secretary's name in the title of the chart and the addition of the note preceding it.

<sup>3</sup> For the Court's reference, a redline from the Secretary's witness list submitted with the Proposed Supplement (ECF 172-5) to Exhibit D is attached as Exhibit E.

the format of the trial through the meet and confer process ordered by this Court in its Letter of January 16, 2019.

13. If a trial occurs in this matter, these proposed amendments will promote judicial economy and efficient use of the parties' resources by streamlining the trial process and better informing the expectations of the other parties and the Court vis-à-vis the Secretary's witness list and exhibit list.

14. On January 25, 2019, counsel for the Secretary advised counsel for the Plaintiffs and for the Congressional and Legislative Defendant-Intervenors of the changes the Secretary intended to make to her witness and exhibit lists; provided redlined versions of the proposed amendments to the Proposed Supplement and to the Secretary's witness and exhibit lists; and sought the Plaintiffs' and Intervenors' concurrence. Plaintiffs' counsel concurred in the relief sought. Intervenors had not responded as of the filing of this motion.

WHEREFORE, the Secretary of State respectfully requests that this Court allow amendment of the Proposed Supplement to the Proposed Joint and Final Pretrial Order and exhibits thereto, as set forth in Exhibits A, C, and D.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/Scott R. Eldridge

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Dated: January 25, 2019

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

LEAGUE OF WOMEN VOTERS  
OF MICHIGAN, ROGER J. BRDAK,  
FREDERICK C. DURHAL, JR.,  
JACK E. ELLIS, DONNA E.  
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*Attorneys for Defendant Secretary of State*

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**DEFENDANT'S BRIEF IN SUPPORT OF MOTION  
TO AMEND THE PROPOSED SUPPLEMENT TO THE  
PROPOSED JOINT AND FINAL PRETRIAL ORDER**

### **QUESTION OR ISSUE PRESENTED**

Where a new Secretary of State has assumed office and has, after full consideration of the merits, costs, and risks involved in this action, significantly adapted the trial strategy to protect her interests as the principal Defendant in this case, should the Secretary be granted leave to amend the Proposed Supplement to the Proposed Joint and Final Pretrial Order, at the Court's request, to reflect that shift in trial strategy and clarify the Secretary's intended presentation of evidence at trial?

**Defendant Secretary of State's answer: Yes.**

**Plaintiffs' answer: No.**

**Intervenors' answer: Undetermined.**



**CONTROLLING OR MOST APPROPRIATE AUTHORITIES**

None applicable

For the reasons set forth in the preceding Motion, the Secretary of State respectfully requests that this Court allow amendment of the Proposed Supplement to the Proposed Joint and Final Pretrial Order and exhibits thereto, as set forth in Exhibits A, C, and D.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/Scott R. Eldridge

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Dated: January 25, 2019

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 25, 2019, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record in this matter.

Respectfully submitted,

/s/ Scott R. Eldridge

# **EXHIBIT A**

**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
v.	)	Hon. Gordon J. Quist
	)	
RUTH JOHNSON, in her official	)	
Capacity as Michigan	)	
Secretary of State, et al.,	)	
	)	
Defendants.	)	

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

Pursuant to the Court’s Order of December 14, 2018 (ECF #159)  
 (“December 14<sup>th</sup> Order”) regarding a supplemental proposed order, and directive at  
 the Status Conference of January 22, 2019, the parties respectfully submit the  
 following:

**1. Disputed Issues of Fact and Law**

The Parties mutually identify the following relevant issues of fact and law<sup>1</sup> in  
 dispute. The subparts of each issue are intended to be illustrative, not exclusive. The

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<sup>1</sup> The 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 Intervenors list the above facts and issues as being relevant for trial.

parties do not by joining in these lists amend their pleadings or waive any rights.

**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.<sup>2</sup>
- 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

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<sup>2</sup> "Op." refers to this Court's Opinion and Order on various motions for summary judgment. (ECF No. 143.)

result of cracking or packing if the Current Apportionment Plan is used in 2020. Op. 9, 22, 23.

- 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.<sup>3</sup>**

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).

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<sup>3</sup> 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 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:* Pursuant to the Court's Letter dated January 16, 2019, the parties have met and conferred in an effort to streamline the trial process and to that end have submitted a stipulation setting out the agreed upon process for raising objections to trial exhibits. The Secretary preserves the right to rely upon objections to Plaintiffs' exhibits as previously stated, and reserves the right to rely upon the Plaintiffs' objections to Intervenors' exhibits as previously stated. The Secretary does not anticipate any other evidentiary issues at this time.

Congressional Intervenors and Legislative Intervenors 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 14<sup>th</sup> 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.<sup>4</sup> Finally, the parties agree that subject to any other directions from the Court, the documents and 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.

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<sup>4</sup> 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.)

- 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 14<sup>th</sup> 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 14<sup>th</sup> 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 at Tabs 6 (Timmer), 13 (Doyle), 14 (Johnson), 16 (Liu), and 19 (Brunell).

### 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 14<sup>th</sup> Order.

## **5. Trial Proceedings**

### **a. Opening and Closing Statements.**

*Secretary's Statement:* Although the Secretary does not anticipate a lengthy opening or closing statement, the Secretary emphasizes that her interests as a defendant in this case are distinct from and not fully aligned with either Plaintiffs or Intervenors. The Secretary therefore reserves the right to present opening and closing statements and notes that, pursuant to the Court's Letter dated January 16, 2019, and the parties' subsequent meet-and-confer process, the parties have submitted a stipulation setting out the agreed upon sequence and timing of opening and 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 does not anticipate presenting or rebutting district-specific evidence:*

The Secretary notes that, pursuant to the Court's Letter dated January 16, 2019, and the parties' subsequent meet-and-confer process, the parties have submitted a stipulation setting out the agreed upon process for presenting expert evidence and lay witness testimony.

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

Congressional Intervenors and Legislative Intervenors will examine Jeff Timmer and Terry 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 reserves the right to cross-examination as to each plan presented and discussed by the Plaintiffs; the time necessary for cross-examination largely depends on the content of Plaintiffs' presentation.

*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 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:*

**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 does not contemplate any further pretrial motions.

*Congressional Intervenors and Legislative Intervenors Statement:* 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.**

Pursuant to the Court's Letter dated January 16, 2019, the parties have met and conferred in an effort to streamline the trial process and to that end have submitted a stipulation setting out their agreements as to timing, presentation of lay witnesses and expert testimony. 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.

*Congressional Intervenors' and Legislative Intervenors' further statement:*

The Congressional Intervenors and Legislative Intervenors agree with the Secretary's position as set forth in the prior Proposed Supplement to the Proposed Joint and Final Pretrial Order, PageID 7276–77, 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 \_\_\_\_\_, 2019.

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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 Amended Exhibit List
C	Congressional Intervenors' Exhibit List
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