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.	)	
JOCELYN BENSON, in her official Capacity as Michigan Secretary of State, et al.,	)	
Defendants.	)	

CONGRESSIONAL AND LEGISLATIVE INTERVENORS' PRE-TRIAL BRIEF

Pursuant to Local Rule 16.8 and the Court's December 14, 2018 Order to Supplement the Proposed Joint and Final Pretrial Order (ECF No. 159), Congressional and Legislative Intervenors state as follows for their trial brief in this matter:

I. Plaintiffs Lack Standing to Bring Their Claims.

A. Legal standard

The Supreme Court in *Gill v. Whitford* set forth the legal test for establishing standing in partisan gerrymandering lawsuits under the First and Fourteenth Amendments. *See Gill v. Whitford*, 138 S. Ct. 1916, 1925 (2018) (internal quotation omitted) (unanimous op.). To establish standing, each Plaintiff in this case has the burden of proving that she or he: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id* (quotation omitted).

"Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized, i.e., which affects the plaintiff *in a personal and individual way*." *Id* (internal alternations and quotations omitted) (emphasis added).

Where, as here, the alleged harm is a "dilution" of votes, a plaintiff demonstrates an "injury [that] is district specific." *Id* 1930. A "district specific" injury is required because "a person's right to vote is 'individual and personal in nature.'" *Id* at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). This threshold requirement is axiomatic given that, "[a]n individual voter . . . is placed in a single district. He votes for a single representative." *Id* at 1930.

The harm Plaintiffs must show at trial "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Id* at 1931. The desire to transform "the legislature as a whole" is a "collective political interest" which courts cannot enforce. *Id*. at 1932. At bottom, standing in partisan gerrymandering suits requires Plaintiffs to prove "a burden on the plaintiffs' votes that is actual or imminent, not conjectural or hypothetical." *Id*. (internal quotations omitted).

B. Plaintiffs will be unable to satisfy this legal test at trial

The Plaintiffs in this case will be unable or unwilling to show the individualized district specific harm that is mandated by *Gill* assuming the underlying claim is justiciable. *See* Congressional Intervenors' Mot. Summ. J. at 3-16 (ECF No. 121-1) (PageID# 2768-81); Congressional Intervenors' Reply Support Mot. Summ. J. at 1-5 (ECF No. 133) (PageID# 5058-5062); Secretary of State Johnson's Mot. Summ. J and Dismiss at 24-35 (ECF No. 119) (PageID# 2415-26).

While this Court determined that the Plaintiffs had shown a "genuine issue of material fact" as to the question of standing in denying the parties' motions for summary judgment, Plaintiffs will be unable to carry their burden with respect to standing at trial. As this Court is well aware, [t]he facts necessary to establish standing . . . must not only be alleged at the pleading stage, but also proved at trial." *Gill*, 138 S. Ct. at 1931. Each district being challenged by Plaintiffs will require them to produce an individual who resides in this district for questioning. Intervenors anticipate that these witnesses will testify regarding alleged general harms that *Gill* has made clear does not establish standing. That is, the testimony of these witnesses will not demonstrate the

individualized harm that *Gill* requires. As a result, after the trial is concluded, or even sooner under Fed. R. Civ. P. 52(c), this Court should enter a judgment against Plaintiffs due to their lack of standing.

II. The Secretary Is No Longer a Proper Defendant.

A. Legal standard

Article III of the United States Constitution requires that a federal lawsuit include a "actual controvers[y] . . . to assure . . . concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions[.]" *Baker v. Carr*, 369 U.S. 186, 204 (1962). Fundamentally, it is the job of the judiciary "to decide the rights of person and of property, when the persons interested *cannot adjust them by agreement between themselves*." *Lord v. Veazie*, 49 U.S. 251, 255 (1850) (emphasis added). When the litigants "desire precisely the same result . . . [t]here is no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 47, 47 (1971) (per curiam) (emphasis added), quoting *Muskrat v. United States*, 219 U.S. 346 (1911).

B. Secretary Benson cannot show that she has standing to continue serving as a Defendant

Secretary Benson's interests in this lawsuit are not adverse to the Plaintiffs' interests. This was most recently affirmed in her statement to the Court that she *does not plan to call any witnesses and will not produce any evidence* in defense of the Current Apportionment Plan at trial. *See* (ECF No. 213). Secretary Benson further admitted that she will not defend the maps that are *the issue* in this lawsuit. *See* Order Granting Plaintiffs' Motion for Determination of Privilege 149 & 150 (ECF No. 216 at 1 n.1)

(PageID 8122) ("The new Secretary's attorneys have informed the Court that the Secretary does not intent to defend the current apportionment plans at issue in this case."). She is therefore not a proper defendant in this matter.

"It was never the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & G.T.R. Co. v. Wellman*, 143 U.S. 339, 345 (1892). Yet Secretary Benson is attempting just that. *See* (ECF No. 211-1) (in the proposed consent decree the Secretary of State admits liability, ¶ 14, 21, waives defenses, ¶ 18, and admitted to facts not in evidence, ¶ 17.) In addition, Secretary Benson has long been an advocate for redistricting reform and has even spoken at League of Women Voter events. These are not the actions of a defendant with a real case or controversy.

Secretary Benson has also taken several additional significant and affirmative actions that make clear she will not defend the Current Apportionment Plans. These include:

- Shortly after Secretary Benson took office she immediately changed counsel essentially on the eve of trial. *See* (ECF Nos. 181 & 182) (noticing the appearance of new counsel on January 9th).

- Entering into secretive settlement negotiations with Plaintiffs for a consent decree almost immediately after taking office. *See* (ECF No. 205). The Consent Decree admits liability, (ECF No. 211-1 at ¶ 14, 21), waives defenses, *id* at ¶ 18, and admitted to facts not in evidence, *id* at ¶ 17, all of which are directly in conflict with even a colorable defense of the Current Apportionment Plans.

- The Secretary informed the Court that she has no intention of defending the Current Apportionment Plans. *See* (ECF No. 216 at 1 n.1).

- The Secretary informed the Court she has no plans to call *any* expert witness nor call any other witness at trial. This is confirmed in the Secretary's Motion to Alter the Proposed Pretrial Order. (ECF No. 213).

- Secretary Benson's own press release about this matter refuses to acknowledge her status as a named defendant. *See* Press Release, *Secretary of State Jocelyn Benson files brief in League of Women Voters v. State of Michigan*, https://www.michigan.gov/sos/0,4670,7-127--487745--,00.html, accessed on January 20, 2019 (note the case caption for the defendant is "State of Michigan" rather than the actual caption of "Benson." Also, there is no reference in the press release to Secretary Benson being the named defendant in this matter).

The foregoing facts and events make clear that Secretary Benson is no longer adverse to Plaintiffs in this action. This Court should realign the parties so that Secretary Benson is recognized and treated as a Plaintiff. *See e.g. Larios v. Perdue*, 306 F. Supp. 2d 1190 , 1195-97 (N.D. Ga. 2003) (three-judge court) (granting motion to realign a defendant State Senator as a plaintiff in a redistricting case); *Skolnick v. Chicago*, 319 F. Supp. 1219, 1221 (N.D. Ill. 1970) (realigning a defendant city council member who admitted plaintiffs' claims in a redistricting case)

C. The Sixth Circuit has previously instructed that Secretary Benson be replaced as a Defendant if she will not defend the maps

As the Sixth Circuit has instructed this Court, Secretary Benson's refusal to defend the maps should result in this Court appointing someone to take her place. *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 580 (2018). The Sixth Circuit specifically instructed that, "[i]f the new Secretary takes office in January 2019 and decides not to further pursue the state's defense of its apportionment schemes, the district court *will have to appoint someone to take the Secretary's place*." *Id* (emphasis added). As the Court has recognized, *see* (ECF No. 216 at 1, n.1), and the Secretary has admitted, *see id*; *see also supra*, the Secretary will not be defending the Current Apportionment Plans. Accordingly, this Court must "appoint someone to take the Secretary's place." *See League of Women Voters of Mich*., 902 F.3d at 580. This Court has not yet done so.

III. The Equitable Doctrine of Laches Bars Plaintiffs' Claims.

A. Legal standards

"[L]aches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). To that end, a "constitutional claim can become time-barred just as any other claim can." *U.S. v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008) (quoting *Block v. North Dakota*, 461 U.S. 273, 292 (1983)); *cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence. That is true in election law cases as elsewhere." (internal citations omitted)).

Laches applies when "(1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay." *ACLU of Ohio v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004); *Costello v. United States*, 365 U.S. 265, 282 (1961). This Court reserved judgment on the issue of laches until trial. (ECF No. 143 at 41) ("After carefully considering the parties' arguments, the Court will not decide the laches issue at this juncture."). At trial, Intervenors intend to show that both elements of laches have been satisfied.

First, there is no question that the Plaintiffs were impermissibly dilatory in filing their lawsuit. The Current Apportionment Plans at the center of this dispute was passed by the Michigan State Legislature and signed by the Governor in 2011. There is extensive evidence that the League of Women Voters believed that the rights of their members were being violated at that time. *See* Proposed Intervenor Exhibits 2 – 7 (ECF No. 172-3). Furthermore, the Plaintiffs waited until four years after forming a belief that the 2011 map was unconstitutional until they first retained experts in January of 2015 to conduct

an analysis of the Current Apportionment Plans. Intervenors' Proposed Trial Exhibits 16 & 17 (ECF No. 172-3). Plaintiffs' decision to sit on their rights for over six years should be fatal to their claims.

Second, Intervenors will show that they were prejudiced by the delay such that their due process rights have been negatively impacted. *See e.g.,* Cong. Intervenors' Mot. Summ. J. at Exhibits at D, J-P (ECF No. 121) (detailing generally the inability to remember certain meetings or conversations that occurred many years ago). Despite being able to bring their claims at an earlier date, Plaintiffs waited *years* before doing so. This resulted in a number of key witnesses being unable to remember significant details about the map drawing process. *See, e.g., id.* Nearly every witness deposed was unable to remember details regarding the process used to draft the maps. In fact, the total universe of lost potential evidence and memories is unknown, and never can be known, because of the Plaintiffs' dilatory actions. Since Intervenors will prove the Plaintiffs did not act with the requisite diligence in asserting their rights and they have been prejudiced as a result, this Court should enter judgment for the Defendants.

IV. On the Applicability of the *Gill* Concurrence and the Pending Supreme Court Partisan Gerrymandering Cases.

a. Gill v. Whitford

The Supreme Court unanimously decided the contours of standing as it relates to partisan gerrymandering claims (should they be determined to be justiciable) in *Gill v. Whitford*. 138 S. Ct. 1916. In *Gill* four members of the unanimous majority filed a concurring opinion detailing what, in their view, a Plaintiff would need to prove in order to prevail on a partisan gerrymandering claim under the First Amendment. *See Gill*, 138 S. Ct. at 1934 (Kagan, J. concurring). Many courts, including this one, have taken this

concurrence as an endorsement or "roadmap" of what a plaintiff must show to successfully prove a First Amendment partisan gerrymandering claim. *See* Order Denying Mot. Summ. J. (ECF No. 143); *see also Ohio A. Philip Randolph Inst. v. Smith*, No. 1:18-cv-357, 2018 WL 3872330, *4 (S.D. Ohio Aug. 15, 2018) (three-judge panel); *Common Cause v. Rucho*, 318 F. Supp. 777, 801 (M.D.N.C. Aug. 28, 2018). This position, however, is not a majority view of the Supreme Court and may well be held invalid in the coming months.

The unanimous Court in *Gill* specifically disclaimed any reliance on the concurring opinion when they stated "[t]he reasoning of this Court with respect to the disposition of this case is set forth in this opinion *and none other*." *Gill*, 138 S. Ct. at 1931 (emphasis added). Stated differently, the four concurring Justices specifically acknowledged that *their own concurring opinion* does not control. *Id*. There can be no better evidence that the authority offered by the concurring opinion should not be followed by this Court given that the very authors of that opinion noted the inapplicability of the concurring opinion *in the same case*. *Id*.

The *Gill* concurring opinion does not have majority support on the Supreme Court and is not a sound basis to determine the rights of the parties under current Supreme Court precedent. While a number of district courts have similarly and improperly invoked the *Gill* concurrence, *see e.g., Common Cause,* 318 F. Supp. 777, this Court should not follow in their footsteps given the strong likelihood that a majority of the Supreme Court may well reject this standard. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different

case."); *but see* (ECF No. 143) (citing to *Common Cause v. Rucho* no less than fifty-five times).

b. *Rucho v. Common Cause* and *Lamone v. Benisek* .

The United States Supreme Court has announced that oral argument in *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726, will take place on March 26, 2019. In both cases the Supreme Court postponed the question of jurisdiction until a decision on the merits is reached.

This Court, in denying summary judgment, cited *Rucho* no less than fifty-five times. (ECF No. 143). It stands to reason that this Court should await the Supreme Court's ruling on this case given that it will have a significant, and potentially dispositive, impact on any decision of this Court. In fact, given the timing of *Rucho* and the timing of the inevitable appeal in this case, the likely scenario—should this case proceed—is a remand to this Court from the Supreme Court with instructions to reconsider in light of *Rucho* and *Benisek*. Should the justiciability of these claims be sustained, a remand will likely require additional trial days, factual development, and legal briefing from the parties. Therefore, this Court, in order to preserve the precious resources of the Parties as well as the Court, should stay these proceedings or postpone any post-trial decision until the Supreme Court issues its opinions in *Rucho* and *Benisek* and receives briefing from the parties with respect to the impact of those decisions on this case.

V. Plaintiffs' Proposed Standard To Evaluate Equal Protection Clause Claims Is Not Judicially Manageable.

The doctrine of justiciability imposes a limitation that prevents courts from entering into a dispute that is entrusted to the political branches or into disputes where no judicially manageable standard exists to evaluate the claim. *Vieth v. Jubelirer*, 541 U.S.

267, 277-78 (2004) (plurality op.). Judicial power is limited to deciding only those cases where a judicially manageable standard exists because the Article III power of courts must be governed by standards and rules that yield decisions that are "principled, rational, and based upon reasoned distinctions. *Id*. at 278.

A majority of the Supreme Court has never agreed on a standard to evaluate partisan gerrymandering claims. In fact, fifteen justices of the U.S. Supreme Court have issued opinions on what the proposed standard should be. Yet none of these opinions persuaded a majority of justices on the Court. Intervenors will show that Plaintiffs' proposed standard will suffer the same fate.

A. Previous efforts to articulate a standard to evaluate partisan gerrymandering claims have failed.

Political complaints about "partisan gerrymandering" are as old as the Nation itself. *Vieth*, 541 U.S. at 274-75. The Boston Gazette coined the term "gerrymandering" in 1812 after Governor Eldridge Gerry passed a districting plan in Massachusetts that allegedly disadvantaged the Federalists. Elmer C. Griffth, *The Rise and Development of the Gerrymander* 17 (1906). In the 205 years since, no judicially manageable standard has emerged to evaluate partisan gerrymandering claims in federal court.

This failure is not through lack of trying. Although both this Court and the Plaintiffs view *Davis v. Bandemer* as holding that partisan gerrymandering claims are justiciable, *League of Women Voters of Mich. v. Johnson*, No. 17-14148, 2018 U.S. Dist. LEXIS 202805, *43 (E.D. Mich. Nov. 30, 2018), the *Bandemer* Court could not agree on the precise *standard* to evaluate partisan gerrymandering claims.

Beginning with *Davis v. Bandemer*, fifteen different Justices of the United States Supreme Court have issued opinions proposing purportedly judicially manageable

standards to evaluate partisan gerrymandering claims. *Davis v. Bandemer*, 478 U.S. 109, 127-37 (1986) (plurality op.); *id*. at 161-62 (Powell, J., and Stevens, J., concurring in part and dissenting in part); *Vieth*, 541 U.S. at 292 (noting that four dissenters proposed three different standards); *see League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 414 (2006) (Kennedy, J., concurring) (acknowledging that disagreement still persists in articulating the standard to evaluate partisan gerrymandering claims but declining to address the justiciability issue); *see also id*. at 471-72 (Stevens, J., and Breyer, J., concurring in part and dissenting in part) (stating that plaintiffs proved partisan gerrymandering under proposed test); *id*. at 483 (Souter, J., and Ginsburg, J., concurring in part, dissenting in part). Despite all of these opportunities to do so, the Supreme Court has never issued a binding majority opinion articulating the appropriate standard to evaluate partisan gerrymandering claims.

It stands to reason that partisan gerrymandering cases are not justiciable given that no Supreme Court majority can identify the precise judicially manageable standard to evaluate such claims. *Bandemer*'s holding also calls into serious doubt the justiciability of these claims. The Court stated that it was "*not* persuaded that there are *no* judicially discernible and manageable standards by which political gerrymander cases are to be decided." *Bandemer*, 478 U.S. at 123 (emphasis added). The double negative was necessary because the Court could not agree a judicially manageable standard. *Vieth*, 541 U.S. at 278-79.

In *Vieth*, the Supreme Court expressly and unanimously abandoned the *Bandemer* plurality's test. *See Vieth*, 541 U.S. at 283-84 (plurality op.); *id*. at 308 (Kennedy, J., concurring); *id*. at 318 (Stevens, J., dissenting); *id*. at 346 (Souter and Ginsburg, JJ.,

dissenting); *id*. at 355-56 (Breyer, J., dissenting). The plurality opinion found that "[e]ighteen years of judicial effort with virtually nothing to show for it justify us revisiting the question whether the standard promised by *Bandemer* exists." *Id*. at 281. The Court stated:

> no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.

Id. The Court's lack of agreement on this issue has persisted in cases since *Vieth*. *See LULAC*, 548 U.S. at 414, 417-19, 471-72, 492, 512. In fact, it has now been over *thirty years* since the *Bandemer* Court failed to identify a judicially manageable standard and the Court is no closer to test today than it was thirty years ago. *Gill*, 138 S. Ct. at 1932-33 (questioning the validity of plaintiffs' proposed partisan asymmetry standards and the efficiency gap as producing only averages about political parties, not the weight of individual votes of individuals).

The Supreme Court's recent opinion in *Gill* similarly rejected the opportunity to articulate a standard courts must use to evaluate partisan gerrymandering claims. *Id*. at 1929. Instead, the Court resolved only what plaintiffs asserting partisan gerrymandering violations must plead and prove to satisfy Article III standing.

B. Plaintiffs' Predominant Purpose Standard Is Deficient.

The first prong of Plaintiffs' proposed standard required a showing that the legislature's "predominant purpose in drawing the district was to subordinate the interests of supporters of a disfavored party and entrench a representative from a favored party in power." *See League of Women Voters of Mich.*, 2018 U.S. Dist. LEXIS 202805 at * 45

(citing *Common Cause v. Rucho*, 318 F.Supp. 3d 777, 852 (M.D.N.C. 2018) (three-judge court)). According to the Plaintiffs and this Court, this standard still permits "a state legislative body [to] engage in some degree of partisan gerrymandering, so long as it was not predominantly motivated by invidious considerations." *Id*. at *46 (quoting *Common Cause*, 318 F. Supp.3d at 852).

The predominant purpose test is deficient. This test was derived by the *Common Cause* court, which incorporated the Supreme Court's racial gerrymandering jurisprudence for use in the partisan gerrymandering context. In doing so the Court committed three errors.

First, the *Vieth* plurality and Justice Kennedy rejected this very test. In *Vieth*, the plaintiffs proposed that to satisfy the intent element of their partisan gerrymandering claim, they must show that the "mapmakers acted with a predominant intent to achieve partisan advantage which can be shown by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." *Vieth*, 541 U.S. at 285. The Supreme Court ruled that this test is not judicially manageable. *See id*. at 285-86 (plurality op.); *id*. at 308 (Kennedy, J., concurring) (stating that the plurality "demonstrates the shortcomings of the other standards that have been considered to date...including the parties before us...."); *LULAC*, 548 U.S. at 417-18 (opinion of Kennedy, J.) (rejecting plaintiffs' proposed "sole intent" standard).

The fact that the predominant intent standard is the same test that is used to evaluate racial gerrymandering claims does not make the standard judicially manageable in the partisan gerrymandering context. *Vieth*, 541 U.S. at 285-86; *id*. at 308 (Kennedy,

J., concurring). This is because "the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered." *Id*. at 286. Accordingly, the predominant intent standard in the racial gerrymandering context is judicially manageable. *Id*. On the other hand, because partisan motivations are both lawful and expected in redistricting, finding justiciability opens the floodgates to litigation and asks courts to determine at what point does the lawful and expected partisan intent of mapmakers become "so substantially affected by the excess" that the map is unconstitutional. *Id*. Therefore, the predominant intent standard is both "indeterminate," "vague," and "neither discernable nor manageable." *Id*. at 284-285, 290.

Second, racial classifications—unlike political classifications—are always and inherently suspect. *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 440 (1985) (stating that statutes that classify by race "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy" and are subject to strict scrutiny).

By contrast, "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." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). In fact, political affiliation is considered among the traditional redistricting criteria. *See, e.g., Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015) ("We have listed several [traditional race-neutral districting principles] including compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests…incumbency protection, *and political affiliation*.") (emphasis added) (internal citations and quotation marks omitted). In racial gerrymandering cases,

the legislature's political motivation for districting is also recognized as a valid *defense*. *See generally Easley v. Cromartie,* 532 U.S. 234 (2001). The burden to prove unlawful intent based upon politics must therefore be higher than the burden to prove racial discrimination.

Third, 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. This further demonstrates that the test to prove a racial gerrymander is wholly inapplicable to cases involving a partisan gerrymander.

Plaintiffs' proposed test to satisfy the intent prong of their claim has been rejected. It is neither determinate nor is it judicially manageable. It is instead vague and permits "election impeding" lawsuits "contending that partisan advantage was the predominant motivation." *Vieth*, 541 U.S. at 286. This Court should rule that Plaintiffs' proposed intent prong is not judicially manageable.

C. The Effect Test is deficient.

Plaintiffs' test to prove unconstitutional effect is equally flawed. Plaintiffs must prove that "the lines of a particular district have the effect of discriminating against—or subordinating—voters who support candidates of a disfavored party, if the district dilutes such voters' votes by virtue of cracking or packing." *League of Women Voters of Mich.*, 2018 U.S. Dist. LEXIS 202805 *46.

Similar to the proposed intent prong, the effect prong is substantially similar to the effect prong the *Vieth* Court rejected. In *Vieth*, the plaintiffs stated that the requisite unconstitutional effect is established when: "(1) the plaintiffs show that the districts systematically "pack" and "crack" the rival party's voters *and* (2) the court's examination of the 'totality of circumstances' confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats." *Vieth*, 541 U.S. at 286-87 (emphasis in original). The Supreme Court rejected this test because its premise—that one can identify a person's politics as readily and discernibly as a person's race—is flawed. The Court stated: "a person's politics is rarely as readily discernible—and never permanently discernible—as a person's race." *Id*. at 287. This is because people's politics shift from one election to the next and even within the same election. *Id*. These facts alone "make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy." *Id*. at 287.

This test also assumes a constitutional right to proportional representation. *Id*. at 288. Additionally, the test assumes that statewide races "establishes majority status for district contests", an assumption that to be true would require that only one factor determines voting behavior, namely, partisan affiliation. *Id*. Finally, party constituents can be "cracked" or "packed" for geographical reasons. Democratic voters, for example, can be naturally "packed" into cities. *Id*. at 290. Unlike one person, one vote cases, the proposed test in *Vieth* required judges to decide "whether a districting system will produce a statewide majority for a majority party", an exercise that that "asks [judges] to make determinations that not even election experts can agree upon." *Id*.

Justice Kennedy agreed that the *Vieth* plaintiffs' test was unmanageable for the reasons articulated by the Court. *Id*. at 307-08 (Kennedy, J., concurring). Justice Kennedy concluded that "Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Id*. The importance of proposing a judicially manageable standard for evaluating unconstitutional effects "is *critical* to [the Court's] intervention." *Id*. at 308 (Kennedy, J., concurring).

Plaintiffs' arguments here regarding the Effect Test suffer from the same unmanageable defects.

First, Plaintiffs do not attempt to define how much partisanship and how much partisan effect is too much. This alone makes Plaintiffs' test unmanageable. *LULAC*, 548 U.S. at 420 (Kennedy, J.) (stating that plaintiffs partisan asymmetry standard does not shed light on "how much partisan dominance is too much.").

Second, Plaintiffs' reliance on partisan asymmetry to demonstrate burden has already been rejected. *Id*. at 419-20 (2006) (Kennedy, J.) (stating that asymmetry fails to "provide[] a standard for deciding how much partisan dominance is too much").

Third, the use of the efficiency gap and other "group political success measures" (ECF 119 at 43) (Page ID 2422) to demonstrate cracked and packed voters is deficient because the test only depicts harm on political parties, not on individual voters. Furthermore, the tests only show averages, not specific harm. *Gill*, 138 S. Ct. at 1932-33. In fact, Dr. Mayer admitted as much. *See* (ECF 119-17 at 7) (Page ID 2583) ("An efficiency gap is not calculated for a single district."). Additionally, Dr. Warshaw also

stated that he did not demonstrate which districts were packed and cracked. (ECF 119-14 at 27) (Page ID 2553). Dr. Chen's analysis suffers from the same shortcomings as he uses social science metrics to calculate statewide asymmetry. *See* (ECF 119 at 44-45, 48-49) (Page ID 2423-24, 2427-28). None of these tests are a "well-accepted" measure of partisan-fairness and these measures are subject of "serious criticism by respected political scientists." *Id*. at 49 (Page ID 2428).

Proportionality is also the underlying basis of all of Plaintiffs' social science metrics that they will rely on to prove their claims. But the concept that there is a constitutional right to proportionality has been repeatedly rejected. *Bandemer*, 478 U.S. at 132 (plurality op.); *id*. at 157-58 (O'Connor, J., dissenting); *Vieth*, 541 U.S. at 288 (plurality op.); *id*. at 308 (Kennedy, J., concurring); *id*. at 338 (Steven, J., dissenting); *id*. at 352 n.7 (Souter, J., dissenting).

Plaintiffs' proposed standards do not prove an *individual's* vote is diluted. *Gill*, 138 S. Ct. at 1931-33. Plaintiffs' proposed standard to prove vote dilution is unmanageable and should be rejected.

VI. Plaintiffs' Proposed Standard To Evaluate First Amendment Claims Is Not Judicially Manageable.

Although the Supreme Court has opined that free speech and association claims are at least plausible, *see Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015), a plurality of the Court has expressed concerns that 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 cases because partisan intent is inevitable. *See, e.g.*, *Gaffney*, 412 U.S. at 753.

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); *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 . . . .").

The opinion of the Supreme Court in *Gill* demonstrates that the First and Fourteenth Amendment claims are intertwined. *See Gill*, 138 S. Ct. at 1925 (noting that the three-judge district court held that the Wisconsin redistricting plan violated both the First Amendment and the Fourteenth Amendment and remanding for fact finding as to whether plaintiffs have the requisite standing).

Even if an independent First Amendment claim does exist, Plaintiffs cannot demonstrate 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 were 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."). There is no constitutional "right" to win an election. *See id; see also Bandemer*, 478 U.S. at 132; *Shaw v. Reno*, 509 U.S. 630, 682 (1993) (Souter, J., dissenting) ("As we have held, one's constitutional rights are not violated merely because the candidate one supports loses the election or because a group (including a racial group) to which one belongs winds up with a representative from outside that group.") (citing *Whitcomb v. Chavis*, 403 U.S. 124, 153-155 (1971)).

Assuming that a First Amendment claim does exist independent of the Fourteenth Amendment claim, Plaintiffs must prove that the mapmakers acted with "specific intent" to "burden individuals or entities that support a disfavored candidate or political party." *League of Women Voters of Michigan*, No. 17-14148, 2018 U.S. Dist. LEXIS 202805 at *53. Even if Plaintiffs could establish this, they must then demonstrate that the challenged districts actually caused the injury, meaning "that the districting plan in fact burdened the political speech or associational rights of such individuals or entities." *Id.*

Finally, Plaintiffs must show causation, meaning that "absent the mapmakers intent...the concrete adverse impact would not have occurred." *Id*.

For the intent requirement, 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. *Shapiro*, 203 F. Supp.3d at 597. 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*.

With respect to the effect requirement, Plaintiffs' proposed standard is not judicially manageable because it is not limited and precise. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). All laws involving elections burden First Amendment rights. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (stating that all elections laws "inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends."). As stated *supra* at 19-20, Plaintiffs' associational rights are not harmed. Furthermore, the evidence Plaintiffs adduce to demonstrate effect is not judicially manageable and not precise to the individual Plaintiffs and the individual Plaintiffs' districts. *See supra* at 17-18.

The evidence will show that Plaintiffs do not satisfy this standard.

VII. PLAINTIFFS CANNOT PROVE A PARTISAN GERRYMANDER WHEN THE LEGISLATURE FOLLOWED THE APOL CRITERIA.

Even if the Plaintiffs have standing, and even if Plaintiffs' proposed tests for evaluating their claims are judicially manageable, the evidence will show that the enacted House, Senate and Congressional Districts do not constitute an unconstitutional partisan gerrymander. Adherence to the Apol criteria "substantially governed and are reflected in the drawing of the enacted House, Senate, and Congressional plans.". *See, e.g.,* Timmer Report at 46. The few departures from Apol criteria were permissible under Michigan Supreme Court precedent and were for reasons other than partisanship. *See id*.

The Michigan Supreme Court imposed the Apol criteria on redistricting for Michigan in 1982. *In re Apportionment of State Legislature-1982*, 413 Mich. 96, 154-156, 321 N.W.2d 565, 584 (Mich. 1982). The Michigan legislature codified these criteria into law. *See* Mich. Comp. Laws § 4.261 (state legislative districts); *id*. § 3.63. The criteria focus on minimizing splits of counties, and minimizing splits of other political subdivisions. *See id*. § 4.261(e-h); *id*. § 3.63(c). Adhering to the Apol criteria "significantly limit[s] the map drawers' discretion." Timmer Report at 8.

The relief Plaintiffs' seek invites this Court to override the Apol criteria[1]

For example, Plaintiffs challenge House District 60 as a partisan outlier. *See* Pls.' Opp.'n to Mot. for Summ. J., Ex. 3 (ECF 129-4 at 2) (PageID 3423). But House District 60 complies with the Apol criteria because it is wholly contained within Kalamazoo County. Timmer Report at 29. House District 60 further complies with Apol because in House District 60, there is not a single county, city, or municipality that is split. Timmer

[1] The Constitution vests the state legislatures with the authority to impose the

Report at 13. In contending this is a partisan outlier, Plaintiffs are inviting this Court to override the Apol criteria.

Plaintiffs cannot prove that factors other than the Apol criteria and the federal Voting Rights Act were the primary drivers of the resulting district lines. Accordingly, Plaintiffs cannot prove the political considerations predominated in any challenged district. This is the sine qua non of Plaintiffs' claim. Unable to prove this claim, this Court should reject Plaintiffs' challenge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed with the Clerk via the CM/ECF system that has sent a Notice of Electronic filing to all counsel of record.

/s/ Jason Torchinsky
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