UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State, et al.

Defendant.
_____/

Civil Action No. 17-cv-14148

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

CONGRESSIONAL AND LEGISLATIVE DEFENDANTS-INTERVENORS' RESPONSE IN OPPOSITION TO JOINT MOTION TO APPROVE CONSENT DECREE

The Congressional and Legislative Defendants-Intervenors ("Intervenors"), by and through their attorneys, hereby respond in opposition to Plaintiffs and the Defendant Secretary of State's (the "Moving Parties") Joint Motion to Approve Consent Decree and Brief in Support (the "Joint Motion") (ECF 211), for the reasons detailed in the attached brief in support.

BRIEF IN SUPPORT

CONCISE STATEMENT OF ISSUE(S) PRESENTED

Whether the Court should grant Plaintiffs and Defendant Secretary's Joint Motion to Approve Consent Decree?

Moving Parties' Answer:	Yes.
Congressional and Legislative Intervenors' Answer:	No.
The Court Should Answer:	No.

CONTROLLING/MOST APPROPRIATE AUTHORITY

Cases

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997)

Baker v. Carr, 369 U.S. 186 (1962)

Gill v. Whitford, 138 S. Ct. 1916 (2018)

Growe v. Emison, 507 U.S. 25 (1993)

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)

Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501 (1986)

Lord v. Veazie, 49 U.S. 251 (1850)

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

Mills v. Green, 159 U.S. 651 (1895)

Moore v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 47 (1971)

United States v. Johnson, 319 U.S. 302 (1943)

United States v. Windsor, 570 U.S. 744 (2013)

Upham v. Seamon, 456 U.S. 37 (1982)

INTRODUCTION

In their Joint Motion to Approve Consent Decree (the "Joint Motion") (ECF No. 211), Plaintiffs and Defendant Secretary of State (the "Moving Parties") request that this panel approve and enter a proposed Consent Decree, even though: (1) *Rucho* and *Benisek* are set for oral argument in the Supreme Court on March 26, 2019, and, contrary to Plaintiffs' and Defendant's contention that the proposed consent decree be "final[] and enforceable, regardless of how the Supreme Court decides *Rucho* and *Benisek* and any other partisan gerrymandering case," this court cannot enforce a decree if it lacks subject matter jurisdiction; (2) this court may lack subject matter jurisdiction over the entire case, pending the upcoming decisions/instructions from the Supreme Court in *Rucho* and *Benisek*; (3) Defendant Secretary lacks standing as a Defendant to pursue entry of the consent decree; (4) this court has no jurisdiction to enter a consent decree without the consent of all impacted intervenors and the proposed consent decree exceeds the authority of federal courts because of the remedy provision contained therein; and (5) the alleged "Enjoined Districts" contemplated in the proposed consent decree do not violate the U.S. Constitution.

For these and other reasons, each of which are more fully discussed below, Congressional and Legislative Defendants-Intervenors respectfully request that this Honorable Court deny the Joint Motion.

ARGUMENT

I. The Proposed Consent Decree Cannot be Made Immune to the Supreme Court's Rulings in *Rucho* and *Benisek*

As this panel is well-aware, the Supreme Court is set to hear two cases – *Rucho* and *Benisek* – that will have a significant, and potentially dispositive, impact on this matter, and specifically the justiciability of the present claims in this litigation and whether this court even has subject matter jurisdiction to consider same. The Moving Parties expressly recognize this. As the Joint Motion states, "the Supreme Court will likely rule in those cases during this term, and the rulings may very well significantly bolster or damage, or even eliminate, at least of the party's arguments here." (ECF No. 211).

However, it appears that the Moving Parties want the proposed consent decree to be in effect no matter what the Supreme Court decides in *Rucho* and *Benisek*, as the Joint Motion then contends that the proposed consent decree "be final, and enforceable, regardless of how the Supreme Court decides *Rucho* and *Benisek* and any other partisan gerrymandering case." (*Id*.) Indeed, the Moving Parties are attempting to make the proposed consent decree immune from the Supreme Court's rulings in *Rucho* and *Benisek*, as the proposed consent decree provides: "[T]he Parties will be bound by this Consent Decree regardless of future developments including, without limiting the generality of the foregoing, any decisions in *Rucho* or *Benisek*." (ECF No. 211-1).

Neither parties nor federal courts can "Supreme Court proof" injunctions (such as the proposed consent decree herein) in such a manner. It is improper to attempt to circumvent the Supreme Court's decisions/instructions in *Rucho* and *Benisek*. This court cannot agree to such an order, since in cases regarding Article III, Section 2 of the Constitution, federal courts can only address that which violate the Constitution or federal law. This is a component of the basic principle of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Moreover, and perhaps most significantly, this court cannot agree to the enforceability of the proposed consent decree "regardless of future developments including . . . any decisions in *Rucho* or *Benisek*" because such language attempts to have this court enter and enforce the proposed consent decree in a case where this court may not even have subject matter jurisdiction at all. This is a significant – and potentially dispositive – issue in this case, and is a serious and substantial question pending before the Supreme Court. In both *Rucho* and *Benisek*, the Supreme Court postponed the question of jurisdiction until a decision on the merits is reached, and there is a likelihood that the Court rules that there is no jurisdiction for these cases in the very near future. In that instance, no decree can be enforced if this court lacks subject matter jurisdiction, despite whatever language the Moving Parties include in the proposed consent order in an attempt to make same immune from the Supreme Court's authority. Indeed,

> Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. **For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant**, *California v. LaRue*, 409 U.S. 109 (1972), principles of estoppel do not apply, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to **deny its jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record**." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (emphasis added); *see also Pollington v. G4S Secure Solutions (USA) Inc.*, 712 F. App'x 566 (6th Cir. 2018) (waiver cannot convey subject matter jurisdiction); *Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056 (6th Cir. 2014) (same – subject matter jurisdiction cannot be waived); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (jurisdiction cannot be waived or ignored – "The limits upon federal jurisdiction…must be neither disregarded nor evaded.").

Importantly, "a court without subject matter jurisdiction **cannot enter a valid judgment** and a purported judgment from a court **without subject matter jurisdiction is void *ab initio***." *Danzeisen v. Cook*, No. 3:09-cv-248, 2009 U.S.

Dist. LEXIS 68446, *3 (S.D. Ohio 2009) (emphasis added). In other words, the parties cannot consent to or waive the subject matter jurisdiction requirement, and this court cannot enter an order if it lacks subject matter jurisdiction over the case, regardless of the language contained in the proposed consent decree.

Thus, if the Supreme Court ultimately decides in *Rucho* and *Benisek* that there is no subject matter jurisdiction for partisan gerrymandering cases such as the present case, then the proposed consent decree is invalid and this court cannot agree to the enforceability of same, despite any language inserted by the Moving Parties to the contrary. The Moving Parties' attempts to engineer a consent conferral or waiver of subject matter jurisdiction would have no legal significance, and this Court should not afford it any. Accordingly, the Moving Parties cannot merely make the proposed consent decree "Supreme Court-proof" or otherwise immune from the Supreme Court's authority or appellate review, and the Joint Motion (and corresponding proposed consent decree) should be denied.

II. The Secretary Is No Longer a Defendant in this Lawsuit and Therefore Lacks Standing to Approve the Consent Decree.

The Court should also deny the motion because Defendant Secretary is no longer truly a defendant and therefore lacks standing to seek the relief requested in the proposed consent decree. "Article III, § 2, of the Constitution confines federal

courts to the decision of 'Cases' or 'Controversies.' Standing to sue **or defend** is an aspect of the case-or-controversy requirement." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (emphasis added).

Stated differently, both sides to a dispute must possess an interest (i.e., standing) in the outcome to generate a true case or controversy. *Mills v. Green*, 159 U.S. 651, 653 (1895) (dismissing case which involved "no actual controversy involving real and substantial rights between the parties to the record"); *United States v. Johnson*, 319 U.S. 302 (1943) (dismissing case because parties did not appear genuinely adverse making lacking "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court."). Therefore, the federal courts have "no power under the Constitution to invalidate this democratically adopted legislation." *United States v. Windsor*, 570 U.S. 744, 778 (2013) (Scalia, J. dissenting).

Defendant Secretary has openly refused to defend the law being challenged by Plaintiffs. Shortly after taking office Defendant Secretary announced, despite it being obviously false in light of the necessity of a trial, "[i]t's clear the court has found significant evidence of partisan gerrymandering," as well as that she was working to settle this case. *See* https://www.detroitnews.com/story/news/local/michigan/2019/01/17/benson-seeks-settle-federal-gerrymandering-case/2608

845002/ (last visited 1/30/19). The Defendant Secretary also informed the Court she "does not intend to defend the current apportionment plans at issue in this case." (ECF No. 216, n.1). And, according to another recent filing, "the Secretary does not intend to call *any* witnesses in her case-in chief" including expert witnesses. (ECF 213-4, p. 4) (emphasis added).

The Secretary is *not* an adverse party to this proceeding. This is evidenced by both her enthusiasm to enter into Consent Decree and her desire and insistence to not defend the Current Apportionment Plan *irrespective* of any possible settlement. Accordingly, the Court cannot bless an agreement between non-adverse parties.

It is nearly axiomatic that "a judgment" entered into by non-adverse parties "is no judgment of the court. It is a nullity . . . ." *Lord v. Veazie*, 49 U.S. 251 (1850). The judicial power may only be exercised when "the allegation will determine the outcome of a lawsuit, and is *contradicted by the other party*." *Windsor*, 570 U.S. at 780 (Scalia, J., dissenting) (emphasis added). While the current Secretary and Plaintiffs may wish it to be true, the Court cannot simply "pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding; absent a 'real, earnest and vital controversy between individuals,' . . . ." *Id* at 781 (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936)). Put another way, there is "no case or controversy within the meaning of Art. III of the

Constitution" when "both litigants desire precisely the same result . . . ." *Moore v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 47, 47-48 (1971). Whether the issue is prudential, *see id* at 760 (majority op.), or justiciability under Article III, *id* at 780-81, the Court must demand "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

When the Secretary made the determination that she would no longer defend the legislative apportionment plan, she lost standing to enter into a Consent Decree with respect to that plan.[1] *Cf. Windsor*, 570 U.S. 744 (federal government refused to *defend* the law but did not attempt to enter into a consent decree invalidating the original congressional enactment). Just as two Plaintiffs could never enter a consent decree binding the state legislature, the Defendant Secretary lacks standing as a defendant to enter into a consent decree. As a result, the Court should deny the Joint Motion.

III. This Court May Lack Subject Matter Jurisdiction Over this Entire Case Pending the Supreme Court's Decisions in *Rucho* and *Benisek*

[1] To that end, it is clear based upon the evidence that, for purposes of standing and Article III jurisdiction, the parties should be realigned to their true positions. *See United States v. Board of Ed. of City of Chicago*, 11 F.3d 668, 671 (7th Cir. 1993) (realigning parties for Article III jurisdictional purposes); *cf. Travelers Indem. Co. v. J.S. Ramstad Constr. Co.*, 118 F. Supp. 423, 427 (D. Alaska 1954) (realigning parties to reflect "their actual positions in relation to each other in this action" in a non-diversity case).

This panel is well-aware that one of the primary issues in this litigation has been the justiciability of Plaintiffs' claims, and whether this court has subject matter jurisdiction to consider same. Fortunately, the Supreme Court has announced that oral argument in the *Rucho* and *Benisek* cases will take place on March 26, 2019. *Rucho* and *Benisek* contain the same claims and issues present in the instant case. The specific applicable and dispositive issues common to both *Rucho* and *Benisek* are precisely the same dispositive issues currently before this court; namely, whether such partisan gerrymandering disputes are justiciable, and if so, what legal and factual standards courts must apply when resolving such disputes.

Rucho and *Benisek* are thus directly applicable, instructive, and dispositive to the present case. Importantly, in both cases the Supreme Court postponed the question of jurisdiction until argument on the merits. With oral argument in *Rucho* and *Benisek* occurring on March 26, 2019, the Supreme Court is set to consider and resolve the question of jurisdiction of these types of partisan gerrymandering cases.

The fact that the Supreme Court postponed consideration of the question of jurisdiction in *Rucho* and *Benisek* rather than noting probable jurisdiction greatly increases the likelihood that such partisan gerrymandering cases (such as *Rucho*, *Benisek*, and the present case) could be decided on threshold questions of

justiciability or standing. This signals that at least some members of the Supreme Court, if not the majority, doubt whether federal courts have jurisdiction in either case. It would appear therefore that Plaintiffs have little to no prospect of succeeding on the merits of any of their claims in this case due to the pending *Rucho* and *Benisek* decisions. The consenting parties clearly know this, and it is precisely why they are seeking to accelerate this process and insulate the proposed decree from further review.

It should be noted that 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 in *Rucho* 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 *Benisek* and 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*. This will likely require additional factual development and legal briefing from the parties. In the interest of judicial economy and in order to preserve limited resources, this Court should stay these proceedings or at the very least any post-trial decision until the Supreme Court completes its review of *Rucho* and *Benisek*.

It should also be noted that if the Supreme Court determines in *Rucho* and *Benisek* that there is no subject matter jurisdiction for federal courts in these

partisan gerrymandering cases, not only would the proposed consent decree violate well-established law, it would also unnecessarily cause confusion and chaos throughout the State of Michigan. Indeed, the Moving Parties identify eleven "Enjoined Districts" in the proposed consent decree, and observers believe that if entered, the effect of the proposed consent decree could result in the redrawing of twenty-nine state house districts and seriously and substantially disrupt the state legislature and upcoming elections.

Not only would the relief in the proposed consent decree cause unnecessary confusion and disruption, it would also likely cause a substantial domino effect on other districts not presently contemplated and create unpredictable and unforeseeable consequences with regard to elections, incumbents, and the state legislature. All of which would be unnecessary, primarily because there is a better than average likelihood that the Supreme Court rules in *Rucho* and *Benisek* that there is no subject matter jurisdiction for federal courts in these cases, or, if subject matter jurisdiction is found, the Supreme Court would lay out clearly standards and guidelines for such cases that differ from those adopted by the lower courts in *Rucho* and *Benisek*. The only practical upshot of entering the proposed consent decree at this stage would be unnecessary confusion, chaos, and disruption in Michigan's legislature and electorate.

As discussed above and herein, without subject matter jurisdiction over these matters, this court cannot enter the proposed consent decree, and it would amount to a waste of the court's, the parties', and the public's resources, time, and money to enter the proposed consent decree only to have the Supreme Court declare that federal courts do not have subject matter jurisdiction over these partisan gerrymandering cases or otherwise establish standards/frameworks that diverge from those contemplated in the proposed consent decree.

IV. This Court Has No Authority to Enter a Consent Decree Without the Consent of All Impacted Intervenors, Especially Where, As Here, the Proposed Remedy Exceeds the Authority of this Court

The Moving Parties' claim this Court can approve the proposed consent decree over Intervenors' objection is wrong and is based upon a fundamental misunderstanding of Intervenors' interests in this lawsuit. Intervenors have valid interests at stake which the Moving Parties have no ability to nullify by agreement. And even if this were not the case, then the directives and operative provisions contained in the proposed consent decree exceeds this Court's authority.

It is axiomatic that "parties who choose to resolve litigation through settlement . . . may not impose duties or obligations on a third party, without that party's agreement" and may not "dispose of the valid claims of nonconsenting intervenors." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986). Likewise, "[a] district court may not

'require the parties to accept a settlement to which they have not agreed.'" *Reynolds v. Roberts*, 251 F.3d 1350, 1357 (11th Cir 2001) (quoting *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986)). These limitations apply to consent decrees. *See Local No. 93*, 478 U.S. at 529; *see also contra United States v. City of Miami, Fla.*, 614 F.2d 1322, 1329 (5th Cir. 1980) ("Unless the FOP can demonstrate that it has been ordered to take some action by the decree, or ordered not to take some action, or that its rights or legitimate interests have otherwise been affected, it has no right to prevent the other parties and the Court from signing the decree.").

Despite this clear authority, the Moving Parties argue the Court need not require Intervenors' consent to approve the consent decree based on *Lawyer v. Department of Justice*, 521 U.S. 567 (1997). But *Lawyer* stands for no such proposition. In *Lawyer*, both the Florida State House and Senate intervened and agreed to the settlement at issue in that case. *Id.* at 567. By contrast, the present case involves a State House and Senate which very much object to the proposed consent decree. The objectors in *Lawyer*, unlike the here, also identified no cognizable obligations or duties which the settlement would impose upon them.

The reason that redistricting cases are different than those involving other statutes, and why the Supreme Court focused on the agreement of the state legislative bodies in *Lawyer*, is that statutes establishing district lines for legislative bodies are one of the few mandatory provisions found in state laws. If a state

adopts a limitation on abortions or restrictions on gun rights, and a statute like that is struck down, nothing in the U.S. Constitution or federal law *requires* that statute be replaced. By contrast, when a federal court strikes down or enjoins the use of one or more legislative districts, a replacement plan is required. The primary source of that replacement authority is the state legal process, and federal courts must defer to those processes before implementing any remedy. *See e.g. Upham v. Seamon*, 456 U.S. 37 (1982); *see also Growe v. Emison*, 507 U.S. 25 (1993)

Intervenors, including, in his official capacity, the Speaker of the Michigan House of Representative Lee Chatfield, object to the proposed consent decree because it imposes duties and obligations on them, as well as improperly impairs and subverts their constitutional role and interest in the present maps. In moving to intervene, the Senate and the intervening Senators have raised similar objections. One reason for this is that a state district map is passed as part of a statute, just like any other law, and requires approval by both the State House and Senate and presentment to the Governor for, generally speaking, either signature or a veto. *See generally* Citizen's Guide to State Government, pp. 60-62 (available at http://www.legislature.mi.gov/Publications/CitGuide-2018_WEB.pdf, last visited 1.29.19).

The Moving Parties' proposed consent decree dispenses with this constitutionally mandated process and merely allows "the Michigan Legislature . .

. an opportunity to submit redrawn maps for the Enjoined Districts." (ECF 211-1, ¶24). Put another way, the proposed consent decree purports to obligate Intervenors either to ignore their lawful duties by merely proposing new districts to this Court or else to forfeit their state constitutional right to set these districts in the first place. This preempting of state legislative authority not only improperly affects Intervenors, but exceeds this Court's authority.

The Supreme Court has held:

> reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment.... Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, **a district court should not pre-empt the legislative task** nor 'intrude upon state policy any more than necessary.

Upham, 456 U.S. 37, 41–42 (1982) (emphasis added); *see also Growe*, 507 U.S. 25, 34 (1993) (Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.").

The proposed consent decree gets the process required by *Upham* and related authority backwards. Instead of ensuring state legislative primacy by allowing the state legislature an opportunity to create new legislative districts by means of its normal law making processes, the consent decree directs the legislature to submit proposed maps to a federal court in the first instance. Absent any evidence the Michigan legislature will not redistrict according to the law of the State of Michigan and the procedures of its legislative bodies, "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe*, 507 U.S. at 34.

It appears, in fact, the entire purpose of the proposed consent decree is to obstruct valid redistricting by the Michigan legislature. The Court should not discount that. Until now, the State of Michigan through the former Secretary and Attorney General defended the maps at issue. Intervenors, who continue to defend the maps, agreed with the former Secretary's position and there has been no determination by this Court the maps are invalid. Therefore, neither Intervenors nor the Michigan legislature more broadly had any reason to consider proposed new maps until now. The mere fact Defendant Secretary suddenly and effectively concedes defeat and refuses to defend the maps is not evidence the legislature has failed to act. It is simply evidence Defendant Secretary is attempting to use this Court to obtain a redistricting outcome which she could not obtain through the

normal democratic process required by state law. The Court should not and, under binding Supreme Court precedent, cannot, be a party to this attempted usurpation of the democratic process by the Secretary.

V. The Alleged "Enjoined Districts" Contemplated in the Proposed Consent Decree Do Not Violate the U.S. Constitution

The proposed consent decree identifies eleven "Enjoined Districts" of the Michigan House of Representatives and attempts, *inter alia*, to redraw these districts in an allegedly "non-partisan manner that is consistent with the First and Fourteenth Amendment rights of voters in those districts." However, this relief is wholly improper, as the "Enjoined Districts" do not violate the Constitution as presently situated, and there is no basis in the record to support this argument or the relief/remedy contemplated in the proposed consent decree.

Even assuming *arguendo* that Plaintiffs' experts provided evidence of individualized harm—which they do not—it is wholly inadequate to support Plaintiffs' standing. Dr. Warshaw's own chart purports to show the "partisanship" of the districts from both 2006-2010 and 2012-2016 in the districts simulated by Dr. Chen. (See Attachment A at ECF 129-38). Warshaw's chart fails because the Plaintiffs residing in House Districts 32, 91, 92, and 95 all reside in districts that are similar in terms of partisanship as Chen's proposed districts. Likewise, under the most recent data, HD 76 will only serve to further "pack" that Plaintiff into an increasingly Democratic district. Plaintiff in HD 76 is also currently represented by

a Democrat and, under all of Chen's simulations, will continue to likely have a Democratic representative in the future. As such, Plaintiffs have no standing to challenge HD 76 as there can be no remedy if there is no harm to begin with.

This is exactly why the Supreme Court recently found that Professor Whitford had no standing in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Professor Whitford testified that he lived in the City of Madison, Wisconsin, and that essentially no matter what map was drawn he would be represented in the legislature by a Democratic member. Here, the Plaintiffs in these five districts, based on the evidence submitted by the Plaintiffs, would live in a nearly identical district under their own experts' view of a 'fair' redistricting map for the state house. A federal court cannot invalidate these districts based on this evidence as the only evidence that exists, if it is evidence at all, points towards many of the Plaintiffs living in non-gerrymandered, competitive districts where even the Plaintiffs' own experts would not place them in a 'better' district.

District 24 is wholly contained in Macomb County and splits the minimal number of municipalities. Plaintiffs' complaint appears to be that they merely do not like which municipalities were split. Plaintiffs have offered no other Apol compliant alternative.

District 32 is split between St. Clair and Macomb, but does not split any municipalities and is the best configuration of the area to comply with the Apol criteria. Plaintiffs have offered no other Apol compliant alternative.

District 51 crosses from Genesee into Oakland County, but is consistent with Apol and maintains whole municipalities. Plaintiffs have offered no other Apol compliant alternative.

District 55 is wholly contained in Washtenaw County and maintains the integrity of all municipalities except the City of Ann Arbor, which must be split to comply with the U.S. Constitution equal population requirements. Plaintiffs have offered no other Apol compliant alternative.

District 60 wholly contains only the City of Kalamazoo. It is consistent with Apol and any other outcome would require a split that has no constitutional basis. Plaintiffs have offered no other Apol compliant alternative.

District 63 crosses form Kalamazoo to Calhoun County, but maintains whole municipalities. This is consistent with Apol, and anything else requires a split that has no constitutional basis. Again, it appears that Plaintiffs are merely unhappy with the configuration of the whole municipalities. Plaintiffs have offered no other Apol compliant alternative.

District 76 is consistent with Apol criteria, and it simply splits the City of Grand Rapids into two districts to comply with the Constitution's equal population

requirements. It otherwise maintains the municipality's integrity. Plaintiffs have offered no other Apol compliant alternative.

Districts 91 and 92 wholly contain Muskegon County, and maintain whole municipalities. This is consistent with Apol, and anything else would require a split that has no Constitutional basis. As is a common theme throughout the Moving Parties' "Enjoined Districts," the Moving Parties appear to be unhappy with the configuration of the whole municipalities. This is not a valid basis for the relief contemplated by the Moving Parties. Plaintiffs have offered no other Apol compliant alternative.

Districts 94 and 95 wholly contain Saginaw County, and maintain whole municipalities. This is consistent with Apol, and anything else would require a split that has no Constitutional basis. The Moving Parties merely do not like the configuration of the whole municipalities. This does not afford them the relief sought here. Plaintiffs have offered no other Apol compliant alternative.

As such, the proposed "Enjoined Districts," as presently situated, are not in violation of the Constitution and are consistent with Apol's criteria. The Moving Parties are merely dissatisfied with the configuration of the whole municipalities. This does not support the relief sought by the Moving Parties. As such, none of the proposed "Enjoined Districts" are unconstitutional, there are no valid grounds for Plaintiffs' complaint, nor is there any sufficient basis for the relief

contemplated by the Moving Parties with regard to the "Enjoined Districts" in the proposed consent decree.

CONCLUSION

WHEREFORE, for the foregoing reasons, Congressional and Legislative Defendants-Intervenors respectfully request that this Honorable Court deny the Joint Motion, as well as award Congressional and Legislative Defendants-Intervenors costs, attorney fees, and such other and further relief that this Court deems equitable and just.

Respectfully Submitted,

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Date: January 31, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all of the parties of record.

CLARK HILL PLC

/s/ Charles R. Spies