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.

Case No. 2:17-cv-14148

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

THE MICHIGAN SENATE AND THE MICHIGAN SENATORS' RULE 52(C) MOTION FOR JUDGMENT ON PARTIAL FINDINGS

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THE MICHIGAN SENATE AND THE MICHIGAN SENATORS' RULE 52(C) MOTION FOR JUDGMENT ON PARTIAL FINDINGS

Intervenor-Defendants the Michigan Senate and individual Michigan Senators (the "Senate Defendants"), through their counsel Dykema Gossett PLLC, respectfully request that this Court grant this Motion for Judgment on Partial Findings pursuant to Rule 52(c) of the Federal Rules of Civil Procedure. As of the conclusion of Plaintiffs' presentation of witnesses, Plaintiffs have not presented evidence sufficient to demonstrate that Plaintiffs experienced individualized or

organizational harm from Senate District boundaries that could be redressed by a favorable ruling from this Court under the standard the Supreme Court articulated in *Gill v. Whitford*, 138 S. Ct. 1916; 201 L. Ed. 2d 313 (2018). Specifically, Plaintiffs have not proven that revising the challenged Senate Districts' boundaries would remedy alleged vote dilution "so that the voter may be unpacked or uncracked, as the case may be." *Id.* at 1931. Therefore, Plaintiffs do not have standing to bring their claims challenging Senate Districts, and the Senate Defendants are entitled to judgment on partial findings.

The Senate Defendants submit the accompanying Brief in Support of this Motion. In accordance with LR 7.1(a), the Senate Defendants' counsel sought concurrence in the relief requested in this Motion prior to filing. The Congressional and State House Intervenor-Defendants concurred, but the Plaintiffs do not concur, and Defendant Secretary of State Benson has not concurred.

The Senate Defendants present this Motion and their Brief in Support based solely upon the threshold issue of standing based on evidence presented at trial. By filing this Motion, the Senate Defendants do not waive arguments related to justiciability, the proffered intent-and-effects test (including criticism of the Plaintiffs' expert reports and testimony), and laches, or any other arguments. These issues will be raised in the forthcoming proposed findings of fact and conclusions of law.

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WHEREFORE, the Senate Defendants respectfully request that this Court grant judgment on partial findings in favor of the Senate Defendants in this matter and dismiss Plaintiffs' claims with regard to the Senate Districts.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: February 14, 2019

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BRIEF IN SUPPORT OF THE MICHIGAN SENATE AND THE MICHIGAN SENATORS' RULE 52(C) MOTION FOR JUDGMENT ON PARTIAL FINDINGS

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CONCISE STATEMENT OF THE ISSUE PRESENTED

WHETHER THIS COURT SHOULD GRANT THE MICHIGAN SENATE AND THE MICHIGAN SENATORS' MOTION FOR JUDGMENT ON PARTIAL FINDINGS UNDER RULE 52(C) BECAUSE PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY HAVE ARTICLE III STANDING TO BRING THEIR CLAIMS CHALLENGING SENATE DISTRICTS.

Movant's answer: Yes

Plaintiffs' answer: No

Defendant Secretary of State's answer: Unknown

Congressional and State House Intervenor-Defendants' answer: Yes

This Court should answer: Yes

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CONTROLLING OR MOST APPROPRIATE AUTHORITY

Rules

Fed. R. Civ. P. 50(a)

Fed. R. Civ. P. 52(c)

Cases

Gill v. Whitford, 138 S. Ct. 1916; 201 L. Ed. 2d 313 (2018)

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I. INTRODUCTION

Because Plaintiffs failed to present evidence at trial that a favorable ruling from this Court would redress their alleged injuries—namely that individual Plaintiffs' votes have been diluted in Senate Districts that have been "cracked and packed" on a partisan basis—the Plaintiffs do not have standing to bring claims challenging the Senate Districts, and the Senate Defendants are entitled to judgment on partial findings under Rule 52(c) with regard to those claims. Because Plaintiffs presented no evidence that the League of Women Voters (the "League") or its members suffered harm, the League also lacks standing to bring its claims challenging Senate Districts, and Senate Defendants are entitled to judgment on partial findings against the League.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 52(c) is the applicable rule for disposition of this case. It states, in part:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim . . . that, under the controlling law, can be maintained . . . only with a favorable finding on that issue.

Fed. R. Civ. P. 52(c).[1] When weighing the evidence presented to determine whether judgment on partial findings under Rule 52(c) is appropriate, "the district

[1] A judgment on partial findings under Rule 52(c) is not subject to the same standard as a judgment as a matter of law under Rule 50, which is applicable only in jury trials. According to the Notes of the Federal Rules of Civil Procedure

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court is not required to draw any inferences in favor of the non-moving party; rather, the district court may make findings in accordance with its own view of the evidence." *Ritchie v. United States*, 451 F.3d 1019, 1023 (9th Cir. 2006) (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990)); *see also Aubert v. Russell Collection Agency, Inc.*, 215 F. Supp. 3d 583, 593 n.10 (E.D. Mich. 2016) ("It should be borne in mind that the Court was not required to draw any special inferences in favor of the nonmoving party in deciding a Rule 52 motion . . . .").

III. LEGAL STANDARD FOR STANDING

Article III of the U.S. Constitution requires that a plaintiff demonstrate standing to bring a particular claim. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). To demonstrate standing to seek relief in federal court, a plaintiff must have "a personal stake in the outcome." *Baker v. Carr*, 369 U.S. 186, 204 (1962). In contrast, a plaintiff lacks standing if he or she alleges only a "generally available grievance about government." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam). Such generalized grievances are "more appropriately addressed in the representative branches." *Allen*, 468 U.S. at 750-51. The threshold standing requirement "ensures that [judges] act as judges, and do not engage in

---

Advisory Committee on the 2007 Amendments, "Former Rule 52(c) provided for judgment on partial findings, and referred to it as 'judgment as a matter of law.' Amended Rule 52(c) refers only to 'judgment,' to avoid any confusion with a Rule 50 judgment as a matter of law in a jury case. The standards that govern judgment as a matter of law in a jury case have no bearing on a decision under Rule 52(c)."

policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). The familiar three-part test for Article III standing is: (1) The plaintiff must have "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." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Additionally, "a plaintiff must demonstrate standing for each claim." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Under the Supreme Court's precedent in *Gill*, however, standing requirements for First and Fourteenth Amendment partisan gerrymandering claims overlap to a large degree.

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A. Individual Standing Requirements for First and Fourteenth Amendment Partisan Gerrymandering Claims

The Supreme Court recently addressed individual standing requirements for claims alleging that partisan gerrymandering diluted plaintiffs' votes in violation of the First and Fourteenth Amendments. In *Gill v. Whitford*, the Court held that "a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing." 138 S. Ct. at 1934 (Kagan, J., concurring). Additionally, a plaintiff must prove that the proposed remedy, "revision of the boundaries of the individual's own district," would redress the injury. *Id.* at 1930. In *Gill*, the Court found that the plaintiffs "alleged that they had such a personal stake in this case, but never followed up with the requisite proof." 138 S. Ct. at 1923.

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The Court recognized that "a person's right to vote is individual and personal in nature" and that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Id.* at 1929 (internal quotation marks omitted). When the injury alleged is vote dilution through partisan cracking and packing of legislative districts, "that injury is district specific," rather than statewide. *Id.* at 1930. The Court stated:

> Th[e] disadvantage to the voter as an individual . . . results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact. In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

Id. at 1930 (citations omitted). To prove a concrete, particularized, and remediable injury from partisan gerrymandering, a plaintiff must prove that redrawing the district's boundaries would result in a district that is not cracked or packed.

In *Gill*, the Court did not distinguish between the vote-dilution injury that must be proven for First and Fourteenth Amendment claims; however, Justice Kagan posited in her concurrence that a non-dilutional First Amendment theory of harm may exist, if "the gerrymander has burdened the ability of like-minded people across the state to affiliate in a political party and carry out that organization's activities and objects." *Id.* at 1939. The Court declined to adopt Justice Kagan's theory, stating, "We leave for another day consideration of other possible theories of harm not presented here . . . ." *Id.* at 1931. Plaintiffs in this

case have not alleged or proven that their ability to affiliate in a political party has been burdened. The only theory of individual harm presented in this case is vote dilution under both the First and Fourteenth Amendments, which must be proven on an individual, district-by-district basis.

B. Standing Requirements for an Organization to Bring First and Fourteenth Amendment Partisan Gerrymandering Claims

An organization's standing may be premised on either direct harm the organization suffers itself or on indirect harm to the organization based on harm suffered by its members. *See Greater Cincinnati Coal. for the Homeless v. City of Cincinnati*, 56 F.3d 710, 716-717 (6th Cir. 1995). To prove a direct injury to an organization's First Amendment rights, the organization "must establish that its ability to further its goals has been perceptively impaired so as to constitute far more than simply a setback to the organization's abstract social interests." *Greater Cincinnati Coal.*, 56 F.3d at 716. It may demonstrate such impairment through a "demonstrable injury to the organization's activities" and a "consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). For standing as a representative of its members, the organization "must demonstrate that (a) its members . . . have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of

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individual members in the lawsuit." *Greater Cincinnati Coal.*, 56 F.3d at 717 (citation omitted).

IV. ARGUMENT

A. Individual Plaintiffs Have No Injury-in-Fact That This Court Could Redress.

At trial, Plaintiffs failed to demonstrate standing to bring either their First or Fourteenth Amendment claims because they did not prove that their districts are unconstitutionally cracked and packed or that their alleged injuries are "likely to be redressed by a favorable judicial decision." *Gill*, 138 S. Ct. at 1929. To prove that the districts alleged to be "cracked and packed" could be remediated by redrawing district boundaries, Plaintiffs presented: (1) alternative, simulated district maps drawn by Dr. Jowei Chen; (2) charts created by Dr. Christopher Warshaw analyzing Dr. Chen's simulations, showing the percentage of Republican votes that would result from alternative boundaries; and (3) testimony from voters who reside in the districts at issue.[2] Contrary to Plaintiffs' *arguments*, Plaintiffs' *evidence* does not show that redrawing districts as proposed would remedy alleged vote dilution "so that the voter may be unpacked or uncracked, as the case may be." *Id.* at 1931.

B. Senate Districts

1. Senate District 8

[2] For purposes of the Motion and this Brief only, the Senate Defendants accept Dr. Chen and Dr. Warshaw's analysis as true, even though the Senate Defendants dispute and do not accept that the methodology and results of the studies and simulations are valid measures of partisan gerrymandering.

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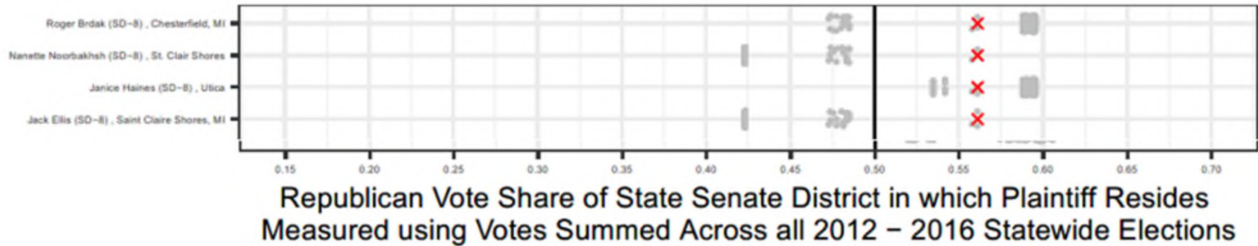
For Senate District 8, Plaintiffs presented the testimony of Mr. Jack Ellis, Ms. Nanette Noorbkahsh, and Mr. Roger Brdak. Dr. Warshaw's chart, presented by Plaintiffs, appears here, showing the ranges of proposed, simulated Senate districts compared with the existing district (ECF No. 129-38, PageID.3883):



Existing Senate District 8 places these witnesses within the range of Dr. Chen's so-called "non-partisan" simulations. There is no evidence that any of the proposed alternative plans would result in a "better" or "more fair" district for the witnesses. With respect to Mr. Brdak, a significant number of simulations would place his home in a *more* Republican-packed district, when currently, Mr. Brdak's home is within the range of nonpartisan simulations produced by Dr. Chen.

When deposed, Mr. Ellis confirmed that he has never chosen not to vote for a particular candidate because he believed that he was voting in a gerrymandered district. (Ex. A, Ellis Dep. at 23). He also personally campaigns for candidates through the Michigan Democratic Party. (Ex. A, Ellis Dep. at 31-32). Similarly, Ms. Noorbkahsh testified that she will always vote regardless of how the districts are drawn, but indicated that she did not donate to or participate in one Democratic Senate candidate's campaign because the candidate did not have a "very good

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chance of winning." (Ex. B, Noorbkahsh Dep. at 11, 22, 23, 26-27). Mr. Ellis indicated that he does not donate to campaigns when he believes the outcome is set. (Ex. A, Ellis Dep. at 27-30, 62-63). These decisions by Mr. Ellis and Ms. Noorbkahsh are not necessitated or caused by the borders of their Senate district, however. Their choices are personal, based on their own subjective judgment as to whether a particular candidate can and will win or not.[3] They were not prevented from voting, campaigning, or donating to a campaign—they could freely exercise these rights any time they like.

When Mr. Brdak was deposed, he presented no evidence that his district boundaries affect how he votes, campaigns, or donates. To the contrary, he confirmed that nothing about his 2011 districts stop him from voting, prevents him from donating to particular candidates, or discourages from campaigning. (See Ex. C, Brdak Dep. at 42-45). Although he believes that his legislative districts are gerrymandered, he also believes that they are currently competitive. (Ex. C, Brdak Dep. at 18, 35). Mr. Brdak did not testify that he was harmed in any way.

None of the Senate 8 witnesses presented any evidence that they were harmed in a manner that supports standing to bring partisan gerrymandering

[3] Mr. Ellis testified that other considerations, such as a particular candidate's personality, whether he or she is engaging, whether he or she has name recognition or a family history in politics, and whether voters show up at the polls or are apathetic during any given election, also contribute to a candidate's likelihood of winning. (Ex. A, Ellis Dep. at 51-52, 62-65).

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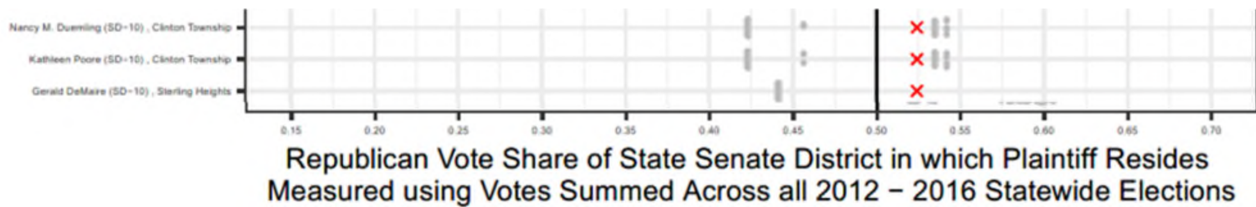
claims; they have not proven that they were harmed because they live in a cracked or packed district. While Mr. Ellis, Ms. Noorbkahsh, and Mr. Brdak asserted that they *believe* they live in gerrymandered districts, Plaintiffs' own experts have demonstrated that Senate District 8 is within the range of simulations that they consider to be "non-partisan," and redrawing the district would not redress their alleged harm. Plaintiffs' claims related to Senate District 8 should be dismissed.

2. Senate District 10

For Senate District 10, Plaintiffs presented the testimony of Ms. Nancy Duemling, Ms. Kathy Poore, and Mr. Gerald DeMaire. Dr. Warshaw's chart, as presented by Plaintiffs, appears here (ECF No. 129-38, PageID.3883):

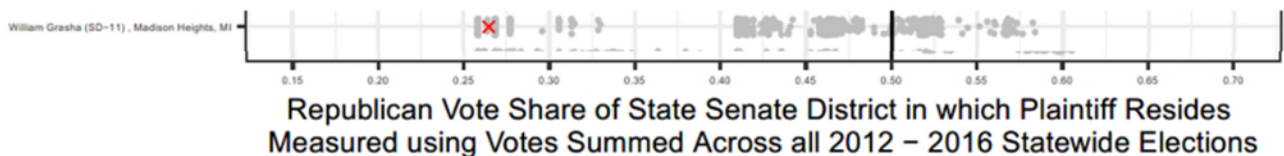


For this Senate District, using Dr. Warshaw's proposed 45-55% range for competitive districts, all three witnesses currently reside in a reliably "competitive" district, which they testified they wanted. Ms. Poore and Ms. Duemling are not harmed because their current district is within the range of Dr. Chen's nonpartisan simulations and Dr. Warshaw's 45-55% competitive range. Under all of Dr. Chen's simulations, Mr. DeMaire would be "packed" into a more reliably Democratic district, to the point that his district would no longer be "competitive." These redrawn districts do not redress any alleged harm.

When deposed, all three witnesses confirmed that they would vote regardless of whether their district was redrawn; they have never chosen not to vote based on their beliefs that their Senate District is gerrymandered. (Ex. D, Duemling Dep. at 10-12, 19, 28; Ex. E, Poore Dep. at 15-16; Ex. F, DeMaire Dep. at 20). Ms. Duemling's belief that the district was gerrymandered has not prevented her from donating or campaigning, or impacted her enthusiasm to vote. (Ex. D, Duemling Dep. at 19-21). Ms. Poore's belief in gerrymandering has not impacted her donation decisions; instead, it "encourages" and "motivates" her to be politically active. (Ex. E, Poore Dep. at 27-28). Mr. DeMaire testified that his belief that gerrymandering occurred has not prevented him from affiliating with people who share his values. (Ex. F, DeMaire Dep. at 29). These witnesses have not proven any First or Fourteenth Amendment harm from their district and their claimed injuries cannot be redressed; their Senate District 10 claims should be dismissed.

3. Senate District 11

For Senate District 11, Plaintiffs presented the testimony of Mr. William Grasha. Dr. Warshaw's chart appears here (ECF No. 129-38, PageID.3883):



Mr. Grasha currently lives in a Democratic-leaning Senate district. Like his current district, most of Dr. Chen's simulated districts would result in Democratic

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candidates picking up far more than 55% of the district's votes, meaning that Mr. Grasha would not be any less "packed" in a redrawn district than he claims to be now. On the other hand, some of the simulated districts would result in Mr. Grasha being "cracked" into a more Republican district that is outside Dr. Warshaw's 45-55% "competitive" range. There is no evidence that an alternative district would be "better" or "more fair" for Mr. Grasha; his alleged injuries are not redressable.

Mr. Grasha believes that his Senate District became much more Democratic after the 2011 redistricting. (Trial Vol. III, Feb. 7, 2019, at 15). When asked whether he thought his vote would have more power if his district had fewer Democrats, he stated that "if those Democratic votes were shifted to other districts and the power structure changed in [the Legislature]," then his vote would have more power. (Trial Vol. III, Feb. 7, 2019, at 18). But, that harm is not individualized or district-specific. Mr. Grasha complains that Democratic candidates do not hold a majority across the state in other districts. That statewide injury is not cognizable for standing purposes in partisan gerrymandering claims under *Gill*. 138 S. Ct. at 1931 (stating that an interest in the legislature's overall "composition and policymaking" does not present a personal injury for Article III standing). (Trial Vol. III, Feb. 7, 2019, at 20 ("[I]n the districts I'm currently in I have Democratic representation, [but] my representative will never get to sit as a majority leader . . . .")). Because Plaintiffs have not demonstrated harm from

Senate District 11 or proven that redrawing the district would remedy the alleged harm, their claim as to this district should be dismissed.

4. Senate District 12

For Senate District 12, Ms. Maria Woloson testified. Dr. Warshaw's chart, as presented by Plaintiffs, appears here (ECF No. 129-38, PageID.3883):

Dr. Warshaw's chart shows that Ms. Woloson's current Senate District is well within his 45-55% "competitive" range, with around 53 or 54% of the vote share going to a Republican from 2012 to 2016. District 12 elected a Republican Senator in 2014, but elected a Democratic Senator in 2018. (Ex. G, Woloson Dep. at 13). The change in party control over this seat—without a corresponding change in district lines—unequivocally proves that it is a competitive district. Ms. Woloson did not show that Senate District 12 is gerrymandered as a result of the 2011 redistricting or that election outcomes are "predetermined" as she claims. (Ex. G, Woloson Dep. at 22-25). Plaintiffs' experts have not presented any evidence that their proposed alternatives would result in a "better" or "more fair" district for Ms. Woloson. Plaintiffs' Senate District 12 claims should be dismissed.

5. Senate District 14

Ms. Josephine Feijoo and Ms. Doris Sain testified for Senate District 14 for Plaintiffs. Dr. Warshaw's chart appears here (ECF No. 129-38, PageID.3883):

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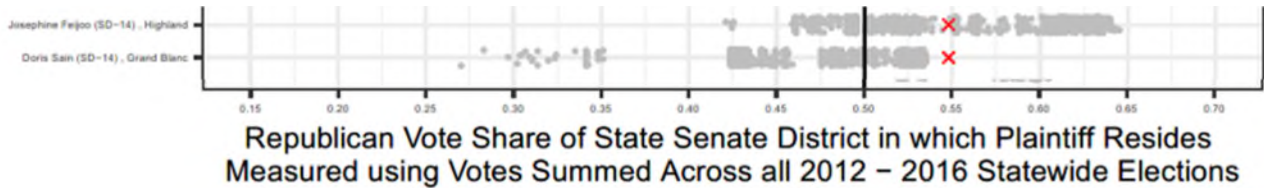

For this Senate District, Ms. Sain lives within the range of what Dr. Warshaw testified is a competitive district. Therefore, Dr. Chen and Dr. Warshaw's evidence does not prove that Ms. Sain's district is packed or cracked. A significant number of Dr. Chen's simulations would "pack" Ms. Sain into a Democratic district, taking her out of one that is in Dr. Warshaw's "competitive" range. This would not resolve any alleged cracking.

Ms. Sain testified that she does not donate to candidates when she believes the outcome is predetermined because then her political donations have very little influence. (Ex. H, Sain Dep. at 19-21). Ms. Sain's decision not to donate is not caused by the borders of her Senate District, however. Her choice is based on her subjective judgment as to whether a particular candidate will win or not. Even after the redistricting, she has never been prevented from exercising her rights to vote, speak, and associate; she has always had the choice to contribute as she saw fit politically. (Ex. H, Sain Dep. at 32-33). Ms. Sain did not articulate any personal harm from living in an allegedly gerrymandered district.

Dr. Warshaw's chart shows that Ms. Feijoo's current Senate District is within his 45-55% "competitive" range. Most of Dr. Chen's simulations would

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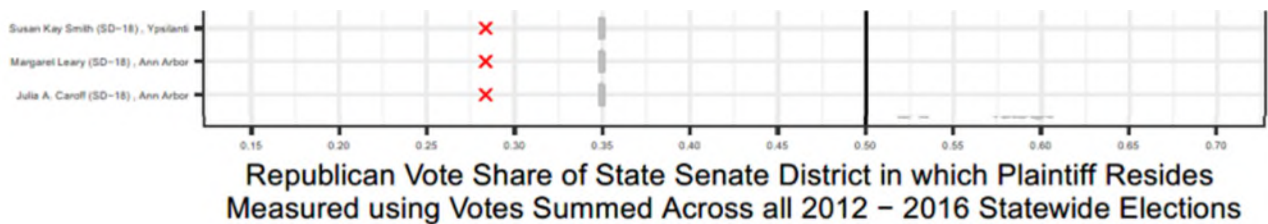
place her in a *more* Republican district, however. Plaintiffs' experts have not presented any evidence that these proposed alternatives would result in a "better" or "more fair" district for Ms. Feijoo. When deposed, Ms. Feijoo testified that she is just as likely to vote in future elections if her Senate District is redrawn or not. (Ex. I, Feijoo Dep. at 10.) She believes that her districts are gerrymandered because in 2018, Democrats were elected to statewide offices—the Governor, Attorney General, and Secretary of State—but did not take over a majority in the State Legislature. (Ex. I, Feijoo Dep. at 12-13). Like Mr. Grasha in Senate District 11, Ms. Feijoo did not claim or prove an individualized, district-specific injury as is required under *Gill*. 138 S. Ct. at 1931. Instead, her claimed injury is statewide. For these reasons, the challenge to Senate District 14 must be dismissed.

6. Senate District 18

Dr. Susan Smith, Ms. Margaret Leary, and Ms. Julie Caroff testified for Senate District 18. Dr. Warshaw's chart, as presented by Plaintiffs, appears here:



Dr. Warshaw's charts show that these witnesses currently live in a Democratic district, and *every alternative district* produced by Dr. Chen's "nonpartisan" simulations *also* puts them in a heavily Democratic district. Not one

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simulation puts them in the "competitive" district they claim to desire. Although these witnesses claim that they have been intentionally "packed" into a district with other Democratic voters (Trial Vol. I, Feb. 5, 2019, at 42-43), their districts will be heavily Democratic regardless of how the lines are drawn. Redrawing District 18 would not redress any alleged harm.

When deposed, the only harm that Dr. Smith stated she felt as an individual is that her vote does not have the influence she believes it should have. (Trial Vol. I, Feb. 5, 2019, at 43.) She indicated that her vote may have more impact if her district was not so packed with Democrats. However, as noted above, every proposed simulation would put Dr. Smith in a district that is still heavily Democratic, and a Democrat would likely always win the general election. This "packing" is not based on how the district boundaries were drawn, but on the natural concentration of Democrats in the area Dr. Smith lives. Therefore, Dr. Smith has not alleged harm from her district that could be redressed by redrawing her district.

Ms. Leary and Ms. Caroff also did not demonstrate any individual harm from their district: Ms. Leary testified that she is just as likely to vote and has always participated to the full in elections, irrespective of district lines. (Ex. J, Leary Dep. at 10–11, 34–37). Ms. Leary indicated that she is satisfied with her current elected officials and prefers them to others. (Ex. J, Leary Dep. at 34.) Ms.

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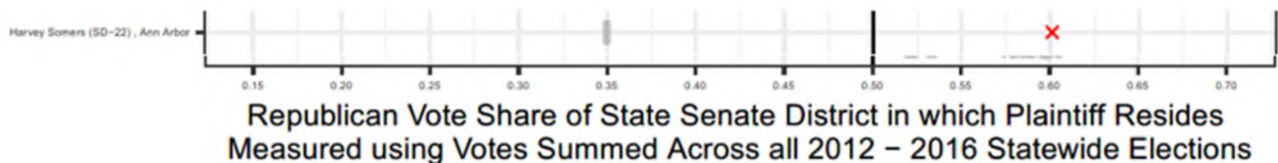
Caroff testified that she continues to be politically active and donate to candidates. (Ex. K, Caroff Dep. at 28–29.) In her view, the "harm overall" from the alleged gerrymandering is at a "national level"—leading to a divided country and Congress and concentrating power in the executive branch at the expense of the legislative branch. (Ex. K, Caroff Dep. at 33–36.) She, like Mr. Grasha in District 11 and Ms. Feijoo in District 14, does not allege individual, district-specific harm, but a statewide injury that is not cognizable for standing purposes under *Gill*. 138 S. Ct. at 1931. Challenges against Senate District 18 should be dismissed.

7. Senate District 22

Mr. Harvey Somers testified for Senate District 22. Dr. Warshaw's chart, as presented by Plaintiffs, appears here (ECF No. 129-38, PageID.3883):



All of Dr. Chen's simulations place Mr. Somers into a district that would be, according to Dr. Chen's analysis, a "packed" Democratic district. Plaintiffs presented no evidence that moving Mr. Somers from what they describe as a "packed" Republican district into a "packed" Democratic district resolves any cognizable harm for Mr. Somers. Mr. Somers could not articulate any concrete harm from his district: Mr. Somers remains "heavily engaged" in the political process and "very active" politically. (Ex. L, Somers Dep. at 17, 19). Since 2011,

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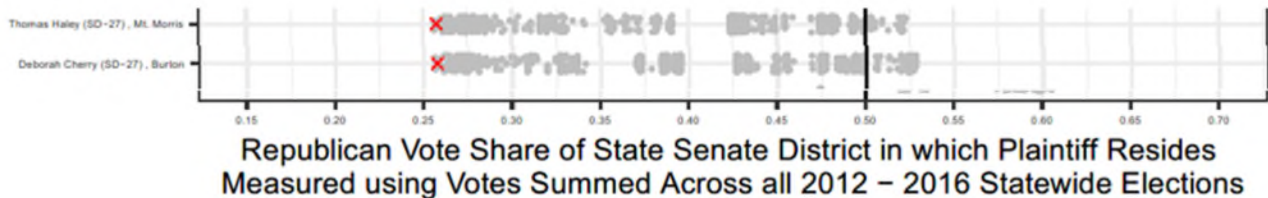
he has "donated a lot to a lot of candidates in and outside of [his] district." (Ex. L, Somers Dep. at 22). Mr. Somers stated that percentages of victory in a district do not matter—all that matters to him are that there are "[g]ood debates and [an] exchange of ideas." (Ex. L, Somers Dep. at 24). Mr. Somers was very positive about the 2018 election, testifying that, in spite of the alleged gerrymandering, achieving "his ideal [of competitive races] is possible" with districts drawn as they are. (Ex. L, Somers Dep. at 45). Because there is no demonstrable, redressable harm, the challenge to Senate District 22 should be dismissed.

8. Senate District 27

Mr. Thomas Haley and Ms. Deborah Cherry testified for Senate District 27. Dr. Warshaw's chart appears here (ECF No. 129-38, PageID.3883):



Like Mr. Haley and Ms. Cherry's current Senate district, most of Dr. Chen's simulated districts would result in Democratic candidates picking up far more than 55% of the district's votes. There is no evidence that Dr. Chen's simulated alternative districts would result in a "better" or "more fair" district for Mr. Haley and Ms. Cherry. In addition to a lack of redressability, neither Mr. Haley nor Ms. Cherry could articulate any concrete harm caused by Senate District 27's lines.

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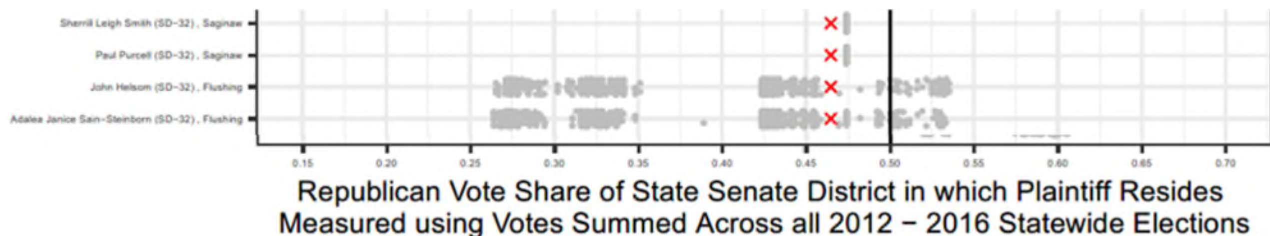
After 2011, Mr. Haley remained politically active and continues to donate to political candidates, including his State Senator; he will vote regardless of his district's shape; he is content with his elected officials and will be happy if they get re-elected. (Trial Vol. II, Feb. 6, 2019, at 238–240, 247.) Ms. Cherry will continue to exercise her right to vote, regardless of district shape. (Ex. M, Cherry Dep. at 9-11.) When asked to articulate the 2011 district lines' harm to her, she stated that she does not "feel like" her vote is "as important" as it could be. (Ex. M, Cherry Dep. at 14.) Ms. Cherry, a former Michigan Representative and Senator, could not explain whether or how the districts' shapes limited her campaign activities or political expression. (Ex. M, Cherry Dep. at 18–21.) Plaintiffs have not proven harm from this district's boundaries or that redrawn lines would remedy alleged harm. Claims as to this district should be dismissed.

9. <u>Senate District 32</u>

Ms. Adalae "Jan" Sain-Steinborn, Ms. Sherrill Smith, and Mr. Paul Purcell testified for Senate District 32. Dr. Warshaw's chart appears here:



Dr. Warshaw's chart shows that the current Senate District 32 is well within his 45-55% "competitive" range for all three witnesses. The majority of Dr. Chen's

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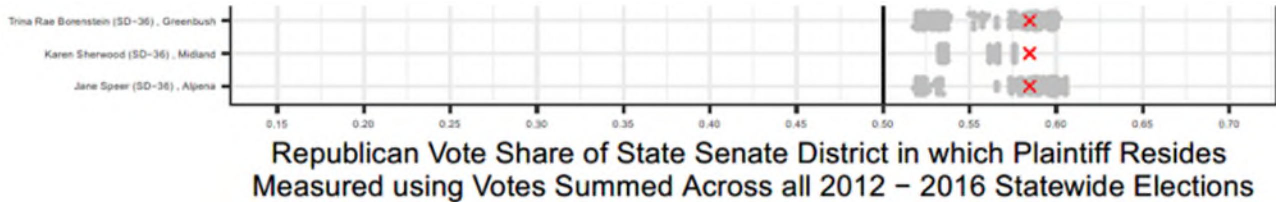
simulations would actually take Ms. Sain-Steinborn out of the "competitive" range and place her into a district that he would deem "packed." For Mr. Purcell and Ms. Smith, the *only* alternative districts are nearly identical to their current district. Redrawing the district would not redress Mr. Purcell's and Ms. Smith's alleged harm would not be redressed if the district was redrawn.

Both Ms. Sain-Steinborn and Ms. Smith are extremely committed to the political process and believe in voting no matter how the district lines are drawn. (Ex. N, Sain-Steinborn Dep. at 9–10, 18-19, 30, 36-37; Ex. O, Smith Dep. at 9, 12, 26, 56-57.) Both believe that alleged gerrymandering has energized the political process. (Ex. N, Sain-Steinborn Dep. at 45; Ex. O, Smith Dep. at 50-51). When asked about the effects of the alleged gerrymandering, Ms. Smith said that she has not actually seen "th[e] effect" of gerrymandering in Senate District 32. (Ex. O, Smith Dep. at 37.) Mr. Purcell's only non-self-inflicted alleged harm is that he has philosophical differences with his elected officials. (Ex. P, Purcell Dep. at 34.) Plaintiffs have not presented any evidence that these witnesses have been harmed by partisan gerrymandering or that these alleged injuries are redressable. Claims related to Senate District 32 should be dismissed.

10. Senate District 36

For Senate District 36, Plaintiffs presented the testimony of Ms. Trina Rae Borenstein, Ms. Karen Sherwood and Ms. Jane Speer. Dr. Warshaw's chart, as presented by Plaintiffs, appears here (ECF No. 129-38, PageID.3883):



Dr. Warshaw's charts show that Ms. Borenstein and Ms. Speer currently fall within the proffered range of nonpartisan district simulations. Many of Dr. Chen's simulations would actually "crack" Ms. Borenstein and Ms. Speer into districts that would garner a greater Republican vote share, according to Dr. Chen's definitions. With respect to Ms. Sherwood, all of Dr. Chen's simulations put her in a Republican district according to his definition, many uncompetitively so. There is no evidence that any of these proposed alternatives would result in a "better" or "more fair" district: a Republican candidate would likely represent the district regardless of how the lines are drawn, according to Dr. Chen.

Additionally, these three witnesses could not articulate any concrete, particularized harm to them based on the district. The only harm that Ms. Speer could articulate is that she now "feel[s] frustrated" and "less enthusiastic about voting" because she knows what result is more likely. (Ex. Q, Speer Dep. at 12–13, 33). Ms. Borenstein feels harmed because some unidentified nonparties supposedly

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tell her they feel that their votes do not count. (Ex. R, Borenstein Dep. at 34-35.) The only articulatable harm she has suffered is a worsening of the "attitude" with which she approaches the political process. (Ex. R, Borenstein Dep. at 62.) Ms. Sherwood testified that the harm from redistricting is not individual in nature, but is "average" harm. (Trial Vol. II, Feb. 6, 2019, at 32.) She admits that redrawing maps very well may not help anything. (Trial Vol. II, Feb. 6, 2019, at 41.) These harms are not concrete in nature and redrawing District 36 would not redress any harm: Claims related to District 36 should be dismissed.

Because no new district boundaries can be drawn that would "unpack" or "uncrack" Plaintiffs' districts, see *Gill*, 138 S. Ct. at 1931—or that would not repack or recrack Plaintiffs into new districts—Plaintiffs have not demonstrated that their alleged injuries are redressable. Individual Plaintiffs have not proven, therefore, that they have standing for either First or Fourteenth Amendment claims.

C. <u>The League Does Not Have Standing.</u>

At trial, Plaintiffs failed to demonstrate that the League has standing to bring either its First or Fourteenth Amendment claims based on direct harm to itself or indirect harm to its members. To show direct harm, an organization "must establish that its ability to further its goals has been perceptively impaired . . . ." *Greater Cincinnati Coal.*, 56 F.3d at 716-717 (citation omitted). It may demonstrate such impairment through a "demonstrable injury to the organization's activities" and a

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"consequent drain on the organization's resources." *Havens Realty Corp.*, 455 U.S. at 379. Plaintiffs did not present any evidence that the League of Women Voters of Michigan's ability to further its goals has been perceptively impaired.

To the contrary, Ms. Poore—who cofounded the Macomb Chapter of the League—confirmed that she does not think that gerrymandering has affected her ability to serve the League and accomplish its goals. (Ex. E, Poore Dep. at 9, 31). Her belief that Michigan districts have been gerrymandered "encourages" and "motivates" her to promote her ideals and "makes [her] want to fight all the harder . . . [t]o educate voters," which she asserted "is [the League's] main . . . purpose for existing." (Ex. E, Poore Dep. at 28, 30). Rather than burdening the League's First Amendment rights to free speech and association, the manner in which the State Senate Districts were drawn in 2011 has, if anything, increased the League's ability to spread its message and make voters aware of the issues that concern it.

The League has not had trouble reaching voters with election information: Dr. Susan Smith[4] testified that, in the context of voters using the League's voter education and information guides, "Michigan has the biggest percentage of people participating in the country as far as the League is concerned." (Trial Vol. I, Feb.

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[4] Dr. Smith has been involved with the League of Women Voters of Michigan for about 48 years. She has been part of the Lansing, Mount Pleasant, and Ann Arbor Leagues; she was President of the State League from 2011 to 2015; and she is currently on the State League Board as Redistricting Director and is President of the Ann Arbor League. (Trial Vol. I, Feb. 5, 2019, at 49-50).

5, 2019, at 48). She also testified that the Ann Arbor League was able to register over 1,000 high school students to vote. (Trial Vol I, Feb. 5, 2019, at 52).

With regard to convincing candidates to participate in forums and provide responses for voter guides since the 2011 redistricting, Dr. Smith testified that the League has had trouble convincing Republican candidates to participate. (Trial Vol. I, Feb. 5, 2019, at 59-62). Dr. Smith's testimony implied that Republicans in certain districts did not respond or participate because their districts were gerrymandered so that they had an overwhelming chance of winning. However, Dr. Smith did not establish such a causal connection; the implication is only speculative. Republican candidates may not have wanted to participate for a number of reasons, including that they know that those who attend League candidate forums are Democratic voters unlikely to vote for a Republican candidate and opposed to Republican views. Rather than spend valuable campaign time meeting with voters who will not support them, these candidates focus their campaign efforts elsewhere.

Plaintiffs also attempted to show that since the 2011 redistricting, they have had setbacks advocating for and passing voter rights legislation. Dr. Smith testified that in 2012 the League "met with Secretary of State Johnson to talk about the possibility of getting a bill introduced and passed" for no-reason absentee ballot voting. (Trial Vol. I, Feb. 5, 2019, at 64). The Secretary "told [the League] she

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was interested in supporting that kind of legislation, but she wanted it introduced by the Republicans and that she would work with her staff to have a bill introduced. Eventually a bill was introduced." (Trial Vol. I, Feb. 5, 2019, at 64-65). Although the bill ultimately did not pass, the League was able to meet and communicate with the Secretary and with legislators, including meeting with House and Senate Election Committee Chairs to "talk about the League's interest in voting rights" and no-reason absentee voting. (Trial Vol. I, Feb. 5, 2019, at 65). Neither the First nor Fourteenth Amendment protects a right to have preferred legislation passed, and a bill's failure to be enacted is not a cognizable injury for purposes of organizational standing. The League was by all accounts able to further its voting rights policy goals.

As a case in point, Dr. Smith stated that when the League did not succeed in passing legislation, it instead focused its efforts on passing Proposal 3 through a ballot initiative to amend the State Constitution to include certain voting rights, which was successful. (Trial Vol. I, Feb. 5, 2019, at 67). Because the League's ability to further its goals has not been perceptively impaired, the League does not have organizational standing to bring First or Fourteenth Amendment claims.

To have standing solely as a representative of its members based on indirect harm, an organization "must demonstrate that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are

germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Greater Cincinnati Coal.*, 56 F.3d at 717 (citation omitted). Because none of the individual Plaintiffs have standing to sue in their own right, the League does not have standing to sustain a claim on its members' behalf, either.

V. CONCLUSION

Plaintiffs failed to present evidence at trial that they suffered cognizable injuries stemming from the Senate Districts or that a favorable ruling from this Court would redress those injuries. The Senate Defendants are entitled to judgment on partial findings under Rule 52(c), and this Court should dismiss Plaintiffs' claims with regard to the Senate Districts.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: February 14, 2019

By: */s/ Jason T. Hanselman*

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 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 counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

By: *<u>/s/ Jason T. Hanselman</u>*
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