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., Defendants.	Case No. 2:17-cv-14148 Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist **PLAINTIFFS' COMBINED RESPONSE TO INTERVENORS' FED. R. CIV. P. 52(C) MOTIONS**

Joseph H. Yeager, Jr. (IN 2083-49)
Kevin M. Toner (IN 11343-49)
Harmony A. Mappes (IN 27237-49)
Jeffrey P. Justman (MN 390413)
Daniel R. Kelley (IN 30706-49)
Matthew R. Kinsman (IN 32032-71)
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: 317-237-0300
Jay.Yeager@FaegreBD.com
Kevin.Toner@FaegreBD.com
Harmony.Mappes@FaegreBD.com
Jeff.Justman@FaegreBD.com
Daniel.Kelley@FaegreBD.com
Matthew.Kinsman@FaegreBD.com

Mark Brewer (P35661)
GOODMAN ACKER P.C.
17000 West Ten Mile, Second Floor
Southfield, MI 48075
Telephone: 248-483-5000
MBrewer@goodmanacker.com

Counsel for Plaintiffs

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On February 4, 2019, the parties commenced a bench trial that included ten witness examinations, almost three dozen *de bene esse* depositions, numerous expert reports and depositions, and approximately 600 trial exhibits. When Defendant Secretary Benson and the Congressional, House, and Senate Intervenors rested on February 7, the Court instructed all parties to submit proposed findings of fact and conclusions of law ("Post-Trial Briefing") by February 22, 2019.[1] The Court made clear that there would be no post-trial "briefing" other than the proposed conclusions of law, and directed the parties to limit their proposed conclusions to 50 or fewer pages. (*See* Tr., ECF No. 250 at PageID #9350:14-19.)

Contrary to the Court's explicit directive, and just days before Post-Trial Briefing was due, the Michigan Senate, House, and Congressional Intervenors (collectively, "Intervenors") filed two motions asking the Court to enter judgment against Plaintiffs pursuant to Fed. R. Civ. P. 52(c). (ECF No. 252 (Mich. Senate Intervenors' Mot. for J. on Partial Findings) (Feb. 14, 2019); ECF No. 253 (Mich. Congressional and House Intervenors' Mot. for J. on Partial Findings) (Feb. 18, 2019) (together, "Motions").)

[1] Each party has now filed its Post-Trial Briefing. *See* ECF Nos. 254-55 (Mich. Senate Intervenors); ECF No. 256 (Defendant Secretary of State); ECF No. 257 (Plaintiffs); and ECF No. 258 (Mich. Congressional and State House Intervenors).

The Motions should be denied. The point of Rule 52(c) is to avoid the burdens of presenting additional evidence in response to a plaintiff's case in chief. Courts recognize that Rule 52(c) motions serve no purpose if the movant has already presented its evidence to defend a plaintiff's claims. By failing to tender a Rule 52(c) motion at trial and then presenting evidence, Intervenors have obviated the utility of a Rule 52(c) judgment. The Motions also should be denied because they are contrary to Intervenors' representations to the Court, including their commitment to adhere to the prescribed post-trial briefing schedule and to avoid playing a disruptive role. The Motions will result in prejudicial delay and unnecessary, repetitive briefing of the same standing arguments that the Court has already once heard, considered, and rejected, and is already again considering in connection with the Post-Trial Briefing.[2] For these reasons and as explained more fully below, the Motions should be denied.

I. Consideration of the Complete Trial Record is Required Here.

Federal Rule of Civil Procedure 52(c) provides that a party can move for judgment on partial findings "[i]f a party has been fully heard on an issue during a nonjury trial." Fed. R. Civ. P. 52(c). A Rule 52(c) motion is typically advanced by the defendant "at the close of the plaintiff's case (and may be renewed at the close of all

[2] Intervenors presented the same standing arguments in summary judgment motions, pre-trial briefs, and on February 22, in two lengthy submissions of proposed conclusions of law. (ECF No. 121 (Congressional Intervenors' Motion for Summary Judgment) at PageID #2767-2781; ECF No. 224 (Congressional and Legislative Intervenors' Trial Brief) at PageID #8223-8227; ECF No. 254 (Michigan Senate and Senators' COL) at PageID #10349-10357; ECF No. 258 (Congressional and State House Intervenors' Proposed FOF and COL) at PageID #1102-11131.

evidence)." 9C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2573.1 (3d ed. 2018 update). The purpose of Rule 52(c) is to "conserve[] time and resources by making it unnecessary for the court to hear evidence on additional facts when the result would not be different even if those additional facts were established." *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 272 (3d Cir. 2010).

A. Intervenors' Request for a Rule 52(c) Judgment is Untimely and Procedurally Improper.

As a threshold matter, Intervenors' failures to tender a Rule 52(c) motion at the close of Voters' case in chief, and their subsequent presentation of evidence, render their Motions both untimely and procedurally improper.

In their opening statement, House and Congressional Intervenors represented to the Court that they intended to "ask the Court to enter a Rule 52(c) judgment at the conclusion of Plaintiff's case in chief."[3] (Tr., ECF No. 248 at PageID #8748:4-6.) At the conclusion of Plaintiff's case in chief, however, Intervenors did not move for judgment under Rule 52(c) or seek any other form of relief; and instead, they proceeded to submit their own evidence. (*Id.* at PageID #9252:4-9261:10.) Moreover, following their own case in chief, Intervenors still did not offer a Rule 52(c) motion. (*Id.* at PageID #9346:13-9351:8.) Even as the Court and the parties engaged in an extensive dialogue related to the post-trial briefing schedule and page limits, Intervenors were silent as to any intent they may have had to file a Rule 52(c) motion.

[3] Senate Intervenors did not reference Rule 52(c) during the bench trial.

(*Id.* at PageID #9347:13-9351:4.) Rule 52(c) refers to entering a judgment on partial findings "during a nonjury trial," but Intervenors made no motion during the nonjury trial. The rule simply does not apply.

Moreover, Intervenors waived their ability to move for judgment on partial findings because they "proceed[ed] to introduce evidence." *A. & N. Club v. Great Am. Ins. Co.*, 404 F.2d 100, 104 (6th Cir. 1968) (finding that a defendant who moved for a directed verdict under Rule 41(b)—the precursor to Rule 52(c)—following the plaintiff's case in chief waived its ability to move for a directed verdict after presenting evidence).[4] This result follows from the purpose of Rule 52(c), which is to conserve a court's "time and resources" by avoiding unnecessary presentations of evidence. *See McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 911 F. Supp. 2d 1, 18 (D. Mass. 2012) (summarily denying a Rule 52(c) motion and finding that "judgment on the entire record is appropriate" because the trial was completed and "the parties [had already] filed post trial briefs."); *In re Brooke Corp.*, 568 B.R. 378, 396 (Bankr. D. Kan. 2017) ("[If] all of the evidence has been presented, the ruling on the [52(c)] motion and the ruling on the merits of the case fuse and become the same."); *In re Oberdick*,

[4] *See also, e.g.*, *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 724 (8th Cir. 1978) (holding that, once a defendant introduces evidence, it waives the right to a directed verdict and stating that "[i]n such situations the sufficiency of the evidence is tested on appeal by viewing the entire record," even when "the trial judge reserved ruling on the motion when made"); *Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 451, n.29 (7th Cir. 2006) (same conclusion under a Rule 52(c) analysis) (citing *Duval*, 578 F.2d at 723-24).

490 B.R. 687, 697 (Bankr. W.D. Pa. 2013) (finding it "pointless" to consider a Rule 52(c) motion when the entire record is available, because that "would be tantamount to making a decision on the case after trial on the complete trial record" and any arguments in the motion would be addressed in a final decision by the Court).[5]

Because the Court has already completed trial and received voluminous evidence and extensive post-trial briefing from all parties, Rule 52(c) is entirely inapposite here. Accordingly, the Court should consider the complete trial record and "render a judgment based on all the evidence, testimony, and applicable law." *W.L. Gore & Assocs., Inc. v. Medtronic, Inc.*, 874 F. Supp. 2d 526, 540 (E.D. Va. 2012), *aff'd*, 530 F. App'x 939 (Fed. Cir. 2013).

B. Intervenors' Belated Rule 52(c) Motions Violate the Court's Briefing Instructions and Contradict Intervenors' Representations to the Court.

In addition to being untimely and procedurally improper, Intervenors' Rule 52(c) Motions violate the Court's briefing instructions and contradict Intervenors' representations to the Court.

At the end of the trial, this Court directed the parties to limit "conclusions of law" to no more than "50 pages" and ordered that there be no separate briefing. (Tr., ECF No. 250 at PageID #9349:11-9350:19.) By filing the Motions rather than

[5] *See also, e.g.*, *Warner Chilcott Labs. Ireland Ltd. v. Impax Labs., Inc.*, 2012 WL 1551709, at *7 (D.N.J. Apr. 30, 2012), *aff'd sub nom. Warner Chilcott Co., LLC v. Impax Labs., Inc.*, 478 F. App'x 672 (Fed. Cir. 2012); *In re Cupit*, 514 B.R. 42, 48 (Bankr. D. Colo. 2014), *aff'd*, 541 B.R. 739 (D. Colo. 2015).

confining themselves to their combined 100 pages of conclusions of law and legal arguments in their Post-Trial Briefing, the Intervenors effectively granted themselves an enlargement of the Court's page limitation by adding an additional 58 pages of briefing on standing—an issue they then rebriefed extensively in their Post-Trial Briefing. (*See*, ECF No. 252 and ECF No. 253.)

Intervenors seek to require the Court (and the other parties) to expend additional resources addressing untimely briefing on issues that were fully briefed in the Post-Trial Briefing. This violates Intervenors' repeated commitments to the Court to avoid delay and disruption. *See, e.g.*, Individual Michigan Legislators Reply in Support of Their Motion to Intervene (ECF No. 85 at PageID #2033-2034) (acknowledging Court's right to set limits to avoid delay and committing "to work in any expedited schedule the Court may order"); *see also* Motion to Intervene by Republican Congressional Delegation, (ECF No. 21 at PageID #218) (arguing that permitting intervention will allow them to assert defenses "without any delay or disruption to the litigation").

In sum, the parties have fully presented their evidence on all issues and exhaustively briefed the legal arguments. This Court should consider the relevant issues under the agreed-upon record, not on the partial arguments and findings advanced by Intervenors.

II. Plaintiffs' Evidentiary Record Establishes Standing.

Alternatively, even if the Court accepts Intervenors' invitation to consider only a partial trial record, Plaintiffs' have presented sufficient evidence to establish standing for both their First and Fourteenth Amendment Claims, as described fully in Plaintiffs' Post-Trial Briefing. *See* ECF No. 257, Pls.' Proposed Findings of Fact and Conclusions of Law, § III(A) (District Level Evidence from Voters), § III(B) (League of Women Voters' Standing Evidence), § III(C) (Other Evidence of Standing), and § IV (Expert Evidence of Standing).

A. Intervenors' Motions Omit Key Evidence from Voters.

Intervenors claim that nearly every voter—whether League member or individual plaintiff—has failed to establish vote-dilution or First Amendment standing, but they cherry pick and cite incomplete parts of the Voters' testimony in doing so. Three examples:

Intervenors claim that the "only harm" that Voter Jane Speer could "articulate" is that she "feels frustrated" and is "less enthusiastic about voting." (ECF 252 at PageID #9382.) Not so. Ms. Speer testified that she has donated less money in both the 1st Congressional District and 36th Senate District, both of which are being challenged in this lawsuit, because she "knows what the results are going to be." (Speer Dep. 13:7-14:11.) She also articulated cognizable vote-dilution harm for her and others in these two districts; she personally believes, other voters have told her, "why bother" with voting when their vote does not matter. (*Id.* at 15:1-24.)

Intervenors also claim that "many" of Dr. Chen's simulations would put Ms. Speer into districts that would garner a greater Republican share of the vote (ECF 252 at PageID #9382; ECF 253 at PageID #9933-9934), but the majority of Dr. Chen's simulated districts would put Ms. Speer into much more competitive districts, both for Congress and the state Senate. This Court already held at the summary judgment stage that vote dilution may be based on "thousands of alternative districts" (ECF 143 at PageID #5316), and the only thing Plaintiffs must do is identify one district. They have more than satisfied that requirement.

Intervenors claim that Voter Christine Canning-Peterson has merely alleged a "generalized grievance," not a concrete allegation of vote dilution (ECF 253 at PageID #9939), but she testified about vote-dilution and First Amendment harms in the most vivid of terms. (Canning-Peterson Dep. 11:7-13:14.) She explained how the 2011 redistricting moved the Democratic Congressman she previously supported into a different district, with a Republican then elected to replace him. (*Id.*) And because the 7th Congressional District, where she lives, is less competitive, she donates less money to candidates she supports every election cycle, she has been unable to recruit quality candidates because "people don't believe they're going to win anyway," and she has "reduced [her] civic activity." (*Id.* at 14:1-15:9, 18:7-13.) Intervenors claim that the redistricting has not impacted Ms. Canning-Peterson's "ability" to vote, campaign, run for office, or other things (ECF 253 at PageID #9939), but ignore her testimony

that it impacted her "enthusiasm and [her] willingness. It cut down my participation." (Canning-Peterson Dep. 29:8-15.)

Finally, Intervenors challenge the standing of Voter and former League President Jessica Reiser because they claim she has voted for Republicans on occasion and there is "no evidence in the record that she will only vote for a Democrat." (ECF 253 at PageID #9953.) This is simply wrong. Ms. Reiser testified that she votes "predominantly democratic," she has voted for Democrats since 2011, and would probably vote for Democrats in 2020. (Reiser Dep. 8:13-24.) Intervenors say that Ms. Reiser's "ability to express her political views has not been impacted" (ECF 253 at PageID #9939), but that overlooks the impact of dilution. She testified that she chose not to vote in House District 63 in 2011 because of the redistricting. (Reiser Dep. 11:1-17.) And Intervenors say that Ms. Reiser has no standing because "every simulation" from Dr. Chen still puts Ms. Reiser in a Republican-leaning district. (ECF 253 at PageID #9939.) Of course, that ignores that every one of the thousand simulated districts would be much more competitive. *Gill* does not require anything more.

B. Intervenors' Motions Omit Key Evidence from the League of Women Voters.

Intervenors also cite cherrypicked evidence regarding the League of Women Voters' standing. (ECF No. 252 at PageID #9383-9387.) Intervenors attempt to cast Susan Smith's testimony about candidate forums as merely "speculative," saying that

Republicans may not want to participate in forums with "Democratic voters," as the only alternative theory presented. (*Id.* at PageID #9385.) Intervenors fail to mention that the candidate forums, as well as the print and online voter guides, are distributed and shown to the public, not just League members. (Smith, Trans, ECF No. 248 at PageID #8774:21-8776:1.) The candidate forums are usually televised on local community TV or they are streamed on YouTube. (*Id.* at Page ID #8775:15-8776:1.) These forums are directed to the public, not Democratic voters, and since 2011 Republicans have participated in these forums far less, which has made the League's mission more difficult. (*Id.* at PageID #8776:8-8777:1.)

Intervenors also ignore Dr. Smith's testimony regarding the impact gerrymandering has had on getting out the vote and engaging voters, key components of the League's mission. Dr. Smith testified that both League members and members of the public told her that "I'm not going to bother to vote." (*Id.* at PageID #8779:5) Others expressed concern that they knew the person they wanted to support "is not going to win anyway." (*Id.* at PageID #8779:5-6.) Finally, some felt that no matter how they voted, the legislature is "going to do what they want to do anyway, and so I just don't see any point in [] participating." (*Id.* at 8779:7-10.) She is clear about the connection between these issues and the gerrymander. (*Id.* at 10681, ¶ 438.)

This evidence, and extensive evidence presented by Plaintiffs in the Findings of Fact and Conclusions of Law, clearly demonstrates the harm suffered by the League.

Conclusion

For all of above reasons, Intervenors' Motions for Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c) [ECF Nos. 252-53] should be denied.

Respectfully submitted,

Date: February 28, 2019

/s/ Joseph H. Yeager, Jr.

Mark Brewer (P35661)
GOODMAN ACKER P.C.
17000 West Ten Mile, Second Floor
Southfield, MI 48075
Telephone: 248-483-5000
Fax: 248-483-3131
MBrewer@goodmanacker.com

Joseph H. Yeager, Jr. (IN Bar No. 2083-49)
Kevin M. Toner (IN Bar No. 11343-49)
Harmony A. Mappes (IN Bar No. 27237-49)
Jeffrey P. Justman (MN Bar No. 390413)
Daniel R. Kelley (IN 30706-49)
Matthew R. Kinsman (IN 32032-71)
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300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: 317-237-0300
Jay.Yeager@FaegreBD.com
Kevin.Toner@FaegreBD.com
Harmony.Mappes@FaegreBD.com
Jeff.Justman@FaegreBD.com
Daniel.Kelley@FaegreBD.com
Matthew.Kinsman@FaegreBD.com

Counsel for Plaintiffs

Certificate of Service

I certify that on February 28, 2019, I have electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record in this matter.

Respectfully submitted,

/s/ Joseph H. Yeager, Jr.