IN THE 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

Defendant.
_____/

Civil Action No. 17-cv-14148

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

**CONGRESSIONAL AND HOUSE INTERVENORS' REPLY IN SUPPORT OF THEIR RULE 52(c) MOTION**

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Plaintiffs' response to the Congressional and House Intervenors' 52(c) Motion largely ignores the district by district analysis that overwhelmingly demonstrates that the Plaintiffs lack standing in this case. Instead, Plaintiffs assert a series of blurry procedural arguments in response to the Motion, effectively arguing that the Motion was untimely and procedurally improper because it was filed after trial. The Congressional and House Intervenors concur with the Michigan Senate and Michigan Senators' Reply (ECF No. 265), and further assert that the Congressional and House Intervenors' Motion was timely and properly filed where: (1) Plaintiffs were not "fully heard" on the issue of standing under Fed. R. Civ. P. 52(c) until all *de bene esse* depositions were completed, many days after the final day of the courtroom portion of the trial; and (2) as referenced in Congressional and House Intervenors' opening statement on the first day of trial, a judgment on partial findings under Rule 52(c) can be granted after all evidence has been presented, which is exactly what the Congressional and House Intervenors requested in their 52(c) Motion.

## I. THE CONGRESSIONAL AND HOUSE INTERVENORS' RULE 52(c) MOTION WAS TIMELY FILED.

Federal Rule of Civil Procedure 52(c) states that during a nonjury trial, a "court may enter judgment against [a] party on a claim or defense that . . . can be maintained or defeated only with a favorable finding on that issue" *only* "*After* [the] party has been *fully heard* on [the] issue . . . ." Fed. R. Civ. P. 52(c)

(emphasis added). Rule 52(c) thus "requires that a party be 'fully heard' on an issue essential to its case *before* the court can enter a judgment on partial findings against that party." 9 James Wm. Moore *et al., Moore's Federal Practice - Civil §* 52.50 (2019) (emphasis added).

Prior to the commencement of the trial, the parties agreed that 35 individual Plaintiffs and League members would testify outside of the courtroom through an agreed-upon *de bene esse* deposition procedure that lasted from February 4, 2019 to February 12, 2019. (2/1/19 Order Re: Parties' Partial Stipulations and Report, ECF No. 234, PageID.8367). It was universally known to all parties that *after* the last day of the "courtroom portion" of the trial was completed on February 7, 2019, the evidence was not yet closed, since several more days of *de bene esse* depositions had yet to be completed.

The fact that numerous voters had not yet testified as of February 7 leads to the ineluctable conclusion that Plaintiffs could not possibly have been "fully heard" on the issue of standing as required under Fed. R. Civ. P. 52(c) until all *de bene esse* depositions were completed. As the Senate Intervenors' Reply explains, 13 of the 35 deponents testified *after* the conclusion of the courtroom portion of the trial concluded on February 7, and each of these voters were questioned about the issue of standing. Therefore, because Plaintiffs had not been fully heard until February 12, the Congressional and House Intervenors had to wait to file their Rule 52(c)

Motion until the close of all of the Plaintiffs' evidence (*i.e.*, until the Plaintiffs were "fully heard" on the issue of standing), otherwise, the Motion would have been premature. Fed. R. Civ. P. 52(c); 9 James Wm. Moore *et al., Moore's Federal Practice - Civil §* 52.50 (2019). Accordingly, The Congressional and House Intervenors' 52(c) Motion was timely filed since the Plaintiffs were not "fully heard" on the issue of standing under Fed. R. Civ. P. 52(c) until all *de bene esse* depositions were completed on February 12, 2019, many days after the final day of the courtroom portion of the trial had concluded on February 7, 2019.

## II. RULE 52(c) CONTEMPLATES THE EXACT SCENARIO THAT OCCURRED HERE.

It is beyond question that a Rule 52(c) motion may be made and granted after the close of all evidence in a case. *See* Fed. R. Civ. P. 52(c), Notes of Advisory Committee on 1991 Amendments; 9 James Wm. Moore *et al., Moore's Federal Practice - Civil §* 52.50 (2019) ("The court in its discretion may enter a judgment on a claim after all the evidence on the crucial issue is heard, or the court may wait and render a judgment at the close of all the evidence."). This clear proposition was not disputed in the Plaintiffs' response ("A Rule 52(c) motion...may be renewed at the close of all of the evidence." Plaintiffs' Response, ECF No. 263, PageID.11522). This is exactly why the Congressional and House Intervenors filed their 52(c) motion after the date that the evidence closed, *after* completion of the final *de bene esse* depositions on February 12, 2019. Therefore,

since a Rule 52(c) motion may be made and granted after the close of all evidence in a case, this motion was timely and properly filed.

## III. THE INTERVENORS' RULE 52(c) MOTIONS HAVE NOTHING TO DO WITH THE PARTIES' FINDINGS OF FACT AND CONCLUSIONS OF LAW.

At the conclusion of the trial, the court gave the parties instructions regarding the length of the parties' findings of fact and conclusions of law and set a filing deadline. (Trial Tr. vol. 3, 2/7/19, ECF No. 250, PagelD.9347). At no time did this court ever discuss, let alone prohibit, any party from filing any motion that would otherwise be allowed under the Federal Rules of Civil Procedure. Accordingly, neither the Congressional and House Intervenors nor the Senate Intervenors' Rule 52(c) motions should be improperly linked to the Court's instructions regarding the Findings of Fact and Conclusions of Law as the Plaintiffs suggest. These are completely separate procedural concepts that have nothing whatsoever to do with one another.[1]

## IV. THE PLAINTIFFS HAVE FAILED TO RESPOND TO THE SUBSTANCE OF THE MOTION.

As extensively discussed in the Congressional and House Intervenors' post-trial briefing, *each* of the Plaintiffs must demonstrate on an individual, district-

[1] The Congressional and House Intervenors also concur with and adopt all of the arguments made by the Senate Intervenors in their Reply relating to the Intervenors' denial that the Intervenors' respective Rule 52(c) motions had anything to do with extending the 50-page limit on post-trial briefing. They did not.

specific basis that they suffered individual harm from residing in a packed or cracked district. *Gill v. Whitford,* 138 S. Ct. 1916; 201 L. Ed. 2d 313 (2018). Accordingly, the Congressional and House Intervenors went painstakingly through each of the Congressional and State House Districts in their Rule 52(c) motion to clearly demonstrate that the Plaintiffs have not met this burden on a district-by-district basis. *See* ECF No. 253, PageID.9932-48 (lack of standing in Congressional Districts) and PageID.9948-33 (lack of standing in State House Districts). In fact, Norma Sain (CD 5), Pamela Lynk (HD 92), Frederick Durhal, Jr., Diana Ketola (CD 1), Jon LaSalle (CD 1), Richard Long (CD 11), Lorenzo Rivera (CD 8), Rashida Tlaib are all Plaintiffs or League Members who did not even testify in this case. Their claims should be dismissed on that basis alone. *See* ECF No. 253, PageID.9933 at fn. 1.

Plaintiffs only addressed the merits of the challenge to the standing of only two Congressional and House voters: Christine Canning-Peterson and Jessica Reiser (Plaintiff's Response, ECF No. 263, PagelD. 11527-28). As to Ms. Canning-Peterson, she testified that while she believes that allowing the party in power to draw district lines is "wrong," Canning-Peterson Dep. Tr. at 18:25-19:1, she admitted that the lines of her district have not impacted her ability to vote, campaign, run for office, express her political views, donate to a candidate of her choice, or contact her representatives. Canning-Peterson Dep. Tr. at 26:2-27:7.

Ms. Canning-Peterson has not been individually harmed and she therefore lacks standing. *Gill v. Whitford,* 138 S. Ct. 1916; 201 L. Ed. 2d 313 (2018).

The same is true for Jessica Reiser. Ms. Reiser cannot establish an individualized injury since she testified that the 2011 redistricting has not caused her injury, as: (i) her ability to express her political views has not been impacted; (ii) she has not been precluded from fundraising for Democratic candidates; (iii) she can contact her representative and ask her representative to vote a certain way; and (iv) she is free to speak out on an issue she disagrees with her representative on. Reiser Dep. Tr. at 28-30. In addition, Dr. Chen's and Dr. Warshaw's own data (ECF No. 253, Ex. A. at 26), depict Ms. Reiser in a Republican leaning district under every simulation. Accordingly, her alleged harms cannot be remedied. *Gill,* 138 S. Ct. 1916 (2018).

Finally, Congressional and House Intervenors concur with the Michigan Senate and Michigan Senators' position in their Reply (ECF No. 265) that by declining to defend the standing of other challenged individuals, Plaintiffs waived their right to do so. *Allstate Ins. Co. v. Global Med. Billing, Inc.,* 520 Fed. Appx. 409 (6th Cir. 2013) (holding that failure to respond to attack on standing amounted to a waiver of the argument); *Humphrey v. U.S. Attorney Gen. Office,* 279 Fed. Appx. 328, 331 (6th Cir. 2008). Therefore, the Congressional and House Intervenors agree with the Senate Intervenors that this Court should evaluate the

merits of the Intervenors' respective Rule 52(c) Motions without the benefit of a response regarding the districts that the Plaintiffs failed to address in their response. (ECF No. 263).

Respectfully submitted,

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Date: March 7, 2019

## CERTIFICATE OF SERVICE

I hereby certify that on March 7, 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.

*/s/ Kevin A. Fanning*
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