IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,

Plaintiffs,

v.

RUTH JOHNSON, 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

MOTION TO INTERVENE BY REPUBLICAN CONGRESSIONAL DELEGATION

Proposed Intervenors Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott, Members of Congress representing the State of Michigan (collectively, "Congressional Intervenors" or "Applicants"), by and through their undersigned counsel, respectfully request, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to intervene as defendants in the above-captioned proceeding for the purpose of participating in the disposition of the proceeding. In support of this Motion, Applicants submit the accompanying Brief in Support. Additionally, Applicants submit the following proposed pleadings in response to the Complaint filed in this matter:

(1) Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) with Brief in Support attached hereto as Attachment 1; and

(2) Motion to Stay and/or Abstain, with Brief in Support, attached hereto as Attachment 2.

In accordance with LR 7.1(a), Applicants sought and obtained the concurrence of Defendant in their request to intervene in this matter. Prior to filing this Motion, Applicants explained the nature of this Motion to Plaintiffs and requested, but did not obtain, their concurrence in the relief sought.

WHEREFORE, Applicants respectfully request that the Court grant their Motion to Intervene and permit the Applicants to intervene as Defendants in this proceeding.

Respectfully submitted,

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Date: February 28, 2018

UNITED DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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Civil Action No. 17-cv-14148

Hon. Eric L. Clay
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BRIEF IN SUPPORT OF MOTION TO INTERVENE BY REPUBLICAN CONGRESSIONAL DELEGATION

Proposed Intervenors Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott, Members of Congress representing the State of Michigan (collectively, "Congressional Intervenors" or "Applicants") submit the within Brief in Support of their Motion to Intervene as named Defendants in this action pursuant to Federal Rule of Civil Procedure 24 (the "Motion").

CONCISE STATEMENT OF THE ISSUE PRESENTED

I. WHETHER THIS COURT SHOULD GRANT APPLICANTS' MOTION TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO RULE 24(a)(2), OR IN THE ALTERNATIVE, BY PERMISSIVE INTERVENTION UNDER RULE 24(b).

CONTROLLING OR MOST APPROPIATE AUTHORITY

Rules

Fed. R. Civ. P. 24(a)(2)

Fed R. Civ. P. 24(b)

Cases

Jansen v. Cincinnati, 904 F.2d 336 (6th Cir. 1990)

Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)

Triax Co. v. TRW, Inc., 724 F.2d 1224 (6th Cir. 1984)

I. INTRODUCTION

On December 22, 2017, the League of Women Voters of Michigan, Roger J. Brdak, Frederick C. Durhal, Jr., Jack E. Ellis, Donna E. Farris, William "Bill" J. Grasha, Rasa L. Holliday, Diana L. Ketola, Jon "Jack" G. Lasalle, Richard "Dick" W. Long, Lorenzo Rivera and Rashida H. Tlaib (collectively, "Plaintiffs") filed a Complaint (ECF No. 1) seeking declaratory and injunctive relief based on the claim that the current legislative and congressional apportionment plans ("Current Apportionment Plans") are unconstitutional. Plaintiffs here bring claims under 42 U.S.C. § 1983, 1988 and the First and Fourteenth Amendments to the United States Constitution. Specifically, Plaintiffs contend that by continuing to implement the Current Apportionment Plans, named Defendants have impermissibly discriminated against Plaintiffs as an identifiable political group (likely Democratic voters) in contravention of the Equal Protection Clause of the Fourteenth Amendment, and unreasonably burdened Plaintiffs' right to express their political views and associate with the political party of their choice in contravention of the First Amendment. Plaintiffs seek to enjoin the further implementation of the Current Apportionment Plans in the upcoming Congressional and state legislative elections scheduled for 2020. *See* Pls' Resp. to Motion for Stay, at 2 (ECF No. 15).

Applicants file their Motion seeking leave of this Court to intervene in this matter based on established Supreme Court precedent. Applicants have significant

interests in this litigation and none of the currently named parties adequately represent Applicants' interests. Applicants are incumbent Republican members of Congress and stand to be irrevocably harmed by any redrawing of congressional districts. Accordingly, Applicants have a substantial interest in this litigation and the redrawing of the current congressional districting plan should the Court ultimately so order. Moreover, Applicants' interests cannot be adequately and fairly represented by any other existing party to this action. Permitting Applicants to intervene will promote and ensure the presentation of complete and proper evidence and legal arguments and lend finality to the Court's adjudication on the merits.

For these reasons, as more fully discussed *infra*, Applicants request leave of the Court to intervene as Defendants in this matter to protect their interest in the outcome of this litigation and the impact such an outcome will have, if any, on the Current Apportionment Plans.

II. APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, intervention as a matter of right is appropriate when, upon a timely motion, a party:

> Claims an interest relating to the property or transaction that is the subject of the actions, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a)(2). The United States Court of Appeals for the Sixth Circuit has recognized a "rather expansive notion of the interest sufficient to invoke intervention of right." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). "As a general rule, a person cannot be deprived of his or her legal rights in a proceeding to which such a person is neither a party nor summoned to appear in the legal proceeding." *Jansen v. Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990). Therefore, "the need to settle claims among a disparate group of affected persons militates in favor of intervention." *Id*. With that in mind, the Sixth Circuit has established the following legal standards by which courts can measure applications under Rule 24(a)(2). *Id*.

The Sixth Circuit has provided the following four (4) pragmatic criteria to be considered on an application to intervene under Rule 24(a)(2):

(1) the motion must be timely;

(2) the applicant has a significant interest in the litigation;

(3) the interest may be impaired or impeded by disposition of the action; and,

(4) the interest is not adequately represented by an existing party to the litigation.

See id.; *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1984). For the reasons discussed below, Applicants readily meet each of the four (4) criteria, thereby entitling them to intervene in this matter.

A. Applicants' Motion to Intervene Has Been Timely Filed.

It cannot be disputed that Applicants' Motion seeking intervention has been timely filed. The timeliness of a motion to intervene "should be evaluated in the context of all relevant circumstances." *Jansen*, 904 F.2d at 340 (citing *Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir. 1987)). The Sixth Circuit has outlined five factors to be considered when assessing the timeliness of a motion to intervene: (1) the stage of the proceeding; (2) the purpose of intervention; (3) the length of time between when the applicants knew or should have known of their interest and moved to intervene; (4) prejudice that any delay may have caused the parties; and (5) the reason for any delay. *Jansen*, 904 F.2d at 340 (citing *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)). In this instance, Applicants clearly meet all five factors. Currently, the proceeding is in its most nascent stages, with an Answer to Plaintiffs' Complaint not yet filed. The prejudice inquiry is related to timeliness, as the "analysis must be limited to the prejudice caused by the *untimeliness*, not the intervention itself." *See United States v. Detroit*, 712 F.3d 925 (6th Cir. 2013).

Here, the Complaint was filed on December 22, 2017, and there have been no substantive actions yet taken by the Court. The named Defendant has not yet

filed an Answer to the Complaint, and in fact, under this Court's Scheduling Order signed and filed February 7, 2018 (ECF No. 16), the named Defendant is not required to do so until after the Hearing on the Motion to Stay or Dismiss is held on March 20, 2018.

Moreover, in filing this present action and failing to include Applicants, Plaintiffs have likely known from the outset that Applicants would seek intervention. Plaintiffs seek to enjoin Michigan Members of Congress from seeking election in their current districts, which have been in effect for three election cycles, since the 2011 reapportionment. Furthermore, this lawsuit has the potential to cast a pall over the 2018 primary and general elections, as Applicants will be forced to campaign for office in districts that may, in an as of yet indeterminate amount of time, no longer exist.

Consequently, Plaintiffs and the currently named Defendant will suffer no prejudice in the event the Court grants Applicants' Motion and permits them leave to intervene at this very early stage of the case. To the contrary, permitting Applicants to intervene at this point will allow them to assert their defenses without any delay or disruption to the litigation.

For all these reasons, Applicants' Motion is timely.

B. Applicants Have A Sufficient Interest That May Be Affected by Disposition of This Litigation Which Is Not Adequately Represented by Any Current Party.

Applicants readily satisfy the three remaining criteria for intervention set forth in *Triax, supra*, in that they possess a sufficient interest in the subject of this litigation, which could be affected by the disposition of this matter and which is not adequately represented by any current party. This matter concerns the Congressional and legislative districting plans enacted and implemented by the Michigan legislature in 2011, which allegedly violates the First and Fourteenth Amendments of the United States Constitution. (*See* Comp. at ¶1). Applicants are currently incumbent members of the Michigan congressional delegation and as such, stand to be significantly harmed by any mid-reapportionment change to their current districts. Thus, Applicants have a sufficient interest in the subject matter of this litigation. *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) (recognizing that a state legislative body has the right to intervene because the legislative body would be directly affected by a district court's orders.). From a pragmatic perspective, Applicants possess at least some of the information regarding the Current Apportionment Plan, which is necessary to this litigation. In this regard, permitting Applicants to intervene would limit to some degree the need for cumbersome third-party discovery and serve to streamline the use of judicial resources.

Moreover, if the Court ultimately determines that the Current Congressional Apportionment Plan must be redrawn, Applicants' interests would be directly implicated and affected. Plaintiffs request, *inter alia*, that the Court "[e]njoin Defendant . . . from administering, preparing for, and in any way permitting the nomination or election of members of . . . Michigan Members of Congress from the Current Apportionment Plan that now exists." (Compl. at 33 ¶ (c)). That request will directly impact all current members of the Michigan Congressional Delegation, as Plaintiffs' are requesting a complete redrawing of the congressional districts that have been in effect for three congressional election cycles. The Applicants would be directly affected by any Order of this Court that would require any mid-decade modification or redrawing of the Current Apportionment Plan.

Additionally, no current party to the litigation adequately represents the interests of Applicants. Plaintiffs' interests are adverse to the Current Apportionment Plan, and the existing Defendant does not adequately represent the same interests Applicants have in defending the challenged redistricting plan. While the named Defendant is charged with the implementation of the Current Apportionment Plan, the Michigan Secretary of State will not be directly impacted by any change to the districts themselves. Rather, Applicants, as current members of Congress, who are currently attempting to run for reelection in districts that will

be directly impacted by any change in the congressional districts as they are currently drawn. As such, Applicants have a substantial interest in defending the Current Apportionment Plan that is not possessed by any currently named party.

Accordingly, Applicants respectfully request leave of this Court to intervene in this case as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2).

III. ALTERNATIVELY, APPLICANTS ARE ENTITLED TO PERMISSIVE INTERVENTION

Alternatively, pursuant to Federal Rule of Civil Procedure 24(b), this Court should permit Applicants to intervene. Rule 24(b) provides for permissive intervention where a party timely files a motion and "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). Intervention under Rule 24(b) is a "discretionary power" left to the judgment of the district court. *Bradley v. Milliken*, 828 F.2d 1186, 1193 (6th Cir. 1987). In exercising its broad discretion under this Rule, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. FED. R. CIV. P. 24(b)(3).

For the same reasons outlined above, Applicants have demonstrated their right to intervene in this matter. Applicants have filed their Motion early in the litigation, prior to any substantive action on the merits by the Court. Applicants also possess claims and defenses in line with the Current Apportionment Plan,

given that Applicants will be directly and irrevocably impacted by any change to the Current Apportionment Plan. Furthermore, disallowing Applicants to intervene could prejudice Applicants' interests and rights. This case asks this Court to rule on the validity of the Current Congressional Apportionment Plan, and possibly order that it be redrawn – doing so without the input of the parties who stand to be most directly harmed by a change in the current plan would be inefficient and unjust. The only way to protect the fairness of the litigation and lend credibility and finality to the Court's decision on the merits is to permit Applicants to intervene.

IV. CONCLUSION

For all of the foregoing reasons and authorities, Applicants' Motion to Intervene should be granted and Applicants permitted to intervene as Defendants in order to protect their interests in the subject matter and outcome of this litigation concerning the constitutionality of the Current Apportionment Plan.

Respectfully submitted,

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/s/Jason Torchinsky
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Date: February 28, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018 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/Brian D. Shekell
Brian D. Shekell (P75327)

Date: February 28, 2018

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LIST OF ATTACHMENTS TO MOTION TO INTERVENE

Att. 1 **Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b) (1) and 12 (b)(6)**

Att. 2 **Motion to Stay**

ATTACHMENT 1

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MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6) BY JACK BERGMAN, BILL HUIZENGA, JOHN MOOLENAAR, FRED UPTON, TIM WALBERG, MIKE BISHOP, PAUL MITCHELL, AND DAVID TROTT AS INTERVENORS IN SUPPORT OF DEFENDANT

Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott (collectively, "Congressional Intervenors"), all Members of Congress representing Michigan, file the present Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In support of their Motion, Congressional Intervenors rely upon their Brief in Support filed herewith.

Respectfully submitted,

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

/s/ Jason Torchinsky
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BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6) BY JACK BERGMAN, BILL HUIZENGA, JOHN MOOLENAAR, FRED UPTON, TIM WALBERG, MIKE BISHOP, PAUL MITCHELL, AND DAVID TROTT AS INTERVENORS IN SUPPORT OF DEFENDANT

Intervenors, Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott, Members of Congress representing Michigan (collectively, "Congressional Intervenors") hereby submit this Brief in Support of their Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

CONCISE STATEMENT OF THE ISSUES PRESENTED

I. WHETHER THIS COURT SHOULD DISMISS THE COMPLAINT ON THE BASIS THAT PLAINTIFFS LACK STANDING PURSUANT TO FED. R. CIV. P. 12(b)(1), AS PLAINTIFFS CANNOT CHALLENGE THE CURRENT APPORTIONMENT PLAN ON A STATEWIDE LEVEL AND HAVE NOT ALLEGED ANY PARTICULARIZED INJURY.

II. WHETHER PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE PARTISAN GERRYMANDERING CLAIMS ARE NOT JUSTICIABLE.

III. EVEN IF PLAINTIFFS' CLAIMS ARE JUSTICIABLE, WHETHER THEY SHOULD BE DISMISSED ON THE BASIS THAT LEGITIMATE STATE INTERESTS JUSTIFY THE CURRENT APPORTIONMENT PLAN.

IV. ALTENATIVELY, WHETHER THIS COURT SHOULD DISMISS PLAINTIFFS' COMPLAINT ON THE BASIS THAT THEIR SIX-YEAR DELAY IN FILING THIS LAWSUIT WOULD RESULT IN PREJUDICE TO DEFENDANTS.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Rules

Fed. R. Civ. P. 12(b)(1)

Fed. R. Civ. P. 12(b)(6)

Cases

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

Bush v. Vera, 517 U.S. 952 (1996)

Gruca v. United States Steel Corp., 495 U.S. 1252 (3d Cir. 1974)

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

United States v. Hays, 515 U.S. 737 (1995)

I. PRELIMINARY STATEMENT

Plaintiffs seek to invalidate Michigan's now six-year old legislative and congressional districting plans ("Current Apportionment Plan") as "durable and severe" partisan gerrymanders – alleging Equal Protection and First Amendment violations – but possess neither the legal standing nor the legal support to do so. Collectively, Plaintiffs are residents of only 11 of the 110 State House districts, 10 of the 38 State Senate districts, and 9 of the 14 Congressional districts, and as such do not have the standing to challenge the Current Apportionment Plan on a statewide level.[1]

But even if they could cure their standing issues, Plaintiffs' claims still cannot succeed as a matter of law because partisan gerrymander claims are not justiciable. For more than 30 years, neither the U.S. Supreme Court nor the lower courts have been able to devise a manageable or consistent standard to adjudicate such claims. Moreover, the Supreme Court has recognized that because the Elections Clause vests an inherently political branch (i.e., state legislatures) with drawing Congressional districts, substantial political considerations in districting are inevitable – and indeed, have been accepted practice for over 200 years. Thus,

[1] As explained below, standing to challenge a Congressional redistricting (a fraction of the entire Congress) is a very different type of standing than Mr. Whitford claimed in *Whitford v. Gill* because of the nature of the caucus system in the Wisconsin Assembly (where he was challenging the map applicable to the entire body).

the kind of judicial condemnation of politically-minded redistricting that Plaintiffs seek is simply not found in – and not supported by – our jurisprudence.

For these reasons, and those more fully explained below, Congressional Intervenors respectfully submit that the Complaint should be dismissed in its entirety, with prejudice.

II. FACTUAL BACKGROUND

Individual Plaintiffs are eleven individual citizens of Michigan who reside in only 11 of the 110 State House districts, 10 of the 38 State Senate districts, and 9 of the 14 Congressional districts. (Complaint ¶ 10) Each purports to be a registered Democrat, who "votes for Democratic candidates and assists them in their election efforts, and has for many years associated with the Democratic Party. Each is a registered voter." *Id.*

The Complaint asserts two causes of action. Count I alleges a violation of the First Amendment and 42 U.S.C. §§ 1983, 1988, claiming that the Current Apportionment Plan "intentionally diminishes and marginalizes the votes of the individual Plaintiffs, Democratic members of the League, and other voters based on partisan affiliation." *Id.* ¶ 76. Count II alleges an Equal Protection violation under the Fourteenth Amendment and 42 U.S.C. §§ 1983, 1988, alleging that the Current Apportionment Plan "uses political classifications in an invidious manner

[to] . . . . intentionally and materially pack[] and crack[] Democratic voters, thus diluting their votes". *Id.* ¶¶ 82-83.

III. ARGUMENT

A. This Action Must Be Dismissed Because Plaintiffs Lack Standing Pursuant To Federal Rule Of Civil Procedure 12(b)(1)

A motion to dismiss for lack of standing is properly analyzed under Rule 12(b)(1), since "standing is thought of as a 'jurisdictional' matter, and a plaintiff's lack of standing is said to deprive a court of jurisdiction." *Ward v. Alternative Health Delivery Sys.*, 261 F.3d 624, 626 (6th Cir. 2001).

Article III of the U.S. Constitution limits the jurisdiction of federal courts to actual cases or controversies. *See* U.S. CONST. ART. III, § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984). And the most important aspect of the case and controversy requirement is the doctrine of standing, which prevents litigants from "raising another person's legal rights," and prohibits the adjudication of generalized grievances "more appropriately addressed in the representative branches." *Id.* at 750-51. Therefore, to invoke the power of federal courts, a plaintiff bears the burden of demonstrating that s/he has suffered an injury to a legally protected interest that is both concrete and particularized to the plaintiff, and is an injury that the court can redress. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 & n.1 (1992); "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561; accord *Kardules v. City of Columbus*, 95

F.3d 1335, 1346 (6th Cir. 1996). *See also Ballentine v. U.S.*, 468 F.3d 806, 810 (3d Cir. 2007) ("On a motion to dismiss for lack of standing, the plaintiff bears the burden of establishing the elements of standing, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.").

1. Plaintiffs Lack Standing To Challenge The Current Apportionment Plan On A Statewide Level

In the context of racial gerrymandering claims, the Supreme Court has held that a plaintiff has standing to bring a challenge only to the district where the plaintiff resides. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996). In *Hays*, the U.S. Supreme Court based its decision in part on the fact that, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.* (quoting *Shaw*, 509 U.S. at 648). The Court concluded that, "where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference." *Id.* at 745.

For this reason, an organization lacks standing to bring a statewide gerrymandering claim on behalf of its members unless it can show that it has

members in every district of the state. *Id*; *see also Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265, 1268-70 (2015) (holding that an organization bringing a racial gerrymandering case on behalf of its constituents does not have standing). The district-specific rule makes sense because congressional elections are on a district wide basis, not on a statewide or proportional basis. *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring). Indeed, someone who lives outside of the challenged district does not suffer a personal, individualized injury by the election of a congressperson who does not represent him. *See Ala. Legis. Black Caucus*, 135 S. Ct. at 1265; *Hays*, 515 U.S. at 745.

The same logic applies to partisan gerrymandering claims. In fact, while the Supreme Court has not specifically addressed the issue of whether the district-specific rule applies to partisan gerrymandering cases, several Justices have indicated that it does. *See Vieth v. Jubelirer*, 541 U.S. 267, 327-28 (2004) (Stevens, J., dissenting) ("Because *Hays* has altered the standing rules for gerrymandering claims—and because, in my view, racial and political gerrymanders are species of the same constitutional concern—the Hays standing rule requires dismissal of the statewide claim."); *Id.* at 347-48 (Souter, J., and Ginsburg, J., dissenting) (relying on *Hays* for the proposition that to succeed in a partisan gerrymandering claim, a plaintiff must show that the district of his

residence disregarded traditional districting criteria)[2]; *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring) (stating that elections are on a district wide basis for specific candidates not for party); *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (dismissing appeal for lack of standing because intervenor congressional defendants—who alleged that the remedial map would flood their districts with Democrats making it more difficult to get reelected—did not live in or represent the challenged districts, Congressional Districts 3 and 4). Accordingly, the Plaintiffs' desperate attempts to distinguish standing in racial gerrymandering claims from standing in partisan gerrymandering claims are, simply put, a distinction without a difference.

Furthermore, this case is readily distinguishable from the standing found by the divided three-judge panel opinion in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). And even that standing finding was a major subject at the recent oral arguments before the United States Supreme Court. Mr. Whitford challenged the map for the entire Wisconsin Assembly. *Id.* at 855. In the Wisconsin Assembly, as explained in official state publications, the "caucus" system essentially controls whether legislation succeeds or fails in the legislature because of the "majority of the majority" practice described therein. *See Id*. at 845.

[2] While the plurality in *Vieth* did not specifically address whether the plaintiffs therein possessed standing to challenge the plan at issue on a statewide basis, this was only because the plurality found that the claims advanced were otherwise non-justiciable. *Vieth*, 541 U.S. at 292.

So, if Mr. Whitford's claims prevail, he would stand a much better chance at seeing his preferred party take control of the Assembly as a result of the Court's remedy. Here, there is no such legislative control at issue.[3]

Michigan does not possess a legislature-wide caucus system like that in Wisconsin, nor do Plaintiffs claim that such a system is present. Moreover, Michigan's 14 Congressional Districts are but a fraction of the 435 Congressional seats. There is no legal action that the Congressional Delegation takes as a body. In other words, majority control of any particular state's Congressional Delegation means absolutely nothing with respect to control of any legislative outcomes. In sum, Plaintiffs in this case present a dramatic juxtaposition to where the plaintiffs stood in *Whitford*, because success there could actually shift control of the entire legislative body at issue, unlike in this case.

Recent federal court decisions have found differently than the divided panel in *Whitford*, and for good reasons. *See e.g., Ala. Legis. Black Caucus v. Alabama*, No. 2:12-CV-691, 2017 WL 4563868, at *5 (M.D. Ala. Oct. 12, 2017) (dismissing partisan gerrymandering claims involving districts in which none of the Plaintiffs resided); *see also* Statement of Reasons For The Court's Decision Denying The Motion To Dismiss, at 2, *Agre v. Wolf*, Civil Action No. 17-4392 at 4 (E.D. Pa. Nov. 16, 2017).

[3] Compare *Whitford v. Gill*, No. 16-1161 (U.S.) (injury claimed because of the legislature-wide caucus system).

Moreover, the Plaintiffs' reliance on the recent decision of the Middle District of North Carolina in *Common Cause v. Rucho*, 2017 WL 3981300 (M.D.N.C. Sept. 8, 2017) to show standing on this point is erroneous. Even a cursory reading of the filings in that case reveals that the plaintiffs, who were challenging only North Carolina's congressional districts, were residents of every congressional district in the state. Amended Complaint at ¶ 2, Defendants' Memorandum in Support of Motion to Dismiss at 2. That is not the situation we encounter with Plaintiffs in the present case.

Here, Plaintiffs purport to challenge the Current Apportionment Plan on a statewide basis. But to advance such a claim, Plaintiffs are required to establish that they collectively live in all 14 Michigan Congressional districts. *See Ala. Legis. Black Caucus*, 135 S. Ct. at 1265, 1268-70. Because there are only eleven Plaintiffs in this action, who reside in only 9 of the 14 districts in the state, Plaintiffs necessarily lack standing to challenge the Current Apportionment Plan on a statewide basis, and the Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

2. Plaintiffs Lack Standing Because They Have Alleged Only A General Harm With No Particularized Injury

The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and

seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74.

Plaintiffs here have failed to show that their alleged injuries are to a legally protected interest that is both concrete and particularized to themselves. Their Equal Protection and First Amendment claims in Counts I and II center on the effects of the redistricting, which affects all Michigan voters and is not particularized to Plaintiffs. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (refusing to create an exception to the general prohibition on taxpayer standing for challenges to state tax or spending decisions, and observing that taxpayer standing has been rejected "because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally'").

It follows that Plaintiffs lack standing and the Complaint must be dismissed.

B. The Complaint Should Be Dismissed For Failure To State A Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6)

1. Applicable Legal Standard

In deciding a Rule 12(b)(6) motion, a court "may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein."

Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008) (citing *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)). In evaluating the legal sufficiency of a complaint, it is "viewed in the light most favorable to Plaintiffs; the allegations in the complaint are accepted as true, and all reasonable inferences are drawn in [their] favor. However, a legal conclusion couched as a factual allegation need not be accepted as true." *Gavitt v. Born*, 835 F.3d 623, 639-40 (6th Cir. 2016) (internal citations omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Plaintiffs' obligation to provide the grounds for the stated entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The factual allegations must "raise a right to relief above the speculative level." *Id*. Plaintiffs' complaint must "state a claim that is plausible on its face, i.e., the court must be able to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id*. quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

2. Partisan Gerrymandering Claims Are Not Justiciable, And Therefore Both Counts Must Be Dismissed

Where no judicially manageable standard exists to adjudicate a claim or where the question presented is one confined to the political branches, the claim must be dismissed as non-justiciable. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *Vieth*, 541 U.S. 722. The history of partisan gerrymandering cases in the

Supreme Court makes abundantly clear that there is, at present, no manageable standard to evaluate such claims. As a result, the Complaint should be dismissed.

a. A Brief History of Partisan Gerrymandering Claims

In 1986, in *Davis v. Bandemer*, the Supreme Court considered, for the first time, whether a partisan gerrymandering claim under the Fourteenth Amendment's Equal Protection Clause was justiciable. 478 U.S. 109 (1986).[4] Six Justices of the *Bandemer* Court indicated that while they could not agree upon a single standard for adjudicating such claims, they were "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided." *Id.* The splintered Court issued four separate opinions, and the majority of the Court did not agree with the plurality opinion regarding the standard for adjudicating partisan gerrymandering. Over the course of the next 18 years, lower courts attempted with futility to apply some standard adopted by the plurality in *Bandemer*.

In 2004, the Supreme Court rejected the *Bandemer* test. *See Vieth*, 541 U.S. at 283-84. Although the Justices in *Vieth* issued five separate opinions, they once again failed to identify any workable standard to evaluate partisan gerrymandering

[4] Claims of partisan gerrymandering were presented to the Court prior to *Bandemer*, but none were decided on that issue. *See, e.g., Smiley v. Holm*, 285 U.S. 186 (1932) (finding the statute to be invalid based on the then-existing federal congressional apportionment statute); *Wood v. Broom*, 287 U.S. 1 (1932) (in which the Court sidestepped the gerrymandering allegation and decided the case on other grounds).

claims. The four Justice plurality explained that the *Bandemer* test provided nothing more than "one long record of puzzlement and consternation." *Id*. The plurality noted that any attempt to apply the plurality opinion in *Bandemer*, "has almost invariably produced the same result (except for the incurring of attorneys' fees) as would have obtained if the question were non-justiciable: Judicial intervention has been refused." *Id*. After engaging in extensive analysis, the plurality concluded that "eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims." *Id.* at 282, 306. Justice Kennedy concurred in the judgment in *Vieth*, and acknowledged that he could not identify any judicially discernable standards to guide courts in evaluating partisan gerrymandering claims. *Id*. at 308. He concluded that although the arguments in favor of holding partisan gerrymandering claims non-justiciable are "weighty" and in fact "may prevail in the long run…some limited and precise rationale" might be discovered in the future. *Id*. at 306.

Two years after *Vieth*, the Supreme Court again revisited the justiciability of partisan gerrymandering claims. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("LULAC"). The LULAC case produced six opinions, but once again failed to produce a discernable standard upon which to evaluate

partisan gerrymandering claims. 548 U.S. at 461 (Kennedy, J. concurring) (acknowledging that disagreement still persists in articulating the standard to evaluate partisan gerrymandering claims but declining to address the justiciability issue).

From the four opinions in *Bandemer*, to the five opinions in *Vieth*, to the six opinions in LULAC, the U.S. Supreme Court has produced 15 opinions, none of which produced a judicially manageable rule or standard to determine if an unconstitutional partisan gerrymander occurred. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 594 (D. Md. 2016) (three-judge court) (standards to assess political gerrymandering claims remain unclear); *Pearson v. Koster*, 359 S.W.3d 35, 42 (Mo. 2012) (rejecting partisan gerrymandering claim in part because of the "Supreme Court's inability to state a clear standard"); *Radogno v. Ill. State Bd. of Elections*, No. 11-4884, 2011 U.S. Dist. LEXIS 122053, *14 and 18 (N.D. Ill. Oct. 21, 2011) (three-judge court) (recognizing that because the U.S. Supreme Court has not adopted a test, trying to find one may be an "exercise in futility"); *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1296, (M.D. Ala. 2013) ("The Black Caucus plaintiffs conceded at the hearing on the pending motions that the standard of adjudication for their claim of partisan gerrymandering is 'unknowable.'") (three-judge court); and Statement of Reasons For The Court's Decision Denying The Motion To Dismiss, at 2, *Agre v. Wolf*,

Civil Action No. 17-4392 (E.D. Pa. Nov. 16, 2017) (noting that a majority of the Supreme Court has never agreed upon a standard for reviewing a partisan gerrymandering Equal Protection claim).

Without a standard to apply, at least two federal courts have found that the *Vieth* plurality plus Justice Kennedy's concurrence constituted a majority for the proposition that partisan gerrymandering claims are presently non-justiciable. *Lulac of Texas v. Texas Democratic Party*, 651 F. Supp. 2d 700, 712 (W.D. Tex. 2009) (three-judge court) (*Vieth* held that partisan gerrymandering claims are non-justiciable); *Meza v. Galvin*, 322 F. Supp. 2d 52, 58 (D. Mass. 2004) (three-judge court) (noting that *Vieth* held "that political gerrymandering cases are nonjusticiable").

On October 3, 2017, the Supreme Court heard oral arguments in *Whitford*, a case on appeal from the Western District of Wisconsin. In *Whitford*, the Supreme Court is considering, once again, whether partisan gerrymandering claims are justiciable, including whether a workable standard exists to evaluate gerrymandering claims based on the First Amendment or the Equal Protection Clause. *Gill v. Whitford*, No. 16-1161, jurisdictional statement at 40 (U.S. Mar. 24, 2017); *Gill v. Whitford*, 137 S. Ct. 2268 (2017).[5]

[5] In light of the pending decision in *Whitford*, Congressional Intervenors have contemporaneously filed a motion asking to the Court to stay this matter until the Supreme Court has rendered its opinion. If the U.S. Supreme Court concludes that

b. Count I Must Be Dismissed Because It Is Not Justiciable

In Count I, Plaintiffs claim that the Current Apportionment Plan violates their First Amendment rights "because it intentionally diminishes and marginalizes the votes of the individual Plaintiffs, Democratic members of the League, and other voters based on partisan affiliation." (Compl. ¶ 76.) Plaintiffs further contend that the Current Apportionment Plan "burdens and penalizes Democratic voters because of their participation in the electoral process as Democrats, their voting history for Democratic Candidates, their association with the Democratic Party and their express of political views as Democrats" which equates to discrimination based on Plaintiffs' "views and the content of their expression." (Compl. ¶ 76.) These allegations are insufficient to state a cognizable First Amendment claim.

As an initial matter, courts reviewing First Amendment claims in partisan gerrymandering cases have made clear that there is no independent First Amendment violation without a violation of the Equal Protection Clause. *See Whitford*, 218 F. Supp. 3d at 884 (recognizing that elements to prove an unconstitutional partisan gerrymander under the First Amendment or the Equal Protection Clause are the same); *Pope v. Blue*, 809 F. Supp. 392, 398-399 (W.D.N.C. 1992), *aff'd by* 506 U.S. 801 (1992) (rejecting First Amendment claims

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partisan gerrymandering claims are non-justiciable, it simply does not matter which constitutional provision Plaintiffs rely upon to support their claims. This entire action is moot.

as merely co-extensive with plaintiffs' Fourteenth Amendment claim); *Legislative Redistricting Cases*, 629 A.2d 646, 660 (Md. 1993) ("There is no case holding that the First Amendment visits greater scrutiny upon a districting plan than the Fourteenth. Rather, the cases uniformly counsel the opposite.") (citing *Anne Arundel County Republican Cent. Comm. v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394, 401 (D. Md. 1991), *sum. aff'd*, 504 U.S. 938 (1992); *Badham v. Eu*, 694 F. Supp. 664. 675, *sum. aff'd*, 488 U.S. 1024, (1989); *see also Republican Party v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) ("This court has held that in voting rights cases no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim."). Since Plaintiffs' Equal Protection claim must be dismissed because it is not justiciable, *see infra*, Plaintiffs' First Amendment Claim should be dismissed for the same reason.

Moreover, no First Amendment rights have been infringed here. Indeed, notably absent from the Complaint is any allegation that Plaintiffs were actually silenced, or prevented from speaking, endorsing a candidate, or campaigning for a candidate because of the Current Apportionment Plan. *See, e.g., League of Women Voters*, No. 1:11-cv-5569, 2011 U.S. Dist. LEXIS 125531 at *12-13; *Badham*, 694 F. Supp. at 675 ("Plaintiffs here are not prevented from fielding candidates or from voting for the candidate of their choice."). Similarly, Plaintiffs' vague contention that the Current Apportionment Plan "burdens and penalizes Democratic voters"

by having the "purpose and effect of subjecting Democrats to disfavored treatment" is not well-pled. The legislative process can be influenced in a myriad of ways, and is not limited to merely voting for a single successful candidate in a Congress of 435 House members. Simply stated, the "First Amendment guarantees the right to participate in the political process; it does not guarantee political success." *Id.*

Further, Plaintiffs' allegation that the Current Apportionment Plan's "packing" and "cracking" of Democrat voters makes it easier for Republicans to win, merely suggests that the Michigan Legislature considered partisan objectives when drafting the Current Apportionment Plan. *See Vieth*, 541 U.S. at 294; *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *see Cromartie*, 526 U.S. at 551. Because this precise conduct is contemplated by the Elections Clause, it could not have violated Plaintiffs' First Amendment Rights. *See Shapiro*, 203 F. Supp. 3d at 595; *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011) (three-judge court) (rejecting First Amendment partisan gerrymandering claim because redistricting map did not prevent plaintiffs from speaking, endorsing political candidates of their choice, contributing for a candidate, or voting for the candidate and because the First Amendment "does not ensure that all points of view are equally likely to prevail.").

Count I should therefore be dismissed.[6]

c. Count II Should Be Dismissed Because It Is Not Justiciable

Notwithstanding the pendency of *Whitford*, it is abundantly clear that, after thirty years of consideration, the U.S. Supreme Court has failed to establish any workable standard for adjudicating gerrymandering claims under the Equal Protection Clause. Indeed, "A majority of the Supreme Court has never … held that a particular instance of partisan gerrymandering violates the Equal Protection Clause. Nor has a majority of the Supreme Court agreed upon a standard for reviewing such a claim." Statement of Reasons For The Court's Decision Denying The Motion To Dismiss, at 2, *Agre v. Wolf*, Civil Action No. 17-4392 (E.D. Pa. Nov. 16, 2017). Thus, absent the emergence of a test that can be broadly applied, current Supreme Court precedent dictates that partisan gerrymandering claims under the Equal Protection Clause are simply not justiciable. *See LULAC of Texas*, 651 F. Supp. 2d at 712; *Meza v. Galvin*, 322 F. Supp. 2d at 58.

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[6] Plaintiffs advance each of their claims under 42 U.S.C. § 1983. But, section 1983 does not create substantive rights; it merely serves as a vehicle to enforce deprivations of "rights[,] privileges, or immunities secured by the Constitution and laws [of the United States]." *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), *Gonzaga Univ. v. Doe,* 536 U.S. 273, 285 (2002) ("§ 1983 merely provides a mechanism for enforcing individual rights 'secured' elsewhere, i.e., rights independently 'secured by the Constitution and laws' of the United States"); *Chapman v. Houston Welfare Rights Org*., 441 U.S. 600, 617 (1979) ("One cannot go into court and claim a 'violation of § 1983' –for § 1983 by itself does not protect anyone against anything"). As a result, Plaintiffs' Section 1983 claim should be dismissed because Plaintiffs' substantive claims lack merit.

Importantly, Plaintiffs do not even propose or identify any such tests. Instead, they base their Equal Protection claim on the allegation that the Current Apportionment Plan was drawn using partisan classifications and, based upon those classifications, voters were placed into districts through a process of cracking and packing to make it easier for Republicans to get elected. (Compl. ¶¶ 28-43). But, it is well-established that a congressional map is not unconstitutional merely because it makes it more difficult for a party to win elections or because it was created with partisan considerations. *See Vieth*, 541 U.S. at 288 (plurality op.); *Id*. at 308 (Kennedy, J., concurring); *id*. at 338 (Stevens, J., dissenting).

Count II should therefore be dismissed for failure to state a claim.

3. Even If Plaintiffs' Claims Are Viable, Legitimate State Interests Justify The Current Apportionment Plan

Even if Plaintiffs' claims are justiciable, and a prima facie Equal Protection claim could be shown, Plaintiffs' claims still cannot succeed because the Current Apportionment Plan is justified by legitimate state interests. *Bandemer*, 478 U.S. at 141-142. Contrary to Plaintiffs' contention that strict scrutiny applies, the Supreme Court has made it clear that "[w]e have not subjected political gerrymandering to strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 964 (1996).

Courts have found many legitimate state interests which would justify some degree of partisanship. Examples of legitimate state interests in redistricting have included goals like "[c]ompactness, contiguity, respecting lines of political

subdivision, preserving the core of prior districts, and avoiding contests between incumbents". *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1071 (D. Ariz. 2014).

Legitimate state interests that justify the Current Apportionment Plan likely include the protection of incumbents. *Vera*, 517 U.S. at 964. Avoiding contests between incumbents not only furthers efficiency concerns; it also fosters the benefit a state enjoys by having senior members of the House of Representatives. While Plaintiffs will no doubt argue that politics, rather than protecting incumbents, was the primary intent of the Current Apportionment Plan, here again, "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (emphasis added); *see also Burns v. Richardson*, 384 U.S. 73, 89, n.16 (1966) (finding nothing invidious in the practice of drawing district lines in a way that helps current incumbents by avoiding contests between them).

It follows that if legitimate state interests do exist – and they do – Plaintiffs' claims cannot succeed. *Harris*, 993 F. Supp.2d at 1079 (plaintiffs failed to carry burden of showing that partisanship outweighed legitimate state interest of obtaining preclearance with the Voting Rights Act). Accordingly, Plaintiffs' claims cannot succeed and must be dismissed.

4. Plaintiffs' Claims Are Barred By Laches

Finally, Plaintiffs' claims are barred by the doctrine of laches due to their six-year delay in filing, and the prejudice that would result. Laches is an affirmative defense that allows for dismissal of claims where the movant can show that the plaintiff unreasonably delayed filing an action and the delay caused injury to other parties. *See, e.g., Gruca v. United States Steel Corp*., 495 F.2d 1252, 1258-59 (3d. Cir. 1974). Courts regularly dismiss redistricting challenges based on laches. *Cohen v. Osser*, 56 Pa. D. & C.2d 672, 679-80 (Ct. Comm. Pleas 1971) (declining to postpone or judicially interfere with election procedures underway because to do so would wreak "havoc" and confusion for the candidates where defendants enacted new districts in February 1971, nominating petitions began circulating in the same month for primary elections in May 1971 and plaintiffs brought their suit shortly after enactment); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990) (dismissing a claim that a county board of supervisors' method of elections violated the Voting Rights Act where plaintiffs waited seventeen years after plan was first initiated to file their claim, and the challenge was brought only two years prior to the new census.). Plaintiffs offer no valid excuse for their six-year delay, and the Complaint does not allege any newly-discovered information that might justify it. The prejudice to the Defendants, to the Legislature, to the current candidates, and to the State of Michigan is manifest.

CONCLUSION

For the reasons and authorities set forth herein, Congressional Intervenors respectfully request that the Court dismiss the Complaint in its entirety, with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6).

Respectfully submitted,

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Date: February 28, 2018

ATTACHMENT 2

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,

Plaintiffs,

v.

RUTH JOHNSON, 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

MOTION TO STAY BY JACK BERGMAN, BILL HUIZENGA, JOHN MOOLENAAR, FRED UPTON, TIM WALBERG, MIKE BISHOP, PAUL MITCHELL, AND DAVID TROTT AS INTERVENORS

Congressional Intervenors Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott, Members of Congress representing Michigan (collectively, "Congressional Intervenors"), file the present Motion to Stay. In support of their Motion, Congressional Intervenors rely upon their Brief in Support filed herewith.

Respectfully submitted,

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Date: February 28, 2018

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,

Plaintiffs,

v.

RUTH JOHNSON, 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

BRIEF IN SUPPORT OF JACK BERGMAN, BILL HUIZENGA, JOHN MOOLENAAR, FRED UPTON, TIM WALBERG, MIKE BISHOP, PAUL MITCHELL, AND DAVID TROTT AS INTERVENORS IN SUPPORT OF MOTION TO STAY

Congressional Intervenors, Jack Bergman, Bill Huizenga, John Moolenaar, Fred Upton, Tim Walberg, Mike Bishop, Paul Mitchell, and David Trott, Members of Congress representing Michigan (collectively, "Congressional Intervenors") hereby respectfully submit this Brief in Support of their Motion to Stay.

CONCISE STATEMENT OF THE ISSUES PRESENTED

I. WHETHER THIS COURT SHOULD STAY THIS ACTION PENDING RESOLUTION OF THE U.S. SUPREME COURT'S DECISION IN *WHITFORD*.

II. WHETHER THIS COURT SHOULD STAY THIS ACTION BECAUSE PLAINTIFFS' UNJUSTIFIED DELAY IN RAISING THESE LEGAL CHALLENGES SHOULD NOT HAVE ANY COGNIZABLE IMPACT ON THE 2018 ELECTION CYCLE.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Gray v. Bush, 628 F.3d 779 (6th Cir. 2010)

Gill v. Whitford, 137 S. Ct. 2289 (2017)

I. PRELIMINARY STATEMENT

The present action is filed challenging Michigan's 2011 Congressional redistricting plan (the "Current Apportionment Plan") as unconstitutional.

Plaintiffs in the instant action do not attempt to distinguish their legal claims from the ones currently pending before the United States Supreme Court in *Gill v. Whitford*, No. 16-1161, 2017 U.S. LEXIS 4040 (U.S. June 19, 2017). Plaintiffs' constitutional claims *are identical* to the constitutional claims asserted in *Whitford*. Because the Supreme Court's resolution of those claims – including the critical issues of whether partisan gerrymandering claims, in any form, are non-justiciable political questions and, if they are justiciable, under what standard or test they should be evaluated – will dictate the entire course of the present action, it is appropriate and just for the Court to stay this case pending the Supreme Court's forthcoming decision in *Whitford*. Briefing is closed, and the U.S. Supreme Court heard oral argument in *Whitford* on October 3, 2017. The U.S. Supreme Court will issue its decision by June 30, 2018 at the latest, although, of course, the Supreme Court could issue its decision much earlier.

II. FACTUAL BACKGROUND

A. Plaintiffs' Present Action

On December 22, 2017, League of Women Voters of Michigan ("League"), 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 (collectively, "Plaintiffs") filed a Complaint for Declaratory and Injunctive Relief, alleging Michigan's state legislative and congressional districts violate Plaintiffs' First Amendment free speech and association rights and Fourteenth Amendment equal protection rights. (Compl. ¶ 1.)

Plaintiffs here bring legal claims under 42 U.S.C. §§ 1983 and 1988, under the Equal Protection Clause of the Fourteenth Amendment and under the First Amendment of the United States Constitution, i.e. identical claims to those advanced in *Whitford*. (Compl. ¶¶ 1, 74-85).

Specifically, Plaintiffs allege that the Current Apportionment Plan "singles out the individual Plaintiffs and hundreds of thousands of other similarly-situated Michigan Democrats based on their political affiliation, and intentionally places

them in voting districts that reduce or eliminate the power of their votes . . . inverts the Constitutional order by allowing those in power to treat voters as pawns to be shuffled back and forth based on their political allegiances, manipulating the electoral process in order to preserve and enhance the controlling party's power . . . violates individual Plaintiffs' rights to associate and speak freely, and individual Plaintiffs' rights to equal protection." (*Id.* ¶ 1, 2.)

In Count I, Plaintiffs allege that the "Current Apportionment Plan violates the First Amendment because it intentionally diminishes and marginalizes the votes of the individual Plaintiffs, Democratic members of the League, and other voters based on partisan affiliation . . . burdens and penalizes Democratic voters because of their participation in the electoral process as Democrats, their voting history for Democratic candidates, their association with the Democratic Party and their expression of political views as Democrats . . . Plaintiffs have been discriminated against because of their views and the content of their expression" which "denies individual Plaintiffs and other Democratic voters in Michigan their rights to free association and freedom of expression guaranteed by the Constitution." (*Id.* ¶¶ 76-77.) In Count II, Plaintiffs allege that the Current Apportionment Plan "violates individual Plaintiffs' as well as Democratic League

members' Fourteenth Amendment right to Equal Protection of the laws . . . [because it] intentionally and materially packs and cracks Democratic voters, thus diluting their votes, even though non-gerrymandered maps could have been drawn instead." (*Id.* ¶ 83) Plaintiffs seek to have the Court "Declare Michigan's Current Apportionment Plan unconstitutional and invalid, and the maintenance of the Current Apportionment Plan for any primary, general, special, or recall election a violation of Plaintiffs' constitutional rights" and to "[e]njoin Defendant and her employees and agents from administering, preparing for, and in any way permitting the nomination or election of members of Michigan's Legislature and Michigan Members of Congress from the unconstitutional Current Apportionment Plan that now exists." (*Id.* at pg. 32, 33)

For all of the reasons detailed below, the Court should stay this action pending the U.S. Supreme Court's decision in *Whitford.*

III. ARGUMENT

A. A Stay of This Action is Warranted

A district court has "broad discretion to stay proceedings as an incident to its power to control its own docket." *DeJonghe v. Ocwen Loan Servicing*, LLC, No. 17-11488, 2017 U.S. Dist. LEXIS 209950, at *2 (E.D. Mich. Dec. 21, 2017) (citing

Clinton v. Jones, 520 U.S. 681, 706, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997)). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Gray v. Bush*, 628 F.3d 779, 785 (6th Cir. 2010) (citing *Landis v. North American Co*., 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936)); *see also Jordan v. City of Detroit*, 557 F. App'x 450, 456-57 (6th Cir. 2014) (citing *Gonzalez v. Ohio Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 70371, 2008 WL 4277258, at * 1 (E.D.Mich. Sept. 17, 2008) ("We also consider a court's inherent authority to 'control its docket in promoting economies of time and effort for the court, the parties, and the parties' counsel.'")).

Accordingly, a court may "find it . . . efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *DeJonghe v. Ocwen Loan Servicing, LLC*, No. 17-11488, 2017 U.S. Dist. LEXIS 209950, at *2-3 (E.D. Mich. Dec. 21, 2017) (citing *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979)). "A stay pending the [Court's] decision will also serve to conserve the resources of the parties and the Court while avoiding the wasted effort that may be involved in proceeding under an uncertain legal framework." *DeJonghe v. Ocwen Loan Servicing, LLC*, No. 17-11488, 2017 U.S.

Dist. LEXIS 209950, at *3 (E.D. Mich. Dec. 21, 2017).

Decisions to stay "ordinarily rest[] with the sound discretion of the district court." *Ricketts v. Consumers Energy Co.*, No. 16-cv-13208, 2017 U.S. Dist. LEXIS 82501, at *5 (E.D. Mich. May 31, 2017) (citing *Ohio Envtl. Council v. U.S. Dist. Ct.*, 565 F.2d 393, 396 (6th Cir. 1977)). "The most important factor is the balance of the hardships, but the district court must also consider whether granting the stay will further the interest in economical use of judicial time and resources." *Id*. (citing *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 627-28 (6th Cir. 2014)).

There are three overriding reasons why the Court should stay this matter: (1) the United States Supreme Court's forthcoming decision in *Whitford* will dictate if and how this litigation should proceed; (2) there is absolutely no need to rush this case to judgment as it is already far too late to impact the 2018 election cycle; and finally, (3) the balance of equities weighs in favor of granting a stay.

1. **This Court Should Stay This Matter Pending the U.S. Supreme Court's Resolution of *Whitford*, Which Will Dictate If and How This Litigation Should Proceed.**

Critically, Plaintiffs in the present action do not attempt to distinguish their legal claims from the claims pending in *Whitford*. *Gill v. Whitford*, 218 F. Supp.

3d 837 (W.D. Wis. 2016). Plaintiffs' constitutional claims *are identical* to the constitutional claims asserted in *Whitford*.

First, Plaintiffs – as in *Whitford* – claim that their state's redistricting plan violates the First Amendment, because it "because it intentionally diminishes and marginalizes the votes of the individual Plaintiffs, Democratic members of the League, and other voters based on partisan affiliation. The Current Apportionment Plan burdens and penalizes Democratic voters because of their participation in the electoral process as Democrats, their voting history for Democratic candidates, their association with the Democratic Party and their expression of political views as Democrats." (Compl. ¶ 76; *compare with Whitford* Compl. ¶¶ 2, 91-94: alleging that Wisconsin's plan violates the First Amendment by intentionally and unreasonably burdening Democratic voters' rights of association and free speech on the basis of their voting choices, their political views, and their political affiliation).

Second, Plaintiffs here – like the plaintiffs in *Whitford* – claim that their state's redistricting plan violates the Equal Protection Clause of the Fourteenth Amendment, because it "uses political classifications . . . intentionally and materially packs and cracks Democratic voters, thus diluting their votes, even

though non-gerrymandered maps could have been drawn instead." (Compl. ¶¶ 82-83; *compare with Whitford v. Gill*, No. 15-0421 (W.D. Wis. July 8, 2015) (three-judge court) (Compl. ¶¶ 2, 31, 35, 82, 89) (ECF No. 1) ("*Whitford* Compl.") (alleging that Wisconsin's plan violates the Fourteenth Amendment's Equal Protection Clause by treating voters unequally and intentionally discriminating against Democratic voters).

And Plaintiffs here – like the plaintiffs in *Whitford* – allege that this discriminatory plan was effectuated by the "cracking" and "packing" of Democratic-affiliated voters, diluting the power of their vote and making it more likely to elect Republicans to Congress. (*See* Compl. ¶¶ 10, 16, 17, 28, 30, 32, 73, 83; *compare with Whitford* Compl. ¶¶ 15, 31, 35, 57-58, 82, 91-94) (alleging that Wisconsin's plan "packed" and "cracked" Democratic voters, "wasting" their votes in an effort to benefit Republicans and disadvantage Democrats)).

Because Plaintiffs' Equal Protection Clause claim and First Amendment claim are identical to the claims advanced in *Whitford*, the U.S. Supreme Court's decision in that case will directly determine if and how this litigation should proceed. If the U.S. Supreme Court rules that partisan gerrymandering claims under the Equal Protection Clause or the First Amendment are non-justiciable, that will be

dispositive of both of Plaintiffs' claims. Moreover, if the U.S. Supreme Court decides the merits of *Whitford*, then it will announce standards to adjudicate partisan gerrymandering claims that will determine how discovery and trial in this case should proceed. A stay of this matter pending the outcome of *Whitford* makes particularly good sense given that the *Whitford* appeal has already been fully briefed and argued and the Supreme Court may issue its ruling any day, and at the latest will do so by June 30, 2018.

2. This Case Should Be Stayed Because It Is Already Far Too Late For Disposition of This Case to Have Any Impact on the 2018 Election Cycle.

The forthcoming 2018 elections should not factor into the Court's stay analysis for two reasons.

i. Plaintiffs Had Six Years to Challenge the Current Apportionment Plan and Should Not Be Afforded Extraordinary Relief Based on an Alleged Crisis of their Own Creation.

Plaintiffs should not be permitted to benefit through any purported emergency caused by their own delay in filing suit. The current Congressional map went into effect nearly *six years ago*. And nothing has occurred since that time that has suddenly provided Plaintiffs with the ability to assert the claims they allege now. The *only* thing that has changed since 2011 is that last year – for the

first time in more than a generation – a three judge panel found that partisan gerrymander claims were justiciable and ordered a state legislative map to be redrawn. *Whitford v. Gill*, 218 F. Supp. 3d 837, 837-965 (W.D. Wis. 2016). In addition, the Supreme Court is hearing the First Amendment partisan gerrymandering case, *Benisek v. Lamone*, No. 17-333, 138 S. Ct. 543 (2017), in late March, and has stayed the three-judge district court's ruling in *Rucho v. Common Cause*, No. 17A745, 2018 U.S. LEXIS 758 (Jan. 18, 2018) (granting application for stay). *See also Benisek v. Lamone*, 266 F. Supp. 3d 799 (D. Md. 2017); *Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 U.S. Dist. LEXIS 5191 (M.D.N.C. Jan. 9, 2018). Following the ruling in *Whitford*, multiple lawsuits, including this one, were filed alleging similar – and in this case, identical – partisan gerrymandering claims. However, in this case, Plaintiffs waited until December 22, 2017 – nearly a year after the district court's decision in *Whitford*, and just a few short months before the primary election cycle officially begins and the primary election to be held in August.

Plaintiffs waited until December 22, 2017 to assert claims they could have asserted years, or at least months, ago. Plaintiffs should not be rewarded for their delay with the extraordinary relief being sought just months before the primary.

ii. The Outcome of This Case Could Not Realistically Affect the 2018 Congressional Elections

Even if there were an extraordinarily accelerated schedule, it would be impossible for the outcome of the present action to affect the 2018 election cycle. Plaintiffs' unexplained and unreasonable delay should not entitle them to an extremely expedited schedule that would be highly prejudicial to Congressional Intervenors. Specifically, for any new redistricting legislation to be enacted in time to impact the 2018 election, at a bare minimum, the following events would have to occur:

1. This Court would have to adjudicate all pretrial motions, including the Congressional Intervenors' Motion to Intervene and the attendant Motions to Dismiss and Stay, as well as all future discovery disputes;

2. Plaintiffs must prevail at trial;

3. The Court would have to enter an Order and Opinion detailing how the Current Apportionment Plan must be replaced with new maps that meet whatever standards the Court imposes;

4. New maps would then need to be created that comply with the Court's Order;

5. Both chambers of the Legislature would need to consider and separately pass the bill;

6. The Governor would need to sign the bill; and

7. The Secretary of State would need sufficient time to prepare for the 2018 primaries based on the newly-formed districts either formed by

legislation or by order of this Court.

As detailed below, it is unrealistic for each of these events to be completed in time to impact the 2018 elections. All of this presupposes that Defendants and/or Congressional Intervenors do not seek and secure a stay from the U.S. Supreme Court with regard to any decision in Plaintiffs' favor – just as occurred in *Whitford*. *See Gill v. Whitford*, 137 S. Ct. 2289 (2017).

Giving Plaintiffs the benefit of every possible doubt, it is unreasonable to believe that a new plan could be enacted into law with sufficient time for the Secretary of State to prepare for the primary elections to be held August 7, 2018. This case is in its infancy. There is currently a hearing on Defendant's Motion to Stay and to Dismiss set for March 20, 2018. Assuming *arguendo* the Court rules in favor of Plaintiffs, the case proceeds to trial and the Court again rules in favor of Plaintiffs, it will then need to draft an Opinion and Order that provides the Legislature with specific guidance as to how a new redistricting plan must be drafted. Because of the complexity of the factual issues raised in this case and the compressed time frame required to comply with such an Order, any such decision will require a great deal of specificity. By way of comparison, in the *Whitford* case, which addressed the exact same issues as here, the District Court issued two

separate opinions, the first addressing the constitutionality of the Wisconsin plan and the second addressing the appropriate relief. *See Whitford,* 218 F. Supp. 3d, at 837-965; *Whitford v. Gill*, 2017 WL 383360 (W.D. Wis. Jan. 1, 2017). Collectively, the opinions were *over 125 pages* and were not issued until *over five months* and *over seven months* after the trial was completed, respectively. *Id.* In addition, the *Whitford* opinions were issued only after the Court resolved numerous post-trial motions and disputes. It is hard to imagine any scenario where the trial in this matter concludes on before August 7, 2018; all post-trial motions are adjudicated; a final Order and Opinion is issued (this does not even account for the fact that any ruling overturning the Current Apportionment Plan would almost certainly be appealed to the U.S. Supreme Court, which could stay implementation of any remedial order, just as it did in nearly identical circumstances in *Whitford*. 137 S. Ct. 2289; *see also Abbott v. Perez,* No. 17A225, 2017 U.S. LEXIS 4434 (U.S. Sept. 12, 2017) (in which the U.S. Supreme Court recently issued a stay of a liability determination seven months before a primary election)); a new Congressional map is created consistent with the Court's Order and passed by both chambers of the Legislature and signed by the Governor (or a map is imposed by the Court after a reasonable process if the State is unable to adopt new legislation)—all before the

August 7, 2018 primary.

Moreover, even after a new plan is created, it would be extremely difficult to pass new legislation through both chambers of the Legislature prior to August 7, 2018.

Accordingly, even if Plaintiffs prevail at trial and are given the benefit of every doubt regarding timing – there is no way that a new Plan could possibly be enacted into law in time to impact the 2018 elections.

3. The Balance of the Equities Weighs In Favor of Granting a Stay.

A denial of this stay *will* necessarily cause harm to Congressional Intervenors. Denying the stay will require Congressional Intervenors to expend taxpayer dollars conducting extensive discovery. Furthermore, proceeding with this case – which asserts identical claims to those presently being considered by the U.S. Supreme Court – makes little sense. If the U.S. Supreme Court rules that partisan gerrymandering claims are non-justiciable, then taxpayer resources will have been completely wasted. Alternatively, if the Supreme Court promulgates a new standard, then briefing and discovery governed by those new standards will be needed. Therefore, to preserve both taxpayer and judicial resources, this Court should grant a stay until the Supreme Court issues its ruling in *Whitford*.

Plaintiffs will face, at most, minimal harm if forced to wait a mere few months for the U.S. Supreme Court to rule in *Whitford*. They already let six years and three elections pass before filing this lawsuit. By choosing to sit on their alleged rights *for years*, any need for urgency is of Plaintiffs' own making, and should not be credited by this Court in considering this Motion. *See Nexteer Auto. Corp. v. Korea Delphi Auto. Sys. Corp.*, No. 13-CV-15189, 2014 U.S. Dist. LEXIS 18250, at *26-27 (E.D. Mich. Feb. 13, 2014) (stating "delay of over one-year prior to seeking injunctive relief weighs against a finding of irreparable harm.") (citing *Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg.*, 511 F. App'x 398, 405 (6th Cir. 2013)).

This Court should therefore find that the balance of the equities tips in Congressional Intervenors' favor and grant the stay.

CONCLUSION

In the event that the Court does not dismiss Plaintiffs' Complaint in its entirety for all of the reasons set forth in Congressional Intervenors' separately filed Motion to Dismiss and Brief in Support, Congressional Intervenors respectfully request that the Court stay from hearing this case until identical claims are decided by the U.S. Supreme Court.

Respectfully submitted,

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