UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, ROGER J. BRDAK, FREDERICK C. DURHAL, JR., JACK E. ELLIS, DONNA E. FARRIS, WILLIAM "BILL" J. GRASHA, ROSA L. HOLLIDAY, DIANA L. KETOLA, JON "JACK" G. LASALLE, RICHARD "DICK" W. LONG, LORENZO RIVERA and RASHIDA H. TLAIB,

Plaintiffs,

v.

JOCELYN BENSON, in her official Capacity as Michigan Secretary of State,

Defendant.

Case No. 2:17-cv-14148

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

THE MICHIGAN SENATE AND THE MICHIGAN SENATORS' CONCLUSIONS OF LAW

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THE MICHIGAN SENATE AND THE MICHIGAN SENATORS' CONCLUSIONS OF LAW

I. PLAINTIFFS LACK STANDING.

For the reasons stated in the Senate Defendants' Rule 52(c) Motion for Judgment on Partial Findings (ECF No. 252, PageID.9355 *et seq.*), Plaintiffs lack standing to bring their First and Fourteenth Amendment partisan gerrymandering claims challenging Senate Districts. The Senate Defendants incorporate the findings of fact, arguments, and conclusions of law contained in their Motion for Judgment on Partial Findings and Brief in Support herein by reference. A summary of those findings and conclusions follows.

A. Individual Plaintiffs Lack Standing Because They Have No Injuries That a Court Could Redress.

The individual Plaintiffs failed to demonstrate during trial that they have standing to bring claims challenging Senate Districts. They did not prove that the challenged districts were packed or cracked, or that any other cognizable harm resulted from the district boundaries. They also did not prove that revising the challenged Senate Districts' boundaries would remedy alleged vote dilution "so that the voter may be unpacked or uncracked, as the case may be." *Gill v. Whitford*, 138 S. Ct. 1916, 1931; 201 L. Ed. 2d 313 (2018).

Article III of the U.S. Constitution requires a plaintiff seeking relief in federal court to demonstrate standing by showing (1) that the plaintiff has suffered

an injury in fact—a violation of a legally protected right that is concrete and particularized—(2) that is fairly traceable to the defendant's challenged conduct and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61; 112 S. Ct. 2130; 119 L. Ed. 2d 351 (1992). The U.S. Supreme Court articulated the specific standing requirements for partisan gerrymandering claims alleging vote dilution in violation of the First and Fourteenth Amendments in *Gill v. Whitford*, 138 S. Ct. 1916; 201 L. Ed. 2d 313 (2018). To demonstrate a cognizable injury, a "plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district . . . ." *Id.* at 1934 (KAGAN, J., concurring); *see also id.* at 1930-31 ("[H]arm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another hypothetical district."). In other words, the injury is district-specific rather than statewide. *Id.* To demonstrate redressability, a plaintiff must prove that "revision of the boundaries of the individual's own district," would remedy the harm. *Id.* at 1930.

The only theory of harm articulated by Plaintiffs in their Complaint was vote dilution under the First and Fourteenth Amendments. Plaintiffs did not bring any non-dilutional claims. (Pls.' Compl., ECF No. 1, PageID.30 ("The Current Apportionment Plan violates the First Amendment because it intentionally

diminishes and marginalizes the votes of [individual Plaintiffs] based on partisan affiliation.") and PageID.32 ("The Current Apportionment Plan is a partisan gerrymander that violates individual Plaintiffs' . . . Fourteenth Amendment right to Equal Protection of the laws. The Current Apportionment Plan intentionally and materially packs and cracks Democratic voters, thus diluting their votes . . . .")). Therefore, even though Justice Kagan suggested in her *Gill* concurrence that a non-dilutional First Amendment theory of harm *may* exist (*see Gill*, 138 S. Ct. at 1939), such a theory is not presented here, and Plaintiffs were required to show concrete, particularized, redressable harm in the form of "a burden on their individual votes" on a district-by-district basis to demonstrate standing. *Id.* at 1934.

This Court held that Plaintiffs lacked standing to challenge the Apportionment Plan on a statewide basis and dismissed Plaintiffs' statewide claims on May 16, 2018. (*See* Op. & Order, ECF No. 54). Only Plaintiffs' district-specific claims remain: Plaintiffs challenge Senate Districts 8, 10, 11, 12, 14, 18, 22, 27, 32, and 36, in which individual Plaintiffs or League members live. (Op. & Order, ECF No. 143, PageID.5304). The trial and *de bene esse* deposition testimony of individual Plaintiffs and League members failed to show any burden on their individual votes in a concrete, particularized, and redressable manner.

No individual Plaintiff or League member presented evidence demonstrating that the district in which he or she lives is cracked or packed or that his or her

individual vote had been burdened in the district. All individual Plaintiffs and League members are freely able to vote, donate to campaigns, campaign on behalf of candidates, and contact their Senators with their concerns. (*See* Senate Intervenors' Proposed Findings of Fact, Section II.D). While the U.S. Constitution protects each individual's right to vote and to be represented in government, it does not protect the right to be represented by a specific political party. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 294; 124 S. Ct. 1769; 158 L. Ed. 2d 546 (2004) (plurality opinion). For an allegedly "cracked" district, then, individual Plaintiffs and League members cannot prove that their votes are diluted or burdened by showing that they are unhappy with representation by a Republican Senator. *See Davis v. Bandemer*, 478 U.S. 109, 132; 106 S. Ct. 2797; 92 L. Ed. 2d 85 (1986). For an allegedly "packed" district, individual Plaintiffs and League members cannot prove that their individual votes are diluted or burdened by showing that they and other Democrat voters were unable to elect a Democratic majority into office, because such an injury would be statewide, not district-specific. (*See* Senate Intervenors' Proposed Findings of Fact, ¶¶ 116, 125).

Individual Plaintiffs and League members have not shown, therefore, a legally cognizable injury to support individual standing in this case. In addition, the testimony of Plaintiffs' experts failed to prove, through their 1,000 simulations of alternative Senate District boundaries, that redrawing any of the districts would

result in a district that is "uncracked" or "unpacked." *Gill*, 138 S. Ct. at 1931; *see also* Section III below. Therefore, Plaintiffs have not proven that their alleged injuries are redressable on a district-by-district basis. Plaintiffs have not demonstrated standing to bring their district-specific First or Fourteenth Amendment partisan gerrymandering claims challenging Senate Districts. Their claims should be dismissed.

B. The League of Women Voters of Michigan Lacks Standing Because Neither It Nor Its Members Suffered an Injury in Fact.

At trial, Plaintiffs also failed to demonstrate that the League has standing to bring either its First or Fourteenth Amendment claims based on direct harm to itself or indirect harm to its members. To demonstrate standing as a representative of its members based on *indirect* harm, the League would have had to prove that its members had standing to sue in their own right. *Greater Cincinnati Coal. for the Homeless v. City of Cincinnati*, 56 F.3d 710, 717 (6th Cir. 1995). The individual Plaintiffs and League members did not show, however, that they have standing. (*See* Section I.A. above.) Thus, the League has not proven that it has standing to represent its members.

Judge Quist articulated the two associational standards available to the League to support its standing based on *direct* associational harm in his partial concurrence and dissent from this Court's November 30, 3018 Opinion and Order (*see* Op. & Order, ECF No. 143, PageID.5341-5342):

> [There are] two distinct types of 'associational' standing: (1) First Amendment associational standing, as outlined in Justice Kagan's concurrence in *Gill*, 138 S. Ct. at 1938; and (2) independent standing for an organization or association, as outlined in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). . . . For First Amendment associational standing, the League is not the right type of plaintiff; for independent standing for an organization or association, the League does not provide the right type of evidence.

Now, after trial, the League is still "not the right type of plaintiff." *Id.* And the League has not remedied its evidentiary deficiency; it still has not provided "the right type of evidence." *Id.*

Justice Kagan suggested in her concurrence in *Gill* that a non-dilutional First Amendment theory of harm may exist, if "the gerrymander has burdened the ability of like-minded people across the state to affiliate in a *political party* and carry out *that organization's* activities and objects." 138 S. Ct. at 1939 (KAGAN, J., concurring) (emphasis added). The Court declined to adopt Justice Kagan's theory, stating, "We leave for another day consideration of other possible theories of harm not presented here . . . ." *Id.* at 1931. The Court emphasized its decision by stating, "The reasoning of this Court with respect to the disposition of this case is set forth in this opinion and none other." *Id.* Yet even if the Court had accepted Justice Kagan's non-dilutional, associational theory of harm, the League does not meet its requirements in this case: The League is not a political party or organization—it is self-avowedly nonpartisan. (Trial Tr. vol. 1, 2/5/19, at 38, 71, 77, ECF No. 248, PageID.8753, 8786, 8792.) According to Justice Kagan, the hypothetical First

Amendment associational injury may only be inflicted on "political parties, other political organizations, and their members." 138 S. Ct. at 1938 (KAGAN, J., concurring). Therefore, the League does not have standing to bring its claims under this theory.

The League also does not have independent standing as an organization under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). To prove a direct injury to an organization's rights, the organization must prove "concrete and demonstrable injury to [its] activities—with the consequent drain on the organization's resources—[that] constitutes far more than simply a setback to the organization's abstract social interests." *Id.* The League did not prove that it spent any extra money or resources to remedy a "concrete and demonstrable injury." *Id.* To the contrary, participation and engagement in the League by members and others with like interests has been strong; for example, one witness for the League testified that Michigan has the largest percentage of people using their educational and informational voter guides in the country. (Trial Tr. vol. 1, 2/5/19, at 48, ECF No. 248, PageID.8763).

As one injury, the League alleged, but did not prove, that Republican candidates are less willing to participate in the League's candidate forums when they are assured of winning an election because gerrymandering has provided them with safe seats. (Trial Tr. vol. 1, 2/5/19, at 59-62, ECF No. 248, PageID.8774-

8777). However, the League did not present any evidence to prove the causal connection, such as evidence that Republicans candidates participated *more* in the League's forums *before* the 2011 redistricting or that all candidates campaign *less* in general in districts they know to be "safe." The League did not explain why it believes alleged gerrymandering causes only *Republican* candidates not to participate in the League's forums: If gerrymandering causes low candidate participation in campaign activities, then presumably Democratic candidates in "packed" districts would also decline to participate. Perhaps Republican candidates do not participate—if it is true they do not—because they believe that those who attend League forums are Democratic voters who are unlikely to vote for them, or due to scheduling conflicts, or for any other legitimate reason. These candidates may simply choose to focus their campaign efforts elsewhere. In any case, these complaints do not constitute "concrete and demonstrable injury to [the League's] activities—with [a] consequent drain on the organization's resources," as required under *Havens Realty Corp.*, 455 U.S. at 379.

For these and other reasons explained in the Senate Defendants' Brief in Support of their Rule 52(c) Motion for Judgment on Partial Findings, the League has not demonstrated that it has independent standing to bring either its First or Fourteenth Amendment partisan gerrymandering claims challenging the statewide

apportionment plan and individual Senate Districts, which this Court should dismiss.

II. PLAINTIFFS' CLAIMS ARE NONJUSTICIABLE AS A MATTER OF LAW.

Plaintiffs' First and Fourteenth Amendment partisan gerrymandering claims are nonjusticiable political questions as a matter of law because the U.S. Supreme Court has not articulated a judicially manageable standard to adjudicate such claims, even though it has faced the inscrutable question—how much politics is too much—for decades without resolution.[1] Previously, the Court "set forth six independent tests for the existence of a [nonjusticiable] political question," the two most important of which are (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and (2) "a lack of judicially discoverable and manageable standards for resolving it . . . ." *Vieth*, 541 U.S. at 277-278 (quoting *Baker v. Carr* 369 U.S. 186, 217; 82 S. Ct. 691; 7 L. Ed. 2d 663 (1962)). These two tests embody the Constitution's separation of powers between the legislature and the judiciary: Courts are confined to the exercise of

[1] Although this Court determined in its November 30, 2018 Order and Opinion (ECF No. 143, PageID.5336) that Plaintiffs' claims are justiciable, this Court may always reconsider its prior decisions following the close of evidence (or otherwise). *See Deitz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) ("[T]he Court has recognized that a district court ordinarily has the power to modify or rescind its orders at any point prior to final judgment in a civil case.") Upon reconsideration, this Court should find that Plaintiffs' claims are nonjusticiable for the reasons that follow.

principled judicial powers and cannot overstep their bounds into the Legislature's political, lawmaking realm.

A. Plaintiffs' Claims Are Nonjusticiable Political Questions Because There Are No Judicially Discoverable and Manageable Standards to Resolve Them.

The Supreme Court recently acknowledged in *Gill v. Whitford* that it does not know "what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines." 138 S. Ct. 1916, 1926 (2018). Allegations of unconstitutional political gerrymandering are, therefore, "an unsettled kind of claim th[e] Court has not agreed upon, the contours and justiciability of which are unresolved." *Id.* at 1934. Yet a court's "judicial action must be governed by *standard*, by *rule*. . . . [L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 277-278 (emphasis in original). A claim that does not have "judicially discoverable and manageable standards for resolving it" is nonjusticiable and cannot be maintained in court. *Baker*, 369 U.S. at 217.

The Court's recent unanimous statement in *Gill* that the justiciability of partisan gerrymandering claims is unresolved directly contradicts its earlier holding in *Davis v. Bandemer*, 478 U.S. 109 (1986). In that case, a majority of the Court found partisan gerrymandering claims to be justiciable under the Equal Protection Clause. *Id.* at 113, 127. The Court was "not persuaded that there are no

judicially discernible and manageable standards by which political gerrymander cases are to be decided." *Id.* at 123. However, the *Bandemer* Court could not agree on a standard, *id.* at 132-133 (plurality opinion); 162 (POWELL, J., dissenting), and it has not been able to agree on one to date.

Since *Bandemer*, the Court has stepped back from the position that partisan gerrymandering claims are justiciable. In *Vieth v. Jublirer*, the Court explicitly reconsidered its *Bandemer* holding. 541 U.S. at 272, 277. A plurality of the *Vieth* Court found that political gerrymandering challenges are nonjusticiable, with four justices deciding that no manageable standards exist for purely political gerrymandering cases. It stated:

> Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.

Vieth, 541 U.S. at 281 (plurality opinion).[2] In reaching its conclusion, the *Vieth* plurality noted that the standard enunciated by the *Bandemer* plurality had proved

[2]Justice Kennedy concurred in the judgment based on the plaintiff's lack of standing. *Vieth*, 541 U.S. at 292. In his concurrence, Justice Kennedy acknowledged that "[n]o substantive definition of fairness in districting seems to command general assent [and there are no] rules to limit and confine judicial intervention." *Id.* at 306-07. However, he did not foreclose the possibility that manageable standards might someday be found. *Id.*

unworkable. *Id.* at 281-84. The *Vieth* plurality also rejected the plaintiffs' alternative standard, which would have required showing (1) predominant intent to disadvantage a political group, coupled with (2) systematic packing or cracking of districts, and (3) a totality of circumstances confirming the political groups' inability to convert its "majority of votes into a majority of seats." *Id.* at 286-87. The *Vieth* plurality rejected the standard, borrowed from the Court's racial gerrymandering cases, for several reasons: (1) racial segregation is an unlawful motive, while political considerations are not; (2) the Constitution does not afford equal protection to political groups, so there is no right to proportional political representation in government; and (3) unlike race, political affiliation is fluid and not permanently discernable. Each of these considerations "make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy." *Id.* at 287.

1. <u>There Are No Judicially Discoverable and Manageable Standards Because Partisan Considerations in Districting Are Not Per Se Unlawful.</u>

One reason the Court has been unable to articulate a standard that marks the permissible limits of partisan gerrymandering is that some amount of partisan gerrymandering is constitutional—that is, it is not *per se* unconstitutional to take partisan politics into consideration when drawing district lines. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 239; 121 S. Ct. 1452; 149 L. Ed. 2d 430 (2001) (calling

the "creation of a safe Democratic seat" a "constitutional political objective"); *Hunt v. Cromatie*, 526 U.S. 541, 551; 119 S. Ct. 1545; 143 L. Ed. 2d 731 (1999) (stating that "a jurisdiction may engage in constitutional political gerrymandering"); *Gaffney v. Cummings*, 412 U.S. 735, 753; 93 S. Ct. 2321; 37 L. Ed. 2d 298 (1973) ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. . . . Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences."); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (ALITO, J., concurring in part and dissenting in part) (reiterating that political gerrymandering is constitutional, though "some might find it distasteful"); *Vieth*, 541 U.S. at 286 (plurality opinion) (calling politics "an ordinary and lawful motive" in redistricting).[3]

That some partisan considerations may be taken into account in redistricting makes a comparison to constitutionally prohibited considerations impossible. For

[3] Based on this Supreme Court precedent, this Court should decline to follow the three-judge panel in *Common Cause v. Rucho*, which determined that "[b]ecause the Constitution does not authorize state redistricting bodies to engage in . . . partisan gerrymandering, we believe a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering." 318 F. Supp. 3d 777, 851 (2018).

example, the obligation to refrain from racial discrimination in redistricting is a "clear constitutional command" under the Equal Protection Clause. *Id.* In contrast, an asserted "obligation not to apply too much partisanship in districting" is an inferred obligation, one that is "dubious and severely unmanageable" because "how much is too much" has not been identified. *Id.* This is why the Court has not accepted the "predominant intent" test used in racial gerrymandering cases for use in partisan gerrymandering cases: Some intent to draw district lines with politics in mind is not unconstitutional. *Id.* at 286, 293 (plurality opinion) ("A purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not."); *see also Shaw v. Reno*, 509 U.S. 630, 650; 113 S. Ct. 2816; 125 L. Ed. 2d 511 (1993); *Bush v. Vera*, 517 U.S. 952, 964; 116 S. Ct. 1941; 135 L. Ed. 2d 248 (1996) (plurality opinion) ("We have not subjected political gerrymandering to strict scrutiny.").

2. There Are No Judicially Discoverable and Manageable Standards Because Political Affiliation is Fluid and Not Permanently Discernable.

Another reason the Court has not articulated a standard that marks the permissible limits of partisan gerrymandering is because political affiliation is not a permanently discernable characteristic in the same way that race and national origin are, for example. Addressing this issue, the *Vieth* plurality stated:

> Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.

541 U.S. at 287 (plurality opinion). There are many factors that influence how and whether a person will vote in any particular election and in any particular race—other than political party. The fluidity of political affiliation is reflected in the record here, with many of the Plaintiffs and League members acknowledging that they do not always vote for the Democratic candidate in every race or that they do not have a political party affiliation. (*See, e.g.*, Brdak Dep., ECF No. 252-4, PageID.9461; Poore Dep., ECF No. 252-6, PageID.9526-9527; DeMaire Dep., ECF No.252-7, PageID No. 9553; Woloson Dep., ECF No. 252-8, PageID.9582; Sain Dep., ECF No. 252-9, PageID.9615;). In addition to a candidate's political party, the Plaintiffs and League members—likely reflective of the electorate generally—consider many things before voting, such as the candidate's platform, experience, viewpoints, engagingness, name recognition, and affiliations. (*See, e.g.*, Ellis Dep., ECF No. 252-2, PageID.9404; Duemling Dep., ECF No. 252-5, PageID.9502; Poore Dep., ECF No. 252-6, PageID.9522, 9527; DeMaire Dep., ECF No.252-7, PageID No. 9553; Woloson Dep., ECF No. 252-8, PageID.9582, 9590.) Plaintiffs recognize that the outcome of any particular race may also be

impacted by voter turnout in an election. (*See e.g.*, Ellis Dep., ECF No. 252-2, PageID.9404; Duemling Dep., ECF No. 252-5, PageID.9501; Sain Dep., ECF No. 252-9, PageID.9625-9626.)

Because political affiliation is not a permanent, immutable voter characteristic and because voters may vote for candidates based on factors other than political party, "there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party." *Veith*, 541 U.S. at 288-89 (plurality opinion). The fact that voters are not restricted to voting for one political party and that many factors influence how and whether they vote means that attempting to pinpoint and measure the cause of the outcome of any particular election and race is not possible. Specifically, it is "impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy." *Id.* at 287.

3. There Are No Judicially Discoverable and Manageable Standards Because the Constitution Does Not Afford Equal Protection to Political Groups.

Although the *Vieth* Court generally splintered on the question of justiciability, seven Justices indicated that a standard premised on proportional voter representation is not required by nor furthers principles of constitutional equal protection. *See id.* at 287-88 (plurality opinion); *id.* at 338 (STEVENS, J., dissenting) ("The Constitution does not, of course, require proportional

representation of racial, ethnic, or political groups.); *id.* at 352 n.7 (SOUTER, J. AND GINSBURG, J., dissenting). The plurality rejected the plaintiffs' third prong—whether the totality of circumstances confirmed the political groups' inability to convert its "majority of votes into a majority of seats" (*id.* at 286-87)—stating:

> Before considering whether this particular standard is judicially manageable we question whether it is judicially discernible in the sense of being *relevant to some constitutional violation*. Deny it as appellants may (and do), [the plaintiffs' proposed] standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. *But the Constitution contains no such principle*. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.

Id. at 287-288. Equal protection does not apply to political groups; thus, there is no right to proportional political representation. *Id.* The Court's view in this respect has remained consistent over time. In *Bandemer*, the Court said, "[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause." 478 U.S. at 132. This is because "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the

district." *Id.* Therefore, neither an individual nor group of individuals may prevail in a claim alleging vote dilution when "the mere lack of proportional representation" is the only evidence presented. *Id.*

B. Plaintiffs' Claims Are Nonjusticiable Political Questions Because the Constitution Places Responsibility for Districting with the Legislature.

In addition to the Court's inability to articulate a judicially manageable standard, partisan gerrymandering claims are nonjusticiable because they seek the judiciary's intervention in the affairs of the legislature, the political branch of government, to decide a question entrenched in politics. The larger issue underlying partisan gerrymandering claims is the separation of powers:

> As Chief Justice Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be "nonjusticiable," or "political questions."

Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (citations omitted). *See also Bandemer*, 478 U.S. at 143 (attempting to discern a workable standard that "recognizes the delicacy of intruding on this most political of legislative functions"). As noted above, one of the "independent tests for the existence of a [nonjusticiable] political question," is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department."

Vieth, 541 U.S. at 277-278 (quoting *Baker v. Carr* 369 U.S. at 217). Here, "[t]he Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics." *Id.* at 285. Article I, section 4 of the U.S. Constitution—the Elections Clause—states, "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations . . . ." This provision contemplates that districting will be performed by state legislatures, with Congress stepping in as needed. The courts are not mentioned. The Elections Clause left the courts out of the matter because elections are political and best left to the legislature to regulate. *See Miller v. Johnson*, 515 U.S. 900, 914; 115 S. Ct. 2475; 132 L. Ed. 2d 762 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition . . ."); *Shaw v. Reno*, 509 U.S. 630, 662; 113 S. Ct. 2816; 125 L. Ed. 2d 511 (1993) (WHITE, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics . . ."); *Gaffney v. Cummings*, 412 U.S. 735, 753; 93 S. Ct. 2321; 37 L. Ed. 2d 298 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."). Such a political question would also conflict with the judiciary's independence. For these reasons, partisan gerrymandering claims are not justiciable by the courts.

Because Plaintiffs' claims are nonjusticiable political questions and because there are no judicially discernable and manageable standards by which to judge Plaintiffs' claims, this Court's November 30, 2018 Order and Opinion adopting First and Fourteenth Amendment standards by which to measure the claims was improper, and the portion of its Order and Opinion on justiciability should be rescinded.

III. EVEN IF PLAINTIFFS HAD STANDING AND THEIR CLAIMS WERE JUSTICIABLE, PLAINTIFFS FAILED TO PROVE THEIR CLAIMS.

If this Court concludes that Plaintiffs have standing and that their First and Fourteenth Amendment partisan gerrymandering claims are justiciable, however, Plaintiffs have not proven their claims under the standards adopted by this Court. In its November 30, 2018 Order and Opinion, this Court adopted the following standards articulated by the three-judge panel in *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861 (M.D.N.C. 2018). For the Equal Protection Clause claim, this Court adopted a three-part standard:

> First, a plaintiff must prove two elements: (1) discriminatory intent under the predominant purpose standard, i.e., that "a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power," and (2) discriminatory effects, i.e., that "the lines of a particular district have the effect of discriminating against—or subordinating—voters who support candidates of a disfavored party, if the district dilutes such voters' votes by virtue of cracking or packing." If a plaintiff proves these elements, the burden

> shifts to the government to prove "that a legitimate state interest or other neutral factor justified such discrimination."

(Op. & Order, ECF No. 143, PageID.5330-5331 (citing *Rucho*, 138 F. Supp. 3d at 861-867)). For the First Amendment claim, this Court adopted a second three-part standard:

> A plaintiff must satisfy three elements. First, the plaintiffs must demonstrate that those who drew the districts did so with the "specific intent" to "burden individuals or entities that support a disfavored candidate or political party." Second, the plaintiffs must show that the challenged districting plan actually caused an injury, i.e., "that the districting plan in fact burdened the political speech or associational rights of such individuals or entities." Third, the plaintiff must show causation, i.e., that "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred."

(Op. & Order, ECF No. 143, PageID.5335 (citing *Rucho*, 318, F. Supp. 3d at 929; *Shapiro*, 203 F. Supp. 3d 579, 597-98 (D. Md. 2016))).

These tests are inappropriate to measure what constitutes unconstitutional partisan gerrymandering for several reasons, including those articulated above in support of the nonjusticiability of these claims. *See, e.g.*, Section II.A.1. above, stating that the U.S. Supreme Court has criticized the use in partisan gerrymandering cases of the "predominant intent" test borrowed from racial gerrymandering cases because political considerations in districting are not unconstitutional, while racially motivated districting violates equal protection principles. The First Amendment standard adopted by this Court is inappropriate

to measure the burden of a partisan gerrymander on speech and association for the same reason: Partisan gerrymandering is not per se unconstitutional, so intending to draw lines based in part on political considerations does not violate the First Amendment. However, if the standards adopted by this Court are appropriate to measure an unconstitutional level of partisan gerrymandering—which they are not—Plaintiffs failed to demonstrate the required elements of the standards and have not proven their claims.

A. The 2011 Apportionment Plan is Sufficiently Justified by State of Michigan Law and the Apol Criteria, and the Plan Was Not Drawn With a Predominant Purpose to Discriminate.

The 2011 Apportionment Plan, including the Senate Districts that Plaintiffs challenge, was drawn with the predominant intent to comply with Michigan's neutral, traditional redistricting criteria, commonly known as the "Apol Criteria." The Apol Criteria were developed in 1982 by the former Director of Elections Bernard Apol at the direction of the Michigan Supreme Court after the Court found that the State's prior apportionment method violated the "one person, one vote" standard established in *Reynolds v Sims*, 377 U.S. 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964). *In re Apportionment of State Legislature-1982*, 413 Mich. 96, 142; 321 N.W.2d 565 (1982). As articulated by the Michigan Supreme Court in 1982, the Apol Criteria require that districts be "contiguous, single-member districts drawn along the boundary lines of local units of government which, within those

limitations, are as compact as feasible." *Id.* at 140. The Apol Criteria sought to preserve county, city, and township boundaries while shifting the fewest number of cities or townships and the fewest number of people possible to reduce population divergences. *Id.* at 140-142.

In 1996, the Michigan Legislature enacted Public Act 463, which codified a set of standards based on the Apol Criteria at Mich. Comp. Laws § 4.261 *et seq.* for state House and Senate districting. As enacted for state legislative districts, the Apol Criteria include: (1) district contiguity; (2) "a population not exceeding 105% and not less than 95% of the ideal district size . . . unless and until the United States supreme court establishes a different range of allowable population divergence for state legislative districts"; (3) preservation of county lines with the least cost to population equality; (4) when necessary to break county lines, the fewest number of cities or townships possible will be shifted to reduce the population divergence, and between 2 cities or townships, the one with lesser population shall be shifted; (5) if a county is apportioned more than one district, district lines must be drawn on city and township lines; (6) when it is necessary to break city or township lines, the fewest number of people possible will be shifted to reduce the population divergence; and (7) if a city or township is apportioned more than one district, district lines must be drawn to achieve maximum compactness with near absolute population equality (population range of 98% to

102% between districts within the city or township). Mich. Comp. Laws § 4.261. The enacted Apol Criteria also include instruction with regard to measuring compactness and counting splits of naturally discontiguous townships. Mich. Comp. Laws § 4.261(j)-(k).

The Apol Criteria were the predominant considerations of Terry Marquardt, a senior Republican Senate staffer who was primarily responsible for drawing the Michigan Senate Districts. (Marquardt Dep., ECF No. 129-46, PageID.4356, 4362-4363 at 30:11-32:5; 56:12-20; 58:8-18). Mr. Marquardt began the drawing process by examining population estimates and anticipating drawing districts based on minimizing county line breaks. (Marquardt Dep., ECF No. 129-46, PageID.4356-4357 at 33:22-37:20). When the census data became available in 2011, he focused on population numbers and racial data to comply with the Voting Rights Act. (Marquardt Dep., ECF No. 129-46, PageID.4358 at 39:13-41:9). Ensuring that the maps had the fewest county, city, and township breaks possible in compliance with the Apol Criteria and that the districts complied with the Voting Rights Act were major considerations. (Marquardt Dep., ECF No. 129-46, PageID.4361, 4363 at 50:15-53:25; 58:8-18.) After following the Apol Criteria and comply with the VRA, "there's very little discretion" left to the mapmaker. (Marquardt Dep., ECF No. 129-46, PageID.4364 at 62:16-19; 64:15 ("[The Apol] criteria was the driving force.")). Political data was examined only as a secondary consideration, after the

Apol Criteria were satisfied, to ensure that the maps could garner enough votes in the Senate to be enacted. (Marquardt Dep., ECF No. 129-46, PageID.4365-4366 at 69:11-71:14 ("I would only add, though, that [political data] came into play very little because the [Apol] criteria was driving almost every decision that was made.")).

Mr. Marquardt's testimony demonstrates that the Apol Criteria were the predominant considerations in drawing the Senate Districts. Once the Apol Criteria were met—contiguity, equal population, minimal county breaks, minimal city and township breaks, compactness—very few choices as to how to draw the districts were left to the mapdrawer's discretion. Political data, used in only a few instances where some discretion remained, was not the predominant consideration. It was not even a secondary or tertiary consideration. Compliance with state and federal law predominated above all other considerations. Therefore, the maps were not drawn with either the predominant purpose of disadvantaging a political group or specific intent to burden the political speech or associational rights of a political group, and Plaintiffs have not proven their claims.

B. The Models Plaintiffs' Experts Presented Were Fatally Flawed and Do Not Prove Discriminatory Intent or Effect Under the Equal Protection Standard or a Burdensome Impact Under the First Amendment Standard.

Plaintiffs presented expert reports and testimony of Dr. Jowei Chen and Dr. Christopher Warshaw to attempt to prove that the maps were drawn with

discriminatory intent and caused a discriminatory effect. Dr. Chen's simulations are fatally flawed, however, because he did not insert the Apol Criteria as enacted when coding his algorithm to render simulated districts. Mich. Comp. Laws § 4.261(f) states:

> If it is necessary to break county lines to stay within the range of allowable population divergence provided for in subdivision (d), the fewest whole cities or whole townships necessary shall be shifted. *Between 2 cities or townships, both of which will bring the districts into compliance with subdivisions (d) and (h), the city or township with the lesser population shall be shifted*.

(Emphasis added.) According to Dr. Chen, he did not program his simulation algorithm to include the last requirement of the provision: He did not require his computer to choose the city or township with the lesser population when shifting municipalities. (Chen Dep., ECF No. 160-5, PageID.6542 at 104:4-105:5). Dr. Chen stated:

> What the algorithm does is when it's going through, say, iterative changes and redrawing the boundaries between districts . . . it will build up a district, first in order to fill up a county. And then, say, it has to intrude into a neighboring county in order to complete the district, *it will start randomly adding municipalities*—cities and townships, and add just enough to achieve an equally populated district. So that's what the algorithm does. . . . Well what I'm explaining is what the algorithm does is like I said when it intrudes into a new county, it adds—it keeps on adding municipalities *chosen at random* and adds enough to bring it to an equally populated district.

(Chen Dep., ECF No. 160-5, PageID.6542 at 104:4-105:5 (emphasis added)). Dr. Chen's algorithm told the computer to randomly add municipalities when breaking

a county line, which is not the process that Michigan law outlines. Dr. Chen's simulations were flawed, therefore, because they did not match the process by which Michigan mapdrawers draw state legislative districts. Dr. Chen's simulations would never create the 2011 Apportionment Plan or plans like the 2011 Apportionment Plan, because he gave the computer different instructions than Michigan mapdrawers use.

Dr. Chen also failed to correctly instruct his computer with regard to the compactness requirement under Michigan law. Mich. Comp. Laws §§ 4.261(i) and (j) govern compactness:

> (i) Within a city or township to which there is apportioned more than 1 senate district or house of representatives district, district lines shall be drawn to achieve the maximum compactness possible within a population range of 98% to 102% of absolute equality between districts within that city or township.
>
> (j) Compactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area, not part of the Great Lakes and not part of another state, inside the circle but not inside the district.

According to Dr. Chen, rather than programming his algorithm to favor compactness *when a municipality has more than one district*, as stated in the statute, he instructed his computer to favor compactness in *all* districts. Dr. Chen confirmed that after the algorithm takes care of the first four factors, the algorithm then favors districts that minimize the Michigan land area inside of each district circumscribing circle but outside of the district itself; essentially, the algorithm

"favors districts that are more compact." (Chen Dep., ECF No. 160-5, PageID.6551 at 140:15-22). The enacted Apol Criteria do not favor compactness in all districts the way that Dr. Chen's algorithm does, which means that all of Dr. Chen's simulated districts would necessarily be more compact than the district plans Michigan mapdrawers create.

Additionally, Dr. Chen's instructions to his computer were mandatory. (Chen Report, ECF No. 160-2, PageID.6461 (stating that he "instructed the computer algorithm to adhere strictly to these criteria," and calling one criterion an "an absolutely inviolable principle")). In contrast, the Michigan Supreme Court has clarified that the statutory Apol Criteria are guidance only, not mandatory,[4] because "[t]he Legislature, in enacting a law, cannot bind future Legislatures." *Le Roux v. Sec'y of State*, 465 Mich. 594, 616; 640 N.W.2d 849 (2002). While a mapdrawer has discretion to make some choices about how to draw the district lines, Dr. Chen's computer rigidly applied the instructions that it was given. Dr. Chen's program would never be able to draw maps that compare to the Current Apportionment Plan because the program followed different instructions.

Dr. Chen's results were not comparable to the enacted 2011 Apportionment Plan, and his conclusions from the comparison are flawed. Dr. Chen cannot

[4] Although not legally binding, the Apol Criteria were Mr. Marquardt's predominant consideration with respect to drawing Senate districts. (Marquardt Dep., ECF No. 129-46, PageID.4364 at 62:16-19; 64:15).

conclude that the differences between his simulated districts and the districts of the 2011 Apportionment Plan are due to discriminatory partisan intent because his computer program was unable to make the same kind of district map as the 2011 Apportionment Plan—Dr. Chen's simulation process included variables that the mapdrawers' process did not, and so the differences between his output and the actual mapdrawers' output could have been caused by those uncontrolled variables. Because Dr. Chen's algorithm was not based on the correct Apol Criteria, his simulations were not Apol simulations, and he has no basis on which to draw conclusions about the partisanship of the simulations compared with the 2011 Apportionment Plan. Because Dr. Chen's simulations are unreliable bases for comparisons and conclusions, Dr. Chen failed to prove that the Senate Districts were drawn with discriminatory intent or caused a discriminatory effect.

C. Plaintiffs' experts' measurements are also insufficient because they do not measure harm to individual voters.

Under *Gill*, partisan gerrymandering claimants must allege and prove individual harm rather than statewide injuries. *Gill* held that political gerrymandering claims alleging vote dilution involve district-specific injuries, and plaintiffs must show "a burden on their individual votes." 138 S. Ct. 1916, 1930-34; 201 L. Ed. 2d 313 (2018). This Court anticipated the holding in *Gill* when it dismissed Plaintiffs' statewide claims on this basis. (Op. & Order, ECF No. 54, PageID.957.) In *Vieth*, seven justices agreed that a standard premised on

proportional voter representation is not required by nor furthers principles of constitutional equal protection. 541 U.S. at 287-88, 338, 352 n.7.

Plaintiffs' experts used the following methods in their reports to "measure the *overall partisanship* of *each districting plan*" (Chen Report, ECF No. 81-5, PageID.1856): A direct comparison of the number of Republican and Democratic districts in each plan (enacted and simulated); the efficiency gap, and the median-mean difference. (Chen Report, ECF No. 81-5, PageID.1860, 1862, and 1863.) These methods are inappropriate to demonstrate partisanship on a district-by-district basis, as required by *Gill*, and instead measure statewide, proportional representation. For example, Plaintiffs' reliance on partisan asymmetry to demonstrate burden has already been rejected. *League of United Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399, 419-20 (2006) (KENNEDY, J., concurring). The use of the efficiency gap and other "group political success measures" (ECF No. 119, PageID.2422) is insufficient to demonstrate cracked and packed districts because such analyses only depict harm to political parties, not to individual voters. Furthermore, the tests only show averages, not the specific harm required. Indeed, Dr. Warshaw testified that the efficiency gap "addresses the votes, the average effects on Democrats and Republicans in the state. It doesn't characterize the individual voters." (*See, e.g.*, Trial Tr. vol. 1, 2/5/19, at 171, ECF No. 248, PageID.8886.) Dr. Mayer also admitted that an efficiency gap is not

calculated for specific harm. (*See* Mayer Dep., ECF No. 119-17, PageID.2583 ("An efficiency gap is not calculated for a single district.")). Dr. Warshaw stated that he did not demonstrate which districts were packed and cracked. (Warshaw Dep., ECF No. 119-14, PageID.2553). Dr. Chen's analysis has the same failings, as he uses social science metrics to calculate statewide asymmetry. (*See* Def.'s Mot. for Summ. J., ECF No. 119, PageID.2423-24, 2427-28). None of the tests used by Plaintiffs' experts are "well-accepted" measures of partisan fairness, and these measures are subject of "serious criticism by respected political scientists." (*See* Def.'s Mot. for Summ. J., ECF No. 119, PageID.2428.) Dr. Warshaw admitted that there is not even a precise range of an efficiency gap score that would indicate whether a district is unacceptable or an extreme gerrymander. (Trial Tr. vol. 1, 2/5/19, at 154, ECF No. 248, PageID.8869).

The starting point of Dr. Warshaw's analysis is proportionate voting, contrary to the Court's finding in *Vieth* that proportional voter representation of political parties is not required by nor furthers principles of constitutional equal protection. 541 U.S. at 287-88, 338, 352 n.7. Dr. Warshaw explained that "what you might expect is that a party that wins half the votes should win half the seats, and if you win more than half the votes then you should win more than half the seats." (Trial Tr. vol. 1, 2/5/19, at 118, ECF No. 248, PageID.8833). Dr. Warshaw admitted that some political scientists do not even believe that the efficiency gap is

capable of measuring a partisan gerrymander. (Trial Tr. vol. 1, 2/5/19 at 154, ECF No. 248; PageID.8869). Dr. Warshaw also admitted that the efficiency gap can be affected by intentional drawing of district lines to accomplish goals other than maximizing partisan seats such including racial minorities; that these districts would be heavily packed; that the packing would be "natural" and for reasons other than partisan gerrymandering and that the described districts would be heavily Democratic. (Trial Tr. vol. 1, 2/5/19, at 168, ECF No. 248, PageID.8883).

Because of these flaws in Plaintiffs' experts' studies, it is not possible for Plaintiffs' to demonstrate using those studies that districts were drawn with discriminatory intent or that the 2011 Apportionment Plan caused a discriminatory effect on any one Plaintiff or League member.

D. Individual Legislators' Emails Do Not Demonstrate Legislative Intent.

To the extent that Plaintiffs rely on emails from individual legislators to demonstrate discriminatory legislative intent or intent to burden political speech or association, those emails are not attributable to the Legislature as a whole. Courts have refused to ascribe intent so broadly to the Legislature or to give one-off statements the weight of law. Notably, the Supreme Court has cautioned against inquiries into legislative motive or purpose on the basis of statements from only a few legislators:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Hunter v. Underwood, 471 U.S. 222, 228 (1985) (quoting *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968) (footnote omitted)). The Michigan Court of Appeals has agreed and stated:

> There is a contention by some that a discriminatory purpose is reflected in comments made by certain legislators to the media, but as we have said, statements of individual legislators generally do not comprise proper evidence of legislative intent. *See Chmielewski v Xermac, Inc*, 457 Mich 593, 609 n 18; 580 NW2d 817 (1998); *Detroit Bd of Ed v Romulus Bd of Ed*, 227 Mich App 80, 89 n 4; 575 NW2d 90 (1997); *City of Williamston v Wheatfield Twp*, 142 Mich App 714, 719; 370 NW2d 325 (1985) . . . . Plaintiffs identify no caselaw permitting consideration of the statements of individual legislators, particularly statements made to the media, to establish legislative intent.

Gillette Commer. Operations N. Am. & Subsidiaries v. Dep't of Treasury, 312 Mich. App. 394, 432; 878 N.W.2d 891 (2015). *See also Doe v. Snyder*, 932 F. Supp. 2d 803, 810 (E.D. Mich. 2013) ("[C]ourts are wary of considering the 'almost always cacophonous' comments of individual legislators in determining legislative intent.") (citing *Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 784

(6th Cir. 2003) (stating that legislative "intent is better derived from the words of the statute itself than from a patchwork record of statements inserted by individual legislators and proposals that may never have been adopted by a committee, much less an entire legislative body.")). While legislators' individual email comments may show their own views with respect to the various districts, legislative intent cannot be surmised through such narrow windows. Brief, emotive emails, like off-the-cuff statements to the media, should not weigh heavily as evidence of intent. Furthermore, emails written by non-legislator mapdrawers or other legislative staff are even further removed from the Legislature and do not demonstrate the Legislature's intent.

IV. NO RELIEF IS AVAILABLE TO PLAINTIFFS.

A. Plaintiffs' Claims Are Barred by Laches Because District Boundaries Cannot Be Redrawn Using Outdated Census Data from 2010.

Plaintiffs' partisan gerrymandering challenges to the Senate Districts were brought too long after the 2011 redistricting and are barred by laches. Laches is an equitable defense to bar claims due to the "negligent and unintentional failure to protect one's rights." *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002). "It is well established that in election-related matters, extreme diligence and promptness are required. When a party fails to exercise diligence in seeking extraordinary relief in an election-related matter, laches may bar the

claim." *Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808, 815 (S.D. Ohio 2014) (internal citation and quotation marks omitted), *stay pending appeal denied*, 769 F.3d 385 (6th Cir. 2014) and *judgment aff'd*, 768 F.3d 524 (6th Cir. 2014). Claims for relief based on constitutional grounds in election-related matters may be barred by laches. *See id.* at 814-15; *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008). In fact, consideration of equitable principles and exigent circumstances may warrant withholding relief, even if a redistricting plan is held to be unconstitutional. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

Laches applies if "(1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay." *ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004). Laches may apply to a redistricting claim when populations within voting districts have shifted during the delay; the proximity of prior and upcoming censuses are also an equitable factor to consider. *Cf. Shapiro v. Maryland*, 336 F. Supp. 1205, 1210 (D. Md. 1972) (holding that a redistricting claim delayed four and a half months was not barred by laches because the next census and its data on population changes was still ten years away) (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964)).

The "one person, one vote" rule is key to ensuring that state legislative districts do not violate the Equal Protection Clause. *See Evenwel v. Abbott*, 136 S.

Ct. 1120; 194 L. Ed. 2d 291 (2016). To ensure that each person's vote has equal weight, state legislative districts must be apportioned so that they are "as nearly of equal population as practicable." *Reynolds v. Sims*, 377 U.S. at 577; *see also WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653; 84 S. Ct. 1418; 12 L. Ed. 2d 568 (1964) ("[T]he Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis."). A state's apportionment scheme "cannot . . . result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." *Id.* However, state legislative district populations need not contain exactly equal populations: "[W]hen drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness." *Evenwel*, 136 S. Ct. at 1124 (citing *Brown v. Thomson*, 462 U. S. 835, 842-843; 103 S. Ct. 2690; 77 L. Ed. 2d 214 (1983)). Generally, population deviations among all districts must be less than 10% to avoid being prima facie unconstitutional. *Chapman v. Meier*, 420 U.S. 1, 23 (1975); *Evenwel*, 136 S. Ct. at 1124 ("Where the maximum population deviation between the largest and smallest district is less than 10%, the

Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule.").

Here, Plaintiffs' six-year delay in bringing their partisan gerrymandering claims challenging the 2011 Apportionment Plan means that Plaintiffs missed their window of opportunity to obtain relief. (*See* Pls.' Compl, ECF No. 1, filed December 22, 2017). The only relief available for allegedly unconstitutional partisan gerrymandering is redrawing the districts in a constitutionally compliant manner. *Gill*, 138 S. Ct. at 1930. To do so, the redrawn districts must comply with the "one person, one vote" standard. *Evenwel*, 136 S. Ct. at 1124. However, it is not possible in 2019 to redraw districts in Michigan according to that standard because the only population data available to redraw districts is the 2010 census data, which is out of date and does not reflect current population sizes and locations. During trial, Jeffrey Timmer testified that in 2018, the U.S. Census Bureau released its annual population estimates, and the Bureau estimated that "27 counties in Michigan have lost population, with an aggregate total of 150,000 people being lost within those counties." (Trial Tr. vol. 3, 2/7/19, at 104, ECF No. 250, PageID.9291). Wayne County alone lost "[a]bout 70,000 [people or] a little more, which is equivalent—nearly equivalent to the population of one State House district . . . ." (Trial Tr. vol. 3, 2/7/19, at 104, ECF No. 250, PageID.9291). Therefore, if the 2010 census data was used to redraw maps in 2019—which is all

that would be available to mapdrawers to input—then districts would end up with far fewer people in reality than are reflected in the data, which would be antithetical to the one person, one vote standard. (Trial Tr. vol. 3, 2/7/19, at 105, ECF No. 250, PageID.9292). Any apportionment plan drawn using such outdated population counts would violate the Equal Protection Clause.

Plaintiffs plainly failed to exercise extreme diligence and promptness required for their claim in this case. Eight years will have elapsed between when the 2011 Apportionment Plan was enacted and when any redrawn plan could be implemented. Additionally, the next census to be taken in 2020 is just around the corner, which counsels against redrawing district maps in 2019 with data that is nearly a decade old. Any alleged defect in the old plan will soon be remedied in due course. This is especially true for the Senate Districts, which will be redrawn before the next regularly scheduled Senate election in 2022: The 2011 districts will never be used as the basis for a Senate election again.

Plaintiffs knew or should have known of their claim immediately following the 2011 redistricting. Dr. Susan Smith, who was the was President of the League from 2011 to 2015, attended the June 2011 public hearing during which the 2011 congressional and state legislative apportionment bill was released and discussed. (Trial Tr. vol. 1, 2/5/19, at 49-50, 56, ECF No. 248, PageID. 8764-8765, 8771). Copies of the bill were provided for members of the public, but the bill contained

only numerical descriptions of the properties contained in each new district. (*Id.* at 57, PageID.8872). The district maps were presented to the public on easels, but according to Dr. Smith, the maps were not large enough for people who lived in more densely populated areas to determine which districts they would be in. (*Id.* at 57-58, PageID. 8772-8773). At that point, "[a]fter sitting through that hearing and seeing the lack of transparency, the lack of public involvement, the lack of even communicating what the maps were even at that point before [the Legislature] voted on them, that's when [Dr. Smith] thought, wow, the League has got to get involved." (*Id.* at 59, PageID.8774). The League also issued a position statement in 2012 against "preferential treatment for any party and . . . protection of incumbents" through redistricting. (*See* Senate Intervenors' Proposed Findings of Fact, ¶ 38). The League retained experts on January 16, 2015 and February 17, 2016, (Def.'s Mot. Summ. J., ECF No. 121, PageID.2784), but did not file their claim until December 22, 2017. (*See* Senate Intervenors' Proposed Findings of Fact, ¶ 39).

As noted above, laches applies if "(1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay." *ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004). Plaintiffs' unreasonable delay in bringing their claims has resulted in prejudice to Defendants, and specifically to the Senate Defendants. First, Plaintiffs' delay has made it

impossible for this Court to grant any relief—the 2010 census data is outdated and cannot be used to redraw district boundaries that meet the one person, one vote rule—yet Defendants were required to mount a full defense against Plaintiffs' claims. Because Plaintiffs unreasonably slept on their rights and caused Defendants prejudice, laches bars their claims.

B. No Relief May Be Granted Regarding the Senate Districts Without Unconstitutionally Truncating Senators' Four-Year Terms of Office.

This Court is unable to provide Plaintiffs any relief with respect to the challenged Senate Districts for another reason, as well. Under the Michigan Constitution, state Senators serve "four-year terms concurrent with the term of office of the governor." Mich. Const. art. IV, § 2. Senators were last elected to office during the November 2018 general election, and they began their four-year terms on January 1, 2019. Previously, when denying the Defendant Secretary's Motion to Dismiss Plaintiffs' Claims as to the Michigan Senate (ECF No. 63), the Court noted that if it "were to find the Michigan apportionment plan or any of its portions to be the product of unconstitutional partisan gerrymandering, this Court could issue an order to remedy the harm caused by the unconstitutional violations," specifically by "ordering that voting district maps be redrawn and ordering special elections." (Order Den. Mot. to Dismiss, ECF No. 88, PageID.2051). However, the Court may always revisit its prior decisions following the close of evidence.

See Deitz v. Bouldin, 136 S. Ct. 1885, 1892 (2016) ("[T]he Court has recognized that a district court ordinarily has the power to modify or rescind its orders at any point prior to final judgment in a civil case."). Because ordering a special election for the Senate would contravene the word and spirit of the Michigan Constitution, this Court should not order a special Senate election.

If this Court were to order a special Senate election in 2020 based on redrawn Senate District maps, then the Senators' four-year terms would be truncated in violation of the term of office established by the Michigan Constitution. No court has ever ordered a state special election that would truncate legislators' terms of office in violation of the state's constitution as a remedy for partisan gerrymandering. *Cf. North Carolina v. Covington*, 137 S. Ct. 1624, 1625-1626; 198 L. Ed. 2d 110 (2017) (examining the equitable factors to consider when deciding whether to truncate existing legislators' terms and order a special election as a remedy for racial gerrymandering); *Travia v. Lomenzo*, 381 U.S. 431; 85 S. Ct. 1582; 14 L. Ed. 2d 480 (1965) (discussing three-judge panel's order providing for truncated one-year terms after unequal population districts were found to violate the Equal Protection Clause); *In re Apportionment Law Appearing As Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1046 (Fla. 1982) ("[T]he courts have both the power and the duty to truncate the terms of legislators elected from

malapportioned districts which violate the "one-person one-vote" command of the equal protection clause.").[5]

While there have been multiple findings of partisan gerrymandering in other cases, no special elections reducing a term of office contrary to the state's constitution have been ordered. This Court should not grant the requested relief with regard to the challenged Senate Districts because doing so would contravene the Michigan Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs have failed to demonstrate standing to bring their claims, and their claims should be dismissed. If this Court finds that Plaintiffs have standing, their First and Fourteenth Amendment partisan gerrymandering claims should be dismissed as nonjusticiable political questions. If this Court finds Plaintiffs' claims to be justiciable, Plaintiffs have failed to produce

[5] Although the Florida Supreme Court found that it had "the power and the duty" to truncate legislators' terms of office, the Florida Constitution explicitly provides that authority. The Florida Constitution provides for staggered Senate terms: Half of its Senators are elected every two years for four-year terms. After each redistricting, some Senators' terms are truncated to two years so that all Senators are elected using the new apportionment plan. The Florida Constitution provides for truncated terms: "[A]t the election next following a reapportionment, some senators shall be elected for terms of two years when necessary to maintain staggered terms." *See In re Apportionment Law Appearing As Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1046 (Fla. 1982) (quoting Fla. Const. art. III, § 15(a)). Therefore, truncating Senators' terms does not conflict with the Florida Constitution.

the evidence required to prove their claims and their claims are barred by laches. This Court is unable to grant Plaintiffs any relief because the 2010 census data that would be used to redraw district boundaries is no longer accurate and the redrawn districts would violate the federal "one person, one vote" standard. In every aspect of this case, Plaintiffs are unable to succeed, and judgment should be entered for the Defendant Secretary and the Congressional, House, and Senate Defendant-Intervenors.

Respectfully submitted,

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Date: February 22, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2019, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: February 22, 2019

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