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.

No. 2:17-cv-14148

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

DEFENDANT'S TRIAL BRIEF

INTRODUCTION

A fair and impartial election system is one of the cornerstones of a constitutional, representative democracy. As the State's chief election officer, Michigan's Secretary of State has a duty to ensure that Michigan's electoral system "operate[s] in a manner that is fair, accessible and in compliance with the constitutional mandate of one person, one vote."[1] The Secretary of State is, thus, an indispensable party to this lawsuit, which seeks to alter the administration of Michigan's elections. Although Secretary Benson's interests in this case may be different than her predecessor and not fully aligned with either the Defendant-Intervenors or the Plaintiffs, Secretary Benson intends to defend this lawsuit in a manner that best protects the integrity of Michigan elections.

Citizen engagement and participation in the election process is another foundational component of the American system. For the Secretary—and the voters of the State of Michigan, who recently amended the State's Constitution to require redistricting by an Independent Citizen Redistricting Commission (ICRC)—that engagement includes "citizen involvement in redistricting as a solution to end efforts to rig districts to encourage particular partisan outcomes." *Id.* As such, Secretary Benson believes that the most equitable resolution of this

[1] *Secretary Benson, League of Women Voters Reach Agreement to Settle Redistricting Case,* Mich. Dep't of State (Jan. 25, 2019), https://www.michigan.gov/sos/0,4670,7-127-1640_9150-488376--,00.html

case involves the entry of a consent decree (ECF 211) that will correct the most egregious and impactful instances of partisan gerrymandering while conserving taxpayer resources to focus on a successful implementation of the ICRC starting in 2020.

ANALYSIS AND ARGUMENT

A. The Secretary Has Fully Evaluated the Merits of Plaintiffs' Lawsuit.

Plaintiffs brought this case under Sections 1983 and 1988 (42 U.S.C. §§ 1983, 1988) against the Secretary's predecessor-in-interest in her official capacity in December 2017, alleging that the State's 2011 redistricting was the result of unconstitutional, partisan gerrymandering. *See generally* Compl., ECF 1. The parties contested the Plaintiffs' claims, and the Congressional and Legislative Defendant-Intervenors—not all of whom represent Challenged Districts—sought to intervene in the case. *See generally* Mot. to Dismiss, ECF 11; Mots. to Intervene, ECF 21, 70, 136.

In November 2018, Michigan voters elected Jocelyn Benson, a longtime proponent of non-partisan redistricting, to serve as Secretary of State. At the same time, the voters adopted Proposal 2, creating the ICRC to draw Michigan's election districts in a non-partisan manner. Secretary Benson, who is an experienced election law scholar and the former dean of Wayne State University Law School, assumed the office of Secretary of State on January 1, 2019. The Secretary has

reviewed fully all of the briefings and proceedings in this litigation; her staff and current counsel met with previous counsel from Dickinson Wright; and the Secretary has reviewed the merits of this litigation with her current counsel from Miller Canfield, which has been appointed as Special Assistant Attorneys General.

After due deliberation and consideration of the merits, costs, and risks in this action, the Secretary recognizes that Plaintiffs have introduced significant evidence challenging the constitutionality of Michigan's 2011 electoral maps. Indeed, Plaintiffs have presented facts and data evidencing a strong probability that partisan gerrymandering impacted the population grouping in a number of districts. The maps further appear to demonstrate that "cracking" and "packing" of voters by political affiliation was particularly severe in certain districts. That Plaintiffs' district-by-district claims have survived challenges to justiciability and standing (common hurdles in a partisan gerrymandering case) and have proceeded to this impending trial lends further credence to the viability of their claims.

The Secretary thus recognizes that continued defense of the 2011 redistricted maps in their current form would only serve to perpetuate, rather than mitigate, partisan gerrymandering, while risking the imposition of substantial burdens on the taxpayers and voters if the Plaintiffs' claims were ultimately to succeed. This includes: the significant costs of the case's continued defense (including appeals); the effective removal of current legislators from office and the cost, disruption, and

confusion of a special election to voters and politicians alike; and the risk of conducting the 2020 State House elections using a gerrymandered map if the case becomes protracted through appeals or subsumed by intervening United States Supreme Court decisions, among other possibilities.

B. The Parties Have Vigorously Negotiated and Proposed a Fair, Adequate, and Reasonable Consent Decree.

To mitigate these uncertainties and resolve this dispute efficiently and with finality, the Secretary continued her predecessor's negotiations with the Plaintiffs to "ensure a fair and equitable resolution for the citizens of Michigan that would save taxpayer money and ensure fair representation." *Secretary of State Jocelyn Benson Files Brief in League of Women Voters vs. State of Michigan*, Mich. Dep't of State (Jan. 17, 2019), https://www.michigan.gov/sos/0,4670,7-127-1640_9150-487745--,00.html. As a compromise to avoid further litigation, the Secretary reached an agreement with the Plaintiffs that she believes "strikes a balance between recognizing the unconstitutionality of the 2011 districting maps while reaching a remedy that is limited in scope and impact given the length of time these districts have been in place," and between "limiting disruption to the current maps while acknowledging the harm done to voters through attempts to rig the outcomes of elections through partisan gerrymandering." *See* note 1, *supra*. The Secretary thus fully supports the fairness, reasonableness, and adequacy of the proposed consent decree submitted by the parties, ECF 211. If, however, the Court

were to not approve the consent decree, the Secretary is prepared to defend this litigation as the principal defendant in the case and the constitutional officer charged with administering elections in Michigan, with interests in the outcome that are distinct from those of the Plaintiffs and Defendant-Intervenors.

C. Even with a Consent Decree on the Table, the Secretary will Defend her Interests as Michigan's Chief Elections Officer, Distinct from the Intervenors.

Regardless of the potential pending resolution of this lawsuit, the Secretary, as the constitutional officer charged with administering elections in Michigan, continues to maintain her own distinct interest in the outcome of this dispute. *See* Mich. Comp. Laws § 168.21 ("The secretary of state shall be the chief election officer of the state."). Notably, the Secretary's interests in defending this case are not fully aligned with either, and differ in important ways from both, the Intervenors or the Plaintiffs. Unlike the Intervenors, the Secretary acknowledges that the facts presented by the Plaintiffs demonstrate that the 2011 redrawing of certain state legislative and federal congressional districts improperly took into account partisan considerations and resulted in districts impermissibly gerrymandered by partisan affiliation, with some districts more egregious examples of this practice than others. *See* Proposed Consent Decree, ECF 211-1, ¶ 17. Consequently, it is not in the best interests of Michigan voters to expend significant resources defending the 2011 maps.

D. As an Indispensable Party Defendant, the Secretary Will Defend the Integrity of Michigan's Election Process and Strongly Opposes any Special Election.

Nor are the Secretary's interests fully aligned with the Plaintiffs. As a threshold matter, the Plaintiffs have challenged numerous State House and Senate and United States Congressional districts as to which the Secretary did not agree to any relief in the Proposed Consent Decree. *Compare* Op. & Order on Summary Judg., ECF 143, PageID.5304; Proposed Consent Decree, ECF 211-1, PageID.7887–88, ¶ 5 (listing districts challenged by Plaintiffs) *with* Proposed Consent Decree, ECF 211-1, PageID.7898 (listing districts that would be redrawn). Thus, the Secretary has not conceded Plaintiffs' claims, as some, including Defendant-Intervenors, have wrongly asserted. Indeed, in the event the consent decree is not approved, the Secretary is prepared to defend her distinct interests in this case; and her willingness to compromise with Plaintiffs in an effort to avoid a protracted trial and subsequent appeal should not weigh against the Secretary being an indispensable defendant should this case proceed without settlement.

Contrary to the Plaintiffs' position, a special election for State Senate offices during the upcoming State House election cycle in 2020 is not an appropriate remedy under the circumstances, and would be a substantial disruption to the normal electoral process. Indeed, a special election would have the effect of removing legislators from office and forcing them to seek re-election after only

two years into a constitutionally-mandated four-year term – an extreme measure against which courts have cautioned in all but the most egregious circumstances of "discriminatory practices [that] so infect the processes of the law as to be stricken down." *Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967).

Furthermore, no court has ever overseen a special election as a remedy for *partisan* gerrymandering, and, as this Court has acknowledged, "the Supreme Court has never addressed whether or when a special election may be an appropriate remedy for unconstitutional partisan gerrymandering." Op. on Mot. to Dismiss, ECF 88, PageID.2052. The Supreme Court also recently called into question whether such a measure is appropriate to rectify a *racial* gerrymander—an issue that, unlike partisan gerrymandering, the Supreme Court has already found to be justiciable. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625–26 (U.S. 2017) (reversing and remanding after finding that district court did not give sufficient weight to the burden of a special election as a remedy for partisan gerrymander); *see also Covington v. North Carolina*, 270 F. Supp. 3d 881, 898–99 (M.D.N.C. 2017) (after remand) (finding special election administratively impracticable and denying remedy). The unique circumstances here – the last major elections cycle before the ICRC draws new State Senate districts for the 2022 election – do not support a special election in 2020, which would mean some

Senate candidates would be forced to run three campaigns in six years (2018, 2020, and 2022).

A comparison of the cases in which courts have found a special election appropriate with the facts at hand demonstrate why a special election would constitute an undue burden here. Unlike *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967), this case does not involve racial segregation of polling places or racially-motivated voter intimidation tactics. In ordering a special election in *Bell*, the court was extremely conscious of the extraordinary nature of the remedy, emphasizing that the "gross, spectacular, completely indefensible nature of this state-imposed, state-enforced racial discrimination and the absence of an effective judicial remedy prior to the holding of the election" justified the measures. *Id.* at 664. *See also id.* at 663–64 (noting that "not every unconstitutional racial discrimination necessarily permits or requires a retrospective voiding of the election"). *See also Garrard v. City of Grenada*, No. 3:04CV76-B-A, 2005 WL 2175729, at *1, *2 (N.D. Miss. Sept. 8, 2005) (ordering special election only after city "egregious[ly] . . . fail[ed] for over ten years to redistrict the annexed area in a constitutional manner" and ordering special election in accordance with state's usual special election procedures). This case does not present the extraordinary circumstances necessary for a special election, particularly because, even if Plaintiffs' prevail on the merits of their Senate District claims, the current maps

will not govern the next State Senate election in 2022. Instead, the non-partisan ICRC maps will control, leaving a judicial remedy in that regard unnecessary.

Two other cases in which special elections were ordered, *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), and *Hackett v. President of City Council of City of Philadelphia*, 298 F. Supp. 1021 (E.D. Pa.), *aff'd*, 410 F.2d 761 (3d Cir. 1969), were not gerrymandering cases at all. Rather, those were instances in which government officials vacated their seats, and state statute required a special election to fill the positions. *Duncan*, 515 F. Supp. at 331, 333–34; *Hackett*, 298 F. Supp. at 1023. The plaintiffs in *Duncan* sought court intervention when the governor refused to hold an election for Georgia's Supreme Court, 515 F. Supp. at 331–34, 343, and the *Hackett* plaintiffs challenged the timing of a special election for Philadelphia city council, 298 F. Supp. at 1023–25. Neither presented the question of whether the court could order such a remedy from its inherent power. *See also Butterworth v. Dempsey*, 229 F. Supp. 743, 759–60 (D. Conn. 1964), 237 F. Supp. 302, 307 (D. Conn. 1964) (adjourning special election after Connecticut's legislature made significant progress in redistricting grossly disproportionate electoral districts).

With the next election for the State Senate not scheduled until 2022 under a district map drawn by the new ICRC, this case is also unlike the racial gerrymandering cases in which courts allowed an impending regularly-scheduled

election to go forward under a gerrymandered map with the understanding that a special election would be held immediately thereafter. *See, e.g.*, *Smith v. Beasley*, 946 F. Supp. 1174, 1212–13 (D.S.C. 1996) (allowing general election to proceed with maps that used race as predominant factor to create majority-minority districts under Voting Rights Act since election was only six weeks away, but under order that "legislators elected in [that] general election will serve for only one year"); *Vera v. Bush*, 933 F. Supp. 1341, 1344, 1347 (S.D. Tex. 1996) (imposing temporary redistricting plan for impending election and adjusting election schedule where legislature refused to call special session during campaign year to redistrict because they were "uninterested in and would be inconvenienced by" doing so); *Burton v. Hobbie*, 561 F. Supp. 1029, 1032–34 (M.D. Ala. 1983) (allowing impending election to occur under legally inoperative redistricting plan that did not receive Voting Rights Act preclearance and ordering special election to follow once approved plan was in place); *see also Arbor Hill Concerned Citizens v. Cty. of Albany*, 357 F.3d 260, 262 (2d Cir. 2004) ("It is within the scope of those equity powers to order a governmental body to hold special elections to redress violations of the VRA.") (emphasis added).

CONCLUSION

In short, the Secretary is an indispensable defendant to this lawsuit whose interests as Michigan's chief elections officer are, first and foremost, aligned with

the Constitutions of the United States and the State of Michigan. The Secretary therefore has interests in the process and outcome of this litigation that are separate and distinct from either the Plaintiffs or the Intervenors, and from her predecessor. Counsel for the Secretary will zealously represent her interests during trial in this matter to facilitate a resolution that remediates the most severe instances of partisan gerrymandering during the only election cycle in the brief window before the independent, nonpartisan, citizen-led ICRC assumes control of the redistricting process.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: */s/ Scott R. Eldridge*

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Dated: January 29, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 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 all counsel of record in this matter.

Respectfully submitted,

/s/ Scott R. Eldridge