

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, et al,

Plaintiffs,

v

JOCELYN BENSON,

Defendant,

COUNT MI VOTE (d/b/a Voters Not
Politicians),

Intervening-Defendant.

No. 1:19-cv-00614
(Lead)

HON. JANET T. NEFF

MAG. ELLEN S. CARMODY

**DEFENDANT BENSON'S
MOTION TO DISMISS IN CASE
NO. 19-00614**

MICHIGAN REPUBLICAN PARTY, et al,

Plaintiffs,

v

JOCELYN BENSON,

Defendant,

COUNT MI VOTE (d/b/a Voters Not
Politicians),

Intervenor-Defendant.

No. 1:19-cv-669
(Member)

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**DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S
MOTION TO DISMISS IN CASE NO. 19-00614**

Defendant Secretary of State Jocelyn Benson, by and through counsel, moves under Fed. R. Civ. P. 12(b)(6), to dismiss Plaintiffs' complaint and states:

1. In November 2018, the people of Michigan amended their Constitution to retake control over the redistricting process from the state Legislature and place it in the hands of ordinary voters, not politicians. *See* Mich. Const. 1963, Art. 4, § 6.
2. They did so because Michigan's redistricting process, like those in other states, has been marred by excessive partisanship, resulting in politically gerrymandered legislative districts. *League of Women Voters, et al. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019).
3. The new amendment creates an Independent Citizens Redistricting Commission consisting of thirteen commissioners – eight members who affiliate with the major political parties (four who affiliate with Republicans and four who affiliate with Democrats), and five members who do not affiliate with either of the major parties. Mich. Const. 1963, Art. 4, § 6(1), (2)(f).
4. The amendment also excludes eight categories of individuals from being eligible to serve on the Commission if the individual is presently or within the last six years has been: a declared candidate for partisan federal, state, or local office; an elected official to partisan federal, state, or local office; an officer or member of the governing body of a national, state, or local political party; a paid consultant or employee of a federal, state, or local elected official or political candidate, of a federal, state, or local political candidate's campaign, or of a political action

committee; an employee of the legislature; any person who is registered as a lobbyist agent with the State, or any employee of such person; an unclassified state employee who is exempt from classification in state civil service under Michigan's Constitution except for employees of courts of record, employees of the state institutions of higher education, and persons in the armed forces of the state; and a parent, stepparent, child, stepchild, or spouse of any of the disqualified individuals. Mich. Const. 1963, Art. 4, § 6(1)(a), (b)(i)–(vii), (c).

5. Defendant Secretary of State Benson is responsible for developing and implementing the application process regarding the Commission, and ultimately ensuring that Commission members are selected. Mich. Const. 1963, Art. 4, § 6(2)(a).

6. Plaintiffs are all individuals who affiliate with the Michigan Republican Party and would like to apply to become the Republican members of the Commission but cannot do so because they fall into one or more of the categories noted above.

7. Plaintiffs allege that the ineligibility provisions violate their First and Fourteenth Amendment rights to speech and association by excluding them primarily based on their past or present political activity.

8. But these claims fail.

9. The State has a compelling interest in deciding both how and who will be responsible for redistricting in Michigan. The composition and selection of the Commission members was designed to eliminate undue partisan or political

influence in the drawing of district lines. The amendment does so by rendering ineligible to serve on the Commission individuals, like Plaintiffs, whose participation would otherwise raise a conflict of interest.

10. Their exclusion is thus not based on their political association or politically expressive activity. Rather, Plaintiffs – partisan elected officials, party leaders, employees or consultants of politicians, a lobbyist, and several immediate family members – are excluded because their private interests conflict with the public duty of the Commission to draw fair and impartial district lines.

11. Plaintiffs do not have a right to be members of this Commission, and they remain free to exercise their rights to affiliate with the Michigan Republican Party, just not as members of the Commission. Any burden on Plaintiffs' rights is minimal and temporary since they may be eligible to serve on a future Commission.

12. And this minimal burden is clearly outweighed by the State's compelling interest, which the exclusions advance by ensuring that those now charged with redistricting are not compromised by political considerations. The ineligibility provisions do not violate Plaintiffs' First and Fourteenth Amendment rights.

13. Plaintiffs' claims are also barred by the doctrine of laches. Plaintiffs have unreasonably and unnecessarily delayed in bringing this constitutional challenge, despite full knowledge of the passage of the amendment, the urgent time constraints it placed on Defendant Benson, and the need for applications to be finalized, prepared, and printed within weeks of filing their challenge. There appears to be no legitimate explanation for the delay—there have been no sudden

factual or legal developments that have had any effect on the claims they seek to raise here.

14. Because Plaintiffs unreasonably delayed for months in raising these claims before this Court, and the consequences of their delay have prejudiced the Defendant, this Court should refuse to entertain their claims now based on the doctrine of laches.

15. As a result, Plaintiffs' Complaint fails to state a claim upon which relief may be granted, and Defendant is entitled to dismissal.

16. Defendant sought concurrence in this motion prior to its filing; the request for concurrence was denied.

WHEREFORE, Defendant Benson respectfully requests that this Court grant her motion to dismiss Plaintiffs' Complaint.

Respectfully submitted,

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Dated: September 19, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

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**DEFENDANT BENSON'S BRIEF
IN SUPPORT OF MOTION TO
DISMISS IN CASE NO. 19-00614**

No. 1:19-cv-00669
(Member)

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**DEFENDANT BENSON'S BRIEF IN SUPPORT OF
MOTION TO DISMISS IN CASE NO. 19-00614**

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs' complaint should be dismissed for failure to state a claim because the amendments to Michigan's Constitution rendering ineligible certain individuals from serving on the new Independent Citizens Redistricting Commission do not violate Plaintiffs' speech and association rights under the First Amendment, or their right to equal protection under the Fourteenth Amendment.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund, 206 F.3d 680, 684 (6th Cir. 2000)

Ludwig v. Bd. of Trustees, 123 F.3d 404, 408 (6th Cir. 1997)

Murphy v. Sofamor Danek Group, 123 F.3d 394, 400 (6th Cir. 1997).

Trzebuckowski v. City of Cleveland, 319 F.3d 853, 855 (6th Cir. 2003)

INTRODUCTION

Michigan citizens determined it was vital to retake control over the redistricting process from the state Legislature and place it in the hands of ordinary voters, not politicians. The reason for this seizure is plain and was recently proven; the Legislature, by engaging in unconstitutional partisan gerrymandering, failed to undertake redistricting in adherence to core constitutional principles requiring fair and effective representation for all Michigan's citizens. *League of Women Voters, et al. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019). The U.S. Supreme Court's decision in *Rucho v. Common Cause* does not change the merits of that result. 139 S. Ct. 2484, 2506 (2019) (recognizing that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust" but holding that partisan gerrymandering questions are non-justiciable).

To combat the effects of "excessive partisanship" in redistricting, the people of Michigan conferred this fundamental power upon an Independent Citizens Redistricting Commission. A remedy noted with approval by the Court in *Rucho*. 139 S. Ct. at 2507. The composition and selection of its members was designed to eliminate undue political influence in the drawing of district lines. The amendment does so by rendering ineligible to serve on the Commission individuals, like Plaintiffs, whose participation would otherwise raise a conflict of interest.

Their exclusion is thus not based on their political association or politically expressive activity. Rather, Plaintiffs – partisan elected officials, party leaders, employees or consultants of politicians, a lobbyist, and several immediate family

members – are excluded because their private interest conflict with the public duty of the Commission to draw fair and impartial district lines.

The State has a compelling interest in deciding both how and who will be responsible for redistricting in Michigan. The exclusions plainly further that interest by ensuring that those now charged with redistricting are not compromised by political considerations. And any temporary burden on Plaintiffs’ constitutional rights is minimal. Thus, on balance, the ineligibility provisions do not violate Plaintiffs’ First and Fourteenth Amendment rights. As a result, Plaintiffs Complaint must be dismissed.

STATEMENT OF FACTS

Pursuant to Fed. R. Civ. Proc. 10(c), Secretary of State Benson adopts and incorporates the facts and exhibits provided in her contemporaneously-filed Response to Plaintiffs’ Motion for Preliminary Injunction at pages 7-14. (Doc. 39, Def’s Resp. to Mot. for P.I., PageID.538-545).

ARGUMENT

I. Plaintiffs’ complaint should be dismissed for failure to state a claim because the amendments to Michigan’s Constitution rendering ineligible certain individuals from serving on the new Independent Citizens Redistricting Commission do not violate Plaintiffs’ speech and association rights under the First Amendment, or their right to equal protection under the Fourteenth Amendment.

A. Standard of review

Fed. R. Civ. P. 12(b)(6) permits dismissal for failure to state a claim upon which relief can be granted. Plaintiff must show that the complaint alleges a claim under federal law, and that the claim is substantial. Under Rule 12(b)(6), a

complaint may be dismissed if no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. *Ludwig v. Bd. of Trustees*, 123 F.3d 404, 408 (6th Cir. 1997). This Court must construe the complaint in the light most favorable to the Plaintiff, accept all factual allegations as true, and determine whether it is established beyond a doubt that Plaintiffs can prove no set of facts in support of his claim that would entitle him to relief. *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 855 (6th Cir. 2003). This Court need not accept as true legal conclusions or unwarranted factual inferences. *Murphy v. Sofamor Danek Group*, 123 F.3d 394, 400 (6th Cir. 1997).

B. Plaintiffs have failed to state a claim establishing a violation of the First or Fourteenth Amendments.

Rather than restate identical arguments, Secretary Benson adopts and incorporates by reference the arguments set forth in her contemporaneously filed Response to Plaintiffs' Motion for Preliminary Injunction at pages 19-37 (Doc. 39, PageID.550-569). Fed. R. Civ. Proc. 10(c). In that brief, Secretary Benson has shown that the Plaintiffs are unlikely to succeed on the merits of their constitutional claims because the allegations in the Complaint fail to demonstrate any actual constitutional violations. For the same reasons, Plaintiffs have failed to state claims for which relief could be granted by this Court, and the Complaint should be dismissed in its entirety.

C. Plaintiffs' complaint should be dismissed under the doctrine of laches.

The Plaintiffs have known for months about the passage of this amendment to Michigan's constitution, and the exclusions that form the basis of their claims

were explicitly written into the language of the amendment. *See* Mich. Const. 1963, Art. 4, §6(1). The amendment was passed by the voters on November 6, 2018 and was effective December 22, 2018. News reports about the adoption of the amendment were widespread.¹ The MRP, in particular, must be considered as having been very well aware of the proposal beginning at its inception, continuing throughout the election, and enduring after the adoption of the amendment by the voters. Yet, Plaintiffs undertook no action until the filing of this lawsuit on August 22, 2019—over eight months later. Indeed, these Plaintiffs filed their lawsuit almost a month after even the filing of the *Daunt* case.

The defense of laches is rooted in the principle that “equity aids the vigilant, not those who slumber on their rights.” *Lucking v. Schram*, 117 F.2d 160 (6th Cir. 1941). An action may be barred by the equitable defense of laches if: (1) the plaintiff delayed unreasonably in asserting her rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000). Laches applies in this case for both of these reasons.

First, despite having reason to be very well-informed of the debate surrounding the amendment and its subsequent passage by an overwhelming

¹ *See e.g.* Paul Egan, *Michigan Voters Approve Anti-Gerrymandering Proposal 2*, Det. Free Press, Nov. 6, 2018, at shorturl.at/esHSY, last accessed Aug. 20, 2019, and the passage of the amendment was even the subject of national news, *see e.g.* Katie Zezima and Emily Wax-Thibodeaux, *Voters Are Stripping Partisan Redistricting Power From Politicians In Anti-Gerrymandering Efforts*, The Washington Post, Nov. 7, 2018, at www.shorturl.at/vxAF6, last accessed Aug. 20, 2019.

majority of voters, Plaintiffs unreasonably delayed raising their claims before this Court. The Supreme Court has repeatedly cautioned courts regarding last-minute injunctive relief in such cases. *See, e.g., William v. Rhodes*, 393 U.S. 23, 34-35 (1968) (affirming denial of request for injunction requiring last-minute changes to ballots, given risk of disrupting election process).

Indeed, the Sixth Circuit has reasoned that as time passes, the interests in proceeding with an election increase in importance “as resources are committed and irrevocable decisions are made[.]” *Kay v. Austin*, 621 F.2d 809, 813 (1980); *see also Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000); *McNeilly v. Terri Lynn Land*, No. 1:10-cv-612 (W.D. Mich. July 22, 2010), *aff’d* 684 F.3d 611 (6th Cir. 2012); *Libertarian Party of Michigan v. Johnson*, 905 F. Supp. 2d 751, 754 n.2 (E.D. Mich. 2012). While this case does not concern an election directly, there are the same type of time constraints and government interests involved here as there are in elections. Applications—much like ballots—require printing and distribution, and the constitutional deadlines included in the amendment exert the same time constraints upon the Secretary of State as election dates.

This is a case seeking to halt an amendment to the method of drawing electoral districts more than three-quarters of a year after the amendment was passed, and on the eve of mailing applications for citizens to join the commission. Plaintiffs have unreasonably and unnecessarily delayed in bringing this constitutional challenge, despite full knowledge of the passage of the amendment, the urgent time constraints it placed on the Secretary of State, and the need for

applications to mailed within weeks of filing their challenge. Plaintiffs have “slept on their rights” and did not timely file this challenge. Whereas the plaintiff in *Kay* waited only eleven days after his injury accrued to sue, *id.* at 810, Plaintiffs have delayed for nearly a year.

Moreover, there appears to be no legitimate explanation for the delay—there have been no sudden factual or legal developments that have had any effect on the claims they seek to raise here. As in *Kay*, the Plaintiffs’ claim to have received a serious injury is less credible because they have slept on their rights. 621 F.2d at 813. Nowhere in Plaintiffs’ Complaint do Plaintiffs explain why they were unable to file their claims sooner, or what caused them to delay for so long. Rather, it is apparent that the filing of this lawsuit was timed to have the best chance to interfere with the Secretary’s ability to comply with the deadlines imposed by the amendment. This lawsuit therefore seems intended to make it impossible for the Commission to be implemented in time for the upcoming redistricting, and thereby to preserve the major political parties’ domination over the drawing of legislative districts for another decade.

Second, Plaintiffs’ delay prejudices the Secretary of State in this case, and just as her “interest in proceeding with the election increases in importance,” her interest in proceeding with the implementation of the Commission increases as the deadline for mailing applications looms. (See Exhibit A, Affidavit of Sally Marsh, ¶ 22). Entertaining Plaintiffs’ belated Complaint could effectively be fatal to the Secretary’s ability to meet the deadlines required by the amendment. Further, the

office of Secretary of State has already committed hundreds of hours and thousands of dollars to the effort of preparing the applications and developing a system for tracking and organizing completed applications. *Id.*, ¶¶ 11-12.

Plaintiffs unreasonably delayed for months in raising these claims before this Court, and the consequences of their delay have prejudiced the Defendant and the people of Michigan. Indeed, Plaintiffs' delay threatens to undermine the entire redistricting process. This Court should thus refuse to entertain their demand to be heard in this case and dismiss Plaintiffs' Complaint based on the doctrine of laches.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in Defendant's Response to Plaintiffs' Motion for Preliminary Injunction, incorporated herein, Defendant requests that this Court dismiss Plaintiffs' Complaint, in its entirety, because Plaintiffs' claims are barred by laches and otherwise fail to state a claim upon which relief may be granted.

Respectfully submitted,

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Dated: September 19, 2019

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I hereby certify that on September 19, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

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