

**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.

RUTH JOHNSON, in her official capacity
as Michigan Secretary of State,

Defendant.

Case No. 17-cv-14148

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

**Defendant’s Motion To
Convene a Scheduling
Conference**

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**DEFENDANT’S MOTION TO CONVENE A
SCHEDULING CONFERENCE**

Defendant, Ruth Johnson, for her Motion to Convene a Scheduling Conference, states:

1. Plaintiffs League of Women Voters et al. (League) filed a complaint against Defendant Ruth Johnson (Secretary) on December 22, 2017, challenging the constitutionality of Michigan’s Current Apportionment Plan (defined to include the Congressional, state Senate, and state House districts established after the 2010 census). (ECF No. 1, Pg. ID 1, 13.) The League sought both declaratory and injunctive relief. (*Id.* at Pg. ID 32-33.)

2. In response, the Secretary filed a motion for stay and to dismiss. (ECF No. 11.) The Secretary sought a stay until after the Supreme Court issued decisions in the cases of *Gill v. Whitford* (U.S. Supreme Court Dkt. No. 16-1161) and *Benisek*

v. Lamone (United States Supreme Court Dkt. No. 17-333), both of which involve substantive issues present in this matter, have been argued, and are awaiting decision. In addition, the Secretary filed a motion to dismiss for lack of standing.

3. The League and the Secretary filed a joint Rule 26 report on March 2, 2018. (ECF No. 22.)

4. This Court denied the motion for stay without argument (ECF No. 35), and heard argument on the motion to dismiss on March 19, 2018.

5. On May 9, 2018, this Court issued “Case Management Order No. 1” (Management Order) in which it specified a schedule governing the progress of this case. (ECF No. 53.)

6. The Secretary requests a scheduling conference in order to address issues that arise from the schedule specified in the Management Order. In particular, the Secretary notes the following five matters.

7. *First*, the Secretary notes that the *Gill* and *Benisek* cases have not yet been decided—though, and as noted by this Court, decisions in both cases are expected by the end of June 2018. Among other things, at issue in these two cases is the issue of whether claims of partisan gerrymandering are cognizable—and, if so, what parameters may attend cognizable claims, including evidentiary bases to prove any such claims.

8. The Case Management Order requires the League to file expert disclosures by June 1, 2018, and requires the Secretary to file expert disclosures by June 29, 2018. The filing dates for these expert reports will likely predate the Supreme Court's decisions in *Gill* and *Benisek*, and, if not, will, at a minimum, occur in advance of considered analysis of those opinions.

9. There is no present guidance in this arena—there have been no successful partisan gerrymandering claims until the *Gill* and *Benisek* cases, both of which were appealed, set for full hearing, and argued before the Supreme Court.

10. Assuming that partisan gerrymandering claims are cognizable, the Secretary cannot determine what sort of expert witnesses (statistical or otherwise) might be necessary until after the *Gill* and *Benisek* decisions and a review of what sort of evidentiary bases may be necessary or acceptable in establishing (and therefore defeating) claims of partisan gerrymandering.

11. *Second*, the Case Management Order directs the conclusion of fact and expert discovery by August 24, the filing of summary judgment motions by September 21, and oral argument on summary judgment motions on November 9, 2018. The League's assertions of unconstitutionality are predicated—in part—on the election results from the 2012, 2014, and 2016 election years. (Complaint, ECF No. 1, Pg. ID 29.) Yet, the electoral results of the 2018 election will be important in

whatever statistical or other analyses that may be undertaken with respect to the League's complaint.

12. The League does not challenge the Current Apportionment Plan as to the 2018 election cycle. The Secretary requests that some accommodation be made to the schedule to allow the parties to make changes to submitted expert reports and analyses based on the November 2018 election results. The Secretary asserts that the parties and the Court would benefit from the submission of expert reports that account for the decisions in *Gill* and *Benisek*, and that are modified, as may be appropriate, to rely on the November 2018 election results.

13. *Third*, the Secretary will shortly file a motion to dismiss all aspects of the League's complaint pertaining to apportionment of the Michigan Senate for the reason that after the 2018 elections (as to which the League does not challenge the Current Apportionment Plan), the current Senate plan will not be used for statewide elections thereafter. The next regularly scheduled elections will occur in 2021 after apportionment following the 2020 decennial census. A decision on this issue and others will affect discovery.

14. *Fourth*, the November election and the summary judgment and the trial schedule will have practical impacts on the Secretary. The Secretary is term-limited and she will no longer be at the helm of the Department of State at the time of the

scheduled trial. Depending upon the election results, additional parties may seek intervention.

15. *Fifth*, on May 16, 2018, this Court issued an “Opinion and Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss for Lack of Standing” (ECF No. 54). This opinion directs the Secretary to answer the League’s complaint “insofar as it challenges Michigan’s apportionment plan on a district by district basis within 14 days after entry of this order.” There are more than a hundred electoral districts in the Current Apportionment Plan, and under the Court’s May 16, 2018 Order, proofs will have to be submitted on a district-by-district basis. The parties and Court should discuss how to allow for additional time for Defendants to gain an understanding of which districts Plaintiffs intend to challenge and to assure their expert reports—now due June 29—address these same single districts. In addition to filing an answer, additional motions may be forthcoming, and additional analysis of proofs necessary to defend this action will be required as a result of this Court’s opinion – all of which warrant a discussion concerning the schedule.

16. Pursuant to E.D. Mich. L.R. 7.1, on May 18, 2018, the Secretary sought concurrence in the relief requested in this Motion; counsel for Plaintiffs advised they could not concur.

WHEREFORE, Defendant Ruth Johnson, in her capacity as Michigan Secretary of State, respectfully requests a scheduling conference to address the scheduling matters set forth herein.

Respectfully submitted,

DICKINSON WRIGHT PLLC

/s/ Robert P. Young

Robert P. Young

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Dated: May 18, 2018

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**Defendant’s Brief in Support
of Motion To Convene a
Scheduling Conference**

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**DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO
CONVENE A SCHEDULING CONFERENCE**

For her brief in support, Defendant relies upon the facts, authority, and argument set forth in the accompanying Motion to Convene a Scheduling Conference.

Respectfully submitted,

DICKINSON WRIGHT PLLC

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Dated: May 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, I caused to have electronically filed the foregoing paper 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/Ryan M. Shannon (P74535)