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.	No. 2:17-cv-14148-DPH-SDD **PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO CONVENE A SCHEDULING CONFERENCE**

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO CONVENE A SCHEDULING CONFERENCE

Two days following this Court's ruling on her motion to dismiss and just a week and a half after the Court entered Case Management Plan No. 1, Defendant Ruth Johnson (the "Secretary") moved the Court to convene a scheduling conference. This timing implies that the Court's order on the motion to dismiss somehow necessitates a fresh look at how the case moves forward. But the Secretary's Motion

presents no reason for the Court to convene a scheduling conference. At its core, the Motion is nothing more than a request that the Court reconsider both its order denying a stay of this case and its order establishing a case management schedule and trial date. Because the Motion is groundless and serves no purpose other than to distract and delay, the Motion should be denied. The Plaintiffs (the "Voters") state the following in support of their position:

First, the Court has already been fully briefed on the Secretary's argument on the impact of *Gill v. Whitford* (No. 16-1161) and *Benisek v. Lamone* (No. 17-333). *See* Secretary's Motion to Stay and to Dismiss (Dkt. No. 11) at 20–21; Voters' Opposition to Motion to Stay and to Dismiss (Dkt. No. 15) at 25–27; Report from Rule 26(F) Conference and Discovery Plan ("Discovery Plan") (Dkt. No 22) at 4 (reciting the Secretary's position that "in no event" should the parties have to disclose experts before the Supreme Court rules). Having considered the parties' arguments, the Court denied the motion to stay on March 14, ruling that "there exists a fair possibility that a stay would prejudice Plaintiffs as well as the public interest." Order Denying Motion to Stay (Dkt. No. 35) at 3. Given the prejudice to the Voters and the public interest that would arise "if this case were to persist through three election cycles," the Court found that the Secretary had failed to make out the "clear case of hardship or inequity" that would be necessary to justify a stay. *Id.*

The Court's Order concluded by observing that "a three-judge panel is well-equipped to resolve any issues that might arise if, as Defendant suggests, the Supreme

Court elects to provide additional guidance in the realm of partisan gerrymandering while the parties to the instant case are in the midst of discovery." *Id.*

The Secretary has presented no grounds on which the Court should cast aside its decision with respect to these pending Supreme Court cases.[1] If the law changes as the result of a ruling, the parties, their experts, and Court will manage that change when the time comes. Delaying the entire case is not justified.

Second, the Court has likewise already considered the Secretary's argument that accommodation should be made for the results of the 2018 elections because the Voters do not seek to implement a new districting plan before the 2018 elections take place. *See* Secretary's Motion to Stay and to Dismiss at 21–24; *see also* Discovery Plan at 4. The Court rejected that argument as well, and its Case Management Order fully reflects its decision that discovery in this case should not await the 2018 election. Like *Gill* and *Benisek*, the 2018 elections are not news to the Court and provide no basis upon which to convene a scheduling conference. The existing schedule will allow time for amendments to expert reports if necessary to accommodate 2018 election data.

Third, the Secretary states that she plans to file a new motion to dismiss the Voters' complaint with respect to the apportionment of Michigan Senate districts, "for the reason that after the 2018 elections . . . the current Senate plan will not be used for statewide elections thereafter." Secretary's Motion at 5. She suggests that a

[1] And indeed, there is no guarantee that these cases will be decided this term. During the oral argument in *Benisek*, Justice Breyer broached the idea of holding *Benisek* and two other cases over to the Fall 2018 term for re-argument. *See* Transcript of Oral Argument at 26–27, *Benisek v. Lamone* (2018) (No. 17-333).

decision on this new motion will affect discovery. Of course, the Michigan Senate election schedule has not changed since this case was filed. The Court should not allow the Secretary to defer raising an issue that could have been brought earlier only to raise it later in support of delaying the case. Nor does the existence of this issue justify a change in the discovery schedule. In the event the Secretary raises this issue, the Voters will respond in turn. Meanwhile, the parties should proceed pursuant to the Court's Case Management Plan.

Fourth, the Secretary states that she is term-limited and will no longer be Michigan's Secretary of State at the time of trial, and she suggests that "[d]epending on the election results, additional parties may seek intervention." *Id.* at 5–6. But the Secretary never mentioned this issue as a basis for delay, either in her motion to stay or in the case management submissions. Her belated suggestion that this entire case should await the result of her election ignores that she was sued in her official capacity. Her office will not be vacant and her successor can be substituted here. *See* Fed. R. Civ. P. 25(d).

Fifth, the Secretary does identify one new event in support of her request for delay: the Court's May 16 ruling on the Secretary's motion to dismiss. But that ruling can only work to streamline the case, not expand it. All the claims now in the case have, of course, been pleaded from the beginning. In fact, the Court's Order detailed the provisions of the complaint making those district by district claims. *See* Order on Motion to Dismiss (Dkt. No. 54) at 10–11.

In its rulings denying the Secretary's motion for stay and the Republican Congressional Representatives' motion to intervene, the Court made plain the need for this case to move forward expeditiously. *See* Order on Motion to Stay (Dkt. No. 35) at 3 (noting that "there is a risk that this case will not be resolved by March 2020 even in the absence of a stay"); Order Denying Motion to Intervene (Dkt. No. 47) at 2 ¶ 7 (citing "the need for expeditious resolution of the case"). No intervening event has diminished that need. The Secretary's new proposals will only cause delay in a schedule already compressed for the 2020 election. As before, the parties and the Court can accommodate both foreseen and unforeseeable developments—whether they are Supreme Court rulings, supplemental data derived from the 2018 election results, or the wholly routine substitution of an official-capacity defendant when the Secretary's office switches hands. The Court should deny the Secretary's Motion.

Dated: May 22, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 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/ HarmonyMappes

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For their brief in support of their Response, Plaintiffs rely upon the facts, authority, and argument set forth in the accompanying Response in Opposition to Motion to Convene Scheduling Conference.

Dated: May 22, 2018

Respectfully submitted,

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/s/ Harmony Mappes