

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al.*,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity
as the Secretary of State of Michigan, *et al.*,

Defendants.

Case No. 1:22-CV-00054-PLM-SJB

Three-Judge Panel
28 U.S.C. § 2284(a)

EXPEDITED CONSIDERATION
REQUESTED

PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION
OF THEIR MOTION FOR PRELIMINARY INJUNCTION

Pursuant to W.D. Mich. LCivR 7.1(e), Plaintiffs move this Court for an order expediting the schedule for briefing, consideration, and resolution of Plaintiffs' Motion for Preliminary Injunction. (ECF No. 9).

Expedited consideration of Plaintiffs' Motion for Preliminary Injunction is necessary to avert the imminent mootness of the relief requested therein.

Under W.D. Mich. LCivR 7.2(c), Defendants have twenty-eight days (28) from service to file their responsive brief. The latest-served Defendant was served with Plaintiffs' Motion for Preliminary Injunction on January 31, 2022. (*See* ECF No. 15.) Thus, under a typical briefing schedule in this District, the latest of Defendants' responses to Plaintiffs' Motion would be due on February 28, 2022; and the latest of Plaintiffs' replies would be due fourteen (14) days later on March 14, 2022. *See* W.D. Mich. LCivR 7.2(c). Plaintiffs have requested oral argument and, if this schedule remains unchanged, they anticipate that this Court will schedule a hearing no earlier than late March or early April.

Adhering to this briefing schedule risks mootness. Michigan’s election machinery is proceeding at a rapid pace and the first major deadline has appeared on the horizon. Candidates for major-party congressional nominations must submit their candidate-nomination petitions by April 19, 2022. *See* Mich. Comp. Laws § 168.133. Accordingly, candidates for congressional office are permitted to circulate petitions now and, and some have already begun that process. *See Filing for Office*, Mich. Dept. of State, Bureau of Elections at 3 (Jan. 2022).¹

Assuming this Court were to issue an order declaring Michigan’s congressional districts unconstitutional on or about April 1, 2022, Plaintiffs anticipate that the State will argue that redrawing the districts at that point would cause confusion and upheaval as more and more candidates recirculate nominating petitions. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2004). This concern is real. Despite the constitutional inflection by the malapportioned maps, federal courts are authorized to permit elections to continue even under malapportioned districts if doing so would give a State the time it needs to redraw them in accordance with a federal court order. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 586 (1964).

Indeed, Defendant Secretary of State has issued guidance explaining that congressional candidates may now circulate petitions. *See Filing for Office*, Mich. Dept. of State, Bureau of Elections at 3 (Jan. 2022). After a candidate submits a petition, the Bureau of Elections determines the validity of each signature by looking “to the date of the signature” to determine “whether the signer was, on the date they signed the petition, a registered voter at an address that is *within the boundaries of the district as they are defined*” on April 19, 2022. *See id.* (emphasis added). These “filings do not automatically transfer to the new district”; instead, the candidate has the

¹ *available at* https://www.michigan.gov/documents/sos/Filing_for_Office_Partisan_Offices_2022_719292_7.pdf (last visited Feb. 2, 2022).

“responsibility to know which district he or she seeks to represent and to take all necessary steps to ensure all filings materials include the correct district number.” *Id.*

Accordingly, the relief Plaintiffs seek in their Motion for Preliminary Injunction—to enjoin the use of the Commission’s congressional districts before the 2022 election—may be rendered moot before the motion is resolved in accordance with the usual briefing schedule.

The basis for Plaintiffs’ request is set forth further in the appended Brief in Support.

In accordance with W.D. Mich. LCivR 7.1(d), Plaintiffs will separately file a certificate setting forth in detail the efforts Plaintiffs undertook to comply with the obligation created by that rule.

Dated: February 4, 2022

Respectfully submitted,

/s/ Charles R. Spies

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**Three-Judge Panel Requested
28 U.S.C. § 2284(a)**

**EXPEDITED CONSIDERATION
REQUESTED**

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION TO EXPEDITE
CONSIDERATION OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiffs Michael Banerian, Michon Bommarito, Peter Colovos, William Gordon, Joseph Graves, Beau LaFave, Sarah Paciorek, Cameron Pickford, Harry Sawicki, and Michelle Smith are all registered Michigan voters who consistently vote in federal, state, and local elections. (*See* First Am. Compl. (“FAC”) ¶¶ 19–28 (ECF No. 7, Page ID.60-61).) These Plaintiffs bring two causes of action challenging, on federal constitutional grounds, Michigan’s enacted congressional districts, commonly referred to as “The Chestnut Plan.”

First, those Plaintiffs who live in overpopulated districts allege that the weight of their votes is diluted because the Commission failed to abide by the “one person, one vote principle.” (*See generally* FAC ¶¶ 83–96 (ECF No. 7, Page ID.71-72).) *Second*, Plaintiffs allege that the Commissioners violated the rights guaranteed to them under the Fourteenth Amendment’s Equal Protection Clause because the Commissioners applied the traditional redistricting criteria in an inconsistent and arbitrary manner. (*See generally id.* at ¶¶ 98–123 (ECF No. 7, Page ID.72-76).) Among other relief, Plaintiffs ask that this Court declare the Chestnut Plan unconstitutional under Article I, Section 2 of the U.S. Constitution and the Fourteenth Amendment’s Equal Protection Clause. (*See id.* at Prayer for Relief B–C (ECF No. 7, Page ID.76).) Plaintiffs also ask that this Court enjoin Defendants, among others, from enforcing the Chestnut Plan and from holding any congressional elections using this plan. (*See id.* at Prayer for Relief D (ECF No. 7, Page ID.76).) Lastly, Plaintiffs ask that this Court establish a deadline for the Commission to redraw maps that are constitutionally compliant. (*See id.* at Prayer for Relief E (ECF No. 7, Page ID.76).)

On January 27, 2022, Plaintiffs filed a motion for preliminary injunction seeking to enjoin Defendants from holding any elections using the Michigan congressional districts under the Chestnut Plan before the 2022 congressional elections. (*See* Pls.’ Mot. for Prelim. Inj. at 1 (ECF No. 9, PageID.94)). If the three-judge Court assigned to this case resolves Plaintiffs’ Motion in

accordance with this District's typical briefing-and-argument schedule, this issue will not be resolved until late March or April 2022 (at the earliest). Michigan's election machinery, however, is cascading towards election day. Defendant Secretary of State has issued guidance explaining that congressional candidates for party nominations may begin circulating petitions,² and many hopeful candidates have already started circulating them to individual registered voters (like Plaintiffs) who reside in the congressional districts that the candidates wish to represent. Candidates are required to obtain between one-thousand and two-thousand signatures on their respective petitions. Mich. Comp. Laws § 168.544f. These candidates must submit these petitions to either the Secretary of State or the County Clerk's office by April 19, 2022. *See* Mich. Comp. Laws § 168.133.

When a candidate submits petitions, the Bureau of Elections determines the validity of each signature, in part, by looking "to the date of the signature" to determine "whether the signer was, on the date they signed the petition, a registered voter at an address that is *within the boundaries of the district as they are defined*" on April 19, 2022.³ Thus, a candidate for the nomination for Chestnut Map's Eleventh Congressional District (the most overpopulated district with 389 more people than the ideal) may be obtaining valid signatures today. But if this Court orders districts to be redrawn, those signatures may no longer be valid on April 19, 2022.

Accordingly, if this Court grants Plaintiffs' relief and orders the Commission to redraw the maps, Plaintiffs expect that the Secretary of State and the Commissioners (collectively, "State Defendants") will argue that because the election process is already underway, it risks confusion

² *See Filing for Office*, Mich. Dept. of State, Bureau of Elections at 3 (Jan. 2022) https://www.michigan.gov/documents/sos/Filing_for_Office_Partisan_Offices_2022_719292_7.pdf (last visited Feb. 2, 2022).

³ *See id.*

to candidates and voters to enjoin the map and redraw districts before the 2022 election. In other words, the State Defendants may very well argue that the Court should permit the Commissioners time to redraw districts before the 2024 elections but allow the 2022 elections to proceed under the current malapportioned map. This, of course, would result in irreparable injury to any 2022 Michigan voter who is forced to cast ballots in Michigan's currently malapportioned districts.

If this Court grants this Motion to Expedite, the Court will be able to grant the requested relief, order the drawing of new maps, and provide sufficient time to Michigan's congressional candidates to gather the necessary signatures for the constitutionally satisfactory districts by April 19, 2022. Voters, like Plaintiffs, are signing petitions now, and believing that they are choosing their candidate of choice. Granting this Motion to Expedite will decrease the risk of confusion if the Court orders new districts and, accordingly, decrease the risk that Plaintiffs' Motion will be rendered moot.

ARGUMENT

This Court permits expedited briefing when "the relief requested by a motion may be rendered moot before the motion is briefed in accordance with the schedules set forth herein." *See* W.D. Mich. LCivR 7.2. "May" indicates that expediting briefing is warranted not only when mootness is guaranteed but also when there a *risk* of mootness. *Cf. Michigan State v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) (stating that under Fed. R. Civ. P. 24(a)(1), a would-be intervenor must show that its interests *may* not be adequately represented, not that the proposed intervenors *will not* be adequately represented).

Denying this Motion to Expedite risks mooting Plaintiffs' Motion for a Preliminary Injunction.

First, because Plaintiffs' claims are meritorious, if the 2022 election occurs under the currently malapportioned districts in the Chestnut Plan, Plaintiffs constitutional voting rights will

be harmed. The congressional districts in the Chestnut Plan have a total population deviation of 1,122 people. This violates the strict one person, one vote principle required by Article One, Section 2 of the U.S. Constitution. *See Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). Courts have declared unconstitutional congressional district plans with much smaller deviations.⁴ In fact, Plaintiffs submitted a plan with a total population deviation of one person. (*See* Pls.’ Mot. For Prelim. Inj. Bryan Decl. ¶ 16, Table 2 (ECF No. 9-3, PageID.149)). Furthermore, Plaintiffs’ remedy map more faithfully adheres to Michigan’s traditional redistricting criteria and does not split counties, cities, and townships in the arbitrary manner featured in the Chestnut Map, thus vindicating Plaintiffs’ rights under the Equal Protection Clause. (*See id.* at ¶ 21 (ECF No. 9-3, PageID.151); *see also* Pls.’ Mot. For Prelim. Inj. 20–28 (ECF No. 9, Page ID.119-127)). Accordingly, holding elections under the Chestnut Plan will violate the constitutional rights of Plaintiffs, and irreparably harm Plaintiffs. (*See* Pls.’ Mot. For Prelim. Inj. 14–15 (ECF No. 9, PageID.113-14)). Denying Plaintiffs’ Motion to Expedite, in contrast, will make it more likely that Plaintiffs will suffer an irreparable injury by casting their votes in malapportioned districts and also risks mooting their claims.

Second, Federal courts must afford legislatures sufficient time redraw districts; if they cannot, then they must permit elections to proceed under malapportioned districts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (commending the district court for allowing an impending primary election to proceed after declaring the state legislative map unconstitutional); *Upham v. Seamon*, 456 U.S. 37, 41 (1982). Proceeding under the typical briefing schedule risks

⁴*See, e.g., Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 674–78 (M.D. Pa. 2002) (three-judge court) (holding that Pennsylvania’s congressional district maps violated the “one person, one vote” requirement where the total population deviation was nineteen persons and Pennsylvania could not justify the deviation).

mooting Plaintiffs' claims for purposes of the 2022 election because the petition signature period ends on April 19, 2022. Between the time the briefing ends, oral argument is held, and an order is issued, there may be insufficient time for the Commission to redraw districts before the April 19, 2022 deadline unless the Court expedites its consideration of the preliminary-injunction motion. If the Court does not, the State will likely argue that Michigan's election machinery has grinded too far long that the *Purcell* principle forecloses Plaintiffs' remedy for the 2022 elections, especially the impending primary election on August 2, 2022. Accordingly, this Court could conceivably permit the August 2, 2022 primary election and the general election to proceed, rendering permanent and irreparable the injury to Plaintiffs' right to cast a ballot in properly drawn congressional districts.

Third, expediting briefing would not prejudice Defendants (although it does counsel in favor of denying the redundant intervention motions that were recently filed). Proceeding under the normal briefing schedule risks much more confusion for the Secretary in administering the election. Each passing day, the machinery of the election marches on and, as it does, it imposes a greater burden on the Secretary's ability implement the Court's forthcoming remedy.

Accordingly, to best protect Plaintiffs' constitutional right to vote, Plaintiffs propose the following briefing schedule:

- Defendants' Response(s) Due: Monday, February 21, 2022;
- Plaintiffs' Reply(s) Due: Friday, February 25, 2022;
- Hearing Upon Oral Argument Held: Tuesday, March 1, 2022.

CONCLUSION

Plaintiffs respectfully request that the Court enter an order expediting the schedule for briefing, consideration, and resolution of Plaintiffs' Motion for Preliminary Injunction (ECF No. 9).

Dated: February 4, 2022

Respectfully submitted,

/s/ Charles R. Spies

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, in reliance on the word processing software used to create this Brief, that:

1. This Brief complies with the word-count limitation of W.D. Mich. LCivR 7.3(b)(i) because this Brief in support of a non-dispositive motion contains 1,515 words (including headings, footnotes, citations, and quotations but not the case caption, cover sheets, table of contents, table of authorities, signature block, attachments, exhibits, or affidavits).
2. The word processing software used to create this Brief and generate the above word count is Microsoft Word 2016.

Dated: February 4, 2022

/s/ Charles R. Spies
Charles R. Spies (P83260)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 4, 2022, I caused to be filed with the Court, via submission to the Court's ECF system, PLAINTIFFS' MOTION FOR EXPEDITED CONSIDERATION OF THEIR MOTION FOR PRELIMINARY INJUNCTION and PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR EXPEDITED CONSIDERATION OF THEIR MOTION FOR PRELIMINARY INJUNCTION.

Dated: February 4, 2022

/s/ Charles R. Spies
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