

No. 22-92

In the Supreme Court of the United States

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MICHAEL BANERIAN, ET AL., APPELLANTS,

v.

JOCELYN BENSON,
MICHIGAN SECRETARY OF STATE, ET AL.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

**APPELLEE MICHIGAN SECRETARY OF
STATE'S RESPONSE TO APPELLANTS'
JURISDICTIONAL STATEMENT**

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QUESTION PRESENTED

1. Did the three-judge district court act within its discretion when it denied Plaintiffs' request to preliminarily enjoin Michigan's November 8, 2022, midterm congressional election?

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PARTIES TO THE PROCEEDING

The following were parties before the district court:

Plaintiffs:

Michael Banerian, Michon Bommarito, Peter Colovos, William Gordon, Joseph Graves, Beau LaFave, Cameron Pickford, Harry Sawicki, and Michelle Smith.

Defendants:

Jocelyn Benson, in her official capacity as Secretary of State of Michigan, Douglas Clark, Juanita Curry, Anthony Eid, Rhonda Lange, Steven Terry Lett, Brittini Kellom, Cynthia Orton, M.C. Rothhorn, Rebecca Szetela, Janice Vallette, Erin Wagner, Richard Weiss and Dustin Witjes, in their official capacities as Commissioners of the Michigan Independent Citizens Redistricting Commission.

Intervenor Defendant:

Count MI Vote d/b/a/ Voters Not Politicians, a Michigan nonprofit corporation.

Intervenor Defendants:

Joan Swartz McKay, Grace Huizinga, Samantha Neuhaus, Jordan Neuhaus, Cayley Winters, Glenna Dejong, Marsha Caspar, Hedwig Kaufman, Collin Christner, Melany Mack, Ashley Prew, Sybil Bade, Susan Diliberti, Lisa Wignet, Matthew Wignet, Pamela Tessier, and Susannah Goodman.

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OPINION BELOW

The three-judge district court's order denying Plaintiffs' motion for a preliminary injunction is available at *Banerian v. Benson*, No. 1:22-cv-54, 2022 W.L. 985780 (W.D. Mich. Apr. 1, 2022) (three-judge court).

The three-judge district court previously granted Defendants' Motion to Dismiss Count II of Plaintiffs' complaint. The district court's opinion doing so is reported at *Banerian v. Benson*, No. 1:22-cv-54, 2022 W.L. 676001 (W.D. Mich. Mar. 4, 2022) (three-judge court). That order is not at issue in this appeal.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1253, which provides that “any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.”

The three-judge district court denied Plaintiffs' motion for a preliminary injunction on April 1, 2022. Plaintiffs filed a timely notice of appeal on April 29, 2022.

On June 14, 2022, Plaintiffs filed an application for a thirty-day extension of time with Justice Kavanaugh. See *Banerian v. Benson*, No. 21A831 (U.S. Jun. 14, 2022). On June 21, 2022, Justice Kavanaugh granted Plaintiffs' application, which extended the time to file Plaintiffs' jurisdictional statement to July

28, 2022. See *Banerian v. Benson*, No. 21A831 (U.S. Jun. 21, 2022).

On August 4, 2022, all Defendants jointly moved for a thirty-day extension of time to respond to Plaintiffs' jurisdiction statement. The Court granted the extension on August 5, 2022, extending the time to respond until September 30, 2022.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 2, clause 1 of the United States Constitution provides in relevant part: "[t]he House of Representatives shall be composed of Members chosen ... by the People of the several States."

Article IV, Section 6 of the Michigan Constitution provides in relevant part:

(13) The commission shall abide by the following criteria in proposing and adopting each plan, in order of priority:

(a) Districts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws.

(b) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.

(c) Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not

be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates.

(d) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

(e) Districts shall not favor or disfavor an incumbent elected official or a candidate.

(f) Districts shall reflect consideration of county, city, and township boundaries.

(g) Districts shall be reasonably compact.

(17) An adopted redistricting plan shall become law 60 days after its publication. The secretary of state shall keep a public record of all proceedings of the commission and shall publish and distribute each plan and required documentation.

INTRODUCTION

Plaintiffs, voters in Michigan’s newly drawn congressional districts, appeal the denial of their motion for a preliminary injunction seeking to enjoin the State’s November 8, 2022, congressional elections. Plaintiffs argue that the new plans violate “one person, one vote” principles embedded in the Equal Protection Clause and Article 1, § 2 of the U.S. Constitution. But the time for any court to impose such extraordinary relief has passed.

Michigan voters selected candidates in the new districts at the August 2, 2022, primary election. Election day is now a little over a month away and Michigan voters are already casting absent voter ballots for the candidates of their choice, including congressional candidates. There simply is no way to enjoin an election that is already underway without wreaking havoc on Michigan’s electoral process—something this Court has repeatedly warned against.

Plaintiffs’ jurisdictional statement fails to even mention the November 8 election date. Yet, Plaintiffs tacitly acknowledge that an injunction is not possible at this juncture, since they do not ask this Court to order any form of injunctive relief. (Plfs’ Juris. Stmt., p. 35.) Plaintiffs simply want this Court to reverse the three-judge court’s analysis of the “likelihood of success on the merits” factor, which Plaintiffs believe “permitted a vague and nearly undefinable community-of-interest standard to override the commands of the U.S. Constitution and this Court’s jurisprudence.” (*Id.*, p. 34.)

But the denial of an injunction is not a merits decision and does not bind the parties or the three-judge court in this case. See, e.g., *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Plaintiffs' disagreement with the decision and misplaced concern over the effect of this interlocutory order does not support this Court's review of an otherwise moot or time-barred request for injunctive relief.

This Court should deny the request for relief because there is no relief that can be fashioned before the November 8, 2022 election.

STATEMENT OF THE CASE

Every ten years following the decennial United States Census, Michigan adjusts its state legislative and congressional district boundaries based on the population changes reflected in the census. Under the Michigan Constitution, as amended in 2018, the Independent Citizens Redistricting Commission (Commission) is charged with redrawing state legislative and congressional district maps. See Mich. Const. art. IV, § 6.

A. Overview of the redistricting process in Michigan

1. The Independent Citizens Redistricting Commission

In 2017, Intervenor Defendant Voters Not Politicians filed an initiative petition to amend the Michigan Constitution. See *Citizens Protecting Michigan's Constitution v. Secretary of State*, 921 N.W.2d 247 (Mich. 2018). The proposal principally sought to amend the apportionment provisions in article 4, § 6

of the Michigan Constitution. The proposal passed with overwhelming support in the November 2018 general election and became effective in December 2018. See Mich. Const. art. XII, § 2.

The amendments re-establish a commission—the Independent Citizens Redistricting Commission—charged with redrawing Michigan’s state senate, state house, and congressional districts according to specific criteria. Mich. Const. art. IV, § 6(1), (13). And Michigan’s Constitution now makes clear that “no body, except the . . . commission . . . [shall] promulgate and adopt a redistricting plan or plans for this state.” Mich. Const. art. IV, § 6(19).

The amendments prescribe eligibility criteria and a complex selection process for membership on the Commission, which includes those who affiliate with the Democratic Party, the Republican Party, and persons not affiliated with either major party. *Id.*, § 6(1)–(2).¹ The commissioners for this redistricting cycle were initially selected by a random draw on August 17, 2020.²

As to Secretary of State’s role, she acts as a non-voting secretary to the Commission, and “in that capacity shall furnish, under the direction of the commission, all technical services that the commission

¹ The eligibility criteria and other provisions were challenged in earlier litigation, but ultimately upheld. See *Daunt, et al. v. Benson, et al.*, 999 F.3d 299 (6th Cir. 2021).

² See *History made with selection of 13 commissioners to redraw election districts statewide*, 8/17/20, available at https://www.michigan.gov/sos/0,4670,7-127-1640_9150-536996--,00.html (accessed September 30, 2022).

deems necessary.” *Id.*, § 6(4). Each commissioner is charged with “perform[ing] his or her duties in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process.” *Id.*, § 6(10). And the Commission must conduct its business at open meetings and “conduct its hearings in a manner that invites wide public participation throughout the state.” *Id.*

Under the Constitution, Secretary Benson was required to convene the Commission by October 15, 2020, which she did. Mich. Const. art. IV, § 6(7). The first meeting was held September 17, 2020. Thereafter, the Commission was required “to hold at least ten public hearings throughout the state for the purpose of informing the public about the redistricting process . . . and soliciting information from the public about potential plans,” before the Commission may draft plans. *Id.*, § 6(8). The Commission scheduled 16 public hearings to be held across the state to meet this requirement.³

2. The Commission must draft and approve redistricting plans.

After developing at least one plan for each type of district, the Commission must publish the plans, provide the supporting materials, and “hold at least five public hearings throughout the state for the purpose of soliciting comment from the public about the proposed plans.” *Id.*, § 6(9).

³ See Independent Citizens Redistricting Commission, hearing schedule, available at MICRC_Agenda_2021_05_06.pdf (michigan.gov) (accessed September 30, 2022).

Before voting to adopt a plan, the Commission must “provide public notice of each plan that will be voted on and provide at least 45 days for public comment on the proposed plan or plans. Each plan that will be voted on shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and shall include the map and legal description required in part (9) of this section.” *Id.*, § 6(14)(b). And “[n]ot later than November 1 in the year immediately following the federal decennial census, the commission shall adopt a redistricting plan under this section for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts.” *Id.*, § 6(7). Thus, under the Constitution the Commission was to publish proposed plan(s), with supporting data, no later than September 17, 2021, and adopt a final plan by November 1, 2021, for this cycle. But as explained below, the Commission was unable to meet these deadlines.

After adopting a final plan, the Commission must “publish the plan and the material reports, reference materials, and data used in drawing it, including any programming information used to produce and test the plan.” *Id.* § 6(15). The Commission must also issue a report for each adopted plan “explain[ing] the basis on which the commission made its decisions in achieving compliance with plan requirements and shall include the map and legal description required in part (9) of this section.” *Id.*, § 6(16). An adopted plan “become[s] law 60 days after its publication.” *Id.*, § 6(17).

B. The U.S. Census Bureau's delay in releasing census data delayed the Commission's adoption of plans.

1. States typically use decennial census data in reapportionment and redistricting.

The U.S. Secretary of Commerce oversees the U.S. Census Bureau and the decennial census activities. 15 U.S.C. § 1511(5), 13 U.S.C. § 2. The decennial census data, specifically the population count, is important because it determines the number of representatives representing each state in Congress for the following decade. The more detailed dataset known as redistricting counts, or the Census P.L. 94-171 data, is critical for redistricting because it provides geographic and spatial detail on where people live and their key demographic characteristics.

The U.S. Constitution requires that districts are redrawn every decade to ensure equal populations between districts. See U.S. Const. art. I, § 2, U.S. Const. amend. XIV; *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). The total number of seats in the U.S. House of Representatives is fixed by law at 435, and the seats are apportioned to the states in proportion to their populations.

Although the use of census data is the general practice of the states, no federal rule or statute requires states to use decennial census data in redistricting, so long as the redistricting complies with the U.S. Constitution and the federal Voting Right Act. *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (“[T]he Equal Protection Clause does not require the States to

use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.”)

The Michigan Constitution likewise does not expressly require that decennial census data be used to redistrict, although that appears to be the intent of the amendment. Numerous provisions in Article IV, § 6 refer to the decennial census as the starting point of the redistricting process. See Mich. Const. art. IV, § 6(2)(a)(i), (c)–(f), (5), and (7). And subsections 6(9) and (14)(b) both require that plans be distributed to the public with “such census data as is necessary to accurately describe the plan and verify the population of each district.” Mich. Const. art. IV, § 6(9), (14)(b).

2. The U.S. Census Bureau did not meet statutory deadlines.

Under the Census Act, 13 U.S.C. § 1 *et seq.*, for this census cycle, the apportionment data was due to the then President by December 31, 2020, 13 U.S.C. § 141(b), and the redistricting data was to be released to the states by April 1, 2021, 13 U.S.C. § 141(c). Early in 2021, however, representatives from the Census Bureau announced a four-month delay for apportionment data⁴ and a 6-month delay⁵ for redistricting

⁴ See *Census Bureau Statement on Apportionment Counts*, Release Number CB21-RTQ.06, 1/28/21, available at Census Bureau Statement on Apportionment Counts, (accessed September 30, 2022).

⁵ See *Census Bureau Statement on Redistricting Data Timeline*, Release Number CB21-CN.14, 2/12/21, available at Census Bureau Statement on Redistricting Data Timeline, (accessed September 30, 2022).

data.⁶ As causes of the delay in their 2020 census operations, the Census Bureau cited the COVID-19 pandemic, wildfires in the western states, and the active hurricane season, among others. See, e.g., *Ohio v. Raimondo*, 528 F. Supp. 3d 783, 787 (S.D. Ohio, 2021), reversed 848 Fed. Appx. 187 (6th Cir. 2021). As a result, the release of redistricting data was to be delayed until September 30, 2021. As a comparison, the 2010 census data was received by the Michigan Legislature on March 22, 2011.

3. The Commission adopted plans on December 28, 2021.

On August 12, 2021, the Census Bureau, in an unprecedented move, made available on its website a non-tabulated, legacy format version of the redistricting data.⁷ And on September 1, 2021, the Census Bureau announced it would release the final, tabulated

⁶ The redistricting data includes counts of population by race, ethnicity (Hispanic or Latino origin), voting age, housing occupancy status, and group quarters population at the smallest geographic level, which is a census block.

⁷ Legacy format data is a non-tabulated version of census data that must be processed before use. The data in the legacy format files is identical to the P.L. 94-171 redistricting data files. The difference is in the format the census data is presented. See 2020 Census Statistics Highlight Local Population Changes and nation's racial and ethnic Diversity, August 12, 2021, available at Local Population Changes and Nation's Racial and Ethnic Diversity (census.gov), and Decennial Census P.L. 94-171 Redistricting Data, August 12, 2021, available at Decennial Census P.L. 94-171 Redistricting Data Summary Files, (accessed September 30, 2022).

P.L. 94-171 redistricting data by September 16, 2021, instead of September 30,⁸ which it ultimately did.⁹

The Commission utilized the legacy format data to commence drawing state legislative and congressional district maps with the intent to later reconcile the legacy format data with the final, tabulated data.¹⁰ The Commission proposed state and congressional district plans on November 12, 2021,¹¹ and subsequently held numerous public meetings to hear comment on the proposed plans. Ultimately, the Commission adopted state legislative and congressional district plans on December 28, 2021, including the “Chestnut” plan at issue in the instant litigation.¹²

⁸ See Census Bureau Announces Release Date for Easier-to-Use Formats for Redistricting Data, September 1, 2021, available at Release Date for Easier-to-Use Formats for Redistricting Data (census.gov), (accessed September 30, 2022).

⁹ See Decennial Census P.L. 94-171 Redistricting Data, September 16, 2021, available at Decennial Census P.L. 94-171 Redistricting Data Summary Files.

¹⁰ See MLIVE, August 13, 2021, With census data in hand, Michigan’s redistricting commission to start drafting new political maps next week - mlive.com, (accessed September 30, 2022).

¹¹ See Public Notice, November 12, 2021, available at MICRC_Plan_Publication_Notice_741252_7.pdf (michigan.gov) (accessed September 30, 2022).

¹² See Commission’s Proposed December 28, 2021, Meeting Minutes, available at MICRC_Proposed_Meeting_Minutes_2021_12_28.pdf (michigan.gov), (accessed September 30, 2022). There is also pending litigation challenging the state legislative maps that was assigned to the same three-judge court. See *Agee, et al. v. Benson, et al.*, No. 1:22-cv-00272 (W.D. Mich.) (three-judge court).

C. The delay in adopting plans delayed the implementation of the new maps.

1. The Secretary of State has certain duties to implement the new maps.

The Michigan Bureau of Elections, housed within the Department of State, maintains the State's qualified voter file (QVF), which is an electronic list of all registered voters in the state—currently over eight million people. Mich. Comp. Laws § 168.509o. For each voter, the QVF contains the list of all districts in which a voter lives, i.e., federal and state house and senate districts, as well as county, city, and school board districts, etc., which is used, among other things, to determine what ballot¹³ a voter receives. Mich. Comp. Laws § 168.509q. The QVF also includes a “street index” of addresses for all registered voters in the state. Mich. Comp. Laws § 168.509p(d). After new maps are adopted by the Commission, the Bureau must update the QVF.

For this redistricting cycle, the update to the QVF was to occur in three phases. (Benson's Resp. to Prelim. Inj., ECF No. 47, PageID.979, 998.) In phase one, the new district lines would be added to the QVF. In phase two, the “street index” would be reviewed to identify where districts have changed, and an update to voter registrations would be made where voters' districts changed. To accomplish these updates, the Bureau would do what it could to electronically move large groups of voters at one time. Even so, manual,

¹³ In a statewide election year, like 2022, there are upwards of 50,000 unique ballot styles in use around the state after accounting for the many and varied layers of offices up for election.

address-by-address changes would still be required for thousands and thousands of voters where district boundaries limited the use of large or global moves. In the third and final phase, the Bureau of Elections in collaboration with the over 1,500 local clerks would manually review and modify voting precincts, as necessary. See Mich. Comp. Laws §§ 168.654a, 168.661. This is an extensive and time-intensive process.

With respect to the prior redistricting cycle in 2010–2011, the update to the QVF took approximately six months. (Benson’s Resp. to Prelim. Inj., ECF No. 47, PageID.998.) The Commission’s constitutional deadline of November 1 to adopt plans would ordinarily accommodate the Bureau of Elections’ multi-month process of updating the QVF. The updates to the QVF needed to be completed in time to accommodate candidates seeking to run in Michigan’s August 2, 2022, primary election. (*Id.*)

The deadline to collect signatures and file nominating petitions for accessing Michigan’s primary ballot was April 19, 2022 (the 15th Tuesday before the primary). (*Id.*, PageID.998–99.)¹⁴ This included nominating petitions for congressional representatives, Mich. Comp. Laws § 168.133, and state senators and representatives, Mich. Comp. Laws § 168.163. The completion of the QVF update is essential to the nomination process so potential candidates can know not only *whom* they would represent, but whether they *can do so*, as Michigan Election Law requires candidates to live in the state senate and house district they

¹⁴ See Michigan Election Dates 2022, p. 3, available at 2022 Election Dates Booklet (michigan.gov), (accessed September 30, 2022).

wish to represent. Mich. Comp. Laws § 168.162. More significantly, the Bureau of Elections and local clerks need to have the QVF updated to canvass nominating petitions and determine whether petition-signers are registered to vote in the candidate's district. (*Id.*, PageID.999.) As a result, the QVF updates for these offices needed to be completed by the April 19 filing deadline.

2. The Bureau of Elections completed its update for the 2022 Election Cycle.

After the Commission adopted the new congressional and state legislative plans on December 28, 2021, the Bureau quickly began working to update the QVF.

Weeks later, Plaintiffs filed their complaint on January 20, 2022, and an amended complaint (Plfs' Appx. B, 3a–28a) and motion for preliminary injunction on January 27, 2022 (Plfs' Mot. Prelim. Inj., ECF No. 9, PageID.94). A three-judge panel was appointed on February 1, 2022. (Plfs' Appx. 29a.) The panel set a briefing schedule regarding motions to intervene filed by Voters Not Politicians and a separate group of individual voters, and Plaintiffs' motion for a preliminary injunction, requiring responses to the injunction motion by February 18, 2022. (Briefing Order, ECF No. 24, PageID.422–23.)

Secretary of State Benson filed a response to Plaintiffs' motion for preliminary injunction but did not address the merits of Plaintiffs' substantive argument, since defense of the plan is better left to its drafter, the Commission. (Benson Resp. to Prelim. Inj., ECF No. 47, PageID.1002.)

As explained in her response, the Bureau had nearly completed phase one of the update to the QVF, which involved automatically updating county commissioner, state house, state senate, and congressional district assignments for jurisdictions that are within a single district. (*Id.*, PageID.999.)

The Bureau had commenced phase two in certain parts of the State, which required geocoding QVF addresses and pre-assigning updated district values to street segments based on their location. (*Id.*, PageID.1000.)¹⁵ This meant that new county commissioner, state house, state senate, and congressional district values were applied (as necessary) to all street segments in jurisdictions split by a district. (*Id.*) Geocoding is a new process for the Bureau, and while it sped up the updates, it does not always result in the address being placed in the correct district location. Thus, the third phase of the update was a crucial part of the process. (*Id.*)

In phase three, local clerks would review the pre-assigned district values and communicate precinct boundary changes to the Bureau. (*Id.*) Again, this manual review step was critical because geocoding will not always automatically assign addresses the correct district values. (*Id.*) However, as of February

¹⁵ Geocoding is a technique that assigns location values (latitude and longitude coordinates) to addresses. This allows QVF addresses to be placed on a map, and seen relative to the new county commissioner, state house, state senate, and congressional districts. (Benson's Resp. to Prelim. Inj., ECF No. 47, Ex. 1, PageID.1010–1017.)

18, the Bureau had not fully completed either phase one or two of the process. (*Id.*, PageID.1001.)

Secretary Benson warned in her response that any changes to the maps would likely cause the Bureau to miss its deadline of having the QVF updated by April 19, 2022, and could cause problems for candidates and substantial delays in the election process. (*Id.*, PageID.1001–06.)

The three-judge court heard argument on Plaintiffs' injunction motion on March 16, 2022. At the hearing, the undersigned counsel advised the court that the Bureau of Elections was in the third and final phase of the process to update the QVF, and that it would be impossible at that point in time to make changes to the maps and update the QVF in time for the April 19 filing deadline. (3/16/22 Trans., PageID.2136–2139.)

After a subsequent round of supplemental briefing in which the Secretary did not participate, the panel issued its opinion and order denying Plaintiffs' motion for a preliminary injunction on April 1, 2022. (Plfs' Appx. 239a–252a.) On April 29, 2022, Plaintiffs filed their Notice of Appeal. (Plfs' Appx. 1a.)

In the interim, the Bureau completed its update to the QVF in time for the nominating process. And on August 2, 2022, Michigan held its first election—a primary election—using the new maps drawn by the Commission to elect state legislative and congressional candidates for the State's November 8, 2022,

general election.¹⁶ Thus, the ballot is set for the November 2022 general election.¹⁷ Absent voter ballots became available to voters starting September 24, 2022. See Mich. Const. art. II, § 4(1)(b), (g); Mich. Comp. Laws § 168.759a.

Since members of the U.S. House of Representatives are elected every two years, see U.S. Const, art. I, § 2, Clause 1, the next election at which congressional candidates will run in districts created by the “Chestnut” plan is the August 6, 2024, primary election. See Mich. Comp. Laws § 168.132.

REASONS FOR DENYING RELIEF

I. This Court should deny Plaintiffs’ interlocutory appeal where the time for making changes to Michigan’s November 8, 2022, general election ballot or enjoining the election has passed.

This Court generally disfavors granting review of interlocutory orders. See *N.F.L. v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (Kavanaugh, J. statement respecting denial of certiorari) (“[T]he interlocutory posture” of a case “is a factor counseling against this Court’s review”); accord *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., statement respecting denial of certiorari). This case should be viewed no

¹⁶ See August 2, 2022, primary election results, available at 2022 Michigan Official Primary Election Results-08/02/2022 (mielections.us) (accessed September 30, 2022).

¹⁷ See November 8, 2022, general listing, available at 2022 Michigan Official General Candidate Listing-11/08/2022 (mielections.us) (accessed September 30, 2022).

differently regardless of Plaintiffs direct path to this Court under 28 U.S.C. § 1253.

Plaintiffs sought to enjoin the conducting of Michigan's 2022 midterm congressional elections according to the districts adopted by the Commission in the "Chestnut" plan. But the three-judge court denied that request back in April 2022. And as of the date of this filing, only 39 days remain before Michigan holds its statewide general election on November 8, 2022. Even if this Court were inclined to grant relief, there simply is no time left within which Plaintiffs could be granted relief without throwing Michigan's election into chaos.

"Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016). Here, there is no "powerful reason" to do so.

Plaintiffs were fully aware of the election timeline in making their request for injunctive relief to the three-judge court. They argued that "[s]hould the [three-judge court] decline to enjoin use of the Commissioners' congressional map, Plaintiffs will, when the 2022 Midterm Elections commence on November 8, 2022, suffer an injury that is not 'compensable' at all 'by monetary damages,' and is therefore irreparable." (Plfs' Mot. & Brf. for Prelim. Inj., ECF No. 9, PageID.113.) They further argued that "[o]nce the November 2022 Midterm Elections arrive, the injury exacted by the Commissioners' unconstitutional congressional maps will petrify into a permanent,

irreparable harm that money damages cannot fix.” (*Id.*, PageID.114.)

For relief, Plaintiffs requested that the three-judge court “send the Commission back to the drawing board” to create a new congressional plan or adopt Plaintiffs’ “remedy map,” or appoint a “special master” to establish “constitutionally compliant congressional districts.” (*Id.*, PageID.135.) In concluding, Plaintiffs observed that “[a]s of the date of this filing, the 2022 Midterm Elections are 285 days away,” and “given the irreparable injury that will arise on November 8, 2022 if” the alleged unconstitutional maps “are not remedied, Plaintiffs respectfully request that [the court] preliminarily enjoin the State from using this map for any congressional election in Michigan.” (*Id.*)

In replying to the Secretary’s stated concerns over timing of the requested injunction and its potential effect on the 2022 election timeline, Plaintiffs severely downplayed any timing issues. They argued they were “entitled to an injunction because there [were] six months remaining before the primary election and nine months until the general election. Hence, the Supreme Court’s *Purcell* principle is attenuated because there remains adequate time to complete necessary tasks related to the implementation of a revised map.” (Plfs’ Reply to Benson Resp., ECF No. 50, PageID.1040.)

But Michigan’s primary for the 2022 midterm congressional election was held on August 2 under the new plan, and the November 8 general election date is looming. Further, absent voter ballots have already been printed and made available to voters for the November election. See Mich. Const. art. II, § 4(1)(b), (g);

Mich. Comp. Laws § 168.759a. Accordingly, Michigan voters are already voting for their candidates of choice, including the congressional candidates listed on their ballots.

At this stage, even if this Court were to agree that an injunction should have issued, there is no time left to make any changes to the districts or to the November ballot, or to enjoin the conducting of the congressional elections, without causing chaos and confusion. Indeed, this Court has warned against attempts to impose last-minute changes to election laws, see, e.g., *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (“This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.”); *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006)(per curiam) (same), including in a redistricting case, see *Benisek v. Lamone*, 138 S. Ct. 1942, 1944–45 (2018) (affirming denial of preliminary injunction seeking to enjoin election). In *Benisek*, the Court observed that “due regard for the public interest in orderly elections supported” the denial of injunctive relief in that case. 138 S. Ct. at 1944–45 (citing *Purcell*, 549 U.S. at 4–5.)

Simply put, it is no longer possible to grant the injunctive relief Plaintiffs sought below—the enjoining of the 2022 congressional elections. And Plaintiffs cannot be heard to complain, as they themselves created delay in this Court. The Commission adopted the new congressional plan on December 28, 2021. Nearly three weeks later, Plaintiffs filed their complaint on January 20, 2022, and then an amended complaint, (Plfs’ Appx. B, 3a–28a), and motion for preliminary

injunction a week later on January 27, 2022. (Plfs' Mot. Prelim. Inj., ECF No. 9, PageID.94.) The three-judge court denied injunctive relief on April 1, 2022. (Plfs' Appx. 239a–252a). Twenty-eight days later, on April 29, 2022, Plaintiffs filed their Notice of Appeal. (Plfs' Appx. 1a.) Since that filing, Plaintiffs took no steps to expedite appellate review. In fact, Plaintiffs requested—and received—an extension of time in which to file their jurisdictional statement. (Plfs' Appx., 254a, 260a.) As this Court noted in *Benisek*, “a party requesting a preliminary injunction must generally show reasonable diligence.” *Id.* at 1944 (citations omitted). In this case, while Plaintiffs may have demonstrated diligence before the three-judge court, they have not done so before this Court.

This interlocutory appeal from the denial of their request for injunctive relief is not the end of the road for Plaintiffs, who will presumably continue to pursue the merits of their claims. See, e.g., *Camenisch*, 451 U.S. at 393–94 (issue of preliminary injunction was moot but case as a whole remained alive). Notably, “findings of fact and conclusions of law made by a court” in denying a preliminary injunction are not “binding at trial on the merits.” *Camenisch*, 451 U.S. at 395. While the three-judge court dismissed one of Plaintiffs' claims, (see Plfs' Appx. 232a–238a), no party moved to dismiss Plaintiffs' “one person, one vote” claims, and, in fact, defendants have all answered that claim, meaning the case will go forward. (See, e.g., Benson's Answer, ECF No. 46, PageID.936.) And the next election at which congressional candidates will be elected is the August 2024 primary. If Plaintiffs prosecute their case expeditiously, there is no reason to believe that a decision on the merits and

any post-election relief granted could not be rendered before the 2024 election cycle. Plaintiffs thus continue to have the opportunity to pursue the merits of their claims in court, including before this Court, after the three-judge court enters a final judgment.

But Plaintiffs request for preliminary injunctive relief has run its course. This Court should deny relief.

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CONCLUSION

Plaintiffs sought to enjoin the conducting of Michigan's November 8, 2022, midterm congressional elections according to districts adopted by the State's Independent Citizens Redistricting Commission. But the time for granting such relief, even if it were warranted on the merits, has passed. The election is little over a month away, and Michigan voters are already casting their ballots for candidates, including congressional candidates.

For these reasons, this Court should deny the request for relief.

Respectfully submitted,

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