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 Hon. Eric L. Clay Hon. Denise Page Hood Hon. Gordon J. Quist **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS CONCERNING MICHIGAN SENATE PLAN**

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For the reasons set forth more fully in the accompanying brief, the Secretary's second motion to dismiss should be denied. While it is true that the plaintiffs (collectively the "Voters") do not seek relief for the 2018 elections but instead for the 2020 election cycle, this does not moot their Senate claims or otherwise render this Court unable to grant relief. This Court can order special remedial elections with respect to any unconstitutional Senate districts. These elections can be ordered to coincide with the already scheduled primary and general elections set to occur in connection with the 2020 election cycle, thus causing minimal administrative or other burdens.

Respectfully submitted,

Date: 6/27/2018

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Issue Presented

Did the Voters fail to state a claim upon which relief can be granted with respect to the Michigan Senate or, alternatively, is that claim moot even though the Court could order special elections to occur in 2020?

Most Controlling or Appropriate Authorities

North Carolina v. Covington, 137 S. Ct. 1624 (2017).

Covington v. North Carolina, 270 F. Supp. 3d 881 (M.D.N.C. 2017).

Plaintiffs' Brief in Opposition to Motion to Dismiss
Plaintiffs' Claims Concerning Michigan Senate Plan

The Voters' Complaint makes the case that the Michigan Senate redistricting plan is gerrymandered, resulting in both an unconstitutional dilution of the individual plaintiffs' and League members' votes and also causing associational harm under the First Amendment. Indeed, the efficiency gap for the Michigan Senate suggests it is one of the most extreme gerrymanders in U.S. history. Compl. ¶ 51-52; *see also id.* ¶ 4 ("[B]ased on 2014 election results, the Michigan state senate map is more biased toward one political party than the bias observed in 95% of 727 U.S. legislative upper house elections for which data is available dating back to 1972.").

The Secretary moves to dismiss for failure to state a claim and on mootness grounds. The Secretary does not argue for dismissal under Rule 12(b)(6) in the traditional sense under *Twombly* and *Iqbal*. Nor could, she given the strength of the allegations in the Complaint. *See, e.g.*, Dkt. 54, Order on Mot. to Dismiss at 10 ("Plaintiffs then detail an exhaustive theory of how their injury allegedly arose and how it can be measured."). She argues instead that the Voters have failed to state a claim *upon which relief can be granted* with respect to the Senate map because the Michigan Senate will not be elected again until 2022. A new redistricting map, as a result of the 2020 census, will be in place by 2022; thus, she concludes, there is no relief or remedy this Court could possible order. For these same reasons, the Secretary alternatively argues that the case with respect to the Senate plan is moot.

The Secretary takes an improperly narrow view of the relief this Court can grant. "Relief in redistricting cases is fashioned in the light of well-known principles of equity." *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (internal quotations omitted). And those well-known principles of equity allow a court to order a special election in appropriate circumstances. *Id.* As the Voters will demonstrate, special remedial elections in 2020 for some Michigan Senate districts is appropriate here. Without such remedial elections, the harm inflicted on the Voters will be substantial and irreparable, while the administrative burden on the state to hold some special remedial elections on the same dates as regularly scheduled primary and general elections is *de minimis*. On the availability of this remedy and the strength of the allegations in the Complaint, the Senate case is not moot and the Voters have stated a claim upon which relief can in fact be granted. The Secretary's motion should be denied.

I. Factual & Procedural Background

The Voters filed their Complaint on December 22, 2017. The Voters allege that the current redistricting maps for the Michigan House, the Michigan Senate, as well as the map for the Michigan delegation to the U.S. House of Representatives are all unconstitutional gerrymanders, in violation of the First and Fourteenth Amendments. The two legislative Michigan plans were enacted by the same law, S.B. 498, while H.B. 4780 outlined the lines for the congressional districts. The Complaint describes in great detail the harm these maps impose on the voters of Michigan. And it asked that

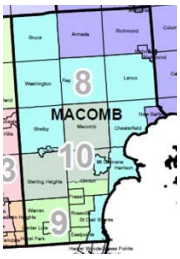
if the legislature did not establish a constitutional plan in a timely fashion, this Court "establish legislative and congressional apportionment plans that meet the requirements of the U.S. constitution and other applicable law." Compl. at p.33 ¶ (d).

With respect to the Senate plan in particular, "based on 2014 election results, the Michigan state senate map is more biased toward one political party than the bias observed in 95% of 727 U.S. legislative upper house elections for which data is available dating back to 1972." *Id.* ¶ 4. For the 2014 State Senate races, the statewide popular vote was close, with Democrats winning 49.23% and Republicans garnering 50.67%. Yet the Senate plan turned that narrow 1.44% vote margin into a 42% super-majority seat advantage in the Senate. Republicans hold 27 seats (71%) to the Democrats' 11 (29%). Compl. ¶ 40; *see also id.* ¶ 38[1]. The actual efficiency gap for the Current Senate Plan in 2014 is extreme, at approximately -.22. This is the widest in the country for upper houses with single-member districts in the current decade for which we have election data. *Id.* ¶ 52. In contrast, the demonstration Senate map attached to the Complaint has much lower partisan asymmetry, as reflected in an efficiency gap of only approximately .025. *Id.* ¶ 63. In addition, the Complaint highlighted (as just one illustration) the obvious irregularity of Senate District 8's shape:

1

Disparities in Votes Cast vs. Seats Won: Michigan Senate General Elections 2002-2014

Year	Rep. Vote Share	Rep. Seat Share
2002	50.0%	57.9%
2006	45.0%	55.3%
2010	53.6%	68.4%
2014	50.4%	71.1%



Id. ¶ 35; *see also* Compl. Ex. B, Districts 32 & 36 (revealing particularly oddly shaped districts).

On January 23, 2018, the Secretary moved to stay the case in light of the pending redistricting cases before the Supreme Court, or alternatively to dismiss for lack of standing. *See* Dkt. 11, Def.'s Mot.to Stay and to Dismiss. This Court denied the request to stay on March 14, 2018 and denied in part and granted in part the motion to dismiss on May 16, 2018, concluding that the Voters had standing to pursue their claims on a district-by-district basis. *See* Dkt. 35, Order Den. Req. to Stay; Dkt. 54, Order on Mot. To Dismiss. In that briefing as well as other filings, the Voters acknowledged that they sought relief not for the 2018 elections, but in time for the 2020 elections.

The Secretary filed a second motion to dismiss seeking to dismiss the claims with respect to the Senate plan. Dkt. 63. The Secretary correctly points out that the Michigan Senate is elected in its entirety every four years, with no scheduled election remaining under the current plan after 2018. The Secretary's motion, however, entirely ignores the availability of special remedial elections using regularly scheduled election dates in 2020.

II. Legal Standard

"The purpose of a motion to dismiss for failure to state a claim is to test whether, as a matter of law, the plaintiff is entitled to legal relief if all the factual allegations in the complaint are taken as true." *In re FCA US LLC Monostable Electronic Gearshift Litigation*, 280 F. Supp. 3d 975, 990 (E.D. Mich. 2017). A plaintiff's case should be dismissed for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint. *Zynda v. Arwood*, 175 F. Supp. 3d 791, 798-99 (E.D. Mich. 2016). A court cannot dismiss for factual implausibility even if it would strike a savvy judge that recovery is very remote and unlikely. *Courie v. Alcoa Wheel & Forged Products*, 577 F.3d 625, 630 (6th Cir. 2009).

There is no case or controversy before the court and a case is moot only "when the issues are no longer 'live' and the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). A case becomes moot only when "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* (quoting *Knox v. SEUI, Local 100*, 567 U.S. 298, 307 (2012)). As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot. *Id.*

III. The Court can order remedial special elections for affected Michigan Senate Districts to occur in 2020 on regularly scheduled election dates.

The Secretary argues that any remedial map with respect to the Senate Plan would be irrelevant because a new redistricting map will necessarily be in place before the 2022 election. The Secretary argues that "it is not possible for this Court to grant effectual relief to Plaintiffs with respect to the portion of the Apportionment Plan enacted for the Michigan Senate." Def.'s Br. at 8.

The Secretary is wrong. The Court can order special elections to remedy unconstitutional practices. *Covington*, 137 S. Ct. at 1625 (2017); *see also, e.g.*, *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 498 (2d Cir. 1999) (affirming the lower court's decision to order a special election with a six-district plan that does not violate the Voting Rights Act and that does not dilute the vote of racial minorities); *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) ("In this vital area of vindication of precious constitutional rights . . . . If affirmative relief is essential, the Court has the power and should employ it."); *Smith v. Beasley,* 946 F. Supp. 1174, 1212-13 (D. S.C. 1996) (enjoining elections in unconstitutional districts and ordering State General Assembly to adopt a new redistricting plan and propose election schedule for special elections in unconstitutional districts); *Duncan v. Poythress*, 515 F. Supp. 327, 344 (N.D. Ga.), *aff'd,* 657 F.2d 691 (5th Cir. 1981) (ordering special election to fill a vacancy on the Georgia Supreme Court after finding of constitutional violations); *Hackett v. President of City Council of City of Philadelphia*, 298 F. Supp. 1021, 1029 (E.D. Pa.), *aff'd*,

410 F.2d 761 (3d Cir. 1969) (reserving the right and jurisdiction to call a special municipal election should Defendant fail to do); *Butterworth v. Dempsey,* 237 F. Supp. 302, 307 (D. Conn. 1964) (3-judge panel) (per curiam) (court has power to order special election to correct unconstitutional legislative districts).

A. The Supreme Court has recognized special elections as an available remedy in redistricting cases.

"Relief in redistricting cases is 'fashioned in the light of well-known principles of equity.'" *Covington*, 137 S. Ct. at 1625 (2017) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). This requires an "equitable weighing process" to "select a fitting remedy," "taking account of what is necessary, what is fair, and what is workable." *Id.* In *Covington*, a racial gerrymandering case, the Supreme Court reviewed an order truncating legislative terms of the legislators from districts modified by the remedial map and requiring the legislators to be replaced by those elected in a court-ordered special election. The Court explained precisely how the trial court might consider the ordering of a special election:

> Although this Court has never addressed whether or when a special election may be a proper remedy for a racial gerrymander, obvious considerations include the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty. We do not suggest anything about the relative weight of these factors (or others), but they are among the matters a court would generally be expected to consider in its "balancing of the individual and collective interests" at stake.

Id. at 1625–26 (internal citation omitted). The Court ultimately remanded because the district court had provided only "minimal reasoning" to support its decision. *Id.* at 1626.

B. *Covington v. North Carolina* is instructive.

On remand, the three-judge district court conducted an in-depth analysis of the "obvious considerations" suggested by the Supreme Court. *Covington v. North Carolina*, 270 F. Supp. 3d 881 (M.D.N.C. 2017).

As to the first consideration – the severity and nature of the particular constitutional violation – the court explained:

> Taken together, the effects of the racial gerrymanders identified by the Court—and affirmed by the Supreme Court—are widespread, serious, and longstanding. Beyond the immediate harms inflicted on Plaintiffs and other voters who were unjustifiably placed within and without districts based on the color of their skin, Plaintiffs—along with millions of North Carolinians of all races—have lived and continue to live under laws adopted by a state legislature elected from unconstitutionally drawn districts. The nature and severity of this ongoing constitutional violation counsel in favor of granting Plaintiffs' request for a special election.

Id. at 894.

As for consideration of "the need to act with proper judicial restraint when intruding on state sovereignty," *Covington*, 137 S. Ct. at 1626, the district court explained that "in cases involving unconstitutional burdens on the right to vote, including racial gerrymandering, numerous courts—including the Supreme Court—have concluded that shortening the terms of elected officials and ordering a special election does not unduly intrude on state sovereignty, particularly when the

constitutional violation is widespread or serious." *Covington,* 270 F. Supp. 3d at 896 (collecting cases).

It was only with respect to the remaining factor—disruption to the ordinary processes of governance—that the court found a special election unwarranted and on that basis ultimately ruled against the requested relief. The court explained that the special elections contemplated would not allow sufficient time to craft remedial maps and would result in confusing scheduling and timing of the elections, "further increasing the harm to North Carolina voters" and "would generate voter confusion and, likely, poor voter turnout." *Id. at* 900-01.

C. Remedial special elections are warranted here.

While this Court need not fashion a remedy *now* at the pleadings stage, even a preliminary assessment of the "obvious considerations" outlined by the Supreme Court makes plain that the Voters have stated a claim upon which relief *can* be granted in the form of special remedial elections in the unconstitutional Senate Districts.

The severity of the constitutional violation is extreme. *See, e.g.*, Compl. ¶ 52 ("The actual efficiency gap for the Current Senate Plan in 2014 was … extreme … the widest in the country for upper houses with single member districts in the current decade for which we have election data."); *id.* ¶ 40 (explaining that the Current Senate plan turned a narrow 1.44% vote margin into a 42% seat advantage in the Senate.)

The extreme nature of the harm is even more apparent when considering the power the Republicans in the State Senate wield under the current Senate plan. The

gerrymander gives them an unconstitutional supermajority. This power allows them to:

- pass any legislation they desire without Democratic votes;
- advise and consent on appointments without Democratic votes (Mich. Const. Art. 5, Sec. 6);
- block an attempted override of a gubernatorial veto (Const. Art. 4, Sec. 33);
- elect the Senate Majority Leader (Senate Rule 1.104(b)) who appoints all committee members (*id.* 1.105); appoints, terminates, and assigns duties to Senate employees and has all final financial authority (*id.* 1.117(a), (e), 1.403, 1.406); and appoints a Business Office Director with authority over all non-legislative administrative duties; (*id.* 1.119)
- elect all of the Senate officers who preside over the Senate in the absence of the Lieutenant Govennor (*id.* 1.104(a)); and
- elect the Secretary of the Senate (*id.* 1.106) who controls broadcasting of Senate sessions (*id.* 1.108), keeps the records of the Senate (*id.* 1.109, 1.116), and handles all legislative administrative duties (*id.* 1.118).

Perhaps most salient given the issues in this case, the 2021 Senate will be responsible for drawing the Michigan redistricting maps for the next decade following the 2020 census. *See* Mich. Comp. Laws 3.62; 4.261. So not only is the present gerrymander currently diluting Plaintiffs' votes and impeding their associational rights, failure to order special remedial elections would allow illegally elected senators to perpetuate the unconstitutional harm unchecked into the next decade.

Moreover, this case is not burdened by the one consideration in *Covington* that weighed against the remedial special elections. Here, the remedy the Voters seek will not generate voter confusion or require an unworkable timeline. If the Voters prevail,

new maps will be in place in time for the 2020 election cycle, during which regularly scheduled primary and general elections for U.S. House and Senate, Michigan House, and President, among others, will occur. Remedial special elections for the Senate can be ordered to coincide with that cycle, resulting in only *de minimis* costs and disruption. *Cf. Rhodes v. Snyder*, 302 F. Supp. 3d 905, n.2 (E.D. Mich. 2018) (recognizing "Governor Snyder's clear preference to coordinate special elections with regularly scheduled elections").

* * *

In sum, given the availability of special elections for the Senate in 2020 as part of the regular election schedule as a remedy, the Secretary's argument that "it is not possible for this Court to grant effectual relief to Plaintiffs" with respect to the Senate Plan is wrong. The Voters have stated a claim, that claim is not moot, and the motion to dismiss should be denied.

IV. Plaintiffs' claims are not moot for two additional, independently-sufficient grounds.

A. Even if the Court did not order remedial special elections, a remedial map is necessary for special elections in any event.

Even if this Court does not ultimately order special elections as a remedy, the potential of a special election occurring anyway warrants the litigation of the claims and the creation of a remedial map.

A Michigan election can generally only be called when authorized by statute. *Sempliner v. Fitzgerald*, 2 N.W.2d 494, 496 (Mich. 1942). In the event of a vacancy, the

governor may either call a special election or direct the vacancy be filled at the next general election. Mich. Comp. Laws Serv. § § 168.634, 168.178; *see* Mich. Const. art. I § 13. Generally, special elections are held to fill vacancies arising because of an incumbent's death, disqualification, or resignation, or for an emergency. *Scovill v. Ypsilanti*, 174 N.W. 139, 141 (Mich. 1919); *see* Mich. Comp. Laws Serv. § 168.176.

Numerous special elections have been held in Michigan in the past decade. *See generally* https://www.michigan.gov/sos/0,4670,7-127-1633_8722---,00.html (last visited June 22, 2018) (Defendant's website providing election results).[2] These included three special elections for the Michigan Senate in the last six years—one in 2013 for the 27th Senate district,[3] another in 2016 for the 4th Senate district,[4] and one coming up in 2018 for the 2nd district seat.[5] This frequency – three in just six years – suggests that it is possible, if not likely, that a special election in the Senate may be necessary sometime before 2022. For this additional reason, the Senate claims are

[2] The Court can take judicial notice of the election information posted on the Secretary of State's website. *Overall v. Ascension*, 23 F. Supp. 3d 816, 824–25 (E.D. Mich. 2014) ("Defendants' exhibits also include public documents, government documents, and publications. The Court may take judicial notice of public documents and government documents because their sources 'cannot reasonably be questioned.'" (quoting Fed. R. Evid. 201(b)); *see also, e.g.*, *Arvest Bank v. Byrd*, 814 F. Supp. 2d 775, 787 n.4 (W.D. Tenn. 2011) (taking judicial notice of corporation information posted on the Tennessee Secretary of State's website).

[3] http://miboecfr.nictusa.com/election/results/13SG1/

[4] http://miboecfr.nictusa.com/election/results/2016GEN_CENR.html#07004008

[5] There will be two elections for this seat on the 2018 ballot. One to fill an immediate vacancy beginning in November and another to serve a normal four-year term beginning in January. https://www.michigan.gov/documents/snyder/Special_Election_Letter_617119_7.pdf

viable and dismissal inappropriate. *See also* Compl. p. 32 ¶(b), (c)(requesting that the current plan be invalidated and that any use of the plan, including for special elections, be found in violation of the Constitution).

B. The current gerrymander will influence the next redistricting cycle.

An additional reason that the Senate case is not moot is that the current gerrymander will influence the next redistricting process, continuing to inflict harm on the Voters. In other words, just because a new map will be created following the 2020 census does not mean the impact of the current map will not be felt in the next decade. For this additional reason, the claims are not moot.

The current redistricting map is often the starting point for the mapmakers for the next redistricting cycle. *See, e.g.*, *id.* ¶ 19 ("This history [of the previous gerrymander] does however provide an example of how one effective gerrymander can have profound effects beyond its ten-year life, as the subsequent plans start not from neutral but from already tilted maps."); *Kelley v. Bennett*, 96 F. Supp. 2d 1301, 1306–07 (M.D. Ala. 2000), *vacated sub nom. Sinkfield v. Kelley*, 531 U.S. 28 (2000) ("Alabama does not wipe the slate clean from one decade to the next, and in the same way that improper preclearance may infect retrogression analysis, a plan whose constitutional defects are left unidentified and unremedied could leave its own unconstitutional mark on the next plan."). This is true as a practical matter but also because courts have recognized "maintenance of the cores of existing districts" as one of several secondary redistricting factors. *Good v. Austin*, 800 F. Supp. 557, 561 (E.D.

Mich. 1992) ("Federal courts have recognized the following as relevant secondary criteria in congressional district map drawing: compactness, contiguity, preservation of the integrity of county and municipal boundaries, maintenance of the cores of existing districts, preservation of cultural, social, and economic communities of interest, and political and racial fairness."). Therefore, for this additional reason, the Secretary's mootness argument fails.

Conclusion

For these reasons, the Voters have stated a claim upon which relief can be granted with respect to the Senate districts and that claim is not moot. The Secretary's second motion to dismiss should be denied.

Respectfully submitted,

Date: 6/27/2018

/s/ Harmony Mappes

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Certificate of Service

I hereby certify that on June 27, 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/ Harmony Mappes