UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, MICHON BOMMARITO; PETER COLOVOS, WILLIAM GORDON, JOSEPH GRAVES, BEAU LaFAVE, CAMERON PICKFORD, HARRY SAWICKI and MICHELLE SMITH,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State of Michigan, DOUGLAS CLARK, JUANITA CURRY, ANTHONY EID, RHONDA LANGE, STEVEN TERRY LETT, BRITTNI 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,

Defendants,

and

JOAN SWARTZ MCKAY, et al,

Intervenor-Defendants,

and

VOTERS NOT POLITICIANS,

Intervenor-Defendant.

No. 1:22-cv-00054

HON. PAUL L. MALONEY

MAG. SALLY J. BERENS

DEFENDANT MICHIGAN SECRETARY OF STATE JOCELYN BENSON'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Secretary Benson has no position regarding whether the congressional plan adopted by the Commission meets the constitutional criteria. But in considering whether to grant the motion for a preliminary injunction, should this Court consider the calendar, the late stage of preparations by election administrators, and the various impending deadlines in its determinations, and, if it decides to act, whether to order the process be expedited and further consider ordering additional relief relating to candidate filing deadlines?

INTRODUCTION

With respect to the redistricting process in Michigan, the Secretary of State wears two hats.

First, under the state Constitution, the Secretary of State acts as a non-voting secretary to the Michigan Independent Citizens Redistricting Commission, tasked with supporting the work of the Commission. Mich. Const. 1963, Art. IV, § 6(4). Secretary of State Jocelyn Benson fulfilled her duties under the Constitution with respect to the new plans adopted by the Commission, and in doing so played no role in drawing or approving the new maps, including the plan challenged here.

Second, the Secretary of State is also the "chief election officer" with "supervisory control over local election officials in the performance of their duties under the provisions of this act." Mich. Comp. Laws § 168.21. The Michigan Legislature has delegated the task of conducting proper elections to the Secretary, an elected executive-branch officer, and the head of the Department of State. Mich. Const. 1963, Art. II, § 4, Art. V, §§ 3, 9. It is in this capacity that Secretary Benson appears before this Court.

After the adoption of new redistricting plans, the Secretary, through her Bureau of Elections, must update Michigan's electronic list of approximately eight million registered voters to ensure that voters are placed within the correct voting districts. This is a labor-intensive process that involves considerable back and forth with the 1,520 local clerks around the state and thus typically takes months to implement—historically, no less than six months. The intent of the Bureau is to

have the updates finalized for congressional and state house and senate districts by the April 19, 2022 filing deadline for these offices.

Plaintiffs ask this Court to declare the new congressional plan unconstitutional and to order the Commission to redraw and adopt a new plan. But time is of the essence here. The plans were adopted by the Commission on December 28, 2021, and for the last seven weeks the Bureau of Elections has worked diligently to implement the new districts into the voter roll. Nevertheless, the Bureau has weeks of work left to do—and will be that much further along a month from now when this Court hears oral arguments on March 16, 2022. The U.S. Supreme Court has warned against modifying election processes close to an election. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). However, if this Court is nonetheless persuaded to grant Plaintiffs' relief, this Court should order the Commission to adopt a new plan on an expedited basis and also order additional relief related to the statutory deadlines for candidates seeking these offices.

COUNTER-STATEMENT OF FACTS

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. 1963, Art. 4, § 6.

A. Overview of the redistricting process in Michigan

1. The Independent Citizens Redistricting Commission

In 2017, Intervenor Voters Not Politicians, a ballot proposal committee, 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); *Citizens Protecting Michigan's Constitution v Secretary of State*, *et al*, 922 N.W.2d 404 (Mich. Ct. App. 2018). The proposal principally sought to amend the apportionment provisions in article 4, § 6 of the Michigan Constitution. Identified as Proposal 18-2 on the November 6, 2018 general election ballot, the proposal passed overwhelmingly. The amendments became effective December 22, 2018. *See* Mich. Const. 1963, 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. 1963, Art. IV, § 6(1), (13). And the Constitution makes clear that "no body, except the . . . commission . . . [shall] promulgate and adopt a redistricting plan or plans for this state." Mich. Const. 1963, 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). The commissioners for this redistricting cycle were initially selected by a random draw on August 17, 2020.[1]

The Commission is granted authority to provide for its own rules and processes, and the Legislature must appropriate money to compensate the commissioners and to enable the Commission to perform its functions. *Id.*, § 6(4)-(5). The Secretary of State 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 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. 1963, 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.*,

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[1] *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 February 18, 2022.) One commissioner was randomly selected on October 21, 2020, to fill a vacancy. Mich. Const. 1963, Art. IV, § 6(3).

§ 6(8). The Commission scheduled 16 public hearings to be held across the state to meet this requirement.[2]

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). The Commission scheduled eight public hearings.[3]

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.

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[2] *See* Independent Citizens Redistricting Commission, meeting schedule, available at MICRC - ICRC Meeting Schedule (michigan.gov), (accessed February 18, 2022.)
[3] *Id.*

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). Under subsection § 6(19), the Michigan Supreme Court "may review a challenge to any plan adopted by the commission and shall remand a plan to the commission for further action if the plan fails to comply with the requirements" of state or federal Constitution or superseding federal law. *Id.*, § 6(19).

B. The federal government's delay in releasing the 2020 census data delayed the Commission's adoption of plans.

1. Use of 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., Am. 14, *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.[4] Similarly, the total number of seats in the Michigan House of Representatives is fixed by law at 110, *see* Mich. Const. 1963, Art. IV, § 3, the Michigan Senate is fixed by law at 38, *see* Mich. Const. 1963, Art. IV, § 2, and both the House and Senate are apportioned on the basis of population. *See Reynolds v. Sims*, 377 U.S. 533, 562-564 (1964).

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."); e.g., *Burns*, 384 U.S. at 92–97 (State may draw districts based on voter-registration data).

While the Michigan Constitution does not expressly require that decennial census data be used to redistrict that appears to be the intent of the amendment. Numerous provisions in article IV, § 6 refer to the decennial census as the starting

[4] "Reapportionment" means "realignment of a legislative district's boundaries to reflect changes in population." *Black's Law Dictionary* (8th ed).

point of the redistricting process. *See* Mich. Const. 1963, 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. 1963, 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 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). However, early in 2021 representatives from the U.S. Census Bureau announced a four-month delay for apportionment data[5] and a 6-month delay[6] for redistricting data.[7] The U.S. Census Bureau cited the COVID-19 pandemic, wildfires in the western states, and the active hurricane season, among others, as causes of the delay in their 2020 census operations. *See, e.g*., *Ohio v. Raimondo*, 2021 W.L. 1118049 at *1-2 (March 24, 2021, S.D. Ohio). As a result, the release of redistricting data was to be delayed until September 30, 2021. In

[5] *See Census Bureau Statement on Apportionment Counts*, Release Number CB21-RTQ.06, 1/28/21, available at Census Bureau Statement on Apportionment Counts, (accessed February 18, 2022.)

[6] *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 February 18, 2022.)

[7] 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.

contrast, the 2010 census data was received by the Michigan Legislature on March 22, 2011.[8]

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.[9] And on September 1, 2021, the Census Bureau announced it would release the final, tabulated P.L. 94-171 redistricting data by September 16, 2021, instead of September 30,[10] which it ultimately did.[11]

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.[12] The Commission proposed state

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[8] Given the delay in the release of census data, Secretary Benson and the Commission sought an extension of the constitutional deadlines from the Michigan Supreme Court. The court, however, declined to provide relief. *See In re Independent Citizens Redistricting Commission*, Michigan Supreme Court Case No. 162891.

[9] 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 February 18, 2022.)

[10] *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 February 18, 2022.)

[11] *See* Decennial Census P.L. 94-171 Redistricting Data, September 16, 2021, available at Decennial Census P.L. 94-171 Redistricting Data Summary Files.

[12] *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 February 18, 2022.)

and congressional district plans on November 12, 2021,[13] and subsequently held numerous public meetings to hear comment on the proposed plans. Ultimately, the Commission adopted state and congressional district plans on December 28, 2021, including the "Chestnut Plan" at issue in the instant litigation.[14]

C. The Commission's unavoidable delay in adopting plans likewise delayed the Secretary's implementation of the maps.

1. The Secretary of State's duty 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 ballot[15] 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.

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[13] *See* Public Notice, November 12, 2021, available at MICRC_Plan_Publication_Notice_741252_7.pdf (michigan.gov), (accessed February 18, 2022.)

[14] *See* Commission's Proposed December 28, 2021, Meeting Minutes, available at MICRC_Proposed_Meeting_Minutes_2021_12_28_745307_7.pdf (michigan.gov), (accessed February 18, 2022.)

[15] In a statewide election year, 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.

The update generally takes place in three phases. In phase one, the new district lines will be added to the QVF. In phase two, the "street index" will be reviewed to identify where districts have changed, and an update to registrations will be made where voters' districts have changed. To accomplish these updates, the Bureau will do what it can to electronically move large groups of voters at one time. Even so, manual, address-by-address changes will still be required for thousands and thousands of voters where district boundaries limit 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 will 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 several discussions between the local clerks and the Bureau.

With respect to the last redistricting cycle in 2010-2011, the update to the QVF took approximately six months. 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 should be completed in time to accommodate candidates seeking to run in the August 2, 2022 primary election.

The deadline to collect signatures and file nominating petitions for accessing the primary ballot is April 19, 2022 (the 15th Tuesday before the primary).[16] This

[16] *See* Michigan Election Dates 2022, p 3, available at 2022 Election Dates Booklet (michigan.gov), (accessed February 18, 2022.)

includes nominating petitions for congressional representatives, Mich. Comp. Laws § 168.133, and state senators and representatives, Mich. Comp. Laws § 168.163. The completion of this process is essential to the nomination process so the potential candidates can know not only *whom* they would represent, but whether or not they *can*, as Michigan Election Law requires candidates to live in the state senate and house district they wish to represent. Mich. Comp. Laws § 168.162. But more significantly, the Bureau of Elections and the local clerks need to have the QVF updated in order to canvass nominating petitions and determine whether petition-signers are registered to vote in the candidate's district. As a result, the QVF updates for these offices must be completed by the April 19 filing deadline.

2. Status of the Bureau of Elections' update of the qualified voter file.

The Commission adopted new congressional and state house and senate plans on December 28, 2021. Shortly thereafter, the Bureau began working to update the QVF.

The Bureau is nearing completion of phase one of the update (and has been working on phase one since the districts were drawn more than a month ago). In this phase, the Bureau is automatically updating county commissioner, state house, state senate, and congressional district assignments for jurisdictions that are within a single district. For example, Munising Township in Alger County is entirely contained within a single state house, state senate, and congressional district. (Ex 1, Bureau Bulletins.)

In the second phase, which the Bureau has begun for some parts of the state as phase one nears completion, the Bureau will geocode QVF addresses and pre-assign updated district values to street segments based on their location. (*Id.*)[17] This means that new county commissioner, state house, state senate, and congressional district values will be applied (as necessary) to all street segments in jurisdictions split by a district. (*Id.*) For example, Munising Township is split by county commissioner districts 1 and 2. All QVF street segments in Munising Township will automatically be assigned their new county commissioner district during phase two. (*Id.*) Geocoding, a new process for the Bureau, will speed up the updates, but because it does not always result in the address being placed in the correct district location, the third phase of the update is significant. (*Id.*)

In phase three, local clerks will (1) review the pre-assigned district values and (2) communicate precinct boundary changes to the Bureau. (*Id.*) This manual review step is critical again because geocoding will not always automatically assign addresses the correct district values. (*Id.*) For example, Munising Township will visually compare the new automatically assigned county commissioner district values in the QVF to the new county commissioner district maps approved by the Alger County Reapportionment Committee. If the township is satisfied that the county commissioner district assignments in QVF match the map, and if the

[17] 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. (Ex 1.)

township is not altering the precinct boundaries for the districts, no further action is needed. (*Id.*)

Assuming all three phases go according to plan, the Bureau presently estimates that the updates to the QVF will be completed by April 19, 2022 for congressional and state house and senate districts. But, at this point, any changes to the maps could cause the Bureau to miss that deadline.

ARGUMENT

I. Secretary Benson has no position regarding whether the congressional plan adopted by the Commission meets the constitutional criteria. But in considering whether to grant the motion for a preliminary injunction, this Court should consider the calendar, the late stage of preparations by election administrators, and the various impending deadlines in its determinations, and, if it decides to act, should order the process be expedited and further consider ordering additional relief relating to candidate filing deadlines.

A. Preliminary injunction factors.

"A district court must balance four factors in determining whether to grant a preliminary injunction: '(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.' " *Am. Civil Liberties Union Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015) (quoting *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012)). "These factors are not prerequisites, but are factors that are to be balanced against each other." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d

566, 573 (6th Cir. 2002). However, "even the strongest showing on the other three factors cannot 'eliminate the irreparable harm requirement.' " *D.T. v. Sumner Cnty. Schools*, 942 F.3d 324, 326–27 (6th Cir. 2019) (quoting *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)). "[T]he party seeking a preliminary injunction bears the burden of justifying such relief." *Livingston County*, 796 F.3d at 642 (quoting *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012)); *see also Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 546 n.2 (6th Cir. 2007) ("[I]n seeking a preliminary injunction, a federal plaintiff has the burden of establishing the likelihood of success on the merits.").

B. In analyzing the balance of harms and public interest factors, this Court should weigh the impact of any injunction on the Secretary's duty to implement the adopted plans or any revised plan.

The balance of harms and public interest factors "merge when the Government is the opposing party." *Nken v. Holder,* 556 U.S. 418, 435 (2009).

Secretary Benson was not involved in drawing or approving the adopted maps and has no position on their constitutionality. Indeed, defense of the maps is best left to the body that drew them—the Commission.[18] The Secretary's purpose here is to advise the Court of impending deadlines impacting the August 2, 2022, primary election. While this date may seem distant, in the election context it is right around the corner.

[18] The Secretary, however, concurs in the motion to dismiss filed by the Commission with respect to Count II in this matter based on the Eleventh Amendment.

Below is a list of important deadlines:

Date	Action	Statute
March 23	State house or senate candidate must have resided within city or township in district at least 30 days before filing deadline.	Mich. Comp. Laws §§ 168.10, 168.161
April 19	Candidates for partisan office must file nominating petitions (or fee if applicable) and affidavit of identity for the August primary	Mich. Comp. Laws §§ 168.93, 168.133, 168.163
April 22	Deadline for candidates to withdraw from the August primary	Mich. Comp. Laws §§ 168.133, 168.163
April 26	Deadline to submit challenges against nominating petitions filed by partisan candidates to filing official	Mich. Comp. Laws § 168.552
May 31	Board of State Canvassers must complete canvass of nominating petitions filed by candidates for the August Primary; Secretary of State certifies candidates eligible to appear on August primary ballot to county election commissions by June 3.	Mich. Comp. Laws § 168.552
June 3	Approximate date county clerks can begin process of printing ballots for the August primary	
June 18	Delivery of military and overseas absent voter ballots must begin	Mich. Comp. Laws § 168.759a
June 18	Deadline for county clerks to deliver absent voter ballots for the August primary to local clerks	Mich. Comp. Laws § 168.714
June 23	Deadline for absent voter ballots to be made available to voters	Mich. Const. 1963, Art. II, § 4
August 2	State Primary	

As noted above, under the current schedule and based on the adopted, existing plans, the Bureau ***anticipates*** having the QVF updated for the new congressional, state house, and state senate districts by April 19. This would ensure that the new districts may be utilized for filing and canvassing nominating

petitions, although accomplishing this task in the census-delay shortened timeline is difficult.

The Secretary of State is the filing official for congressional candidates and state house and state senate candidates whose districts cross county lines. Mich. Comp. Laws §§ 168.133, 168.163.[19] Candidates whose districts lie solely within one county file nominating petitions (or fees as applicable) with the county clerk. (*Id.*)[20] So, the Secretary of State and the county clerks will receive numerous nominating petitions come April of 2022. These filing officials will then have to canvass the nominating petitions to determine whether they are supported by the requisite number of valid signatures from registered voters within the districts, *see* Mich. Comp. Laws § 168.544f, and process any challenges to nominating petitions that are submitted by the deadline. The candidates must then be certified to appear on the ballot, which must occur by May 31, 2022. After that date, counties will begin preparation for printing ballots. By June 18, 2022, absent voter ballots must be available for delivery to military and overseas voters.

In addition to candidate filings, the Secretary of State and local clerks may also be processing petitions to place proposals on the ballot. For example, the Secretary is the filing official for petitions to initiate legislation. *See* Mich. Const. 1963, Art. II, § 9. These petitions may be filed with the Secretary of State until

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[19] *See* Filing for Office, Bureau of Elections, January 2022, p 2, available at Filing_for_Office_Partisan_Offices_2022_719292_7.pdf (michigan.gov), (accessed February 18, 2022.)
[20] *Id.*

June 1, 2022. Mich. Comp. Laws § 168.471. Accordingly, the Secretary's Bureau of Elections may, and usually is, canvassing initiative petitions and nominating petitions at the same time. This involves reviewing hundreds of thousands of signatures.

The April 19 deadline for nominating petitions is just one of many deadlines that carefully control the election processes leading up to the August 2, 2022, primary election. These deadlines help ensure that the filing official responsible for canvassing such petitions has time to perform the canvass, that the slate of candidates can be properly certified and that ballots can be printed, proofed, and ready for delivery by the local clerks to absent ballot voters, including military and overseas voters.

An injunction ordering the Commission to redraw and adopt a congressional district plan would re-start the QVF update all over again, depending on how different the maps turn out to be. And the Bureau would not be able to continue the process until the Commission adopted revised maps. Candidates, of course, have been using the previously proposed and adopted maps to determine whether to run and in which district. And while residency in the district is not an issue for congressional candidates, by April 19, 2022 all candidates must file affidavits of identity that disclose the office and numerical district sought. *See* Mich. Comp. Laws § 168.551.[21] If a candidate's affidavit of identity includes the wrong numerical

[21] Congressional candidates do not have a filing fee option to gain access to the ballot and so must file nominating petitions, but congressional candidates do not

district, the candidate's filing will be disqualified.[22] But if the Court orders the redrawing of a new plan, particularly if it waits to do so until after arguments in this matter on March 16, 2022, the Bureau will ***not*** be able to implement the new maps statewide by April 19 for all 8 million-plus registered voters.

Under these circumstances, the Court should weigh whether such a change to the election process is warranted. *See, e.g.*, *Republican Nat'l Comm.*, 140 S. Ct. at 1207 ("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) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). *See also Crookston v. Johnson,* 841 F.3d 396, 398 (6th Cir. 2016).

Given these concerns, if this Court is inclined to issue an injunction and order the adoption of a new plan, the Secretary suggests the Court order the Commission to complete the plan under an expedited timeline. The Court should also consider ordering additional relief. Because the filing deadline is set by statute, the Legislature could relieve the Bureau and candidates by briefly extending the deadline through legislation. Indeed, such legislation was previously introduced,

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need to live in their districts at the time nominating petitions are filed. Mich. Comp. Laws §§ 168.131, 168.133.

[22] *See* Filing for Office, Bureau of Elections, p 3, available at Filing_for_Office_Partisan_Offices_2022_719292_7.pdf (michigan.gov) (accessed February 18, 2022.)

extending the filing deadline until May 10, 2022 (the 12th Tuesday before the primary election). *See* House Bills 4642 and 4643.[23] But this legislation has not moved. Previously, the Michigan Supreme Court has extended the deadline to file nominating petitions and filing fees in the context of directing the adoption of a redistricting plan. *See In re Apportionment of State Legislature – 1972*, 197 N.W.2d 249, 256 (1972). Federal courts as well have ordered the extension of the filing deadline for nominating petitions under extenuating circumstances. *See Esshaki v. Whitmer*, *et al.*, 455 F. Supp.3d 367, 383-384 (E.D. Mich. 2020) (extending filing deadline for nominating petitions due to COVID-19 pandemic). Thus, the Court can and should consider ordering additional relief related to the April 19 filing deadline.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant Secretary of State Jocelyn Benson respectfully requests that if this Court grants an injunction and orders the Commission to redraw and adopt a new congressional district plan, the Court further order maps be redrawn and adopted on a significantly expedited schedule while adjusting other statutory and constitutional deadlines that are impacted.

[23] The bills are available at Michigan Legislature - House Bill 4642 (2021) (HB 4642) and Michigan Legislature - House Bill 4643 (2021) (HB 4643) (accessed February 18, 2022).

Respectfully submitted,

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Dated: February 18, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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