IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF EASTPOINTE; EASTPOINTE CITY COUNCIL; MONIQUE OWENS, in her official capacity as Mayor of Eastpointe; HARVEY CURLEY, CARDI DEMONACO JR., and SARAH LUCIDO in their official capacities as members of the Eastpointe City Council; and RYAN COTTON, in his official capacity as Eastpointe City Clerk, Defendants.	Civil Action No. 4:17-cv-10079 (TGB)

UNITED STATES' BRIEF IN OPPOSITION TO THIRD-PARTY MOTION FOR INJUNCTIVE, DECLARATORY, OR MONETARY RELIEF OR TO SET ASIDE JUDGMENT

On June 26, 2019, this Court signed a consent decree entered by the parties that resolved the United States' lawsuit against Eastpointe alleging that the method of election for the Eastpointe City Council violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. On October 21, 2019, Christine Timmon, an Eastpointe resident, filed a document titled "Motion for Injunctive, Declaratory, Monetary

Relief and/or Aside Consent Judgment and Decree."[1] Timmon did not seek expedited relief, and Eastpointe held the first election under the consent decree on November 5, 2019. Timmon is not "a party" able to seek relief from judgment, Fed. R. Civ. P. 60(b), and any application for intervention would be untimely, *see, e.g.*, *Stotts v. Memphis Fire Dep't*, 679 F.2d 579 (6th Cir. 1982). Furthermore, Timmon's allegations and claims are baseless, and this Court should deny the motion.

I. CONTROLLING AUTHORITY

Rule 60(b) of the Federal Rules of Civil Procedure authorizes courts to "relieve a party or its legal representative from a final judgment, order, or proceeding." Thus, the "general rule is that one must either be a party or a party's legal representative in order to have standing to bring any Rule 60(b) motion." *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940 (6th Cir. 2013) (internal

[1] Timmon has filed numerous frivolous suits against federal, state, and local officials. *See, e.g.*, *Timmon v. Wood*, No. 09-13763, 2009 WL 3245457 (E.D. Mich. Oct. 2, 2009) (dismissing suit as frivolous); *see also* Mot. to Deem Vexatious Litigant, *Timmon v. S. Fla. Kidney Group*, No. 16-15817 (Fla. Cir. Ct. Jan. 31, 2017) (Ex. 1) (cataloging unsuccessful suits).

quotation marks and citation omitted). A narrow exception exists to address fraud on the court. *See Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980).

Intervention is available only "[o]n timely motion." Fed. R. Civ. P. 24(a), (b)(1). Timeliness incorporates all "relevant circumstances," including:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

United States v. Tennessee, 260 F.3d 587, 592 (6th Cir. 2001) (citation omitted).

II. BACKGROUND

In 2017, the United States filed suit against the City of Eastpointe and local officials, alleging a violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Compl. (ECF No. 1). Earlier this year, this Court denied the City's motion for summary judgment. *United States v. Eastpointe*, 378 F. Supp. 3d 589 (E.D. Mich. 2019). After this Court referred the matter to mediation with the magistrate judge, on June 5, 2019, the parties jointly moved for entry of a consent decree, Mot. to Approve Consent Judgment (ECF No. 61). The proposed

settlement received publicity in all major local papers. *See, e.g.*, Mitch Hotts, *Eastpointe, Justice Department Settle Discrimination Lawsuit*, Macomb Daily (June 4, 2019). At a hearing three weeks later, this Court found that the proposed decree was "a fair, and adequate, and reasonable solution to the issues that were raised in the complaint in this matter, and that the alleged violations of Section 2 of the Voting Rights Act that were acknowledged in the consent decree will be ameliorated according to this plan." Tr. 35:1-5 (June 26, 2019) (Ex. 2). The Court signed and entered the consent decree on June 26, 2019. Consent Decree (ECF No. 64). This Court entered a further order on October 18, 2019, preempting additional aspects of certain state laws. Supp. Order (ECF No. 67). The parties undertook extensive efforts under the decree and their memorandum of understanding to obtain federal and state certification for tabulation systems, to publicize the new voting method, and to resolve technical issues in advance of the November 5 election.

Four months after entry of the decree, and 15 days before the election, Timmon filed a motion seeking an injunction against the use of Ranked Choice Voting ("RCV"); relief against individual Defendants, defense counsel, and a candidate for office; $250,000 in damages; and appointment of counsel. Timmon

Mot. (ECF No. 68). By that time, Eastpointe had already transmitted absentee ballots and made ballots available for in-person absentee voting. *See* Mich. Dep't of State, *November 5, 2019 Election Calendar of Dates* (Ex. 3). Timmon did not seek expedited relief, and on November 5, 2019, Eastpointe conducted its first election under the consent decree. Turnout increased by 48% over the November 2017 election, which included city council races, and more than 78% over the November 2015 election, the most recent to include both city council and mayoral races. Eastpointe voters elected Sarah Lucido and Harvey Curley to four-year city council terms.

III. TIMMON CANNOT OBTAIN NON-PARTY RELIEF FROM JUDGMENT; NOR CAN SHE INTERVENE.

Timmon is not a party to this litigation. Nonetheless, she has filed a document under this docket number, purporting to substitute herself as plaintiff, and attacking the consent decree that governs city council elections in the City of Eastpointe. The motion is best read as a request for relief from judgment, but "a nonparty[] does not qualify for relief under the plain language of Fed. R. Civ. P. 60(b)." *Bridgeport Music*, 714 F.3d at 940. Although this Court could conceivably interpret the filing as incorporating a request for intervention, the motion correctly recognizes that it "may not be timely." Timmon Mot. 11. "If

untimely, intervention must be denied." *Mich. Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981).

A. Timmon Cannot Obtain Non-Party Relief from Judgment.

Timmon is a stranger to this litigation and therefore cannot obtain relief from the consent decree. By its terms, Rule 60(b) only permits this Court to "relieve a party or its legal representative from a final judgment." Fed. R. Civ. P. 60(b). Although the Sixth Circuit has "allowed a nonparty to raise a claim of fraud on the court under Rule 60(b)," *Bridgeport Music*, 714 F.3d at 941 (citing *Southerland*, 628 F.2d at 980), Timmon does not allege—let alone prove—bona fide fraud.[2] Timmon merely charges broad "deceit of federal agencies," Timmon Mot. 7-10, and misrepresents the consent decree. *Compare* Timmon Mot. 11 (alleging that the parties "misled the Court" concerning racial animus), *with* Consent Decree, Order ¶ 2 (noting absence of a claim or finding of intentional

[2] A fraud on the court is conduct "(1) On the part of an officer of the court; (2) That is directed to the judicial machinery itself; (3) That is intentionally false, wil[l]fully blind to the truth, or is in reckless disregard for the truth; (4) That is a positive averment or is concealment when one is under a duty to disclose; [and] (5) That deceives the court." *Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001) (internal quotation marks and citation omitted).

discrimination). Because Timmon is a nonparty who does not fall within a recognized exception to the Rule 60(b) party requirement, this Court should deny the request for relief.[3]

B. Any Implied Request for Intervention Would Be Untimely.

Even if this Court were to construe repeated references to Timmon as "Plaintiff" as a tacit request to intervene, Timmon Mot. 1-2, 4-5, 7, 10-11, the Court should reject intervention. With Eastpointe's first election under the decree already complete, the motion is untimely and should be denied. *See, e.g.*, *Mich. Ass'n for Retarded Citizens*, 657 F.2d at 105.

Intervention at this late hour runs against the five timeliness factors. The first three—the point to which the suit has progressed, the purpose of intervention, and the length of time prior to intervention during which the applicant was aware of the suit—function in a typical manner here. Timmon failed to object after the parties announced the proposed consent decree, and this Court has entered judgment. *See, e.g.*, *Stotts*, 679 F.2d at 582; *Mich. Dep't of Envtl. Qual. v. Ford*

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[3] Other circuits have adopted additional exceptions, but they are also inapplicable. *See, e.g.*, *Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 188 (2d Cir. 2006) (settlement to be used to collect from third party); *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994) (movant in privity with an existing party).

Motor Co., 330 F.R.D. 475, 478-79 (E.D. Mich. 2019). Despite that judgment, Timmon seeks to relitigate both the legality of the remedy and "core premises of the litigation." *United States v. City of Detroit*, 712 F.3d 925, 931 (6th Cir. 2013); *see also Mich. Dep't of Envtl. Qual.*, 330 F.R.D. at 479-80. Moreover, the settlement received substantial publicity months before Timmon filed this motion, and so it would be reasonable to conclude that she "knew or should have known" of the proposed consent decree. *NAACP v. New York*, 413 U.S. 345, 366-67 (1973); *see also, e.g.*, *Stotts*, 679 F.2d at 582-84.

The completed election is also an unusual and extraordinary circumstance, and so the final two factors weigh particularly heavily against intervention. Invalidating a completed contest and recalling voters for a special election "not only disrupt[s] the decision-making process but also place[s] heavy campaign costs on candidates and significant election expenses on local government." *Gjersten v. Bd. of Elec. Comm'rs*, 791 F.2d 472, 479 (7th Cir. 1986). Moreover, "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Timmon failed to challenge the parties' proposed settlement at the June 26 hearing before this Court or in the

months between entry of judgment and casting of the first absentee ballots under consent decree. To do so now would prejudice the parties and the voters of Eastpointe.

Therefore, even if this Court were to construe the non-party request for relief as a motion to intervene, the Court should deny intervention.

IV. THE CONSENT DECREE IS LAWFUL.

Even if this Court were to reach the merits of this motion—and it should not—the arguments have no basis in law or fact. Therefore, this Court should deny the motion in all respects.

Timmon's challenges to the fundamental bases for the consent decree are erroneous. Timmon claims that "Michigan is not a Covered State under any Section of the VRA." However, Section 2 of the Voting Rights Act "is the permanent, nationwide ban on racial discrimination in voting." *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013). Timmon contends that the Voting Rights Act cannot preempt state law because the Act is "obsolete" and the Supreme Court is "on the verge of ruling out VRA laws." Timmon Mot. 7. In fact, the Supreme Court recently noted that "voting discrimination still exists; no one doubts that." *Shelby Cty.*, 570 U.S. at 536; *see also, e.g.*, *Abbott v. Perez*, 138 S.Ct. 2305, 2330-

34 (2018) (recently applying Section 2 to state redistricting plans). Finally, Timmon argues that the election of Councilwoman Owens to the city council in 2017 disproves the fundamental allegations in this case. Timmon Mot. 2, 4. In fact, the Court rejected this exact argument at the summary judgment stage. *See City of Eastpointe*, 378 F. Supp. 3d at 610 (noting "special circumstances").[4]

Timmon also errs in asserting that the City of Eastpointe was required to put any remedy in this case before the voters. Mot. 2-3, 7-8. Following a finding of a Voting Rights Act violation, no referendum or local enactment is necessary to impose a remedy. *See, e.g.*, *Harper v. City of Chicago Heights*, 223 F.3d 593, 597 (7th Cir. 2000); *see also Cleveland Cty. Ass'n for Gov. by the People v. Cleveland Cty. Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) ("[I]f the election plan set forth in the consent decree were intended to remedy an admitted or adjudged violation of the Voting Rights Act, the fact that the Board's actions collided with

[4] In the November 5, 2019 election, Eastpointe voters elected Councilwoman Monique Owens as the City's first black mayor. Owens won by a 19-vote margin, with 32 percent of votes cast, and three white candidates divided 64 percent of the vote. The United States has not analyzed whether this contest was racially polarized.

the state statutory scheme [for restructuring government] would not stand in the way of the plan's implementation."). This is a basic matter of federal preemption.

Finally, Timmon argues that the RCV remedy put in place by this Court violates a panoply of federal laws. Timmon Mot. 6-7. The attacks on the consent decree are uniformly frivolous.

1. RCV does not violate Article 1, Section 2 of the U.S. Constitution, or the one-person, one-vote principle. *See, e.g.*, *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 698 (Minn. 2009) ("No such vote inequality is created by [RCV]."); *Stephenson v. Ann Arbor Bd. of Canvassers*, No. 75-10166 (Mich. Cir. Ct. Nov. 1975) (Ex. 4) (rejecting similar challenge).
2. RCV does not violate the First Amendment. *See Baber v. Dunlap*, 349 F. Supp. 3d 68, 78 (D. Maine 2018) (finding that RCV "encourages First Amendment expression[] without discriminating against any given voter" and declining to find a likelihood of success on a First Amendment claim).
3. RCV does not violate the Fourth Amendment because it does not require "search and seizure of voting documents." Timmon Mot. 6.
4. RCV does not violate the Ninth Amendment, which "does not confer substantive rights." *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991).

5. RCV does not violate the Thirteenth Amendment, which "has only to do with slavery and its incidents." *The Civil Rights Cases*, 109 U.S. 3, 23 (1883).
6. RCV does not violate the Fifteenth Amendment because it is not "motivated by a discriminatory purpose." *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980).
7. RCV does not violate the Nineteenth Amendment because it does not "deny[] the right to vote on grounds of . . . sex." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).
8. RCV does not violate the Civil Rights Act of 1964, because it does not apply differing voter qualification standards, does not deny the right to vote based on immaterial errors or omissions in a registration application, and does not apply a literacy test. *See* Civil Rights Act of 1964 § 101, 52 U.S.C. § 10101(a)(2)-(3), (c), (g).
9. Defendants did not deceive a federal agency as Timmon has claimed in alleging a violation of 42 U.S.C. § 1983. The United States investigated and litigated the Section 2 claim, negotiated the remedy, and jointly moved with Defendants for entry of this consent decree. Mot. to Approve Consent

Judgment. Timmon's claim that the Court needs to hold a further hearing on the remedy is also meritless. This Court already held a hearing on the remedy and only entered the decree after that hearing.

Therefore, if this Court reaches the merits, this Court should find no basis for relief from judgment and deny the motion in full.

V. TIMMON IS NOT ENTITLED TO APPOINTMENT OF COUNSEL.

This Court should also deny Timmon's request for appointment of counsel. Timmon Mot. 11. "[T]he appointment of counsel in a civil case is . . . a matter within the discretion of the court. It is a privilege and not a right." *Childs v. Pellegrin*, 822 F.2d 1382, 1384 (6th Cir. 1987) (internal citation and quotation marks omitted). Although the "court may request an attorney to represent any person unable to afford counsel," 28 U.S.C. § 1915(e)(1), Timmon has not alleged poverty. Nor has she established the "exceptional circumstances" that would justify such a request. *E.g.*, *Bennett v. Smith*, 110 Fed. App'x 633, 635 (6th Cir. 2004). In evaluating a matter for exceptional circumstances, this Court must consider the "probable merit of the claims." *Id.* Timmon's claims are frivolous.

VI. CONCLUSION

For the reasons above, the United States respectfully requests that this Court deny the third-party motion to set aside the Consent Judgment and Decree.

Dated: November 13, 2019

MATTHEW J. SCHNEIDER
United States Attorney
Eastern District of Michigan

/s/ Luttrell D. Levingston
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Washington, DC 20530

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2019, a true and correct copy of the foregoing document was served via the Court's ECF system to all counsel of record.

I further certify that a true and correct copy of the foregoing was also sent via first-class mail to Christine Timmon at 22021 Donald Avenue, Eastpointe, MI 48021.

/s/ Daniel J. Freeman
DANIEL J. FREEMAN
Attorney, Voting Section
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63-4870

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 16-015817 (25)

CHRISTINE TIMMON

Plaintiff,

vs.

SOUTH FLORIDA KIDNEY GROUP

Defendants.

_____/

DEFENDANT, SOUTH FLORIDA KIDNEY GROUP'S, MOTION TO DEEM PLAINTIFF A VEXATIOUS LITIGANT PURSUANT TO FLA. STAT. §68.093 AND REQUIRE PLAINTIFF TO POST SECURITY

Defendant, SOUTH FLORIDA KIDNEY GROUP, by and through their undersigned counsel, hereby files their Motion to Deem Plaintiff a Vexatious Litigant and require Plaintiff to post security, and states as follows:

1. On August 29, 2016, Plaintiff filed her first Complaint against Defendants, wherein the Complaint lists "medical malpractice, negligence, misdiagnosis, medical and prescription errors" in the heading of the Complaint. As mentioned in our Motion to Dismiss filed on October 17, 2016, Plaintiff has failed to comply with Florida Statute 766, and as a result, this Court should dismiss Plaintiff's Complaint with Prejudice.

2. Plaintiff has filed numerous cases in both State and Federal Court, against Defendants that include President Barack Obama, Senator Harry Reid, Speaker of the House John Boehner, Florida Governor Rick Scott, U.S. Congress, multiple federal judges, and the City of Hollywood, which have all been dismissed against Plaintiff.

3. Pursuant to Florida Statute §68.093, a person can be determined to be a vexatious litigant if he/she is "[a] person as defined in s. 1.01(3) who, in the immediately preceding 5-year period, has commenced, prosecuted, or maintained, pro se, five or more civil actions in any court in this state, except an action governed by the Florida Small Claims Rules, which actions have been finally and adversely determined against such person or entity . . ."

4. For this case, Plaintiff should be deemed a vexatious litigant because she is an individual who has represented herself pro se and has filed five or more civil actions in the preceding 5-year period which have been determined against her:

a. *Timmon v. Zweben Schwartz, LLP*, (Case no.: 11-005630-Plaintiff voluntarily dismissed her frivolous Complaint).

b. *Timmon v. Hollywood, Florida City,* (Case no.: 13-027064-Plaintiff's Complaint Dismissed). *See* Court's Order attached hereto as Exhibit 1.

c. *Timmon v. Rick Scott, et al.,* (Case no.: 14-019540-Plaintiff's writ of mandamus Denied). *See* Court's Order attached hereto as Exhibit 2.

d. *Timmon v. Gregoire Loiseau,* (Case no.: 15-005215-Plaintiff's Petition for Injunction/Stalking Denied);

e. *Timmon v. John Mar III LLCII,* (Case no.: 15-017110-Plaintiff voluntarily dismissed her frivolous Complaint after Defendant filed Motion to Dismiss). *See* Voluntary Dismissal attached hereto as Exhibit 3.

5. In addition to the above-mentioned Florida cases, the Plaintiff has also filed eight (8) cases in federal court within the past five (5) years which were resolved against her interests. The plaintiff's eight (8) federal cases include the following:

a. *Timmon v. John Boehner, Harry Reid, and President Barak Obama* (filed on

November 15, 2012-Plaintiff's Complaint was dismissed with prejudice). *See* Court Order attached hereto as Exhibit 4.

b. *Timmon v. United States Government* (filed on December 17, 2012-Plaintiff's Complaint Dismissed). *See* Court's Order attached hereto as Exhibit 5.

c. *Timmon v. Governor Rick Scott* (filed on February 11, 2013-Plaintiff's Complaint Dismissed with prejudice). *See* Court's Order attached hereto as Exhibit 6.

d. *Timmon v. Rick Scott, Dan Gaetz, and Will Weatherton* (filed October 1, 2014-Plaintiff's Complaint Dismissed). *See* Court's Order attached hereto as Exhibit 7.

e. *Timmon v. President Barack Obama and U.S. Congress* (filed on December 29, 2014-Plaintiff's Complaint Dismissed). *See* Court's Order attached hereto as Exhibit 8.

f. *Timmon v. Judge James Cohn, Judge Seltzer, and Judge Marcus* (filed on December 30, 2014-case "terminated").

g. *Timmon v. President Barack Obama* (filed on January 7, 2016-case "terminated").

h. *Timmon v. South Florida Kidney Group Insurance* (filed August 5, 2016-Plaintiff's §Complaint dismissed with Prejudice). *See* Court's Order attached hereto as Exhibit 9.

6. As discussed in Plaintiff's Motion to Dismiss Plaintiff's Complaint, Plaintiff is not likely to prevail on the merits of her action against this Defendant.

WHEREFORE, Defendant, SOUTH FLORIDA KIDNEY GROUP, hereby respectfully requests this Honorable Court to Deem Plaintiff a Vexatious Litigant Pursuant to Fla. Stat. §68.093, require Plaintiff to post security for the reasonable amount of fees and expenses for Defendant to defend this frivolous case (the specific amount to be determined by the Court separately), and grant such other relief this Honorable Court deems equitable and just under the circumstances.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by USPS Regular Mail and by UPSP Certificate Mail/Return Receipt Requested on January 31, 2017, to: Christine Timmon, Pro Se Plaintiff at 820 NW First Avenue, Apartment #7, Fort Lauderdale, Florida 33311.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

— — —

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 17-10079
Hon. Terrence G. Berg

CITY OF EASTPOINTE; EASTPOINTE CITY COUNCIL; SUZANNE PIXLEY, in her official capacity as Mayor of Eastpointe; CARDI DEMONACO JR., MICHAEL KLINEFELT, SARAH LUCIDO, and MONQIUE OWENS, in their official capacities as members of the Eastpointe City Council; and JOSEPH SOBOTA, in his official capacity as Eastpointe City Clerk,

Defendants.
_____/

JOINT MOTION TO APPROVE CONSENT JUDGMENT

BEFORE THE HONORABLE TERRENCE G. BERG
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Wednesday, June 26, 2019

APPEARANCES:

For the Plaintiff: DANIEL J. FREEMAN
LUTTRELL LEVINGSTON
GEORGE EPPSTEINER
U.S. Department of Justice

For the Defendant: ROBERT D. IHRIE
RICHARD S. ALBRIGHT
Ihrie O'Brien

Is there any response, Mr. Freeman? Or is there anything that any other attorney would like to add?

MR. FREEMAN: No response from the government, Your Honor, other than to provide a couple citations to the extent that Your Honor is interested in materials concerning the effectiveness of ranked-choice voting to remedy Section 2 violations given Your Honor's interest in that.

There is an article at 77 North Carolina Law Review 1867, Steven Mulroy, Alternative Ways Out, and an article by Dr. Richard Engstrom called the Single Transferable Vote, which is at 27 University of South Florida Law Review 779, and those which also describe the effectiveness of a variety of modified at-large systems including ranked-choice voting to cure vote dilution under Section 2. Thank you, Your Honor.

THE COURT: All right. Thank you. If I -- I was trying to write those down, but if you could also make sure you give those citations to Ms. Matejcek that would be great.

All right. Well, in this matter the parties have submitted to the Court a proposed consent decree which would resolve the case and that would effect the future method for voting in the City of Eastpointe, and I have carefully reviewed the consent agreement between the parties, and I have also carefully reviewed the consent judgment and decree.

I am going to enter the consent judgment. I do

find that it is a fair, and adequate, and reasonable solution to the issues that were raised in the complaint in this matter, and that the alleged violations of Section 2 of the Voting Rights Act that were acknowledged in the consent decree will be ameliorated according to this plan. That is the intent of the plan, and that's the belief of both parties that have indicated to the Court that that is the reason that they are asking for this consent decree to be entered, and so that will be the ruling of Court.

Now, I will have that entered today so you can go forward with your planning.

I do want to emphasize again what I said before that I think that the attorneys on this case, on both sides, should be commended for the work that they have done, for the attitude, and for the professionalism that they have displayed. I think that both sides have acquitted themselves in the highest possible honor of our profession, and have -- through their approaching this with that kind of commitment to really doing the right thing, and seeing their job as not only simply representing what might be the initial reaction of a client, but also seeing the needs of the public, acknowledging the changing demographics that both sides have referenced during their presentations today and their commitment to ensure that the vote of each citizen has meaning and is actually able to effect the development of

their community.

As I say, I think it is very positive. Sometimes in court we will see behavior of attorneys which is not inspiring, but this is an example of behavior of attorneys that is inspiring, and I want to thank you for all of that.

All right. Thank you very much. If there is nothing further, we can be adjourned. Is there anything further?

MR. IHRIE: Nothing, Your Honor.

MR. FREEMAN: No.

THE COURT: All right. Thank you very much.

THE LAW CLERK: All rise. The Court is in recess.

(Proceedings concluded at 11:02 a.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of U.S.A. vs. City of Eastpointe, et al., Case No. 17-10079, on Wednesday, June 26, 2019.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 07/24/2019

Detroit, Michigan

STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

NOVEMBER 5, 2019 ELECTION

CALENDAR OF DATES

By 4:00 p.m., July 23	Partisan and nonpartisan candidates file nominating petitions and Affidavits of Identity. (168.644e) Withdrawal deadline elapses at 4:00 p.m. on July 26.
By 4:00 p.m., July 23	Minor parties that wish to participate in partisan general elections nominate candidates. Parties must notify clerk of nominated candidates within one business day after caucus (Party must have state recognized ballot status.) (168.644e)
By July 29	Local clerk forwards names and addresses of partisan and nonpartisan candidates to county clerk. (168.321)
By 5:00 p.m., July 30	Petitions to place proposals on ballot filed with county and local clerks. (168.646a)
By 5:00 p.m., August 2	Last day a recall petition can be filed for November election. (Local offices only face recall in May & November.) (168.963)
By 5:00 p.m., August 7	Candidates without political party affiliation who seek a partisan office file qualifying petitions and Affidavits of Identity. (168.590c) Withdrawal deadline elapses at 4:00 p.m. on August 12.
By 4:00 p.m., August 13	Ballot wording of proposals qualified to appear on ballot certified to county and local clerks. (168.646a)
By August 15	Local clerk forwards names and addresses of candidates without political party affiliation who seek a partisan office to county clerk. (168.321)
By September 21	Clerks shall electronically transmit or mail (as requested) an absent voter ballot to each absent UOCAVA (uniformed services or overseas) voter who applied for an absent voter ballot 45 days or more before the election (MOVE deadline.) (168.759a)
By September 21	Absent voter ballots must be available for issuance to voters. (168.714)

September 26 through October 15	Precinct inspectors appointed by local election commission for election. (168.674)
By October 7	Notice of voter registration for general election published. One notice required. (168.498*)
By October 7	Clerk shall post and notify the Secretary of State of hours the clerk's office will be open on the Saturday or Sunday or both immediately before the election to issue and receive absent voter ballots. (168.761b*)
By October 7	Clerk shall post and notify the Secretary of State of any additional locations and hours the clerk will be available to issue and receive absent voter ballots, if applicable. (168.761b*)
October 21	Last day to register in any manner other than in-person with the local clerk for the November election. (168.497*)
October 22 through November 5	In-person registration with the local clerk with proof of residency. (168.497*)
By 4:00 p.m., October 25	Write-in candidates file Declaration of Intent forms for election. (168.737a)
By October 29	Notice of election published. One notice required. (168.653a)
By October 31	Public accuracy test must be conducted by local election commission. (R 168.778) Notice of test must be published at least 48 hours before test. (168.798)
Up to 5:00 p.m. November 1	Electors may obtain an absent voter ballot via First Class mail. (168.759*)
Up to 4:00 p.m. November 4	Electors may obtain an absent voter ballot in person in the clerk's office. (168.761*)
Up to 4:00 p.m. November 5	Emergency absentee voting for general election. (168.759b)
November 5	Election day registrants may obtain and vote an absent voter ballot in person in the clerk's office or vote in person in the proper precinct. (168.761*)
November 5	**ELECTION**
Before 11:00 a.m., November 6	Local clerk delivers results of general election to county clerk. (168.809)
By 9:00 a.m. November 7	Boards of County Canvassers meet to canvass election. (168.821**)

* These sections were amended by 2018 PA 603 and are not yet available on the Legislature's website.

** 2018 PA 614 changes the start of the county canvass for every election to no later than 9 a.m. on the Thursday after the election.

Legislative & Legal Resources

- **Statutory Language**
- **Legislation**
- **Ballot Questions**
- **Resolutions**
- **Testimony**
- **Legal Guidelines & Litigation**
- **Montgomery County, MD, Vacancies Lobbying Packet**

IRV in the News...

Right to Vote Initiative

IRV America

Program for Representative Government

Presidential Election Reform Program

Democracy SoS

Voting & Democracy Research Center

Stephenson v Ann Arbor Board of Canvassers

November 1975

[Actual charter language that was the subject of this court case]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

JAMES E. STEPHENSON,
Plaintiff,

FILE NO. 75—10l66 AW

ANN ARBOR BOARD OF CITY CANVAS-
SERS and JEROME S. WEISS,
Defendant,

V

ALBERT H. WHEELER, JAMES M. DAHL,
DOROTHY L. CAHN, MARJORIE C. BRAZER,
LeROY CAPPAERT, DEBORA H. FREEMAN,
MARY HELEN S. GILBERT, CHESTER FELDMAN
and HENRIETTA FELDMAN, individually
and as a Class,
Intervening Defendants.

OPINION OF THE COURT

The City of Ann Arbor, Michigan, on April 7, 1975 held an election for the offices of Mayor and City Councilman. The election of council persons was determined by the plurality system of voting, i.e., the candidate with the most votes was declared the winner.

The Mayor's race was conducted pursuant to a duly adopted Charter Amendment, Section 13.12(b), Ann Arbor City Charter, where by a "Preferential Voting System" was employed. This particular type of preferential voting has been termed the "Ware System" or "Majority Preferential Vote" also referred to as the "M.P.V. System." [1]

The Ann Arbor voters in the November 5, 1974 general election added Section 13.12(b) to their City

Charter. The amendment was adopted by a majority of the voters.

Under the "Ware System" of preferential voting, where there are two or more candidates for the office in question, the voter has the right to indicate on his paper ballot, a first and second choice or as many choices in a descending numerical order as there are candidates. If five candidates were listed on the ballot, then each voter would have the right to indicate by number, his or her first, second, third, fourth and fifth choice. The ballot explanation informed the voter to mark his first choice with the number "1", and his second choice with a number "2" and third choice with a number "3" (Ballot, Exhibit No Two).

Thus, the voter indicated by number who his or her next selection would be if his or her first choice was not in the race, or was eliminated from the race under the "Ware" or "M.P.V. System."

Under the "Ware" or "M.P.V. System" as is set forth in the Ann Arbor Charter Amendment, the candidate with the lowest number of votes is dropped or eliminated from consideration (where there are three or more candidates) and the second choice preferences from the ballots cast for the eliminated candidate, are then counted and distributed to the remaining candidates according to the second indicated preference on each ballot.

In the April 7, 1975 Ann Arbor Mayoria1 election, there were three candidates listed on the paper ballots. They were Carol Ernst, James E. Stephenson and Albert Wheeler.

The results of the election were as follows:

First Preference Votes for Stephenson 14,453
First Preference Votes for Wheeler 11,815
First Preference Votes for Ernst 3,181
First Preference votes for Miscellaneous
Write-in Candidates 52

Total Valid First Preference Votes 29,501

No Candidate, whether listed on the paper ballot or by write-in vote received a majority of the valid votes cast as required by the Ann Arbor Charter Amendment.

Following the procedures outlined in the Charter Amendment, write-in candidates, and the ballot candidate with the least number of votes (Ernst) were dropped or eliminated, and the second choice votes wherein they were "First Preference" were counted and distributed among the remaining candidates. Note that because some voters elected not to exercise the option of choosing a second preference, the total number of Va1id countable votes was 29,262.

That count of the "Second Preference" Votes from the Ernst ballots and distribution of them among the two candidates resulted in the following vote totals:

Wheeler 14,684
Stephenson 14,563

In view of the fact that the Charter Amendment required that a majority of the total countable vote was necessary in order for a candidate to be elected, and the total countable vote being 29,262, a majority of the vote was 14,631 plus one, or 14,632.

Candidate Wheeler having received 14,684 votes, after the second preference choices were counted from the eliminated candidate's ballots, thus received a majority of the valid countable votes cast and was declared the winner.

Plaintiff Stephenson brought suit, challenging the Constitutionality of the Preferential Voting system established by the Charter Amendment. As part of that action, Plaintiff Stephenson seeks in a Motion for Summary Judgment, a declaration by this Court, that the Charter Amendment is unconstitutional because it violates the equal protection clauses of the 14th Amendment to the Constitution of the United States, and Article 1, Section II, of the Michigan Constitution of 1963.

For purposes of the summary judgment motion the parties hereto agreed that no genuine issue of fact exists, only issues of law. The Court agrees that no genuine issue of fact is before it for consideration and the issue is one of law as raised by the pleadings. Pending decision on this motion, the Court stayed a recount filed by the Plaintiff Stephenson.

The City of Ann Arbor has the duty to insure equal protection of the franchise right to each voter. The equal protection clause of the Fourteenth Amendment to the U.S. Constitution so mandates now that political subdivisions are brought within its coverage by decision of the United States Supreme Court. Avery v Midland County, 390 US 474, 88 S Ct 1114; 20 L Ed 45 (1968).

The equality of voting effectiveness is safeguarded by this Amendment. Reynolds v Simms, 374 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964); Wesberry v Sanders, 376 US 1; 84 S Ct 526; 11 L Ed 481 (1964).

The Michigan Constitution of 1963 additionally guarantees equal protection of the law. Article I, Section 2. And that guarantee likewise extends to the voting franchise.

In view of these provisions and the U.S. Supreme Court interpretation of the guarantees therein provided, does the City of Ann Arbor's Preferential Voting System for the office of Mayor afford equal protection to each voter?

If so, then the Charter Amendment providing for the Preferential Voting System is constitutional. If not, it is unconstitutional. The Michigan Constitution provides that a City has the power and authority to frame, adopt and amend its charter. Article VII, Section 22.

Under the Home Rule Act, MCLA 117.3; MSA 5.2073(a) voting in a municipal election may be partisan, nonpartisan or preferential ballot, or by any other legal method of voting.

The Michigan Statutes do not provide a definition of preferential voting, and only in this oblique manner is mention made of preferential voting. Nevertheless, because preferential voting is authorized in the Home Rule, a form of preferential voting is permissible under that enabling Act.

The voters of the City of Ann Arbor by majority vote November 5, 1974, decided that a form of preferential voting in the Mayorial Contest should be a part of that City's Charter. There is no question that this Charter amendment was adopted in a proper manner and is a part of the Charter and must, therefore, be followed unless the method of preferential voting employed creates inequities and inequalities among the voters and runs afoul of the equal protection guarantees.

The crux of Plaintiff Stephenson's claim of unconstitutionality is that preferential voting under this Charter amendment creates a classification that restricts the franchise of certain voters and thus treats them unequally.

This claimed classification results from certain voters having their second choice ballots counted while the second choice of other voters whose candidate remains in the race, are not so counted. This creates separate classes of voters and affords the vote of some, more weight than others, Plaintiff asserts.

Plaintiff claims there is no "compelling state reason or interest" for creating such classifications, that would render this preferential voting system constitutional.

In Hill v Stone, 95 S Ct 1637 (1975) , 43 LW 4576, and Kramer v Union Fill School District, 395 OS 621, 89 S Ct 1886 (1969), the U.S. Supreme Court stated that a classification may not restrict the franchise on grounds other than residence, age and citizenship unless a compelling state interest was shown.

An examination of these cases reveals classifications of voting rights based on ownership versus nonownership of real property and apportionment of voting districts. Nothing in the Charter Amendment itself speaks to classifications of voters as in the aforecited cases. The Charter Amendment does not discriminate patently or latently against some segment of voters.

All voters for the office of Mayor possessed the same rights that is, the right to, or right not to, select and list their preferences in numerical order.

All voters possessed the right at the same time (election day) to decide who their second choice etc., candidate would be if their first choice were eliminated from the race.

No voter was restricted in his right. Each voted with this same understanding that his second and third choice preferences could be counted if his or her first choice was the candidate with the least number of votes.

No classification was established by the Charter Amendment or City of Ann Arbor to discriminate

against any voter or group of voters--all voters possessed the same rights.

Whatever classification that could be said to have existed, created itself, when a voter had his or her first choice candidate eliminated from the race for having the lowest number of votes after it was ascertained that no candidate possessed a majority of the total vote.

In that context, the second preference vote of a voter became viable as his first preference was eliminated from consideration.

That voter in substance still has only one vote that is counted, his or her first choice having been eliminated. His second preference vote is counted the same as the votes for the first two candidates. Such a voter does not have his vote counted twice--it counts only once and if that first preference no longer remains and is eliminated from consideration, his or her second preference is the "counted" vote. Voters for the top two candidates still have their vote counted for their first choice.

There is no deliberate scheme or practice that classifies voters under this system of voting. Each voter has the same right at the time he casts his or her ballot. Each voter has his or her ballot counted once in any count that determines whether one candidate has a majority of the votes. Each voter has the same opportunity as the next voter in deciding whether or not to list numerical preferences for his or her candidate and has the same equality of opportunity as any other voter if his or her candidate is eliminated as the lowest vote-getter, and his or her second choice preference becomes the viable vote.

This Court further finds nothing unconstitutional in the Charter Amendment that requires the winning candidate to have a majority of the votes cast in an election for the office of Mayor. Much has been said and written on the subject of a winning candidate for office, assuming that office with the backing (by votes) of less than a majority of those voting. Who can say that the voters of Ann Arbor do not know what they want, by their mandate that the Mayor of the City be elected by a majority of the voters. Far better to have the People's will expressed more adequately in, this fashion, than to wonder what would have been the results of a run-off election not provided for.

The fact that the Charter Amendment in question consolidates two elections into one, does not of itself create a classification nor discriminate against any group of voters. It possesses a monetary savings to the municipality in question and is not a factor to be overlooked.

Basic to all, is the right of self determination by the Ann Arbor voters. Their Charter Amendment was voted into effect by a majority of those voting November 5, 1974. The fact that "Ware" or preferential voting system is "different" from the system of voting we have come to know in this State, does not affect its validity.

This Court finds no classification of voters or their rights, created under this system of preferential voting, as the U.S. Supreme Court found in Hill v Kramer, supra.

Under the Michigan Constitution, Article VII, Section 22, the City of Ann Arbor has "the power and authority to frame, adopt and amend its charter". The provisions of Michigan's Constitution as concerns municipalities are to be liberally construed, in their favor, Section 34.

Thus, it is clear that the City of Ann Arbor could and did amend its charter to provide for a system of voting permitted by state statute, MCLA 117.3; MSA 5.2073(a). So long as that system of voting meets constitutional requirements, however "different" it may seem to some, it is a permissible form of voting.

Examined from every angle and tested against the standards of Hill v Stone, supra, this Court finds no classification or suspect classification of voters or their rights that would violate the equal protection clauses of either the United States or Michigan Constitutions. Nor can there be found any infringement of a fundamental right of any voter of the City of Ann Arbor in the exercise or operation of this voting system. All voters possess the same right to vote, to list numerical preferences and are subject to the same possibility of having their first preference eliminated and second or third etc., preference then counted in order to achieve the election of their Mayor by a majority of the total countable votes cast in the election.

The Court also finds no merit to Plaintiff's claim that certain voters have an opportunity to change their minds and their votes while others do not have that right under this "M.P.V." System. Each voter has an equal opportunity and right at the time he or she casts his or her ballot election day. The fact that each person voting lists different orders of preference does not mean that some voters have greater rights than others. Each voter is on an equal footing with the next voter as to whether his first preference, second preference etc. will remain in the "elimination process". It is the equal right to list preferences and the equal opportunity to be eliminated or to stay in the running that accords each voter the same rights, not the possibilities of whose first or second preference may or may not stay in the counting. Each voter is given the same rights at the same time, that is, the time of casting his or her ballot. It is then that a voter may "change his or her mind" by consciously deciding who his or her first, second or third preference is for the office of Mayor. Thus, at the time of vote casting, each voter who chooses to make more than one preferential selection, in effect exercises his or her mental process of changing his or her mind, as the voter decides that a certain candidate meets his tests for Mayor in the event his or her first choice does not remain in the the running. This Court finds no constitutional infringement or prohibition against changing one's mind in this fashion, inasmuch as each voter is given the same right to do so at the same time and each voter's ballot is given the equal right to

be counted in the same manner as any other voter's ballot. Each voter has the same rights as the next one. Nothing in the "M.P.V." system weighs one voter's rights over the other. The M.P.V. system, thus has the same effect as a run-off election, except that it consolidates it into one election.

Plaintiff has failed to demonstrate any true classification restricting the franchise of certain voters. Even if such a classification were found, this Court finds that a compelling state interest exists that would permit a classification in vote counting under such a M.P.V. system, as the City of Ann Arbor provides in its charter. The State does possess a great interest in speedy determination of elections, reduced election costs, involvement of a greater base of voters, affording greater voice in government by minorities and having the elected officer-holder be one who is the choice of a majority of the voters.

The argument by Plaintiff that the M.P.V. system employed here, violates the "one-man, one-vote" requirement of Baker v Carr, 369 US 186; B2 S Ct 691; Reynolds v Simms, supra, and Wesberry v Sanders, supra, likewise fails when the tests of those cases are applied to the manner and method this M.P.V. system employed to determine the winner. Again, each voter is given the same equal opportunity at the time he or she casts his ballot. His or her vote is not "weighed differently" from any other votes in the election. Each voter will have one of his or her preferences counted if he or she elects to make more than one preference. The fact that a few voters may decide not to make more than one preference does not render the system unconstitutional. It is a choice or right possessed that the voter may or may not exercise.

To count every second preferential vote as Plaintiff urges, would make the system self-defeating and in essence would encourage voters not to make a second or third choice, since it would work to defeat that voter's first choice. In "M.P.V.", the second choice of a voter is not counted unless his or her first choice is eliminated from the election first.

An examination of the one-man, one-vote cases discloses that the Court was concerned with certain voter's votes being weighted more than other voters. A voter in one district would have one vote for a particular office while a voter in another district would have two votes for a similar office in the same Representative Body, due to the second voting area only having half the population of the first area. This situation violated equal protection rights guaranteed to all voters under the United States Constitution. What violated equal protection there, was the inequitable effect of giving some voters two votes and other voters only one vote for their representative to the same representative body.

Under the "M.P.V. System", however, no one person or voter has more than one effective vote for one office. No voter's vote can be counted more than once for the same candidate. In the final analysis, no voter is given greater weight in his or her vote over the vote of

another voter, although to understand this does require a conceptual understanding of how the effect of a "M.P.V. System" is like that of a run-off election. The form of majority preferential voting employed in the City of Ann Arbor's election of its Mayor does not violate the one-man, one-vote mandate nor does it deprive anyone of equal protection rights under the Michigan or United States Constitutions.

Plaintiff cited Wattles Ex Rel Johnson v Upjohn, 211 Mich 514, 179 NW 335 as authority for its claim that Preferential Voting is unconstitutional. While Wattles was decided under the 1908 Michigan Constitution, the crux of the matter is that the facts in the present case are clearly distinguishable from Wattles. In Wattles, the Court was dealing with a multiple office situation involving proportional representation. The Preferential System employed was the "Hare" System, which is clearly different from the "Ware" or "M.P.V." System used in Ann Arbor.

This difference is well set forth in Representation of Minorities In An At Large Election in City and Village Governments under Michigan Law, by Leon H. Weaver, M.S.U., at pages 43-47.

Likewise, in Maynard v Board of Canvassers, 84 Mich 228; 47 NW 756, the system of voting struck down by the Court was not the "Ware" or "M.P.V. System" but a cumulative voting system that clearly violated equal protection of voting rights. See also 29 C.J.S. Elections, page 53.

The Michigan Courts, heretofore, have not ruled on the constitutionality of the "Ware" or "Majority Preferential Voting" system as was employed by the City of Ann Arbor in its Mayorial race.

For the reasons set forth herein, and because of the obligation of this Court to scrutinize carefully any attack on the constitutionality of a State statute and self-determination rights this Court finds and determines the "Ware" or "Majority Preferential Voting" System as adopted and employed in the Ann Arbor Mayorial race to be constitutional and not violative of the equal protection clauses of the United States or Michigan Constitutions.

Accordingly then, the Summary Judgment Motion of the Defendants herein is granted and the Summary Judgment Motion of the Plaintiff is denied.

Counsel for the Defendant, Albert H. Wheeler et al shall within 10 days prepare the Judgment pursuant to this Opinion and have the same approved as to form by counsel for the Plaintiff and present the same to the Court for signature. In the event of disagreement or failure to agree upon the form of the Judgment settlement of it shall be noticed for hearing within the same period of time.

This being a question of public import and precedent, no costs or attorney fees are awarded Either party.

James G. Fleming
Circuit Judge

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[1] "The Majority Preferential Vote in Michigan Cities", an unpublished article by Dr. Leon H. Weaver, Michigan State University, East Lansing, Michigan.