UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD AGEE, JR. et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

Case No. 1:22-CV-00272-PLM-RMK-JTN

MOTION OF THE MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR A STAY PENDING APPEAL

EXPEDITED CONSIDERATION REQUESTED

On December 21, 2023, the Court held that several of Michigan's house and senate districts violate the Equal Protection Clause, and it enjoined future use of those districts. *See* Opinion and Order, Doc.131, at 114, PageID.4817. After the holiday weekend, the Commission met on December 28, 2023, to confer with counsel and vote on whether to appeal. Three members of the Commission had resigned, and the Commission was unable to retain a quorum in time to vote. The constitutionally prescribed process of selecting replacement commissioners progressed, three new members were selected, they were sworn in on January 4, 2024, and the next act of the Commission was to vote to direct the undersigned counsel to appeal and seek a stay of the Court's injunction. The Commission has filed its notice of appeal and now moves for a stay of the Court's injunction pending appeal pursuant to Fed. R. Civ. P. 62.

This Court is the proper forum for the Commission to file an initial stay motion. *See* Sup. Ct. R. 23.1. While that process places a losing litigant in the unenviable position of attempting to convince the tribunal that just ruled against it to stay that ruling, the Commission respectfully notes that, in this rule, it is "fairly contemplated" that "tribunals

may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844–45 (D.C. Cir. 1977). The Court should carefully weigh that approach here. In the most recent racial-gerrymandering litigation to reach the Supreme Court, the three-judge district court—although it denied a stay request—altered its remedial plans and determined it would not "proceed with consideration and adoption of a remedial plan during the pendency of any appeal before the United States Supreme Court," which afforded the functional equivalent of a stay. *S.C. Conference of the NAACP v. Alexander*, No. 3:21-cv-03302, ECF No. 501, at 2 (D.S.C Feb. 4, 2023). This Court should stay its injunction for reasons outlined in the brief below. However, if it is not inclined to do so, the Commission respectfully requests that it promptly deny this motion to permit the Commission to renew its application for a stay in the Supreme Court.

Dated: January 4, 2024

Respectfully submitted,

/s/ Nathan J. Fink

FINK BRESSACK
David H. Fink (P28235)
Nathan J. Fink (P75185)
38500 Woodward Ave., Suite 350
Bloomfield Hills, Michigan 48304
(248) 971-2500
dfink@finkbressack.com
nfink@finkbressack.com

/s/ Richard B. Raile

BAKER & HOSTETLER LLP
Katherine L. McKnight
E. Mark Braden
Richard B. Raile
Dima J. Atiya
1050 Connecticut Ave., NW, Suite 1100
Washington, D.C. 20036
(202) 861-1500

kmcknight@bakerlaw.com
mbraden@bakerlaw.com
rraile@bakerlaw.com
datiya@bakerlaw.com

BAKER & HOSTETLER LLP
Patrick T. Lewis
127 Public Square, Suite 2000
Cleveland, Ohio 44114
(216) 621-0200
plewis@bakerlaw.com

Counsel for Defendants, Michigan Independent Citizens Redistricting Commission, Juanita Curry, Anthony Eid, Rhonda Lange, Steven Terry Lett, Brittni Kellom, Cynthia Orton, Rebecca Szetela, Janice Vallette, Erin Wagner, Richard Weiss, Elaine Andrade, Donna Callaghan, and Marcus Muldoon, each in their official capacities as Commissioners of the Michigan Independent Citizens Redistricting Commission[1]

[1] Commissioners M.C. Rothhorn, Douglas Clark, and Dustin Witjes, who are listed in the official caption, resigned their positions and were replaced "automatically" by their successors Elaine Andrade, Donna Callaghan, and Marcus Muldoon under Federal Rule of Civil Procedure 25(d).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD AGEE, JR. et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

Case No. 1:22-CV-00272-PLM-RMK-JTN

BRIEF IN SUPPORT OF MOTION OF THE MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR A STAY PENDING APPEAL

ARGUMENT

A stay pending resolution of a direct appeal is a well-established remedy in redistricting cases. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 974 (2018); *Abbott v. Perez*, 138 S. Ct. 49 (2017); *North Carolina v. Covington*, 137 S. Ct. 808 (2017); *Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v. Johnson*, 512 U.S. 1283 (1994); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers). Under the "traditional" standard for a stay pending appeal, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation omitted). Because the right of appeal from this Court's injunction is to the Supreme Court, 28 U.S.C. § 1253, a renewed stay motion will be (if necessary) presented there and will be subject to a modified standard, requiring that "an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to [note probable jurisdiction]; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay."

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam); *see also Karcher*, 455 U.S. at 1305–06. As shown below, both standards are satisfied.

1. There is a reasonable probability that the Supreme Court will note probable jurisdiction on the question whether the enjoined districts are narrowly tailored to §2 compliance and a fair prospect that a majority of the Court will vote to reverse. This case falls within a right of direct appeal, so the Supreme Court will note probable jurisdiction, unless "the questions are so insubstantial as not to justify hearing argument." Stephen M. Shapiro, et al., Supreme Court Practice, § 7-11, p. 7-29 (11th Ed. June 2019).

Recognizing that its equal-protection and Voting Rights Act jurisdiction create the risk of "competing hazards of liability," the Supreme Court has "assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed." *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (citation omitted). The predominant use of race in structuring a voting district is justified if it "is narrowly tailored" to VRA compliance, which occurs where "the State has 'good reasons' for believing that its decision is necessary in order to comply with the VRA." *Id.*

In this case, the Court's findings of fact describe a process of narrow tailoring to VRA compliance. Early draft plans included Detroit-area districts with very high Black voting-age populations (BVAPs), even exceeding 70%, neighboring districts with very low BVAPs, even falling below 20%. *See, e.g.*, Opinion and Order, Doc. 131, 14, 20, 26, 34 PageID.4717, PageID.4723, PageID.4729, PageID.4735, PageID.4737; *see also* Comm'n Post-Trial Br. 29–30, PageID.4025–26. The Commission was presented with a polarized voting analysis indicating that voting is racially polarized in the region and that districts falling below certain BVAP levels (around 35%) would not afford Black voters an equal opportunity to elect their

preferred candidates. *See* Comm'n Post-Trial Br. 29, PageID.4025. The very low-BVAP districts were likely "cracked" and the very high BVAPs were "packed," and the Commission was warned of §2 liability. Opinion and Order 12, PageID.4715. In areas marked by racial bloc voting, high minority-VAP districts neighboring low minority-VAP districts present a classic scenario of §2 liability. *See, e.g.*, *Georgia State Conf. of the NAACP v. Georgia*, No. 121-cv-05338, 2023 WL 7093025, at *11 (N.D. Ga. Oct. 26, 2023) (finding "cracking" and "packing" where 60% BVAP district neighbored 18.5% BVAP district); *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp.3d 1229, 1284 (M.D. Fla. 2022) (finding equal-protection violation based on "packing" and "cracking" where majority-white districts neighbored majority-Black districts). The Commission's concern was therefore not "highly speculative." Opinion and Order 113, PageID.4816.

The Commission had good reasons to think all three *Gingles* preconditions were met, which is the standard the Supreme Court has set for the narrow-tailoring inquiry. *See Cooper v. Harris*, 581 U.S. 285, 302 (2017). The Court did not find that any of the *Gingles* preconditions was not met on the Commission's record. The Detroit-area Black population is sufficiently compact to compose a majority in single-member districts, and the Commission was presented with a polarized voting analysis showing bloc voting in general elections that would likely arise to legally significant levels in districts below 35% BVAPs. Comm'n Post-Trial Br. 28, PageID.4024. And the Court's findings of fact demonstrate a tailored effort to remedy the likely §2 problem: BVAPs came up in districts where it was low and down in districts where it was high. *See, e.g.*, Opinion and Order 32, PageID.4735. That is a narrowly tailored use of race.

The Commission avoided pitfalls that ensnared prior legislative bodies, such as shooting for a majority-minority target based on an erroneous reading of the majority-minority rule in *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009), *see Cooper*, 581 U.S. at 303, or relying on prior BVAP percentages lacking basis in analysis of any kind, *see Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 276–77 (2015). The Commission looked to the "evidence" presented by a renowned political scientist, *Cooper*, 581 U.S. at 306, and used an analysis of Black cohesion, white crossover voting, and turnout to guide the range of convergence to which low-BVAP districts would rise and high-BVAP districts would fall. The problem is not "that BVAPs above 35-45% in these districts would amount to 'packing,'" Opinion and Order 112, PageID.4815, but that districts of substantially higher BVAPs next to districts with substantially lower BVAP would amount to "packing" and "cracking" and that—to remedy this—BVAPs would have to converge on *some* BVAP figure, range, or target. The legal question is how that should be derived.

The Court's suggestion that "a *majority*-minority" rule should dictate that decision, *id.* at 113, PageID.4816, suggests the same erroneous reading of *Bartlett* rejected in *Cooper* and stands in tension with *Alabama*, and *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178 (2017). And its determination that primaries (not general elections) should control the analysis did not address the Commission's strong basis for concluding that primary elections could not provide a strong basis in evidence for racial maneuvers of any kind, *see* Comm'n Post-Trial Br. 31–32, PageID.4027–28, or cite any precedent finding that an error of that nature, in circumstances like these, could deprive a redistricting authority of a strong basis in evidence where general-election data revealed a severe risk of §2 liability. Finally, because "States retain broad discretion in drawing districts to comply with the mandate of § 2," the

Commission also enjoyed the benefit of choosing which of multiple different views of how that mandate could be fulfilled to apply. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429 (2006) (citation omitted).

The Commission has the best of reasons to seek the Supreme Court's review of this question of law. The Supreme Court has warned not to demand "too much from state officials charged with the sensitive duty of reapportioning legislative districts." *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 195 (2017). The Supreme Court has never addressed the narrow-tailoring question in a case where a redistricting authority had compiled as thorough a body of analysis as the Commission did, and it therefore is likely to note probable jurisdiction. And given its direction to redistricting authorities to measure turnout and white crossover voting in determining an appropriate §2 goal, *see Cooper*, 581 U.S. at 304–05 & n.5, and its direction to lower courts not to require authorities to "determine *precisely* what percent minority population" a district needs to perform, *Bethune-Hill*, 580 U.S. at 195, there is more than a fair probability that five members of the Court will agree with the Commission. The likelihood-of-success element is met, as are the first two factors applied in Supreme Court stay applications.

2. The irreparable-harm element is satisfied as a matter of law, given that "the [State's] inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *see also Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions."). The Michigan

Constitution vests vindication of this interest in the Commission, *see* Mich. Const. art. 4, § 6(6), consistent with Michigan's sovereign authority to choose what parties may "participate in litigation on the State's behalf," including "with counsel of their own choosing." *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022).

The irreparable harm here goes beyond that. For one thing, it is a second irreparable injury that the Commission will (without a stay) be obligated to "adopt an alternative redistricting plan before" a date of the Court's choosing "or face the prospect that the District Court will implement its own redistricting plan." *Karcher*, 455 U.S. at 1306 (Brennan, J., in chambers). That is not only an inherent and implicit state interest; it is an express interest here. Mich. Const. art. 4, § 6(19). The Commission will also be obligated to do so—at best—on a very constricted time frame, even in the best scenario it can reasonably obtain. In Plaintiffs' preferred scenario, the Commission will have *no* opportunity to redistrict, and—although the Commission vigorously contests that position—it remains to be seen where the Court's determination will fall. The Court also appears to be contemplating (and Plaintiffs are expressly advocating) that the Court, perhaps through a special master of its choosing, exercise direct influence in Commission proceedings. And the injunction comes at a time when the Commission is experiencing challenges, as Plaintiffs are too eager to point out (and embellish). *See* Pl's Supp. Br., Doc. 136, at 4–10, PageID.4853–4847. The harms to the Commission's (and the State's) dignitary and practical interests are compounded on each other.

There is more. The Commission's task is uniquely difficult among remedial tasks, as the Court did not adjudicate Plaintiffs' Voting Rights Act claims (and now lacks jurisdiction to do so because of the notice of appeal). Thus, while the Court has declared its view of what

§2 strategy is not supportable, it did not indicate what strategy is correct. A racial-gerrymandering plaintiff "ask[s] for the elimination of a racial classification." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019). But Plaintiffs here did not only, or even primarily, want that: they wanted plans with a certain number of majority-Black districts, which their expert acknowledged are race-based plans. That leaves the Commission the difficult task of discerning whether to draw without racial considerations or whether to draw with *different* ones. Similarly, while the Court suggested that primary data provides the useful information, it made no determination about what those data show, raising difficult questions of how §2 compliance of narrow tailoring can progress.[2] Although the Commission has retained Baker & Hostetler as Voting Rights Act counsel, and all concerned will work diligently and in good faith, the Commission faces many difficulties in this unique circumstance that exacerbate the irreparable harm that accrues as a matter of law.

The irreparable-harm element should further be informed by "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Under the *Purcell* principle, "federal district courts ordinarily should not enjoin state election laws in the period close to an election, and ... federal appellate courts should stay injunctions when ... lower federal courts contravene that principle." *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). The

[2] Notably, the plans Plaintiffs proposed recently, which they declare are race-blind, contain apparent §2 vulnerabilities. For example, their senate plan contains three majority-minority districts of roughly 68%, 58%, and 55% BVAP neighboring districts below 20% BVAP, *see* Report of Trende, Doc. 136-3, at 14, PageID.4880, which would stand condemned by comparison to Plaintiffs' own liability-phase map, which contained *five* majority-Black Detroit-area districts. To put it bluntly, had the Commission adopted this new plan, it might have been invalidated in *this* lawsuit by the advocacy of *these* Plaintiffs, *their* counsel, and *their* expert.

Purcell principle applies here because the "State's election machinery is already in progress," *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), as Plaintiffs acknowledge, Pl's Supplemental Br., Doc. 136, at 10–11, PageID.4853–54. To be sure, the Commission recognizes that the timing of the Court's order with sufficient time for a highly compressed redistricting does not so thoroughly threaten "chaos" such that the *Purcell* principle commands a stay standing alone. *See Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Nevertheless, it is clear that the Court's injunction injects federal power into election-preparation efforts, such that state laws, procedures, and best practices will be stretched and overridden to some degree. This factor, when combined with the others, confirms that irreparable harm stands at its paramount level.

3. The balance of equities favor a stay. Although Plaintiffs will argue that a stay would delay implementation of the rights they have been declared to have, the purpose of the appeal is to determine those rights. Moreover, under a comparison of "the relative harms to" both sides, *Karcher*, 455 U.S. at 1306 (Brennan, J., in chambers), the equities favor a stay. Plaintiffs, as noted, have not won a full vindication of the rights they asserted, and it remains a mystery what those rights are, as they may include a right to race-neutral redistricting or racially predominant redistricting in service of 10 majority-minority house and 5 majority-minority senate districts. Thus, on the one side of the scale rests an ill-defined and inchoate interest that may ultimately not be vindicated as Plaintiffs desire, e.g., if a race-blind plan under-delivers on the majority-minority districts they desires. On the other side of the scale rest discrete, palpable and clear-cut irreparable harms to the State and the Commission.

The public interest favors a stay as well. "By means of an amendment to the Michigan Constitution, the people of Michigan have exercised their power to prescribe for their state government—rather than having their state government prescribe for them—the manner in

which the lines for congressional districts shall be drawn in this State." *Banerian v. Benson*, 597 F. Supp. 3d 1163, 1171 (W.D. Mich.). "The public interest supports allowing the upcoming … election to proceed with the districting plan drawn in the manner that Michigan's Constitution now prescribes." *Id.*

CONCLUSION

The Court should grant the motion.

Dated: January 4, 2024

Respectfully submitted,

/s/ Nathan J. Fink
FINK BRESSACK
David H. Fink (P28235)
Nathan J. Fink (P75185)
38500 Woodward Ave., Suite 350
Bloomfield Hills, Michigan 48304
(248) 971-2500
dfink@finkbressack.com
nfink@finkbressack.com

/s/ Richard B. Raile
BAKER & HOSTETLER LLP
Katherine L. McKnight
E. Mark Braden
Richard B. Raile
Dima J. Atiya
1050 Connecticut Ave., NW, Suite 1100
Washington, D.C. 20036
(202) 861-1500
kmcknight@bakerlaw.com
mbraden@bakerlaw.com
rraile@bakerlaw.com
datiya@bakerlaw.com

BAKER & HOSTETLER LLP
Patrick T. Lewis
127 Public Square, Suite 2000
Cleveland, Ohio 44114
(216) 621-0200
plewis@bakerlaw.com

Counsel for Defendants, Michigan Independent Citizens Redistricting Commission, Juanita Curry, Anthony Eid, Rhonda Lange, Steven Terry Lett, Brittni Kellom, Cynthia Orton, Rebecca Szetela, Janice Vallette, Erin Wagner, Richard Weiss, Elaine Andrade, Donna Callaghan, and Marcus Muldoon, each in their official capacities as Commissioners of the Michigan Independent Citizens Redistricting Commission

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to W.D. Mich LCivR 7.3(b), that excluding the portions of this Brief not included in the word count pursuant to the rule, this Brief numbers 2,518 words. The Brief was drafted using Microsoft Word (Office 365, Version 2302) and counsel relied on this software to generate the word count.

/s/ Nathan J. Fink
Nathan J. Fink