

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 OF THE MICHIGAN
INDEPENDENT CITIZENS
REDISTRICTING COMMISSION
CONCERNING PROPOSED
REMEDIAL TIMELINE**

The Michigan Independent Citizens Redistricting Commission and its Commissioners (collectively, the “Commission”)¹ respectfully provide the following proposed timeline for a remedial phase in this case, in compliance with this Court’s Order of January 3, 2024 (ECF No. 139, PageID.4946). The Order provides that “each Party shall preserve their respective positions, and this meet and confer shall not be construed as a waiver of any position by any Party.” *Id.* at 2, PageID.4947. Per the Order, the Commission proposes this timeline expressly subject to, and without waiver of, its defenses and appeal positions, and without conceding the correctness of the Court’s Opinion and Order dated December 21, 2023 (ECF No. 131, PageID.4704) (the “Permanent Injunction”) or other orders. This timeline is further proposed subject to, and without waiver of, the Commission’s appeal from this Court’s Permanent Injunction to the Supreme Court of the United States, and its motion to stay the Permanent Injunction (and the proposed remedial proceedings to which this timeline relates) pending the Supreme Court’s adjudication of that appeal.

¹ Commissioners Douglas Clark, M.C. Rothhorn, and Dustin Witjes resigned from the Commission in December 2023. On January 4, 2024, Elaine Andrade, Donna Callaghan, and Marcus Muldoon were appointed as successor Commissioners and took the oath of office. While the substitution of Commissioners Andrade, Callaghan, and Muldoon for former Commissioners Clark, Rothhorn, and Witjes is “automatic[]” pursuant to Fed. R. Civ. P. 25(d), the Commission will, as soon as practicable, file a formal substitution motion for purposes of clarity of the docket.

I. INITIAL STATEMENT

The Commission’s timeline is premised on two settled principles of law governing remedial processes in federal-court redistricting litigation. First, as the Commission stated in its remedial brief of January 2, 2024 (ECF No. 135, PageID.4829), the Commission must be afforded a reasonable opportunity to craft remedial districts to cure the constitutional violation the Court found in its Permanent Injunction. The Commission intends to, if afforded a reasonable opportunity, work to fashion remedial districts, and is likely to succeed. Accordingly, the Commission’s timeline is intended to afford the Commission sufficient opportunity to do its work while also respecting the need to have compliant plans in place for the 2024 elections in the Michigan House of Representatives.²

The second principle is that, while the Commission is going about its work, the Court must stay its hand and allow the Commission—which exercises the sovereign legislative power of the State of Michigan—to craft remedial plans. The Court’s role begins when the Commission’s finishes; the Court has the ultimate responsibility to review the plans the Commission enacts for federal-law compliance, and will have the power to fashion remedial districts (based on State policy) if the Commission’s effort is not successful.

² The next elections for the Michigan Senate will occur in 2026. Plaintiffs asked this Court to order a special election in November 2024 for the Michigan Senate, thereby truncating the terms of office of incumbent Senators by two years, even though the Court did not seek briefing on that topic and did not signal an intent to order such relief. “[T]here is much for a court to weigh” before imposing such drastic relief, including “the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with appropriate judicial restraint when intruding on state sovereignty.” *North Carolina v. Covington*, 581 U.S. 486, 488 (2017). Such relief cannot be ordered based on the “most cursory” analysis of the *Covington* factors Plaintiffs included in their post-hearing brief. *See id.* If the Court is considering a special election, it should at a minimum set a separate briefing schedule and provide other stakeholders fair notice and a reasonable opportunity to be heard.

Plaintiffs disagree with both principles, and despite the parties' meet-and-confer that took place on January 4, 2024, per the Court's Order, these fundamental disagreements prevented the parties from agreeing on a timeline.

In particular, Plaintiffs assert that the Court should seize the redistricting "pen" from the Commission *now*, and use a special master to draw remedial plans in "ten days" and afford Plaintiffs, but not the Commission, seven days to object to the remedial plans the special master develops. *See* Pls' Remedy Br. at Ex. A, p. 3, ECF No. 136-2, PageID.4864. Plaintiffs claim that "this Court need not give the original redistricting body a second bite at the apple," Pls' Remedy Br. at 3, PageID.4846, but they misrepresent the Supreme Court decision they cite for the proposition. *North Carolina v. Covington*, 138 S. Ct. 2548, 2553–54 (2018), did *not* say that a redistricting body is not entitled to the first opportunity to remedy a federal-law violation in a redistricting plan. That case instead found that if the redistricting authority's first opportunity at crafting a *remedial plan* is not successful, a district court is not required to give the authority "another chance at a remedial map." *Id.* at 2553. In this case, Plaintiffs demand that this Court deny the Commission not only a second bite at the apple, but also a first bite.

Plaintiffs' request to deny the Commission a reasonable opportunity to craft a remedial plan is unsupported in precedent, *see* Comm'n Remedy Br. at 2–4, ECF No. 135, PageID.4830–32, and unwarranted. As the following timeline illustrates, the Commission is ready, willing, and able to craft remedial plans in the Michigan House of Representatives and Senate. The Court should afford the Commission a reasonable opportunity to do so.

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II. PROPOSED TIMELINE

The Commission proposes the following timeline for a remedial phase in this case:

| DATE | EVENT/DEADLINE |
|---------------------|---|
| Fri., Feb. 2, 2024 | Deadline for Commission to publish proposed plans for 45-day notice and comment consistent with the procedure set forth in Mich. Const. art. iv, § 6(14)(b), for decennial plan adoption. |
| Mon., Mar. 18, 2024 | Conclusion of 45-day notice and comment period. |
| Fri., Mar. 22, 2024 | Deadline for Commission to vote to adopt plans and to file such plans, including block-equivalency files and shapefiles, with the Court, parties, and Special Master. ³ The Commission may file a brief to support such plans. |
| Fri., Mar. 29, 2024 | Deadline for parties to file objections to proposed plans. |
| Fri., Apr. 12, 2024 | Deadline for Special Master to file report and recommendation, and to serve on parties copies of the block-equivalency files and shapefiles for the plan(s) the Special Master recommends. |
| Fri., Apr. 19, 2024 | Deadline for parties to file objections to Special Master's report and recommendation. |
| Mon., Apr. 29, 2024 | Anticipated deadline for Court to enter a final order adopting plans. |
| Mon., May 13, 2024 | Revised deadline for candidates for the Michigan House of Representatives to file nominating papers, pursuant to MCLA 168.163. ⁴ |

Under the foregoing framework, the Commission will be given a fair opportunity to craft remedial plans, including the opportunity to obtain public comment on its draft work. This Court, aided by a Special Master (as the Court has indicated it intends to retain), and with the benefit of briefing and objections by the parties, will have the opportunity to evaluate

³ If the Court determines that Plaintiffs or other parties are entitled to submit proposed plans to the Court, the same March 22, 2024, deadline should be established for any other plans for reasons of fairness and orderliness.

⁴ The present deadline is April 23, 2024. Federal courts in redistricting lawsuits have, in the past, exercised their authority to “extend the time limitations [for candidates to qualify for the ballot] imposed by state law.” *Sixty-Seventh Minn. State Senate v. Beems*, 406 U.S. 187, 201 n.11 (1972). *See also* Comm’n Remedy Br. at 5–6, PageID.4833-34. Candidates for the Michigan House of Representatives are not required to circulate nominating petitions for the House, but instead may pay a nonrefundable filing fee. MCLA 168.163(2). The Commission suggests that this brief extension of this filing deadline will not impair the conduct of the 2024 primary elections for the Michigan House of Representatives scheduled for August 6, 2024.

the Commission's work and proceeding accordingly if the Commission's plans fail to cure the violations found by this Court.

III. CONCLUSION

For the foregoing reasons, and subject to the Commission's reservation of rights set forth above, the Commission urges the Court to adopt the foregoing timeline for a remedial process in this case.

Dated: January 5, 2024

Respectfully submitted,

/s/ Nathan J. Fink

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