Order

Michigan Supreme Court
Lansing, Michigan

March 25, 2022

Bridget M. McCormack,
Chief Justice

164022

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

LEAGUE OF WOMEN VOTERS OF MICHIGAN, AMERICAN CITIZENS FOR JUSTICE, APIA VOTE-MICHIGAN, DETROIT ACTION, LGBT DETROIT, NORTH FLINT NEIGHBORHOOD ACTION COUNCIL, RISING VOICES, KENT BLOHM, CATHY BROCKINGTON, DENISE HARTSOUGH, DONNA HORNBERGER, GILDA JACOBS, JUDY KARANDJEFF, MARGARET LEARY, ATHENA McKAY, CHRISTINE PAWLAK, KATHERINE PRIMEAU, RONALD PRIMEAU, SUSAN ROBERTSON, and SUE SMITH,
Plaintiffs,

v SC: 164022

INDEPENDENT CITIZENS REDISTRICTING COMMISSION,
Defendant.

_____/

On order of the Court, the complaint is considered, and relief is DENIED, because the Court is not persuaded that it should grant the requested relief.

CAVANAGH, J. (*concurring*).

I concur in the denial. Plaintiffs have not sustained their burden to show that the map for the Michigan House of Representatives (the "Hickory map") adopted by the Independent Citizens Redistricting Commission (the Commission) failed to comply with constitutional requirements. The Michigan Constitution requires that the Commission's plan "not provide disproportionate partisan advantage to any political party." Const 1963, art 4, § 6(13)(d). This obligation cannot be viewed in isolation, but rather must be assessed in concert with the Commission's obligation to respect the full list of prioritized criteria, including higher priority criteria such as communities of interest. See Const 1963, art 4, § 6(13)(a) through (g). Further, disproportionate advantage "shall be determined using accepted measures of partisan fairness." Const 1963, art 4, § 6(13)(d).

The Commission considered disproportionate partisan advantage by, among other things, receiving relevant presentations and memorandums from hired redistricting experts including Dr. Lisa Handley, reviewing draft plans against accepted measures of partisan fairness, and revising draft plans to reduce partisan advantage. The Commission

states that it chose to balance partisan fairness with other higher-order constitutional criteria, including its consideration of the identified communities of interest in Flint and the Chaldean community. Plaintiffs have not rebutted that this was a permissible choice. Indeed, plaintiffs failed to meaningfully address the Commission's obligation to consider the partisan-advantage criteria as intertwined with other enumerated and prioritized constitutional criteria.[1]

Further, plaintiffs' expert report from Dr. Christopher Warshaw shows that the differences between plaintiffs' proposed Promote the Vote map and the Hickory map are *de minimis*. See Warshaw, *An Evaluation of the Partisan Fairness of the Michigan Independent Citizens Redistricting Commission's State House Districting Plan* (January 28, 2022) (Warshaw Report), pp 11-16, attached as Exhibit 1 to plaintiffs' complaint. Moreover, Dr. Warshaw concedes that his analysis of two partisan-fairness measures, the efficiency gap and the mean-median difference, was not significantly different from Dr. Handley's calculations. *Id*. at 4 n 6. In light of the absence of a meaningful factual dispute on these points, plaintiffs have not shown that a *de minimis* deviation in partisan advantage between the plans is legally significant. Plaintiffs have made no argument that the similar partisan-fairness metrics, largely agreed upon by Drs. Handley and Warshaw, have ever been accepted by any court to establish a constitutional violation. In sum, plaintiffs have not made the case that the Commission's efforts were insufficient to comply with constitutional requirements. Const 1963, art 4, § 6(19).

MCCORMACK, C.J., joins the statement of CAVANAGH, J.

WELCH, J. (*dissenting*).

In 2018 the voters of Michigan overwhelmingly supported Proposal 2, which amended our state Constitution and established the Independent Citizens Redistricting Commission. Const 1963, art 4, § 6. The voters entrusted this Court with the responsibility of ensuring that the commissioners comply with the constitutional mandate handed to them by the voters. Const 1963, art 4, § 6(19). Under our Constitution, the Commission "shall abide" by seven criteria when developing and adopting redistricting plans for state legislative and congressional districts. Const 1963, art 4, § 6(13)(a) through (g). The word "shall" means that the action is "mandatory." *Lakeshore Group v Dep't of Environmental Quality*, 507 Mich 52, 64 (2021). The inaugural Commission convened in 2020 to create its redistricting plans. This is thus the first opportunity for this Court to examine the interaction among the various constitutionally-mandated criteria. The law is a blank slate. I would have heard this case and taken the time to

[1] While Dr. Warshaw opined that the maps were similar in terms of compactness, he did not analyze any other § 6(13) criteria. See Warshaw Report at 16-17.

make certain that the will of the voters who supported Proposal 2 was actually reflected in the redistricting plan. I dissent from the Court's decision to not hear this case.

The plaintiffs challenge whether the adopted redistricting plan for the Michigan House of Representatives complies with the requirement that "[d]istricts shall not provide a disproportionate advantage to any political party." Const 1963, art 4, § 6(13)(d). This assessment "shall be determined using accepted measures of partisan fairness." *Id*. What amount of advantage to a political party is "disproportionate" or what statistical methods of measuring partisan fairness are acceptable are open questions. The plaintiffs in this case submitted an expert report concluding that the state House plan fails the partisan-fairness requirement because it provides a disproportionate advantage to the Republican Party. The expert's submitted statistical modeling suggests that the adopted plan will favor the Republican Party in 99% of scenarios; that "[o]n this plan, Republicans are likely to win the majority of the seats even if they win the minority of votes"; and that "Democrats could win a minority of the seats while winning a majority of the vote."[2] According to plaintiffs, this built-in, asymmetrical partisan advantage for the Republican Party is not transient and will likely persist for this entire redistricting cycle. See Grofman & King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v Perry*, 6 Election Law Journal 2, 25 (2007) (stating "a partisan bias of 1-3 percentage points . . . is typically persistent over the decade following the redistricting, and accounts for measurable differences in the representation of the state's population in the state legislature"). The statistical modeling suggests that the adopted plan will effectively prevent the Democratic Party from obtaining a majority in the state House except in wave election years. Is the state House plan compliant with our Constitution's requirement that an adopted plan not provide a disproportionate advantage to a political party? Without any hearing, explanation of the law, or application of facts against a settled legal standard, we have no way to actually know.

In the absence of any settled legal standard or baseline for how a challenge should proceed, it is unjust to criticize the plaintiffs' expert-supported presentation of their case as somehow lacking. On the contrary, the plaintiffs' challenge raises a question of first

---

[2] Plaintiffs' expert, Christopher Warshaw, J.D., Ph.D., is a political scientist at George Washington University who studies public opinion, representation, elections, and polarization in American politics. His work has been published in numerous peer-reviewed journals and his expertise in questions of measuring partisan fairness has been recognized and valued by both state and federal courts. See, e.g., *League of Women Voters of Mich v Benson*, 373 F Supp 3d 867 (ED Mich, 2019), judgment vacated on other grounds by *Chatfield v League of Women Voters of Mich*, ___ US ___; 140 S Ct 429 (2019); *Adams v DeWine*, ___ Ohio St 3d ___; 2022-Ohio-646 (2022). The Commission does not dispute Dr. Warshaw's expertise or figures.

impression that checks all the usual boxes to warrant our review. See MCR 7.305(B) (stating that grounds for appellate review include an issue that "involves a legal principle of major significance to the state's jurisprudence" and "has significant public interest"). This Court's role in redistricting disputes, as in every setting, has always been "to determine what are the requirements of this constitution and to define the meaning of those requirements in specific applications." *In re Apportionment of State Legislature—1982*, 413 Mich 96, 114 (1982). Today, the Court does neither.

The responsibility to give meaning to and enforce our Constitution's antipartisan gerrymandering provision belongs to this Court. Indeed, this Court is the only judicial authority empowered to ensure the Commission's adopted plans comply with the redistricting criteria. Const 1963, art 4, § 6(19). The United States Supreme Court has determined that federal courts are not an available forum for claims of partisan gerrymandering. *Rucho v Common Cause*, 588 US ___; 139 S Ct 2484, 2506-2507 (2019); see also *Banerian v Benson*, ___ F Supp 3d ___ (2022) (Case No. 1:22-cv-54), slip op at 1 (rejecting challenge to a claim of partisan gerrymandering as nonjusticiable in federal courts). The *Rucho* Court placed the obligation to hear these kinds of claims squarely on state courts like ours, even citing Michigan as an example of a state whose voters had adopted a state constitutional provision prohibiting or limiting "partisan favoritism in redistricting." *Rucho*, 588 US at ___;139 S Ct at 2507.

In its response, the Commission states that "communities of interest" prevented the Commission from adopting a fairer map on partisan metrics. There is a separate redistricting criterion that "[d]istricts shall reflect the state's diverse population and communities of interest" that is prioritized one step higher than the criterion that "[d]istricts shall not provide a disproportionate advantage to any political party." Const 1963, art 4, § 6(13)(c) and (d). But this Court has never decided how these criteria should balance or whether a different plan could have better balanced all criteria. Further, the Commission never settled upon a definition of "communities of interest" and never identified how "communities of interest" are intentionally reflected in the adopted plan.[3]

---

[3] The Constitution requires that "[f]or each adopted plan, the commission shall issue a report that explains the basis on which the commission made its decisions in achieving compliance with plan requirements . . . ." Const 1963, art 4, § 6(16). Without this information, it is difficult for this Court to comply with our own charge "to review a challenge to any plan adopted by the commission" and "to remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution . . . ." Const 1963, art 4, § 6(19). While my colleagues infer that it is the plaintiffs' burden to show noncompliance in the first instance, it is difficult for any plaintiff to do so given the fact that the Commission has yet to comply with its constitutional obligation to provide a record of its decision-making process.

By failing to engage in a meaningful examination of what the law requires, the Court invites a watered-down approach that may ultimately frustrate the intentions of the more than 60% of Michigan voters who supported the prohibition of partisan gerrymandering. I dissent.

BERNSTEIN, J., joins the statement of WELCH, J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 25, 2022

Clerk

a0322