

***Independent Citizens Redistricting Commission
February 22, 2024 Meeting Public Comment***

Date of Submission: Wednesday, February 21, 2024
Method of Submission: Email To <Redistricting@Michigan.gov>
Name: James Gallant
Subject: MICRC_Definition of "Affiliate"?

Secretary Benson & MICRC,

Will I get more Public Comment today (02-21-2024)?

Please verify if the appropriate MICRC members actually "affiliate" with one of the two major political parties in Michigan?

Rule 405 of the Securities Act of 1933 (attached) identifies common control as the definition of affiliate.

It appears the voting members of the Democratic and Republican Political Parties of Michigan (as membership organizations) exercise control over those Michigan Corporations together with all the other voting members.

Therefore, only voting members of the two major political parties can legitimately claim that they "affiliate" with that political party as a Michigan Corporation.

Thank you, James Gallant

To: Michigan Independent Citizens Redistricting Commission

From: Brennan Center for Justice

Date: February 16, 2024

Re: *Considerations in Redrawing Michigan's State House Map*

Thank you for the opportunity to provide comment as the Michigan Independent Citizens Redistricting Commission goes about the important task of redrawing Michigan's state house map.

The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's systems of democracy and justice. Through its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality. For nearly three decades, the Brennan Center has built up a large body of nationally respected quantitative, empirical, legal, and historical work and research on these issues, including in the fields of redistricting and voting rights. A key focus of our work is fairness for communities of color both in redistricting and in voting. In the redistricting arena, our work has included representing Black, Latino, and Asian voters in litigation over maps around the country, as well as significant involvement in reform efforts at both the state and federal levels.

The Brennan Center respectfully submits the following comments to offer guidance to the Commission on how to best navigate the difficult process of drawing effective new districts while minimizing the possibility of further liability under either federal or state law.

We are happy to follow up to answer any questions that members of the Commission may have.

1. The Commission's map-drawing challenge.

In selecting a map to address the racial gerrymandering violations found in *Agee v. Benson*, the Commission faces the complicated but achievable challenge of carefully navigating between two requirements of federal law.

On the one hand, like all map drawers nationwide, the Commission must comply with the federal Voting Rights Act. This provision inherently requires some consideration of race and the impact proposed maps may have on racial and language minorities. At the same time, under the U.S. Supreme Court’s racial gerrymandering jurisprudence, the Commission is constitutionally obligated to avoid drawing districts in a way where race to “predominates” in the map drawer’s “decision [whether] to place a significant number of voters within or without a particular district.”¹

Charting a course between these two requirements can be a challenge, but there are ways to satisfy both sets of concerns.

In the case of Michigan, it is important to note as an initial matter that no court, including the court in *Agee v. Benson*, has yet adjudicated the extent of Michigan’s current VRA obligations. This factor puts the Commission in a very different position compared to map drawers in states like Alabama, Georgia, and Louisiana, where judicial decisions guided recent map redraws and outlined in detail the steps map drawers would need to take to make maps VRA compliant. In Alabama, for example, the court’s order expressly directed Alabama lawmakers to create a second congressional district “in which Black voters either comprise a voting-age majority or something quite close to it.”²

In contrast, the scope of Michigan’s obligations under the VRA is less settled. Indeed, the Michigan Supreme Court has questioned whether there is any such liability at all in Metro Detroit, given “significant white crossover voting for Black-preferred candidates” in Wayne, Oakland, and Macomb counties.³ The current case, *Agee v. Benson*, also suggests uncertainties about what the VRA requires in Metro Detroit. Prior to last November’s trial, the plaintiffs in *Agee* asked for an advance ruling in their favor establishing that Black voters in Metro Detroit were politically cohesive, one of the necessary factual preconditions for establishing VRA liability. However, the three-judge court not only declined to grant the blanket ruling sought by the plaintiffs, but it also ruled in favor of the Commission on several districts, finding that the plaintiffs had failed to present compelling and credible evidence that Black voters in those districts were politically cohesive.⁴

¹ *Cooper v. Harris*, 581 U.S. 285, 291 (2016).

² *Singleton v. Merrill*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022) (three-judge panel).

³ *Detroit Caucus v. Michigan Independent Citizens Redistricting Commission*, 969 N.W.2d 331, 332 -3 (Mich. 2022) (holding that Black elected officials challenging legislative maps on VRA grounds had not presented “a strong basis in evidence . . . to believe that the three threshold *Gingles* preconditions were satisfied so as to potentially require race-based district lines”). The U.S. Supreme Court has noted that evidence of white crossover voting cuts against findings of Section 2 liability. See *Bartlett v. Strickland*, 566 U.S. 1 (2009).

⁴ *Agee v. Benson*, No. 1:22-cv-00272 (W.D. Mich. Aug. 29, 2023) [ECF No. 81], at. 8-10.

These rulings are consistent with the report of Dr. Lisa Handley, the Commission’s voting rights expert in *Agee*, which found that “district-level 2022 Democratic primary results reveal that majority Black districts are not necessary to provide Black voters with an opportunity to elect their candidates of choice to the Michigan state legislature in the Detroit area.”⁵ To be sure, the plaintiffs in *Agee* contest this conclusion, arguing that a broader array of elections should be taken into account (to the extent such data exists), along with factors such as incumbency advantage. However, Dr. Handley’s report, along with the two court rulings on the subject so far, raise meaningful questions about the scope of VRA liability in the region and suggest that the scope of VRA liability in this region may not be as easily answerable as in more heavily polarized jurisdictions like Alabama.

Drawing maps that comply with the obligations of the Voting Rights Act in the absence of a judicial ruling requires the Commission’s care and nuance and a strong factual record. As the U.S Supreme Court has recently emphasized, assessments like these should not be done on the back of an envelope nor, more importantly, by relying on broad generalizations about the need for Black-majority districts (regardless whether majority status is measured by population or some other metric, such as share of the electorate).⁶

2. How best to minimize the likelihood of further racial-gerrymandering liability.

In redrawing the maps to address the violation, the Commission should be careful not to make the mistake of drawing districts to meet a pre-set minimum Black-population target absent a strong factual basis for doing so.

If evidence about racial bloc voting and political cohesion in Metro Detroit is inconclusive, and if there has not been a clear and unambiguous judicial determination of the extent of VRA liability, the best way for the Commission to ensure that maps are legally compliant is to carefully document – both in its discussions for the record and in written submissions to the special master – how the adopted map makes sense for independent non-racial reasons, in addition to how it complies with potential VRA obligations.

In *Allen v. Milligan*, for example, the district court rejected arguments that creating a new Black-majority congressional district in central and southern Alabama to remedy a VRA violation was a racial gerrymander. This was because proponents of the map presented

⁵ Joint Appendix, vol. I, at 16 (JA00014), *Agee v. Benson*, (May 9, 2023).

⁶ *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398, 404 (2022). (voiding Wisconsin’s newly adopted state house map and explaining that “[r]ather than carefully evaluating evidence at the district court level, the court improperly relied on generalizations to reach the conclusion that the [Gingles] preconditions were satisfied”).

substantial evidence that the heavily rural and impoverished region shared many non-racial commonalities, interests, and representational needs that would benefit from inclusion in a single district.⁷

In the same way, the Commission will likely be much more successful in defending districts in Metro Detroit from renewed allegations of racial gerrymandering if the evidence it submits to the special master shows that districts, individually and as a whole, keep recognizable and logical communities with shared needs and interests together, as required by the Michigan constitution.

In this regard, the degree to which the Commission's map responds to public input regarding communities of interest and takes into account the representational needs of those communities will likely be especially compelling evidence demonstrating that the Commission was not simply trying to meet a demographic target or engaged in broad racial generalizations that assumes that Black voters, regardless of their differences, should be automatically included in a Black-majority district.

The same goes for other map-drawing criteria. If the commission chooses a particular map over others because it better complies with specific criteria like partisan fairness or the preservation of political subdivisions, it should ensure that the record before the special master clearly reflects the importance of those reasons.

The good news for the Commission is it is not necessary for it to unduly focus on the demographics of districts when drawing maps. Due to residential patterns in Metro Detroit, drawing districts in an even-handed manner primarily to comply with the Michigan constitution's community of interest and partisan fairness requirements will almost certainly result in a fairly significant number of naturally occurring Black-majority districts, in addition to other districts that, although not Black majority, are likely to elect Black-preferred candidates in both the primary and general election. Both types of districts are permissible means of avoiding VRA liability, and that gives the commission flexibility.

In short, unlike in many other parts of the country, where map drawers often have to make hard tradeoffs between racial and non-racial objectives, it is substantially easier in Metro Detroit to create meaningful political opportunity for Black voters and comply with other requirements of law at the same time. In fact, the nine commission-drawn plans advanced for public comment were all drawn with limited consideration of race and all contain 10 or 11 districts wholly or partially contained in Wayne County, where Black voters are the largest share of the Democratic primary electorate and where evidence suggests that Black voters are likely to be politically effective. Many of these maps also

⁷ *Singleton*, 582 F. Supp. 3d at 1012-13. (“[V]oters in the Black Belt share a rural geography, concentrated poverty, unequal access to government services, and lack of adequate healthcare . . . That the Black Belt is an important community of interest is common knowledge in Alabama.”).

contain additional districts where evidence may suggest Black voters, though not a majority of the electorate, are likely to be able to elect Black-preferred candidates by forming coalitions with others.

Given all this, the Commission should choose to adopt a map not based upon which map has the largest number of Black districts, but based primarily upon which map best complies with other requirements of Michigan law, particularly consideration the Michigan constitution's community of interest and partisan fairness requirements.

3. The permissible role of race in map drawing.

It is important to understand, however, that none of the prior discussion is to suggest that race cannot be considered at all in map drawing. In fact, there are two common instances where consideration of race is entirely appropriate.

First, in reviewing maps, the Commission may come across a strong basis in evidence, including from public testimony and submissions, to believe that the design of a particular district in a map may be preventing a sizable and politically cohesive group of Black voters from being able to elect their preferred candidates due to racial bloc voting by white voters. In those instances, there is no barrier to map drawers making narrowly tailored and district-specific adjustments to undo the damage caused by such maps.⁸

Second, the Commission may be presented with compelling evidence regarding the representational needs of racial and ethnic minorities. There is no prohibition on the Commission taking this evidence into account.

While, the Commission has, thus far, been wary of arguments for or against maps based on racial considerations, we believe this approach is overly cautious and, in fact, may make it harder for the Commission to meet its obligations under both federal and state law.

The reality in Michigan, as in much of the United States, is that socioeconomic disparities often continue to fall heavily along racial and ethnic lines. In the same way, the representational needs of communities with respect to healthcare, education, policing, and any number of other issues often will have a significant, if not exclusive, racial component. If the Commission concludes that those interests are well-established in the record - including from testimony of community members - dismissing or ignoring those

⁸ Even in Alabama, a state with some of the most starkly racially polarized voting in the country, courts have recognized that it is possible to remedy a violation of the Voting Rights Act without necessarily creating a Black-majority district. Indeed, the remedial congressional map adopted by the court in *Allen v. Milligan*, with support of the plaintiffs, addressed VRA liability by creating two districts that were just shy of Black majority rather than any new Black-majority district. What is true in the Black Belt of Alabama will be even more true in a diverse, multiracial, and politically complex region like Metro Detroit.

interests would be a dereliction of the Commission's obligations under the Michigan constitution to ensure that the creation of new maps reflects public input.

In sum, we encourage the Commission to utilize the numerous helpful sources of information that are available to select a plan that complies with the court's order in *Agee*; maintain attention to relevant law and consider the important evidence provided by the many citizens across the state, including testimony and mapping proposals to aid the Commission's work.

We are quite happy to make ourselves available to you if you should you find further discussion or explanation of these points helpful.