No. 22-92

In the Supreme Court of the United States

MICHAEL BANERIAN, *et al.*,

Appellants,

v.

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF MICHIGAN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

ABHA KHANNA
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

MARC E. ELIAS
EMMA OLSON SHARKEY
MELINDA K. JOHNSON
RAISA M. CRAMER
AARON M. MUKERJEE
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, DC 20002
(202) 968-4490

SARAH PRESCOTT
SALVATORE, PRESCOTT & PORTER, PLLC
105 E. Main Street
Northville, MI 48168
(248) 679-8711

Counsel for Individual Voter Intervenors-Appellees

QUESTION PRESENTED

Whether Appellants' motion for preliminary injunction is moot, and, if not, whether the district court panel abused its discretion in declining to enjoin Michigan's adopted 2021 congressional map?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

The only question properly before this Court is whether the three-judge district court (the "Panel") abused its discretion when it found that, based on the record before it, Appellants failed to meet their evidentiary burden to demonstrate that they were entitled to the extraordinary relief they requested: a preliminary injunction of Michigan's congressional plan (the "Plan") prior to the 2022 election. *See* ECF No. 9 (Pls.' Mot. for Prelim. Inj.) at 20. But the Court need not reach that question because Appellants fail to establish a basis for probable jurisdiction upon which this Court may review the denial of the motion for preliminary relief. Appellants specifically sought relief for the 2022 election, but that election is already underway. Michigan voters are casting ballots under the Plan that Appellants asked the Panel to enjoin in advance of this election. Appellants make no effort to explain how—at this late date—their preliminary injunction motion continues to present a live, reviewable issue.

Indeed, when Appellants asked the Panel to expedite consideration of their preliminary injunction motion back in February, Appellants emphasized that swift consideration of the motion was "necessary to avert the *imminent mootness* of the relief requested therein." ECF No. 20 (Pls.' Mot. for Exp. Consideration of Mot. for Prelim. Inj.) at 1 (emphasis added). Seven months later, there can be no serious argument as to whether the mootness that was then "imminent" has come to pass. As a result, the Court can and should dismiss this appeal seeking review of the Panel's resolution of that motion.

If Appellants' motion for preliminary injunction is still live, it presents an exceedingly narrow question for review—namely, whether the Panel abused its discretion in declining to enjoin Michigan's congressional map based on its population deviation ahead of the 2022 election. Even if the Court reaches that question, it should summarily affirm because it would be inequitable and contrary to the public interest to order relief at this late date. Furthermore, Appellants' own delay litigating this appeal undercuts their argument of irreparable harm.

STATEMENT

The Michigan Independent Citizens Redistricting Commission (the "Commission") is a part of Michigan's legislative branch and is tasked with adopting state legislative and congressional districting plans following the federal decennial census. *See* Mich. Const. art. IV, § 6. The members of the Commission are Michigan citizens, selected from a pool of applicants in a process that involves the majority and minority leaders of the state senate, the speaker and minority leader of the state house, and the Michigan secretary of state. *See id.* § 2(d).

Before even beginning to draft the Plan at issue, the Commission held 16 public hearings. J.S. App. 241a. After it started drafting potential plans, the Commission held upward of 120 more hearings, in which it solicited public comment about the proposed plans. J.S. App. 241a; Mich. Const. art. IV, § 6 (8). The Commission also received thousands of public comments. J.S. App. 241a. The Commission adopted the Plan on December 28, 2021. J.S. App. 241a-242a.

Appellants waited nearly a month after the Plan was adopted to initiate suit, filing on January 20, 2022, in the U.S. District Court for the Western District of Michigan. J.S. App. 241a-242a. One week later, on January 27, Appellants filed an amended complaint in which they raised two claims. First, Appellants alleged that the Plan violated the principle of one person, one vote, arguing that population deviations between districts could not be justified by legitimate state objectives. J.S. App. 20a-21a. Second, Appellants alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by "arbitrarily and inconsistently apply[ing]" the Michigan Constitution's "requirements of keeping counties and townships whole and maintaining communities of interest." J.S. App. 22a-25a. The same day that they filed their amended complaint, Appellants moved for emergency relief, seeking to preliminarily enjoin the Plan before "the 2022 Congressional Elections." J.S. App. 22a.

At Appellants' request, the case was assigned to a three-judge panel under 28 U.S.C. § 2284(a). On February 4, Appellants filed a motion requesting expedited consideration of the preliminary injunction motion. ECF No. 20 at 3. In support, Appellants argued that the relief they sought—"to enjoin the use of the Commission's congressional districts before the 2022 election"—could be barred by an impending April candidate filing deadline, *id.*, and that expedition was "necessary to avert the" motion's "imminent mootness," *id.* at 1. The Panel granted the

request and set an expedited briefing schedule. ECF No. 24 (Order Setting Briefing Schedule) at 2.

Five days later, on February 9, Appellants moved to expedite argument on the preliminary injunction motion, again emphasizing its highly time-sensitive nature. ECF No. 25 at 1-6. At the same time, Appellants acknowledged that, were the Panel to grant their motion and enjoin the Plan, it "would be required to remand this matter back to the [Commission] for changes consistent with any opinion" finding the current Plan invalid. *Id.* at 4-5 (citing *Growe v. Emison*, 507 U.S. 25 (1993)). As Appellants recognized, "this post-judgment process can be expedited, but must still allow for reasonable time and consideration." *Id.* at 5.[1]

Before examining the merits of the request for preliminary relief, the Panel first considered whether it had jurisdiction to hear Appellants' claims and considered several motions to dismiss. J.S. App. 232a-238a. The Panel issued an order on March 4, dismissing as nonjusticiable Appellants' second claim, in which Appellants had alleged that the Plan's purported "inconsistent treatment" of communities of interest violated the Equal Protection Clause. J.S. App. 230a-238a. As Appellants acknowledge, the order dismissing that claim is not at issue in this appeal. J.S. 4.

---

[1] The Panel denied the motion to expedite oral argument on February 11, but emphasized that it recognized the importance of the matter before it and would "move with as much dispatch as possible." ECF No. 30 (Order Denying Mot. for Expedited Oral Arg.) at 2.

The Panel then proceeded to consider the motion for a preliminary injunction on Appellants' one person, one vote claim. ECF No. 24 at 1-2. The Panel heard argument on that motion on March 16. J.S. App. 243a. Following that hearing, the Panel "directed the defendants and plaintiffs alike to provide—no later than March 22—specific citations to the . . . record for every single public comment that they thought supported or refuted" sworn representations made by a member of the Commission explaining the Commission's line-drawing decisions. *Id*.

After carefully considering the papers submitted by the parties, argument presented by counsel, and the supplemental evidentiary filings that the parties submitted in response to the Panel's order, the Panel concluded that Appellants had failed to establish that they were entitled to a preliminary injunction of the Plan. The Panel issued its order and opinion denying that motion on April 1. J.S. App. 252a-253a.

The Panel's opinion makes clear that its decision was based on the evidentiary record before it, noting Appellants' failure to substantiate their arguments with citations to evidence, or refute evidence presented by the Commission. *See, e.g.*, J.S. App. 243a (noting that "defendants submitted a 787-page appendix, which included copies of 546 comments" that they argued supported their position, while "[t]he plaintiffs . . . claimed that 199 comments refuted [the Commission's position], for which they provided citations (usually by way of '*see, e.g.*' cites) for only

59"); *id.* at 250a (finding that of those 59 comments "only 31" in fact refute the Commission's determinations); *id.* at 249a-250a (finding the Commission "has specifically" explained each of its decisions and cited to "hundreds of public comments" that support its approach).

Appellants then waited almost an entire month to file a notice of appeal of the Panel's preliminary injunction order. J.S. App. 1a. They never attempted to seek emergency relief or expedited review from this Court. To the contrary, Appellants sought and obtained a month-long extension to submit their jurisdictional statement. J.S. App. 252a-260a. Appellees then jointly sought a commensurate extension of time to file their response, to which Appellants did not object. Mot. Ext. Time, *Banerian v. Benson*, No. 22-92 (Aug. 4, 2022). That request was also granted.

Five days after Appellants filed their jurisdictional statement, on August 2, 2022, Michigan held its primary election under the Plan that Appellants asked the Panel to enjoin. Nominees have been selected from each congressional district, and Michigan's bipartisan Board of State Canvassers certified those results on August 19.

It is now 39 days before election day. The general election is well underway. Clerks began sending

absentee ballots by September 24, and ballots are now available for early in-person voting.[2]

I. APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION IS MOOT.

As their papers filed below repeatedly emphasized, Appellants' motion for a preliminary injunction specifically sought to obtain relief prior to the 2022 congressional election. *See, e.g.*, ECF No. 9 at 20 (arguing that "conducting the rapidly approaching 2022 Congressional Midterm Elections using malapportioned voting districts will plainly inflict irreparable injury on Plaintiffs"); ECF No. 49 at 14 (arguing, in reply brief, that "Plaintiffs' requested preliminary injunction should be awarded so that the 2022 congressional election can take place on a [new] map"); J.S. App. 223a (identifying, in parties' joint status report, one of Plaintiffs' "Questions of Fact[] Pertinent to Plaintiffs' Preliminary Injunction Request" as "Whether a new congressional redistricting plan may be adopted with sufficient time to implement that plan prior to the congressional primary election on August 2, 2022"). Appellants twice moved for expedited consideration, first of their preliminary injunction motion, and then of the hearing on that motion, both times emphasizing that, unless they obtained relief quickly, their preliminary

[2] Mich. Sec'y of State, Michigan Election Dates Booklet at 10 (2022), https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/2022_Election_Dates_Booklet_738675_7-(2).pdf?rev=dbace5d1524c4156863185a1e9fe2410&hash=AE6210C960392A93D403BAA88B8442D1.

injunction motion would be mooted. ECF No. 20 at 1-2, 9-10; ECF No. 25 at 3-5.

In those papers, Appellants also recognized that they could not obtain the ultimate relief they sought—a new congressional plan for the 2022 election—with a prohibitory injunction alone. If the Panel granted Appellants' motion and enjoined the use of the Plan, the Commission would have to be given the first opportunity to draw a remedial plan. *See, e.g.*, ECF No. 20 at 8-9; J.S. App. 26a (requesting, in amended complaint, that the Panel "[e]stablish a deadline by which the Commissioners must redraw maps, and if the Commissioners do not act by this deadline, assume jurisdiction, appoint a special master, and draw constitutionally compliant congressional districts").

Thus, Appellants argued in February that, unless the Panel decided the preliminary injunction motion quickly, it would become irretrievably moot. ECF No. 20 at 1, 3 (asserting that "[e]xpedited consideration of Plaintiffs' Motion for Preliminary Injunction is necessary to avert the imminent mootness of the relief requested therein" and noting that "the relief Plaintiffs seek in their Motion for Preliminary Injunction—to enjoin the use of the Commission's congressional districts before the 2022 election—may be rendered moot before the motion is resolved in accordance with the usual briefing schedule").

More than seven months have passed, yet in their jurisdictional statement, Appellants make no attempt to explain how, if their motion was on the precipice of mootness back then, its disposition could be ripe for

this Court's review now. They ask that the Court summarily reverse or note probable jurisdiction, but engage in no discussion about how a summary reversal would be effectuated, now that the election for which they sought relief is underway. Appellants acknowledged in the proceedings below that, earlier this cycle, this Court issued stays of decisions requiring a new district map in a case in which early voting for the primary election was set to begin nearly two months after the lower court's orders. ECF No. 25 at 3-4; *see Merrill v. Milligan*, 142 S. Ct. 879 (2022). Here, however, early voting for the *general election* has already *begun*.

As a result, the need for the emergency relief requested—an injunction prior to the 2022 election—is no longer present. This Court should accordingly dismiss the appeal. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 396 (1981) (holding that "when the injunctive aspects of a case become moot on appeal of a preliminary injunction" the issues "can generally not be resolved on appeal, but must be resolved in a trial on the merits"); *cf. Brockington v. Rhodes*, 396 U.S. 41, 43 (1969) (holding where a candidate sought a writ of mandamus to place his name on the ballot, "the case is moot because the congressional election is over"); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (holding where appellants sought relief ahead of election that had since passed, "it is now impossible to grant the appellants the relief they sought in the District Court" and considering "the judgment below in light of" changed circumstances).

Appellants do not argue that the case falls into any of the recognized exceptions to mootness, nor

could they. This Court has recognized two categories of cases in which the standard mootness analysis does not apply: 1) where the party sought to be enjoined voluntarily ceases to continue the challenged practice, or 2) where the legal violation is capable of repetition, yet evades review. Neither applies here. Michigan has not ceased to implement the Plan that Appellants challenge. It is currently holding its congressional election under that very Plan. Nor does this case constitute one of the rare circumstances in which the challenged action is necessarily too short in duration to be fully litigated prior to its cessation or expiration. There is more than sufficient time before the next congressional election for the case to proceed to discovery, trial, and final judgment so that the Panel may consider Appellants' challenge on a full record. *Camenisch*, 451 U.S. at 395-96 (holding that the purpose of the preliminary injunction is to "preserve the relative positions of the parties" and "a determination can be had on appeal of the correctness of the trial court's decision on the merits").

Furthermore, this Court has recognized the significant difference in both the nature and posture of preliminary injunction proceedings, as opposed to permanent injunctions or final judgments. Given the limited purpose of a preliminary injunction—"merely to preserve the relative position of the parties until a trial on the merits can be held"—preliminary injunctions are often considered "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id*. at 395; *see also Sole v. Wyner*, 551 U.S. 74, 84-85 (2007) (explaining at preliminary injunction stage, "the court is called upon to assess the *probability* of the

plaintiff's ultimate success on the merits" and "[t]he foundation for that assessment will be more or less secure" depending upon multiple factors, including the pace at which the preliminary proceedings were necessarily decided) (emphasis added).

Here, the proceedings were "necessarily hasty and abbreviated," *Sole*, 551 U.S. at 84, due to both the timing of Appellants' filings and the need to expeditiously consider the preliminary injunction motion before it became moot. *See* ECF No. 30 at 1-2 (order from the Panel explaining timeline of preliminary injunction proceedings, including that Appellants did not file the operative pleading until January 27, they executed service on January 31, the Panel was appointed on February 1, Appellants first moved to expedite on February 4, the Panel granted that motion "and *significantly* shortened the parties' response times for the pending motions—on February 8"). In other words, the Panel's order denying the motion addressed only Appellants' "opening engagement," and since that motion sought emergency preliminary relief due to the then-impending nature of an election that is currently underway, it is now a "moot issue, not fit for reexamination or review." *Sole*, 551 U.S. at 84. Appellants have the opportunity to make a more fulsome case to the court below, and any appeal of that court's ultimate decision will also benefit from a more developed record.

Appellants provide no basis for this Court to circumvent the ordinary litigation process and issue an advisory opinion on the propriety of the Panel's resolution of Appellants' now-mooted motion. Not only

has the election for which Appellants sought relief already begun, Appellants' claim to irreparable harm has been significantly diminished by their delay in seeking review, and the balance of equities and public interest both strongly disfavor injecting confusion into the election. *See infra* Section III. As this Court recognized in *Camenisch*, when the factors necessary to obtain a preliminary injunction are no longer met on appeal, "the correctness of the decision to grant a preliminary injunction—is moot." The Court should accordingly dismiss. *Id.* at 392-94 ("Because the only issue presently before us—the correctness of the decision to grant a preliminary injunction—is moot . . . the case must be remanded to the District Court for trial on the merits.").

II. APPELLANTS ATTEMPT TO RAISE ISSUES THAT ARE NOT PROPERLY BEFORE THIS COURT.

Even if the Court were to consider this appeal, the only question that is properly before it is exceedingly narrow: did the Panel abuse its discretion when it denied Appellants' motion for a preliminary injunction?

Appellants repeatedly raise issues that were not introduced below, are not germane to the single question before this Court, or that pertain to the claim that the Panel dismissed in an order that Appellants acknowledge "is not at issue in this appeal." J.S. 4.

Appellants' attempt at misdirection begins on the very first page of their jurisdictional statement, where they assert that "[t]his case is about whether a state

may (1) choose an indefinite and inherently malleable redistricting criterion, (2) delegate the responsibility of defining that criterion to an independent commission, (3) allow the commission to apply that criterion inconsistently to draw the borders of thirteen congressional districts, and then (4) use the application of that criterion to justify dilution of roughly two-thirds of the state electorate's votes." J.S. 1. This sorely mischaracterizes the claims below and the current posture of the litigation.

Appellants did *not* argue in their preliminary injunction motion that the Commission itself was unconstitutional or that the state could not properly delegate to the Commission the responsibility for any aspect of the redistricting process. Far from it. Appellants repeatedly noted that, if the Panel granted the preliminary injunction motion, it would have to first give the Commission the opportunity to attempt to draw a remedial map. *See* J.S. App. 26a (requesting, in their first amended complaint, that the Panel "[e]stablish a deadline by which the Commissioners must redraw maps, and if the Commissioners do not act by this deadline, assume jurisdiction, appoint a special master, and draw constitutionally compliant congressional districts"); ECF No. 9 at 42 (asserting, in their motion for preliminary injunction, that "[g]ranting the injunction might send the Commission back to the drawing board (literally and figuratively)"); ECF No. 20 at 5 (reiterating, in their motion to expedite consideration of their preliminary injunction motion, that "Plaintiffs ask that this Court establish a deadline for the Commission to redraw maps that are constitutionally compliant"); *id.* at 9 (noting that "there may be insufficient time for the

Commission to redraw districts before the April 19, 2022 [petition signature] deadline unless the Court expedites its consideration of the preliminary-injunction motion"); ECF No. 25 at 4-5 (explaining, in their motion to expedite oral argument, the involved process that would follow on order granting the motion for preliminary relief, and affirmatively asserting that, "[s]hould this Court find that relief is warranted on either Count, the Court would be *required* to remand this matter back to the Michigan Independent Citizens Redistricting Commission") (emphasis added).

Also not at issue is Appellants' claim regarding the Commission's purported "inconsistent[]" application of the allegedly "indefinite and inherently malleable redistricting criterion" of communities of interest. J.S. 1. As Appellants acknowledge, the Panel dismissed this claim before it considered the preliminary injunction motion, and that order of dismissal is not at issue in this appeal. J.S. 4.

At the end of the day, this appeal presents—at most—an exceedingly narrow question about the Panel's decision to deny a motion for a preliminary injunction on a singular claim. If the Court does determine that it has jurisdiction to hear this appeal, it should confine itself to the single question that is properly before it.[3]

---

[3] Moreover, despite Appellants' reference to their proposed map's population deviation, J.S. 11, the Panel correctly found that the map the Appellants proposed was "altogether redrawn" rather than one "tweaked" "to equalize population among districts," J.S. App. 248a.

III. IF THE COURT REACHES THE MERITS, IT SHOULD SUMMARILY AFFIRM THE PANEL'S ORDER.

While the Individual Voter Intervenors did not take a position below about the merits of Appellants' sole remaining claim, ECF No. 39 (Individual Voter Intervenors' Resp. to Pls.' Mot. for Preliminary Injunction) at 3, n.1, Appellants' utter lack of diligence in attempting to obtain review of that decision in advance of the 2022 election sharply undercuts their allegations of irreparable harm, and in and of itself provides reason to summarily affirm. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence," something "true in election law cases as elsewhere"); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (finding "delay in filing [certiorari] petition . . . vitiates much of the force of [Applicants'] allegations of irreparable harm").

Appellants made *no* attempt to guard against the irreparable injuries that formed the basis for the preliminary injunction motion upon which they now seek this Court's review. Following the Panel's denial of their request for emergency relief on April 1, 2022, Appellants waited 28 days to even file their notice of appeal. J.S. 13; J.S. App. 1a. At no point did they seek emergency relief or expedited review. In fact, they affirmatively sought an extension of the deadline to file their jurisdictional statement, waiting four months before submitting it to the Court on July 28, 2022. J.S. 35. They then consented to a commensurate extension for responses by Appellees, until September

30. Motion Ext. Time, *Banerian v. Benson*, No. 22-92 (Aug. 4, 2022).

It is because of Appellants' incredibly lax approach to this appeal that the parties now find themselves, on the last day of September, a mere 39 days before election day, briefing Appellants' entirely unsupported request that this Court summarily reverse or note probable jurisdiction of a decision denying relief for an election in which voters are already casting ballots. If the Court reaches the merits of Appellants' appeal, it should summarily affirm.

CONCLUSION

For the reasons stated herein, this Court should dismiss this appeal or, in the alternative, summarily affirm.

Respectfully submitted.

ABHA KHANNA
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue,
Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

MARC E. ELIAS
EMMA OLSON SHARKEY
MELINDA K. JOHNSON
RAISA M. CRAMER
AARON M. MUKERJEE
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, DC 20002
(202) 968-4490

SARAH PRESCOTT
SALVATORE, PRESCOTT &
PORTER, PLLC
105 E. Main Street
Northville, MI 48168
(248) 679-8711

Counsel for Individual Voter
Intervenors-Appellees

SEPTEMBER 30, 2022