Order

Michigan Supreme Court
Lansing, Michigan

February 3, 2022

Bridget M. McCormack,
Chief Justice

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

163926

DETROIT CAUCUS, ROMULUS CITY COUNCIL, INKSTER CITY COUNCIL, TENISHA YANCY, SHERRY GAY-DAGNOGO, TYRONE CARTER, BETTY JEAN ALEXANDER, HON. STEPHEN CHISHOLM, TEOLA P. HUNTER, HON. KEITH WILLIAMS, DR. CAROL WEAVER, WENDELL BYRD, SHANELLE JACKSON, LAMAR LEMMONS, IRMA CLARK COLEMAN, LAVONIA PERRYMAN, ALISHA BELL, NATALIE BIENAIME, OLIVER COLE, ANDREA THOMPSON, DARRYL WOODS, NORMA D. McDANIEL, MELISSA D. McDANIEL, CHITARA WARREN, JAMES RICHARDSON, and ELENA HERRADA,
Plaintiffs,

v SC: 163926

INDEPENDENT CITIZENS REDISTRICTING COMMISSION,
Defendant.
_____/

On order of the Court, the first amended verified complaint is considered, and the relief requested is DENIED.

Plaintiffs challenge the plans adopted by the Independent Citizens Redistricting Commission (the Commission) on December 28, 2021 for Michigan's congressional and legislative districts. This Court has authority to "review a challenge to any plan adopted by the commission . . . ." Const 1963, art 4, § 6(19). Plaintiffs allege that the adopted plans do not "comply with the voting rights act and other federal laws" as required by Const 1963, art 4, § 6(13)(a). More specifically, plaintiffs contend that the absence of an equivalent number of majority-minority districts in the adopted plans as compared to Michigan's existing congressional and state legislative districts will result in unlawful vote dilution in violation of the Voting Rights Act of 1965 (VRA), 52 USC 10301 *et seq*. In considering whether the adopted plans violate federal laws, we are bound by the decisions of the United States Supreme Court that construe those laws. *Abela v Gen Motors Corp*, 469 Mich 603, 606 (2004); *Chesapeake & O R Co v Martin*, 283 US 209, 220-221 (1931). Those United States Supreme Court decisions must govern our decision.

Earlier this year, in anticipation of redistricting challenges invoking our original jurisdiction, this Court unanimously adopted amendments to our court rules governing original proceedings. MCR 7.306(J) provides that "[t]he Court may set the case for argument as on leave granted, grant or deny the relief requested, or provide other relief that it deems appropriate, including an order to show cause why the relief sought in the complaint should not be granted." After receiving briefing on the merits of plaintiffs' challenge, we ordered expedited oral argument seeking the parties' respective views on "the proper disposition of the plaintiffs' complaint, including whether the plaintiffs have sustained their claims on the merits or whether there are disputed questions of fact." *Detroit Caucus v Independent Citizens Redistricting Comm*, ___ Mich ___ (2022). During oral argument, plaintiffs' counsel repeatedly answered our question by stating that plaintiffs had no intention of further supplementing the record and that it was plaintiffs' position that the reduction in majority-minority districts was "clear evidence in and of itself," that "the numbers speak for themselves," and that "[t]he results speak for themselves." Counsel also asserted that plaintiffs were satisfied that they "have enough that's been substantiated and submitted" and that "the evidence is clear as day to us and with what we submitted thus far." Plaintiffs' counsel expressly conceded that the case was "ready" for adjudication and that there was no need for a court-appointed expert.[1] The Commission's counsel agreed that this Court should proceed to address the merits of plaintiffs' challenge as presented.

"Redistricting is never easy," and there are "competing hazards of liability" for a body tasked with producing a lawful redistricting plan. *Abbott v Perez*, 585 US ___, ___; 138 S Ct 2305, 2314-2315 (2018) (quotation marks and citation omitted). The Commission must abide by a host of different—and sometimes competing—redistricting criteria. See *id.* at ___, 138 S Ct at 2314; see also Const 1963, art 4, § 6(13)(a) through (g) (ranking priority of state redistricting criteria). As particularly relevant to plaintiffs' challenge, "federal law impose[s] complex and delicately balanced requirements regarding the consideration of race." *Abbott*, 585 US at ___; 138 S Ct at 2314. It is settled beyond

[1] Nor are we persuaded that a court-appointed expert is necessary or advisable. Although MRE 706 "permits a court to appoint and compensate an expert to assist the court," *In re Yarbrough Minors*, 314 Mich App 111, 121 (2016), our Court of Appeals has prudently recognized that "litigant assistance" is not the purpose of the rule, *id.* at 121 n 7 (quotation marks and citation omitted). A court-appointed expert is "for the court's benefit," *Grand Blanc Landfill, Inc v Swanson Environmental, Inc*, 186 Mich App 307, 311 (1990), and is most appropriate "when the parties' retained experts are in such wild disagreement that the trial court might find it helpful and in furtherance of the search for truth to appoint an independent expert," *In re Yarbrough Minors*, 314 Mich App at 121 n 7 (quotation marks and citation omitted). Those circumstances are not present in this case. We agree with plaintiffs' counsel that plaintiffs' position, regardless of its legal merit, is "clear" and does not warrant a court-appointed expert.

dispute that the Equal Protection Clause of the United States Constitution "forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Id*. Yet, "[a]t the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the [VRA] pulls in the opposite direction" and "often insists that districts be created precisely because of race." *Id*.

Plaintiffs, supported by a conclusory expert affidavit with no accompanying bloc-voting analysis, argue that the mere absence of an equivalent number of race-based, majority-minority districts in the adopted plans as compared to Michigan's existing congressional and state legislative districts violates the VRA. But that is not the measure of vote dilution under the VRA. Vote dilution exists when "members of a minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Johnson v De Grandy*, 512 US 997, 1000 (1994) (quotation marks and citation omitted). For more than 35 years, vote-dilution claims have been governed by the standard first announced in *Thornburg v Gingles*, 478 US 30 (1986). As explained by the United States Supreme Court in *Cooper v Harris*, 581 US ___, ___; 137 S Ct 1455, 1470 (2017) (some alterations added):

> [T]his Court identified, in [*Gingles*], three threshold conditions for proving vote dilution under § 2 of the VRA. See [*Gingles*, 478 US at 50-51]. First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. *Id*., at 50. Second, the minority group must be "politically cohesive." *Id*., at 51. And third, a district's white majority must "vote[] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Ibid*. Those three showings, we have explained, are needed to establish that "the minority [group] has the potential to elect a representative of its own choice" in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is "submerg[ed] in a larger white voting population." *Growe v Emison*, 507 US 25, 40 (1993).

The *Cooper* Court then went on to clarify the exact circumstances that might provide sufficient justification to intentionally assign citizens to a district on the basis of race: "If a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. *But if not, then not.*" *Cooper*, 581 US at ___; 137 S Ct at 1470 (emphasis added; citation omitted); see also *Bush v Vera*, 517 US 952, 977-978 (1996) (opinion of O'Connor, J.) (assuming, without deciding, that VRA compliance is a compelling state interest capable of satisfying strict scrutiny to avoid an equal-protection violation but requiring that the redistricting body have "a strong basis in evidence for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2") (quotation marks and citation omitted).

In other words, the Commission needed good reason to think that the *Gingles* preconditions were satisfied to believe that § 2 of the VRA required majority-minority districts. Under *Cooper*, 581 US at ___; 137 S Ct at 1464, the Commission could only "invoke[] the VRA to justify race-based districting" with " 'a strong basis in evidence' " establishing that race-based, majority-minority districts were necessary as a narrowly tailored means of ensuring an equal opportunity to elect candidates preferred by Black voters. (Citation omitted.) The Commission asserts that the evidentiary basis supporting a need for majority-minority districts was entirely lacking in the public record. In fact, the Commission's voting-analysis expert extensively analyzed voting patterns in general-election and primary-election contests over the prior redistricting cycle both statewide and specifically within Wayne, Oakland, Genesee, and Saginaw Counties. The resulting racial bloc-voting analysis (a breakdown in voting patterns based on race) suggested significant white crossover voting for Black-preferred candidates that had the effect of affording Black voters an equal opportunity to elect representatives of their choice even in the absence of 50%+ majority-minority districts. This evidence of white crossover voting—unrebutted by plaintiffs' expert—reinforces our conclusion that plaintiffs have not made the threshold showing of white bloc voting required by *Gingles*.

Plaintiffs have not identified grounds or legal authority that would allow us to question the Commission's decision not to draw race-based, majority-minority districts. That decision was the correct one precisely because there was no "strong basis in evidence" providing "good reason" for the Commission to believe that the three threshold *Gingles* preconditions were satisfied so as to potentially require race-based district lines in order to avoid liability for vote dilution under § 2 of the VRA. See *Cooper*, 581 US at ___, ___; 137 S Ct at 1464, 1470 (quotation marks and citation omitted). " '[I]n the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.' " *Voinovich v Quilter*, 507 US 146, 158 (1993), quoting *Gingles*, 478 US at 49 n 15; see also *Cooper*, 581 US at ___; 137 S Ct at 1470 (recognizing that "[i]t is difficult to see how the majority-bloc-voting requirement could be met—and hence how § 2 liability could be established"—if the electoral history tends to demonstrate that "a meaningful number of white voters join[] a politically cohesive black community to elect that group's favored candidate") (quotation marks and citation omitted; alteration in original). And if the Commission had intentionally created majority-minority districts without "sufficient justification," it would have easily invited a potentially meritorious challenge as an unconstitutional racial gerrymander. See *Cooper*, 581 US at ___; 137 S Ct at 1463.

We are bound to follow the precedent of the United States Supreme Court when considering whether the Commission's adopted plans violate federal law. That precedent requires that any redistricting plan comply with both the VRA and the Equal Protection Clause of the United States Constitution. The relief plaintiffs request would put the work of the Commission squarely in the crosshairs of an Equal Protection Clause violation. We

recognize that some challenges to redistricting might require additional factual development, and that this is particularly true when redistricting happens behind closed doors because the evidence on which decisions are made is generally not publicly available.[2] However, the Commission's work has been an open and public process as required by Const 1963, art 4, § 6. In light of plaintiffs' concession that further factual development is unnecessary for resolution of the case, we have the responsibility to resolve the case at this juncture consistent with our charge under the Michigan Constitution.[3]

Plaintiffs have not demonstrated that the Commission's adopted plans are noncompliant with Const 1963, art 4, § 6(13)(a). Therefore, the relief requested is denied and the first amended verified complaint is dismissed.

ZAHRA, VIVIANO, and BERNSTEIN, JJ. (*dissenting*).

We dissent not because we disagree with the legal framework set out by the majority's denial order; neither party contests that this case is governed by the test set forth in *Thornburg v Gingles*.[4] And we certainly agree with the majority's unremarkable proposition that "[i]n considering whether the adopted plans violate federal laws, we are bound by decisions of the United States Supreme Court that construe those laws." Rather, our contention is that the majority's dismissal is premature. Instead of dismissing the case without any analysis of whether plaintiffs have stated a claim or any opportunity for further factual development if they have stated a claim, we would appoint an independent expert to assist the Court in assessing the evidence and factual assertions presented thus far and any additional evidence the parties would develop and submit for review.[5]

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[2] In early September, the Commission's voting-analysis expert *publicly* presented the initial findings of the Commission's racial bloc-voting analysis. Moreover, that statistical analysis is premised on election results and demographic data that are, and always have been, publicly available. This *evidence* is entirely distinguishable from the materials relating to legal advice that this Court held was not privileged and subject to disclosure in *Detroit News, Inc v Independent Citizens Redistricting Comm*, ___ Mich ___ (2021) (Docket No. 163823).

[3] It is not at all unusual for this Court to dismiss an original action brought under MCR 7.306 without further proceedings. We routinely summarily dismiss original actions seeking superintending control over lower courts and tribunals without holding oral argument. See, e.g., *Oakes v 30th Judicial Circuit Court*, 507 Mich 903 (2021); *Truss v Attorney Grievance Comm*, 507 Mich 884 (2021). And as previously noted, this case has received the extra attention of expedited oral argument.

[4] *Thornburg v Gingles*, 478 US 30 (1986).

[5] We would do so under MRE 706. Given the expedited nature of these proceedings, we conclude that the emergency oral argument on January 26, 2022, in which we questioned

On January 6, 2022, plaintiffs filed the present suit alleging that the redistricting maps adopted by defendant—an independent, quasi-legislative body known as the Independent Citizens Redistricting Commission (the Commission)[6]—impermissibly dilute the votes of Black Michiganders in violation of § 2 of the Voting Rights Act of 1965 (VRA), 52 USC 10301 *et seq*., and Const 1963, art 4, § 6(13)(a) and (c). This case involves significant questions concerning the recently adopted constitutional amendments to our redistricting process, Const 1963, art 4, § 6. It also involves a complex subject matter—voter dilution—that this Court does not regularly address. And the case comes to us as an original action, meaning no other court below has, or can, address it. All of this counsels in favor of caution and the need for due deliberation in resolving this matter. And yet the majority summarily dismisses the case because plaintiffs failed to present sufficient evidence at this threshold stage of the case—something neither common practice nor our court rules required them to do.

This case arises under our original jurisdiction to "review a challenge to any plan adopted by the commission . . . ."[7] Accordingly, no lower court has addressed the merits of plaintiffs' claims. This means that, in essence, we operate as the trial court. In a typical case at this early stage—that is, after the initial pleading has been filed and the defendant has responded—evidentiary materials have not been marshaled or put forward

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the parties about "whether the plaintiffs have sustained their claims on the merits or whether there are disputed questions of fact," would serve as the show-cause hearing.

[6] In 2018, through the exercise of direct democracy, see Const 1963, art 12, § 2 (recognizing the power of the people of Michigan to initiate proposed constitutional amendments that, if various requirements are met, are placed on the ballot and voted on at election time), the voters amended our state's Constitution to vest responsibility for redistricting in the Commission. That amendment is Const 1963, art 4, § 6, which "marked a departure from the prevailing mode of redistricting, which had been done for decades by the Legislature." *Detroit News, Inc v Independent Citizens Redistricting Comm*, ___ Mich ___, ___ (2021) (Docket No. 163823); slip op at 1-2. See also *In re Apportionment of State Legislature–1982*, 413 Mich 96, 116 (1982) (returning responsibility for state legislative redistricting to the Legislature by holding that "the function of the [Commission on Legislative Apportionment] . . . , and indeed the commission itself, are not severable from the [previously] invalidated [apportionment] rules").

[7] Const 1963, art 4, § 6(19).

by the parties. That process occurs later, during discovery. Instead, at this point in a trial proceeding, a defendant might move for summary disposition on the pleadings, arguing that the plaintiff's complaint has "failed to state a claim on which relief can be granted."[8] Such an argument attacks the "*legal sufficiency* of a claim based on the factual allegations in the complaint."[9] Accordingly, the court "must accept all factual allegations as true" and "decid[e] the motion on the pleadings alone."[10] We are a notice-pleading state, and, as a result, the function of the complaint is simply to give notice of the claims being lodged against the defendants.[11] Accordingly, "[a] motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery."[12]

We are at the pleading stage. Plaintiffs have filed their complaint and accompanying brief, and defendant has responded, pursuant to MCR 7.306. If this were a typical case, the trial court would examine the legal sufficiency of the pleadings and could not dismiss the complaint at this stage of the proceedings solely because of plaintiffs' failure to produce all the relevant supporting evidence. That is the situation here.

The majority does not suggest that plaintiffs have failed to state a claim. Nor could it. Plaintiffs' complaint raises a constitutional issue of first impression: the legality of the Commission's maps. The Commission is charged with creating maps based on a series of criteria that are ranked by importance in the redistricting process.[13] The very first criterion—meaning it is the most important one in the creation of the maps—is the one at issue here: the "[d]istricts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws."[14] The VRA states that "[n]o voting . . . standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."[15] A violation occurs "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members" of a protected class "in that its members have less opportunity than other members of the electorate to participate in

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[8] MCR 2.116(C)(8).

[9] *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159 (2019).

[10] *Id.* at 160.

[11] See *Baker v Gushwa*, 354 Mich 241, 246 (1958).

[12] *El-Khalil*, 504 Mich at 160.

[13] Const 1963, art 4, § 6(13).

[14] Const 1963, art 4, § 6(13)(a).

[15] 52 USC 10301(a).

the political process and to elect representatives of their choice."[16] To prevail on such a claim, the plaintiffs must show that (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group . . . is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate."[17] If these showings are made, then the court must consider the totality of the circumstances.[18]

As federal courts have recognized, § 2 claims under the VRA are usually viewed as involving "mixed questions of law and fact," and "[t]his makes it particularly inappropriate to foreclose at the pleading stage Plaintiffs' opportunity to prove their claims."[19] The United States Court of Appeals for the First Circuit said it well:

> It is no accident that most cases under section 2 [of the VRA] have been decided on summary judgment or after a verdict, and not on a motion to dismiss. This caution is especially apt where, as here, we are dealing with a major variant not addressed in *Gingles* itself—the single member district—and one with a relatively unusual history. As courts get more experience dealing with these cases and the rules firm up, it may be more feasible to dismiss weaker cases on the pleadings, but in the case before us we think that the plaintiffs are entitled to an opportunity to develop evidence before the merits are resolved.[20]

Another federal appellate court, rejecting a motion to dismiss based on the pleadings, stated that the plaintiffs needed "only to allege that the [challenged practice or rule] dilutes minority voting strength such that minority voters in the relevant wards have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' "[21] Thus, under a notice-pleading standard like ours, plaintiffs are "not required on the face of their complaint to allege every legal element or fact that must be proven in a vote dilution claim."[22] Nowhere has the United States Supreme Court stated that the *Gingles* factors must be alleged in the complaint in order to survive dismissal at this initial stage—"[t]his implies that a plaintiff should have an

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[16] 52 USC 10301(b).

[17] *Gingles*, 478 US at 50-51 (citation omitted).

[18] *Id*. at 79.

[19] *Rose v Raffensperger*, 511 F Supp 3d 1340, 1355, 1360 (ND Ga, 2021).

[20] *Metts v Murphy*, 363 F3d 8, 11 (CA 1, 2004).

[21] *Kingman Park Civic Ass'n v Williams*, 358 US App DC 295, 302 (2003) (citation omitted).

[22] *Id*.

opportunity to prove the *Gingles* prerequisites by setting out facts in support of the claim."[23] And because VRA claims "require courts to engage in a fact-intensive, 'intensely local appraisal of the design and impact of electoral administration in the light of past and present reality,' " they "are not easily susceptible to resolution at the pleadings stage."[24]

Here, plaintiffs have alleged that defendant's newly adopted maps dilute Black votes in various districts. They have even alleged facts supportive of each of the three *Gingles* threshold factors as well as the "totality of the circumstances" considerations. Those facts, if proven, might not be enough to ultimately prevail in this case. But they would be enough for the case to move forward in any trial court assessing the complaint under a notice-pleading standard, and they should be sufficient for the case to proceed in our Court as well.[25]

The fact that the present case comes to us as an original action matters; we ought not summarily discount an original action as we often do in the exercise of our discretionary jurisdiction. Appellate courts in this state and elsewhere rarely entertain original actions. But when they do, these courts have been attentive to the need for factual development, particularly in cases like the present one that involve significant issues that will affect our state for a decade or more. The United States Supreme Court has stated, "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts."[26]

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[23] *Bradley v Indiana State Election Bd*, 797 F Supp 694, 699 & n 7 (SD Ind, 1992) (noting the "apparent dearth of dismissals in other [VRA] § 2 cases for failure to allege the *Gingles* elements specifically").

[24] *Middleton v Andino*, 474 F Supp 3d 768, 776 (D SC, 2020) (citation omitted).

[25] It is noteworthy, too, that neither the defendants, the majority, nor our own research has uncovered any VRA case that has been summarily dismissed on the merits at such an early stage.

[26] *United States v Texas*, 339 US 707, 715 (1950), superseded by statute on other grounds as recognized by *Parker Drilling Mgt Servs, Ltd v Newton*, 139 S Ct 1881, 1887 (2019); see also Note, *Special Juries in the Supreme Court*, 123 Yale L J 208, 233 (2013) ("The practice of delegating fact-finding in original jurisdiction cases to special masters has become institutionalized . . . ."); Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 Tex L Rev 269, 342 (1999) ("The Court customarily refers these cases to a special master for fact-finding . . . .").

The majority suggests that the gravamen of plaintiffs' complaint is that minority-majority districts need to be adopted. This focus allows the majority to emphasize the caselaw indicating that the VRA does not, without more, require the adoption of such districts. But this twists the nature of the argument. The VRA, as interpreted by the United

Our practice is similar. For example, in judicial disciplinary actions, over which we have original jurisdiction,[27] we have erected an elaborate process by which facts can be developed before this Court disposes of the case.[28] The same goes for attorney discipline proceedings.[29] We have similarly acknowledged the need for factual development in certain constitutional tax challenges—known as Headlee Amendment actions—which can be filed as original actions in the Court of Appeals. In doing so, we erected special pleading requirements that would indicate to the court whether further factual development is needed. Our rules require the pleadings in those actions to "set forth with particularity the factual basis for the alleged violation or a defense and indicate whether there are any factual questions that are anticipated to require resolution by the court."[30] As former Justice YOUNG wrote at the time we adopted that rule, "Trial courts are designed efficiently to preside over discovery matters, pretrial hearings, and ultimately a trial on the merits. Those are the means that our system of justice uses to fully and efficiently develop the facts underlying the parties' claims."[31] But the Court of Appeals was not "equipped for factual development of new claims," and thus for Headlee cases, we implemented a process by which the parties would sharpen the factual dispute at the threshold stage.[32]

Our court rule governing this case, by contrast, has neither a defined process through which facts are to be developed nor heightened pleading requirements. The court rule does not require the parties to specify their factual allegations with particularity, much less present evidence, at this stage. MCR 7.306(C) and (D) simply require the plaintiff to file

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States Supreme Court, prohibits the dilution of the voting power of minority groups. Plaintiffs are claiming that their voting power has been impermissibly diluted. The relief they seek would involve establishing minority-majority districts, but they do not need to show entitlement to that particular relief in order to prevail on their claim. If plaintiffs were able to establish that their voting power has been impermissibly diluted, the appropriate remedy under the VRA might be something greater than the present proportion of Black voting-age population in the present maps but less than the creation of a minority-majority district(s). Perhaps districts with a Black voting-age population of less than 50% would adequately remedy any improper vote dilution given the crossover votes of the white population. Determining this, however, would require a deeper analysis of the facts than the majority is willing to offer.

[27] See Const 1963, art 6, § 30.

[28] See MCR 9.200 *et seq*.

[29] See Const 1963, art 6, § 4; MCR 9.100 *et seq*.

[30] MCR 2.112(M).

[31] MCR 7.206, 480 Mich clviii, clxi (YOUNG, J., concurring).

[32] *Id*.

a complaint and brief, which will be followed by the defendant's answer and brief, capped finally by a reply brief. Nor do we require the parties to specify or present any particular facts or evidence. The rule does not state that the initial pleadings must cover the ultimate merits of the case. And no one reading the rule would believe that a plaintiff is on notice that the case will be dismissed if the plaintiff fails to present all of their evidence along with the complaint and brief. Yet that is exactly what the majority has done, faulting plaintiffs for their failure to present evidence that we never requested or required them to present (and that would never be presented at this stage in any trial court).

What makes the majority's dismissal even more unjust is the tight time frame plaintiffs have had to file this redistricting challenge. The Constitution required defendant to adopt its redistricting maps on November 1.[33] But, because delays in the transmission of data from the United States Census Bureau to the states made this deadline difficult to comply with, defendant did not adopt the maps until December 28—almost two months later.[34] Plaintiffs filed suit roughly a week later. They needed to act quickly because the

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[33] Const 1963, art 4, § 6(7). But before the Commission could "adopt" any plans, it had to make them available for public comment for 45 days, which means that the proposed redistricting plans had to be completed even earlier—by September 17.

[34] In June 2021, the Commission sought a ruling from this Court that the timing requirements of Const 1963, art 4, § 6 are merely directory, that is, that the constitutional deadlines were "advisable, but not absolutely essential—in contrast to a mandatory requirement." *Black's Law Dictionary* (11th ed) (defining "directory requirement"). It claimed, therefore, that the failure to comply with the deadlines due to the delay in receiving the census data would not affect the viability of the late-adopted maps. We denied the petition for anticipatory relief, and there is no need to resolve the matter in the present case. We do, however, note that nothing in our Constitution expressly requires defendant to use the federal decennial census data for redistricting. While the Constitution refers to "the federal decennial census" data in various sections—see Const 1963, art 4, §§ 6(2)(a)(i), (2)(c) through (f), (5), and (7)—when the Constitution provides for the materials defendant can use to create the maps, it refers more generally to "data" without suggesting that such data is limited to the federal decennial census data. Other courts have recognized that federal census data is not required for redistricting. See *In re Interrogatories on Senate Bill 21-247 Submitted by Colorado General Assembly*, 488 P3d 1008, 1013-1014, 1019 (2021) (holding that similar constitutional language—"necessary census data"—did not require Colorado's independent redistricting commission to "refer wholly or exclusively to" the federal decennial census to draw new maps); see also *Holloway v Virginia Beach*, 531 F Supp 3d 1015, 1061 (ED Va, 2021) (noting that "sister jurisdictions have consistently relied upon [non-census data] for examining demographic information of minority populations for Section 2 cases"); *id.* (collecting cases); *Ohio v Raimondo*, 528 F Supp 3d 783, 794 (SD Ohio, 2021), rev'd on other grounds 848 F Appx 187 (CA 6, 2021) ("While the use of census data is the general practice, no stricture of the

first candidate filings under the new maps are due in April.[35] On this compressed schedule, it would have been difficult if not impossible for plaintiffs to assemble and submit with its complaint all the evidence necessary to support their claim.[36] "Since direct evidence of minority voting patterns is unavailable (in that ballots do not indicate a voter's race), statistical proof is commonly presented in vote-dilution cases . . . ."[37] This data generally must be "presented and analyzed by expert witnesses" who can select the proper voting data and undertake regression analysis, scatterpoint analysis, and any other methods for making valid inferences from the data.[38] These are complicated matters that necessarily take time to evaluate. And they are not subjects frequently litigated in our courts.[39]

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federal government requires States to use decennial census data in redistricting, so long as the redistricting complies with the Constitution and the Voting Right[s] Act."); see generally *Burns v Richardson*, 384 US 73, 91 (1966) (holding that states may draw districts based on voter-registration data and stating that "the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured"). Whether the delay was necessary or not, the fact remains that plaintiffs had to bring this suit soon after the maps were adopted in order to ensure that any relief the Court provided would not interfere with the upcoming elections. This necessarily made any presuit factual development more difficult, at the very least, and thus makes it all the more puzzling why the majority would fault plaintiffs for not presenting extensive evidence at the pleading stage (while at the same time failing to examine the evidence plaintiffs did present).

[35] See MCL 168.133; MCL 168.163.

[36] While plaintiffs did not specify at oral argument the precise pieces of evidence they would submit, their counsel nonetheless observed that their filing of the complaint and brief did not waive their opportunity for factual development in this case. Plaintiffs' counsel at argument actually invited the Court to appoint an expert. And while he said he did not think further factual development was necessary for plaintiffs to prevail, he said that plaintiffs would welcome the opportunity for further factual development. The majority makes much of counsel's assertion that plaintiffs had presented enough information to prevail. But is this so damning? Was the only way for plaintiffs to obtain factual development for their counsel to concede that their claim, on the record presently presented, lacked factual support? Requiring such an admission is patently unfair, given the fact that our court rule placed plaintiffs in a precarious position: it was unclear to them—as it was unclear to us before the present majority order—whether this Court would reject a claim at the pleading stage for failure to adduce sufficient proof.

[37] 25 Am Jur 2d, Elections, § 46, p 919.

[38] *Id.* at 919-920.

[39] The majority suggests that "the Commission's work has been an open and public process" and that therefore factual development is unnecessary. Maybe that is so with regard to most of the Commission's work, but it is certainly not the case with the materials

Ignoring the complexities of this case (and VRA cases in general), the majority has completely abdicated its responsibility to evaluate the sufficiency of the evidence presented in this case and explain why it is inadequate. As noted, VRA claims "require courts to engage in a fact-intensive, 'intensely local appraisal of the design and impact of electoral administration in the light of past and present reality . . . .' "[40] The majority somehow finds that plaintiffs have not met their evidentiary burden without examining the evidence and examples plaintiffs have presented. We believe the Court should be more thorough and circumspect in assessing the factual sufficiency of an incomplete record involving such a complex, unfamiliar, and vitally important subject matter.

Given the shortened time frame in which to assess a challenge, we would exercise our authority to appoint an expert under MRE 706(1)[41] to evaluate the evidence presented thus far and any additional evidence the parties may submit in this case. This would allow both sides an opportunity to develop the evidence they intend to rely on and would also

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most relevant to the present matter. Less than two months ago it took an opinion of this Court to force the Commission to disclose documents and a recording of a closed meeting relating to the Commission's compliance with the VRA. *Detroit News, Inc*, ___ Mich ___. These materials were released roughly two weeks prior to the filing of plaintiffs' suit. It is simply not the case that any "open and public process" by the Commission gave plaintiffs ample time for factual development of their VRA claim prior to the filing of this action.

[40] *Middleton*, 474 F Supp 3d at 776 (citation omitted).

[41] Because we are effectively sitting as a trial court, we have discretion to appoint an expert to assist us with fact finding and to decide how that expert will be compensated. See MRE 706; *Grand Blanc Landfill, Inc v Swanson Environmental, Inc*, 186 Mich App 307, 311 (1990) ("MRE 706, which vests a trial court with authority to appoint [a neutral] expert, must be construed as allowing for the creation of a relationship between the expert and the appointing court, for the court's benefit. It is the court that appoints the expert, establishes its duties, and determines its compensation."). An expert witness may be appropriate if the evidence to be presented at trial is complex. See MRE 702 ("If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise . . . ."). The limitation on the appointment of an independent expert is that the court cannot delegate judicial functions to such an expert. See generally *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116 (1996). We conclude that the emergency oral argument on January 26, 2022, in which we questioned the parties about "whether the plaintiffs have sustained their claims on the merits or whether there are disputed questions of fact," would serve as the show-cause hearing required under MRE 706. See note 2 of this statement.

help the Court begin to assess the sufficiency of that evidence.[42] Depending on the expert's report, we would then consider whether a special master is needed to make specific factual findings for our review.

Procedure matters. People care about how their cases are handled and whether they had a fair opportunity to be heard.[43] As a matter of procedure, the majority's decision today is completely unprecedented. It does not resemble what would normally occur in a case filed in our trial courts or in the federal courts. It does not reflect anything required by our court rules. And it does not accord with any notion of fair play. The majority's decision today will do much to undermine the public's confidence that this Court will take seriously original complaints filed in our Court under Const 1963, art 4, § 6. Indeed, plaintiffs have challenged the very highest priority criterion for redistricting in this state—compliance with constitutional requirements, Const 1963, art 4, § 6(13)(a),

[42] Contrary to the majority's insinuation, the expert would not be appointed on behalf of any party but rather would help the Court assess the evidence. But the evidence the expert would help interpret for the Court would include that which is now in the case along with any other evidence that may be developed and presented by the parties on an expedited basis.

[43] See Lind & Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988), p 92 ("Indeed, the picture that seems to be emerging [from research studies] is of people much more concerned with the process of their interaction with the law and much less concerned with the outcome of that interaction than one might have supposed.").

and the VRA—and yet the majority brushes their challenge aside by erecting, without advance notice, a requirement that plaintiffs needed to present evidence sufficient to withstand dismissal at the time they filed their complaint.[44] Despite its decision to

[44] The majority makes a curious claim: that nobody should be troubled by its hasty dismissal of this case because this Court has in the past summarily dismissed requests to exercise superintending control over lower courts pursuant to Const 1963, art 6, § 4. But this is a deeply flawed comparison. Superintending control is "[t]he general supervisory control that a higher court in a jurisdiction has over the administrative affairs of a lower court within that jurisdiction." *Black's Law Dictionary* (11th ed), p 416. To decline to take up such invitations is a far cry from dismissing an original action in a redistricting case involving a VRA claim (the highest-priority constitutional criterion, Const 1963, art 4, § 6(13)(a)), an action that has been solemnly entrusted to this Court alone and will shape the people's exercise of the franchise in this state for the next decade. So different are the two that we can scarcely fathom why the majority thinks that stating it is a point in its favor. In truth, it is a distraction. Regardless of the propriety of that view, the majority has not shown that we have ever taken this course in a redistricting case, let alone one that arises under a new constitutional provision testing the propriety of maps, drawn by a new entity, that mark a significant departure from the maps that have governed since the last redistricting. In other words, we believe it is a poor use of the Court's discretion to essentially close the courtroom doors in a case raising significant legal issues of first impression.

dismiss this case on the basis that the evidence was insufficient, the majority fails to adequately grapple with the evidence and factual assertions that plaintiffs have put forward. We believe, by contrast, that it is too soon to rule on the merits of this case and that plaintiffs deserve an opportunity to prove their case. They deserve their day in court. For these reasons, we respectfully dissent.