NO. 23A641

IN THE
Supreme Court of the United States

MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION, et al.,

Defendants-Applicants,

v.

DONALD AGEE, JR., et al.

Plaintiffs-Respondents,

&

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant-Respondent.

To the Honorable Brett M. Kavanaugh, Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

OPPOSITION TO EMERGENCY APPLICATION FOR STAY AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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INTRODUCTION AND SUMMARY OF ARGUMENT

Applicants ask this Court to reinstate Michigan senate and house districts that the Commission drew with shockingly low "across-the-board racial targets,"—35% to 42% BVAPs—in metropolitan Detroit, an area with one of the most densely concentrated Black populations in the country. App.55a. Applicants claim these racial targets resulted from "the most comprehensive" functional analysis ever conducted in a redistricting effort. Appl.1. But after reviewing over 10,000 pages of record, the three-judge panel found that these racial targets were based on "close to useless" general-election data when everyone understood that Detroit-area "districts are decided in the Democratic primaries, not the general election." App.55a–56a, 113a. As the panel put it, the Commission's reliance on irrelevant data "was a grave disservice to everyone involved with this case, above all the voters themselves." App.114a.

The Commission's pervasive use of race was neither narrowly tailored nor "thorough and reliable." Contra Appl.25–27. As the panel concluded in denying the Commission's stay motion, "the Commission had no data indicating how African American candidates of choice performed in the Democratic primaries in Detroit" and "cannot show it engaged in a narrowly tailored approach to justify its racial gerrymandering." App.119a–120a. The Commission's methodology was akin to guessing how many games the Washington Nationals will win based on players' free-throw percentages. The result was to decimate Michigan's Black legislative caucus.

Besides grounding its appeal request on an unassailable factual finding, the Commission's Application suffers from another defect. Given the evidence in its possession at the time of its racial gerrymandering, the Commission had no basis to believe the *Gingles* factors had been met. So the Commission had no excuse to draw maps based on race in the first place. This alternative ground for affirmance moots any need for a stay or this Court's review. The Application should be denied.

BACKGROUND

I. Michigan's recent redistricting history

The United States 2020 Census found that 13.7% of Michigan residents identified as "Black alone."[1] A near super-majority of these residents reside in Wayne, Oakland, and Macomb counties with the epicenter of these residents hailing from Detroit, which is 78% "Black alone."[2]

Before the Michigan Redistricting Commission began map drawing, it was long accepted that legislative districts in the Detroit area needed to be structured with Black voting age percentages, or "BVAPs," of at least 50% so Black voters would have a fair opportunity to elect their candidates of choice. Following the 1990 census, the Michigan Supreme Court appointed three special masters to consider several proposed redistricting plans. Finding none of the plans acceptable, the special masters created their own. To ensure compliance with the Voting Rights Act ("VRA")—the court unanimously reconfigured several of the house districts in Wayne County "to provide a better racial balance throughout these districts" and approved the plan, adopting BVAPs between 85.73% and 68.17%. *In re Apportionment of State Legislature-1992*, 439 Mich. 251, 253; 483 NW2d 52 (1992). In all, this plan contained five senate[3] and 13 house[4] districts with BVAPs over 50%.

The Michigan Supreme Court eventually issued a lengthier explication of its VRA analysis, applying the *Gingles* factors and concluding that the slightly modified senate and house maps did not violate the VRA. *In re Apportionment, State Legislature-1992*, 439 Mich. 715, 735-36 (1992). That court held that those maps neither

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[1] https://www.census.gov/library/stories/state-by-state/michigan-population-change-between-census-decade.html

[2] https://www.census.gov/quickfacts/detroitcitymichigan

[3] http://www.legislature.mi.gov/(S(dkoujoq3h4lddyyucgtkepbh))/documents/2001-2002/michiganmanual/2001-mm-p0302-p0306.pdf

[4] http://www.legislature.mi.gov/(S(dkoujoq3h4lddyyucgtkepbh))/documents/2001-2002/michiganmanual/2001-mm-p0309-p0323.pdf

deprived Black voters of the ability to elect their candidate of choice nor diluted Black votes by excessively packing Black citizens into the majority-minority districts. *Id.* at 747 n. 75. The maps survived a similar federal-court challenge. *NAACP* v. *Austin*, 857 F. Supp. 560 (E.D. Mich. 1994).

In 2011, the Michigan Legislature passed Public Act 129 of 2011, which apportioned Michigan's 110 representative districts and 38 senatorial districts. The 2011 plan provided for two Detroit-area senate districts with Black majorities and three more with BVAPs above 45%, plus 10 Detroit-area house districts with Black majorities. App.3a.

In 2018, Michigan voters passed a ballot proposal that amended the state Constitution by transferring authority to create legislative districts from the Legislature to the Commission, under the Michigan Secretary of State's supervision. Mich. Const. art. IV, § 6. The amendment specified that, as a first priority, the Commission must ensure the plans "comply with the voting rights act and other federal laws." Mich. Const. art. IV, § 6(13)(a).

In 2020, Michigan's Secretary of State formed the new Commission by selecting 13 random candidates from a pool of over 9,000 applicants. App.4a. The Commission "came to their task with no experience in redistricting and no knowledge of election law[]" so they "hired experts to guide them-notably their 'voting rights act legal counsel,' Bruce Adelson, and a political scientist, Dr. Lisa Handley, along with their general counsel, Julianne Pastula." App.1a.

Michigan's Constitution requires legislative and congressional maps be approved no later than November 1, 2021. Mich. Const. art. IV, § 6(7). Due to the Census Bureau's delay in providing its 2020 census data, the Commission did not begin drafting any maps until August 2021. App.6a.

II. The Michigan Redistricting Commission's map drawing

On September 2, 2021, Dr. Handley gave a presentation to the Commission entitled "Determining if a Redistricting Plan Complies with the Voting Rights Act." App.6a. Dr. Handley told the Commission that in drawing new districts, it could neither "crack" nor "pack" a minority community. App.6a. Her role was to "analyze election data and then to determine, for different districts, what th[e] necessary black-voter percentages" or BVAPs might be to allow Black voters to elect the candidates of their choice. App.8a. To do so, Handley examined 13 statewide general elections and only one statewide democratic primary election between 2012 and 2020. App.8a. The one primary election played no role in Handley's analysis because Black voters did not demonstrate a preference for any particular candidate in that contest. App.8a. Yet as Commissioners were told from the outset, in areas like Detroit that predominately vote for democrats in the general election, the *primary* election—not the general—is the dispositive election for Black voters. App.5a.

Using only the data from those 13 general elections, Handley concluded that Black voters could elect their candidate of choice if the BVAP was in the 35%-40% range in Wayne County and the 40-45% range in Oakland County. Appl.11; App.9a, 55a–56a. That analysis suffered from two fatal flaws.

First, Handley's BVAP targets said nothing about the ability of Black candidates of choice to win primary elections. If the white candidate of choice in a democratic primary defeats the Black candidate of choice, then wins the general election with the support of a majority of Black voters, the Black candidate of choice has still lost. That's why the three-judge panel made the following factual finding about the Commission's racial targets: "Those percentages were based only on general-election data, which rendered them *close to useless* in predicting the success of black-preferred candidates in contested primary elections." App.55a–56a (emphasis added).

Second, a redistricting body can only use race to draw districts if it had "good reasons to think that all the '*Gingles* preconditions' are met." Appl.23 (quoting *Cooper* v. *Harris*, 581 U.S. 285, 403 (2017)). Chief among these preconditions is that a white bloc vote will typically defeat the Black candidate of choice. *Thornburg* v. *Gingles*, 478 U.S. 30, 56 (1986). (The *Gingles* case took place in the context of general elections, but the decision would mean nothing if it did not protect against cracking of Black voters such that their candidates of choice never survive the primary.)

The only evidence the Commission had on this *Gingles* factor at the time it began drawing maps was Dr. Handley's initial report. To begin, Dr. Handley's report included *no* analysis about Macomb County. Trial.Tr.V.36, PageID.3286. So when the Commission used race to draw districts connecting poor, inner-city Detroit neighborhoods with wealthy suburbs in Macomb County—*e.g.*, senate Districts 3, 10, 11, and 12 and house Districts 10, 11, 12, 13, and 14—the Commission had no basis to believe race-based map drawing was necessary. Trial.Tr.V.37-38, PageID.3287-88.

But even as to Wayne and Oakland County, Dr. Handley's report focused exclusively on those 13 general elections. And because Black and white voters in metropolitan Detroit overwhelmingly and routinely elect democratic candidates, those general-election results did *not* show that white voters voted cohesively as a block to defeat Black candidates of choice. Quite the opposite. In Oakland County, the Black candidate of choice won 10 of 13 elections. Trial.Tr.V.41-44; PageID.3291-94. And in Wayne County, the Black candidate of choice won 13 of 13. Trial.Tr.V.45-46, PageID.3295-96. (Although Dr. Handley was unaware of the winning candidate in the elections she studied, the election results are collected in ECF.116, Tab 1.) So at the time the Commission was mapping, it had no basis to conclude Black candidates of choice were losing elections in Wayne and Oakland County due to white block voting, no basis to believe *Gingles* factor three was satisfied, and no basis to use race.

The only other data Handley provided to the Commission was her December 28, 2021 Report, submitted the same day the Commission approved the Hickory and Linden plans. There is no record evidence suggesting this report was provided to the Commission any earlier than December 28th, though it is possible Mr. Adelson talked about it with Commissioners before then. Regardless, that additional data did not support any reasonable belief that white, Detroit-area voters acted as a block to prevent Black candidates of choice from being elected. As Handley testified, Black candidate of choice *succeeded* 50% to 92.9% of the time in the 2018 and 2020 Democratic primaries. App.127a. Though this analysis was shallow and flawed—demonstrating that Dr. Handley knew almost nothing about the primaries' candidates, *see* Trial.Tr.V.83–98, PageID.3333–48—it provided no basis to believe that *Gingles* factor three was satisfied even if one assumes the Commission even knew about it. And that late-submitted supplemental analysis did *not* support 35-40% BVAPs for Wayne County and 40-45% BVAPs for Oakland County; the sole support for those BVAP ranges came from Handley's initial analysis of only general elections.

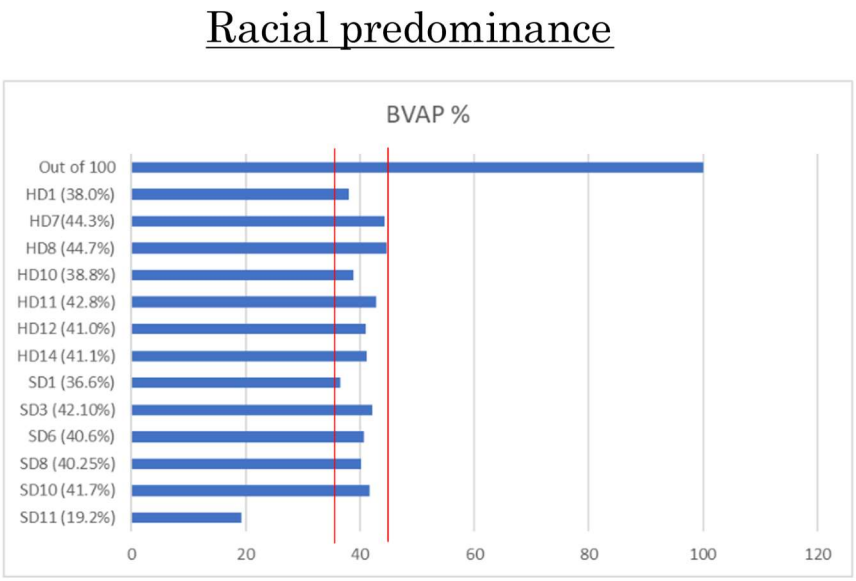
By October 2021, the Commission adopted these racial targets for Detroit-area districts in several draft house and senate maps that did not contain a single majority-Black district. App.12a–38a. On October 20, the Commission held a public hearing. App.39a. There, "the Commission endured a nine-hour pounding from Detroit residents who were distressed, above all, about the proposed absence of any majority-black districts." App.79a. Residents were incensed that the Commission peeled off parts of Detroit to combine with predominately white surrounding suburban areas and set BVAPs that would eliminate their ability to elect Black candidates. App.40a. "Most commentators were highly critical; a plurality of them complained specifically about cracking and the absence of any black-majority districts." App.40a. "'Let's not return to the Jim [C]row politics of old,'" they told the Commission. App.40a.

On October 27, 2021, the Commission met in closed session for the ostensible purpose of discussing legal memoranda provided by Adelson. App.41a. But there were ulterior purposes for this secret meeting, including to: (a) convince the Commissioners that the public comments regarding the need for higher BVAPs in the Detroit-districts were incorrect; and (b) coach the Commissioners on how to mask their raced-based redistricting motives with non-racial language and rhetoric. App.41a–44a.

On December 28, 2021, the Commission adopted the "Hickory Plan" for its final house maps and the "Linden Plan" for its final senate maps. The Hickory Plan gutted the number of Black-majority house districts from 10 to *six*. The Linden Plan had *zero* senate districts above 45% BVAP, even though the previous map had two districts more than 50% BVAP and three more exceeding 45% BVAP. App.52a.

This decrease was due to the Commission's VRA Counsel, Mr. Bruce Adelson, and its General Counsel, Ms. Julianne Pastula, demanding that the Commissioners adhere to Handley's BVAP ranges. Specifically, the Commission "used across-the-board racial targets" that Handley provided as the Commission "drew the boundaries of the Detroit area districts." App.55a. Adelson erroneously told Commissioners "more than 100 times" that any district with a BVAP higher than Dr. Handley's ranges would amount to "packing" in violation of the VRA. App.55a–58a. Pastula, the Commission's General Counsel, "likewise repeatedly advised the Commission to reduce the BVAPs in the Detroit-area districts to the target ranges." App.58a–59a. Individual Commissioners "fully internalized those BVAP targets, and not only complied with them but exhorted each other to do so." App.59a–60a. The Commission "equated hitting their BVAP targets with VRA compliance" and "used the terms 'VRA' or 'VRA compliance' as synonyms for hitting their BVAP targets." App.60a. Those instances "appear passim throughout the transcripts of the Commission's work on the Detroit-area districts." App.60a–62a.

In fact, with one exception, the BVAP for each of the challenged districts fell within the range of the Commission's 35-45% racial targets:



App.63a. (Note that BVAP percentages vary by small amounts from expert to expert. Handley, for example, defined Black as non-Hispanic Black alone. App.154a.) Indeed, despite Detroit's population being nearly 80% Black, "12 of the 13 districts at issue here ended up with BVAPs between 35.03% and 44.29%."App.63a And none of the challenged districts have a BVAP of 50% or higher. App.52a.

PROCEEDINGS BELOW

I. Plaintiffs' claims and the three-judge panel's opinion following trial

In March 2022, Plaintiff-Respondents sued the Defendant-Applicant Commission and Defendant-Respondent Michigan Secretary of State Jocelyn Benson. Respondents initially challenged seven Detroit-area senate districts (nos. 1, 3, 5, 6, 8, 10, and 11) and ten Detroit-area house districts (nos. 1, 2, 7, 8, 10, 11, 12, 13, 14, and 26) under both the U.S. Constitution's Equal Protection Clause and § 2 of the Voting Rights Act. App.53a.

The Commission and Plaintiffs filed cross-motions for summary judgment. The three-judge panel denied Respondents' motion and granted Applicant's motion in part. App.53a. The parties proceeded to a six-day bench trial on the remaining 13 districts (house Districts 1, 7, 8, 10, 11, 12, and 14, and senate Districts 1, 3, 6, 8, 10, and 11). App.53a.

Six Commissioners (Szetela, Rothhorn, Curry, Lange, Wagner, and Eid), Bruce Adelson (the Commission's VRA counsel), Kent Stigall (a mapping software technician utilized by the Commission), Virgil Smith (a former state senator from Detroit), and LaMar Lemmons III (a former state representative from Detroit) testified at trial, each as fact witnesses. App.53a. The trial included testimony from five experts: Sean Trende, Dr. Handley, Dr. Brad Lockerbie, Dr. Maxwell Palmer, and Dr. Jonathan Rodden. App.53a. All five experts submitted an expert report. App.53a.

On December 21, 2023, the three-judge panel issued a highly fact-based opinion and order in Respondents' favor on all their equal-protection claims, holding that "[a]ll the districts in this case were drawn in violation of the Equal Protection Clause of the U.S. Constitution." App.114a. Given its holding, the court did not address Respondents' VRA claims. The court further "enjoin[ed] the Secretary of State from holding further elections in these districts as they are currently drawn[]" and directed the parties to appear to deal with the remedy process. App.114a.

The court's 114-page opinion considered the "more than 100" exhibits admitted at trial, "including a complete transcript of the Commission's proceedings, which totaled 10,603 pages." App.53a. The court "reviewed all the evidence in the record, including every page of the Commission's transcript." App.54a. Indeed, given the public nature of the Commission's proceedings, the court recognized that the factual "record here is unique among redistricting cases litigated in federal court." App.2a.

At trial, the Commission's primary defense was that it did not use race to draw the state legislative districts but instead relied on factors like communities of interest

and partisan fairness. But the court observed that the "record here is almost oceanic in its direct evidence of intent." App.55a. Based on that oceanic record, the three-judge panel made the following factual findings:

- "First, the Commission plainly acted under the constraint of across-the-board racial targets as it drew the boundaries of Detroit-area districts." App.55a.
- Second, "the Commission subordinated all other redistricting criteria to their BVAPs in Detroit-area districts. Indeed, commissioners did so expressly." App.64a. This subordination included the Commission's trial defense that it was motivated primarily by "partisan fairness," App.64a–66a, "communities of interest," App.66a–67a, and shifting population, App.78a.
- Third, the Commission had nowhere "near an adequate bases for the factual premise of its [narrow-tailoring] theory: namely, that black voters could in fact elect their preferred candidates at the BVAP levels prescribed for the districts here." App.113a. To the contrary: "Everyone agrees that the elections in these districts are decided in the Democratic primaries, not the general election. Yet Handley's analysis lacked any primary-election data that was relevant to whether black voters could elect their preferred candidates *at these BVAP levels*." App.113a (emphasis added). As Handley admitted at the time the Commission approved the maps, "'we simply do not know' how black-preferred candidates would fare in Democratic primaries." App.113a.

Applicants "do not agree with the district court's predominance finding" but do not challenge it, respecting "the deference this Court owes district-court findings of fact." Appl.20. Instead, Applicants challenge the three-judge panel's factual finding that the Commission's use of race was not narrowly tailored to VRA compliance. *Ibid.*

II. Post-trial proceedings

Following the three-judge panel's issuance of its meticulously detailed opinion, several things happened in quick succession. Three Commissioners resigned. Appl.17; ECF.136, PageID.4847. The former Commission Chair, Commissioner Szetela, objected to Commissioner Eid's involvement in future map-drawing, presumably because he is under investigation for allegedly tailoring maps to benefit two of his friends who were running for office. ECF.136, PageID.4848. A resigning Commissioner sought to have Commissioner Szetela's seat deemed vacant for "undermining" the Commission with truthful testimony at trial that corroborated the public-record

evidence that the Commission drew districts using racial targets. *Id.* The Commission's VRA counsel, Mr. Adelson, abruptly resigned. ECF.136, PageID.4849. (The Commission's General Counsel, Ms. Pastula, had already resigned following a lawsuit that resulted in the Michigan Supreme ordering the Commission to disclose the closed-door meeting audio to the public. *Id.*) And the Commission initially could not even muster a quorum to vote on whether to appeal the three-judge panel's opinion. *Id.*

The Commission finally did vote to appeal and filed both its Notice of Appeal, ECF.140, and a Motion for Stay Pending Appeal, ECF.141. In that Motion—as in the Emergency Application—the Commission argued that the three-judge panel's "findings of fact describe a process of narrow tailoring to VRA compliance" based on Handley's election-data analysis. ECF.141, PageID.4954. The three-judge panel emphatically rejected that argument: Handley's "data set was nonprobative because it did not include primary election data. Detroit area politics rise and fall in the Democratic party's primary elections because Democrats almost always prevail in the general elections." App.119a. "Simply put," the panel continued, "the Commission had *no* data indicating how African American candidates of choice performed in the Democratic primaries in Detroit. Working to prevent packing black voters into districts is not the same as splintering them to hit racial targets based on incomplete data." App.119a–20a. Accordingly, the panel reaffirmed its factual finding from trial: "The Commission cannot show it engaged in a narrowly tailored approach to justify its racial gerrymandering." App.120a.

As for equitable factors, the panel held the "balance of harms and the public interest do not favor a stay." App.120a. "Plaintiffs, as well as the millions of Michiganders in metro Detroit, deserve maps that are not racially gerrymandered." App.120a. "Going forward, the Commission should apply the criteria mandated by

the Michigan Constitution and stop using the VRA as a proxy for race. The Court refuses to prescribe the Commission with a new racial target." App.120a–21a.

On January 11, 2024, the three-judge panel issued its scheduling order regarding redistricting. ECF.156. The court required the Commission to submit newly drawn district plans for Michigan house Districts 1, 7, 8, 10, 11, 12, and 14 and any nearby, affected districts by February 2, 2024. ECF.156, PageID.5153. (Because there are no Michigan senate elections in 2024, the senate map need not be on an expedited schedule.) The Commission must conduct and conclude public hearings on the new house map by February 23, 2024, then submit a final house map to the Court by March 1, 2024. *Id.* On a parallel track, the court appointed a Mapping Special Master to prepare an independent map. ECF.156, PageID.5155. Subject to appropriate objections and briefing, the "court will approve a remedial house districting plan no later than March 29, 2024," in time for the 2024 Michigan house elections. ECF.156, PageID.5154. Applicants now seek to stay this expedited and Solomonic process so they can appeal the three-judge panel's narrow-tailoring factual finding.

STANDARD OF REVIEW

Applicants invite this Court to plunge prematurely into ongoing lower court proceedings that seek to correct one of the most egregious racial gerrymanders in recent history. Their request comes with a heavy burden. *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers). "A stay is an intrusion into the ordinary processes of administration and judicial review" that "disrupts the usual manner of hearing and considering an appeal before rendering a decision and granting relief." *Louisiana* v. *Am. Rivers*, 142 S. Ct. 1347, 1348 (2022) (Kagan, J., dissenting) (quoting *Nken* v. *Holder*, 556 U.S. 418, 427 (2009)). Only "rarely" is such extraordinary relief warranted. *Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers). This Court usually "resist[s] the shortcut the [Redistricting

Commission] now invites." *Barr* v. *E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 6 (2019) (Sotomayor, J., dissenting from the grant of a stay).

To obtain an emergency stay, Applicants must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010).

Though "necessary" to merit this Court's premature intervention, these conditions are "not necessarily sufficient." *Barnes* v. *E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). Applicants additionally "bear an augmented burden" to show a necessity to "invade[ ] the normal responsibility" of the three-judge district court "to provide for the orderly disposition of cases on its docket." *Certain Named & Unnamed Non-Citizen Child. & Their Parents* v. *Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers). This Court's reluctance and "[r]espect for the assessment of the Court of Appeals is especially warranted when," as here, "that court is proceeding to adjudication on the merits with due expedition." *Doe* v. *Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers); *Yeshiva Uni*v. v. *Yu Pride All.*, 143 S. Ct. 1, 1 (2022) (declining to grant a stay pending appeal when applicants could seek "expedite[d] consideration of the merits of their appeal"). *Cf. Ala. Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320, 2321 (2021) (Kavanaugh, J., concurring) (denying an application where a "more orderly" resolution was but a "few weeks" away).

ARGUMENT

I. This Court is unlikely to note probable jurisdiction.

Applicants have not demonstrated that the Court is likely to note probable jurisdiction. Whether the Commission's use of abnormally low racial target ranges

amounted to narrowly tailoring is a fact question, one the panel decisively resolved against the Commission after considering all the trial evidence, and again in denying the Commission's stay motion. Sixth Circuit Judge Kethledge and Western District of Michigan Judges Maloney and Neff did not clearly err in making that factual finding, as will be explained at length. There is no disputed legal issue at stake here—despite the Commission repeatedly casting shade on Judge Kethledge's lengthy and meticulous opinion—and no legal issue of consequence for this Court to review.

The Court is also unlikely to note probable jurisdiction for a second reason: even if one ignores the panel's factual finding regarding narrow tailoring, there is an independent ground to affirm—the Commission did not reasonably believe that all the *Gingles* preconditions were met at the time the Commission was drawing maps. That means any reversal of the three-judge panel's factual findings will not make any difference to the case's outcome.

The Commission acknowledges that it is strictly barred from drawing maps with race as the predominate consideration unless it had "good reasons to think that all the '*Gingles* preconditions' are met." Appl.23 (quoting *Cooper*, 581 U.S. at 302). Importantly, this showing must be made based on the record before the Commission at the time of redistricting. *Cooper*, 581 U.S. at 302–03.

Gingles factor one asks whether a minority group can make up "more than 50 percent of the voting-age population in the relevant geographic area." *Bartlett* v. *Strickland*, 556 U.S. 1, 18 (2009). This question is most often answered through illustrative maps that, using traditional redistricting principles, demonstrate the *possibility* of creating a threshold number of majority-minority districts. *Black Pol. Task Force* v. *Galvin*, 300 F. Supp. 2d 291, 299 (D. Mass. 2004); *United States* v. *Eastpointe*, 378 F. Supp. 3d 589, 602 (E.D. Mich. 2019).

But the Commission never prepared a demonstration map. Trial.Tr.IV.247, PageID.3064. Indeed, the Commission never even *requested* that a demonstration

map be prepared. *Id.* In its summary judgment briefing, the Commission relied exclusively on the report of Plaintiffs' expert, Mr. Trende, to show that it reasonably believed that *Gingles* factor one was satisfied. ECF.69, PageID.666. But the Commission did not have that report at the time it decided to use race to draw the house and senate maps. In the Commission's Application, it points to "early draft house and senate maps" that "contained districts in Detroit exceeding the 50% BVAP mark, often by large margins." Appl.23–24. But those draft maps do not show how many Black majority-minority districts could be created in and around Detroit. So the Commission's narrow-tailoring defense never even gets off the ground. Strike one.

The Commission also lacked a reasonable belief that *Gingles* factor two was satisfied: Black voter cohesion. *Gingles*, 478 U.S. at 56. Handley's analysis of 13 general elections showed Black voter cohesion in general elections. But as the Commission "got further along towards final maps," the Commission's VRA counsel, Mr. Adelson, "would make statements" that caused Chair Szetela "to question why we're considering race and trying to create districts under the VRA if by his own admission there is *no* cohesion, therefore, we don't meet the *Gingles* standards." Trial.Tr.I.133, PageID.3714 (emphasis added). Strike two.

Finally, the Commission's lack of evidence was most striking on *Gingles* factor three: that a white majority "vote[s] sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56. To begin, Dr. Handley analyzed this factor based on counties and a statewide analysis; she performed *no* district-by-district analysis whatsoever, Trial.Tr.V.46, PageID.3296, even though that's what this Court requires. *E.g.*, *Abbott* v. *Perez*, 138 S. Ct. 2305, 2332 (2018); *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022). And although the Commission tried to do a district-by-district analysis of VRA compliance while drawing maps, it relied on just four general elections—Handley's so-called "Bellwether Elections"—and the trial testimony established that the Bellwether

Elections were a rubber stamp: "no matter how low you draw the BVAP, the bellwether button says the district performs for black voters." Trial.Tr.I.150, PageID.3731. That's because Black candidates of choice always prevail in Detroit-area general elections. The Commission could draw down BVAPs as low as Mr. Adelson directed, and the Bellwether Election button would always show that Black candidates of choice would prevail. Strike three.

In addition, the only evidence the Commission had on the third *Gingles* precondition at the time it began drawing maps was Dr. Handley's initial report. As noted, Handley's report included *no* analysis about Macomb County. Trial.Tr.V.36, PageID.3286. So when the Commission used race to draw districts connecting poor, inner-city Detroit neighborhoods with wealthy, Macomb County suburbs—*e.g.*, senate Districts 3, 10, 11, and 12 and house Districts 10, 11, 12, 13, and 14—the Commission had no basis under *Gingles* factors two *or* three to believe that race-based map drawing was necessary. Trial.Tr.V.37-38, PageID.3287-88. Strike four.

And even as to Wayne and Oakland County, Dr. Handley's report focused exclusively on those 13 general elections. As noted, those election results did *not* show that white voters voted cohesively as a block to defeat Black candidates of choice; the Black candidate of choice won 10 of 13 general elections in Oakland County, and 13 of 13 general elections in Wayne County. Trial.Tr.V.41–46; PageID.3291-96. Strike five.

Also as noted, Dr. Handley December 28, 2021 Report—submitted the same day the Commission approved the senate and house plans—suggested (based on flawed analysis) that the Black candidates of choice *succeeded* 50% to 92.9% of the time in the 2018 and 2020 Democratic primaries that she analyzed. App.127a. Again, the Commission had no reason to believe *Gingles* had been met. Strike six.

In sum, the sole question the Commission presents—whether the Commission's flagrant use of racial targets was narrowly tailored to ensure VRA

compliance—is buried under six independent grounds to affirm the three-judge panel's holding that the Commission violated Plaintiffs' equal-protection rights. Because this Court's decision on the panel's narrow-tailoring factual finding will make no difference to the outcome, there is no likelihood the Court will note probable jurisdiction.

II. Applicants are unlikely to succeed on the merits.

To reiterate, Applicants do not challenge the three-judge panel's factual finding that race predominated their map drawing. Appl.20. Instead, they challenge only the panel's factual finding that Applicants' use of race was not narrowly tailored to VRA compliance. The Commission is unlikely to persuade this Court that the panel's factual finding was clearly erroneous because the Commission's experts relied on irrelevant election data when setting the racial targets that the Commission used.

But first, the legal parameters. If race is the predominant consideration in drawing districts, then a map must satisfy strict scrutiny. *Bush* v. *Vera*, 517 U.S. 952, 958–59 (1996). The burden then shifts to the government to prove that its race-based sorting of voters was narrowly tailored to achieve a compelling governmental interest. *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U.S. 178, 193 (2017). That showing must be made based on the record before the Commission at the time of redistricting. *Cooper*, 581 U.S. at 302–03. And while compliance with the VRA can be a compelling interest. *Abbott*, 138 S. Ct. at 2315, avoiding potential VRA litigation is not. *Shaw* v. *Hunt*, 517 U.S. 899, 911 (1996). "Narrow tailoring" requires the redistricting authority to have a "strong basis *in evidence* in support of the (race-based) choice that it has made." *Alabama Legislative Black Caucus* v. *Alabama*, 575 U.S. 254, 278 (2015) (emphasis added).

The Commission here asserts that its race-based maps survive strict scrutiny because (1) the Detroit-area districts had purportedly been "packed" in potential

violation of the VRA, Appl.21–23, and (2) it therefore had "good reasons to think" that Section 2 of the VRA required the BVAPs targets the Commission used, App.23–25. Neither assertion is correct.

Under *Gingles*, only an "excessive majority" of Black voters can amount to packing under the VRA. *Gingles*, 478 U.S. at 46, n.11. Yet, as the three-judge panel noted, this Court has never once held that a district violated the VRA on packing grounds since *Gingles* was decided. App.113a. And the previous Detroit-area state house and senate districts were not challenged on these grounds. Those realities caused the three-judge panel to remark that "the Commission's theory of potential [VRA] liability, at best, is highly speculative. And speculative reasons are not 'good reasons for thinking that the [VRA] *demanded*' the racial line-drawing employed here." App.113a.

What's more, in every district found in violation of Section of 2 of the VRA, this Court "ordered the creation of a majority-minority (e.g., majority-black) district—rather than a minority-minority one, which is what (per Adelson's advice) the Commission confined itself to here." App.113a. In other words, where this Court has suggested that a successful packing claim requires *more* districts with BVAPs *above 50%*, the Commission says that a packing concern requires it to *lower* BVAPs *below 40%* for the entirety of Wayne County. That turns the packing remedy on its head.

The Commission's cited cases are not to the contrary. In *Allen* v. *Milligan*, 599 U.S. 1 (2023), this Court held that Black voters were likely to succeed on their VRA § 2 claim because the relevant group of Black voters was sufficiently and geographically compact to constitute *two* reasonably configured *majority*-minority districts. 599 U.S. at 19–20. And the Court affirmed the district court's remedy: "an *additional* majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Singleton* v. *Merrill*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022) (emphasis added). No court

suggested that the appropriate remedy was to reconfigure the existing majority-minority district to reduce its BVAP well below 50%.

The same was true in *Robinson* v. *Ardoin*, 86 F.4th 574, 585 (5th Cir. 2023), which vacated a preliminary injunction because circumstances were no longer time-sensitive but otherwise affirmed the district court, which similarly ordered "a remedial congressional redistricting plan that includes an additional majority-Black congressional district." *Robinson* v. *Ardoin*, 605 F. Supp. 3d 759, 766 (M.D. La. 2022). When Black voters were packed into one district and cracked in several others, the solution was more majority-districts, not to gut majority-minority districts. *Accord Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004) (suggesting that remedy for a district packed with a 90% supermajority of Indians was the creation of a second majority-minority district or at least an opportunity district); *Turtle Mountain Band of Chippewa Indians* v. *Howe*, 2023 WL 2868670, at *5 (D.N.D. Apr. 10, 2023) (noting that "[w]hile only a simple majority is required under the VRA, it is recommended that remedial districts contain 65% minority voters"), citing *Bone Shirt* v. *Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006).

In sum, the three-judge panel did *not* suggest here that there is no such thing as a VRA § 2 packing claim. Contra Appl.22–23. It correctly held that packing concerns do not arise until an "excessive majority" of Black voters are packed into a single district, and that even when a court holds that packing has taken place, the remedy is more majority-minority districts, not districts with low BVAPs that diminish Black voters' ability to elect the candidate of their choice. App.112a–113a. That is consistent with every court that has ever addressed the issue.

As for the assertion that VRA § 2 *required* 35-40% BVAPs in Wayne County and 40-45% BVAPs in Oakland County, the three-judge panel rightly held that position "meritless." App.112a. Neither the panel nor Plaintiffs disputed the Commission's legal premise that "[r]acial considerations are narrowly tailored if they adhere

to 'a functional analysis of the electoral behavior within the particular election district.'" Appl.25 (citing *Bethune-Hill*, 580 U.S. at 194). The problem was that Handley, the Commission's expert, made a mistake and only considered general-election data for setting the racial targets, not primary-election data.

Consider Handley's Wayne County analysis, which appears at App.253a:

WAYNE COUNTY Percent Black VAP needed to win	race of B-P candidate	turnout rate for office and percent vote for black-preferred candidates						percent of vote B-P cand would have received if district was 55% black VAP	percent of vote B-P cand would have received if district was 50% black VAP	percent of vote B-P cand would have received if district was 45% black VAP	percent of vote B-P cand would have received if district was 40% black VAP	percent of vote B-P cand would have received if district was 35% black VAP
		Black votes			White votes							
GENERAL ELECTIONS		votes cast for office	B-P	all others	votes cast for office	B-P	all others					
2020 President	W	58.0	97.5	2.5	76.6	47.5	52.5	71.5	69.0	66.6	64.3	62.0
2020 US Senate	W	57.8	95.2	4.8	75.6	47.2	52.8	70.4	68.0	65.7	63.4	61.2
2018 Governor	W	33.2	97.0	3.0	63.2	53.5	46.5	70.5	68.5	66.6	64.8	63.1
2018 Secretary of State	W	33.1	97.0	3.0	62.2	53.6	46.4	70.7	68.7	66.8	65.0	63.3
2018 Attorney General	W	32.7	95.5	4.5	61.3	49.4	50.6	67.6	65.4	63.4	61.5	59.7
2018 US Senate	W	33.1	95.8	4.2	63.1	52.3	47.7	69.3	67.3	65.4	63.6	61.9
2016 President	W	57.0	98.4	1.6	64.0	39.7	60.3	70.3	67.4	64.4	61.6	58.7
2014 Governor	W	35.8	96.5	3.5	47.7	41.3	58.7	67.7	65.0	62.3	59.7	57.2
2014 Secretary of State	AA	35.5	96.8	3.2	46.1	36.8	63.2	65.9	62.9	60.0	57.2	54.4
2014 Attorney General	W	35.3	95.7	4.3	45.9	41.0	59.0	67.5	64.8	62.1	59.5	57.0
2014 US Senate	W	35.7	98.0	2.0	46.8	53.4	46.6	74.9	72.7	70.5	68.4	66.4
2012 President	AA	60.4	99.0	1.0	65.7	51.9	48.1	76.8	74.5	72.1	69.8	67.5
2012 US Senate	W	59.9	98.1	1.9	64.4	57.6	42.4	79.1	77.1	75.1	73.1	71.1

The last column of Handley's chart shows that with a 35% BVAP, the Black candidate of choice would have won every single one of the analyzed 13 general elections, often by substantial margins. To the surprise of no one, President Biden was the Black preferred candidate over former President Trump in the 2020 election because Detroit overwhelmingly elects Democrats. Whether Black voters preferred general-election candidate—President Biden—would prevail in a 35% BVAP Detroit district says absolutely nothing about whether Black voters' preferred candidate can prevail in a *primary*.

Take senate District 8, one of the districts Plaintiffs challenged here. It has a 40.20% BVAP. In other words, it is a district that Handley's general-election analysis

predicted was five points safer than the 35% BVAP "safe" line to elect Black candidates of choice. In the 2022 primary, the first using the Commission's maps, the Black candidate of choice, Black candidate Marshall Bullock, *lost* by a staggering 37% to the white candidate of choice, white candidate Mallory McMorrow. How could that happen? Because while Black voters chose Bullock 75.8% to 24.2%, white voters chose McMorrow by a landslide 95.9% to 4.1%. There was no white crossover voting:

Michigan 2022 State Senate Democratic Primaries	Race	Party	Vote	Black Voters EI[1]	Black Voters 95% confidence interval	Black Voters EI[2]	Black Voters ER	Black Voters HP	White Voters EI[1]	White Voters 95% confidence interval	White Voters EI[2]	White Voters ER	White Voters HP
State Senate District 8													
Mallory McMorrow	W	D	68.4	24.2	21.7, 26.6	26.0	27.2	30.9	95.9	94.3, 97.2	97.1	97.1	90.5
Marshall Bullock II	B	D	31.6	75.8	73.4, 78.3	73.9	72.8	69.1	4.1	2.8, 5.7	2.8	2.9	9.5
Turnout:votes/VAP						***20.5***	***17.5***	18.9			***30.5***	***28.8***	***36.1***

App.232a.

At trial, the Commission suggested this lopsided vote was because of a viral speech that McMorrow gave about the transgender community. But as one of Plaintiffs' experts explained, that's "exactly what the Voting Rights Act is trying to forestall"—"issues that white candidates can use to drive a wedge between themselves and the black community." Trial.Tr.II.82, PageID.2622. Given the magnitude of the racial block voting in senate District 8, it is highly unlikely that a Black candidate of choice will have any reasonable chance to prevail in this district's primary elections in the future. That means Handley's work was hardly a "thorough and reliable analysis." Appl.26. Rather, her analysis is "close to useless in predicting the success of black-preferred candidates in contested primary elections," as the three-judge panel found. App.55a–56a. And if Black candidates of choice cannot prevail in the primary, they obviously cannot go on to prevail in the general.

Plaintiffs' expert was blunt about this and the other challenged senate and

house districts: "we consistently see black and white voters coalescing around different candidates, and white voters in particular do not vote for, in these open seat races, black candidates." Trial.Tr.II.106, PageID.2646. "[Y]ou're flirting with an environment where the house black caucus will fit into the backseat of an Uber XL by the end of the decade." Trial.Tr.II.107, PageID.2657. And that environment is exactly what started to come to pass in the 2022 election; the media reported that Michigan's Black Legislative Caucus lost 20% of its members in the 2022 cycle.[5]

Handley's failure to consider the ability of Black candidates of choice to succeed at the primary level in districts made up of predominantly white, suburban voters, is what caused the three-judge panel to comment that it could "make shorter work of the Commission's backup argument that its race-based line-drawing can survive strict scrutiny." App.112a. That work was factual, not legal, in nature: the Commission had nowhere "near an adequate basis for the *factual* premise of its theory: namely, that black voters could in fact elect their preferred candidates at the BVAP levels prescribed for the districts here." App.113a (emphasis added).

"Everyone agrees," the panel continued, "that the elections in these districts are decided in the Democratic primaries, not the general election. Yet Handley's analysis lacked any primary-election data that was relevant to whether black voters could elect their preferred candidates at these BVAP levels." App.113a. Even the

[5] "[T]he Capitol will lose two of five Black senators and two of 15 Black representatives." Ben Orner, *Black Michiganders voted heavily for Dems but were 'sacrificed' in representation*, Mlive (Nov. 28, 2022), https://www.mlive.com/politics/2022/11/black-michiganders-voted-heavily-for-dems-but-were-sacrificed-in-representation.html. *Accord* Malachi Barrett, *What a Democratic majority in Lansing could mean for Detroit*, Bridge (Dec. 20, 2022) https://www.bridgemi.com/michigan-government/what-democratic-majority-lansing-could-mean-detroit.

Commission's VRA attorney "admitted as much." App.113a. So did Handley herself: she conceded in an email to the Commission's Chair, at the very end of the map-drawing process, "that 'we simply do not know' how black-preferred candidates would fare in Democratic primaries." App.113a.

Detroit is not an outlier when it comes to elections being decided in primaries. For their post-hoc defense of their systematic racial targets, Applicants cite a law review article that Handley authored. Appl.11. ("Dr. Handley utilized the method she developed in the pioneering article Grofman, Handley, Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C.L. Rev. 1383 (2000-2001)." In it, Handley describes the importance of examining *primary* elections to ascertain the threshold BVAPs necessary for Black voters to elect their candidates of choice: "The highest of the three percentages necessarily interests us most because it is the percentage needed for the black-preferred candidate to win all three elections-the Democratic primary, the Democratic runoff and the general election-and attain a seat in the legislature." *Id.* at 1410. "The fact that the highest percentage black needed to win is not always found in the general election illustrates the importance of examining all stages of the election process, and not simply relying on an analysis of the general election." *Id*. at 1411. Respondents agree.

Handley's scholarship is consistent with the views she has expressed in other litigation. For example, Handley recently provided trial testimony in *Alpha Phi Alpha Fraternity Inc.* v. *Raffensperger*, No. 1:21-CV-05337-SCJ, 2023 WL 7037537 (N.D. Ga. Oct. 26, 2023). There, Black voters likewise asserted vote dilution claims under

the VRA and racial gerrymandering claims under the Equal Protection Clause. *Id*. at *2. Handley testified that she analyzed 11 democratic primary elections because "'we have a two-part election system here and you have to make it through the Democratic primary to make it into the general election' and, in some jurisdictions, primaries are the operative barrier for Black-preferred candidates, so Dr. Handley 'would always look at both.'" *Id*. at *41. Yet in Michigan, the Commission drew all its Detroit-area senate and house districts based on Handley's analysis of 13 general elections alone.

The Commission's Application strategy is to criticize the three-judge panel for making a factual finding that Handley's 35-40% BVAP recommendation for Wayne County and 40-45% BVAP recommendation for Oakland County were not narrowly tailored because they were based solely on that pool of 13 general elections. As explained, that factual finding is fully supported by the evidence and Handley's own scholarship. It is also consistent with scores of federal cases. Where, as here, it is established that a majority of voters in an area heavily prefer Democrat candidates, primary elections "are far more probative than general elections of racial voting patterns." *Pope* v. *Cnty. of Albany*, 94 F. Supp. 3d 302, 321, 324 (N.D.N.Y. 2015). Accord, *e.g.*, *Black Pol. Task Force* v. *Galvin*, 300 F. Supp. 2d 291, 306 (D. Mass. 2004) (Selya, Woodlock, Ponsor, JJ) ("an area in which the vast majority of citizens vote Democrat—makes general election results unreliable barometers of the second and third Gingles preconditions"); *Baldus* v. *Members of Wisconsin Gov't Accountability Bd*., 849 F. Supp. 2d 840, 857 (E.D. Wis. 2012) (recognizing that VRA § 2 applies to primary elections).

One federal judge used the word "skewed" to describe an expert's analysis that excluded primaries from his election-data analysis in an area where Black and white voters overwhelmingly support the same Democratic candidate in the general election. *NAACP* v. *City of Starke*, 712 F. Supp. 1523, 1534 (M.D. Fla. 1989). That word applies equally to Handley's analysis, the Commission's map-drawing approach, and the Application's failure to connect the 35-45% BVAP targets to primary data.

The Commission's additional attacks on the three-judge panel can be quickly dismissed seriatim. First, the panel did not show "disdain for a process that this Court has cautioned courts to respect." Contra Appl.27 (quoting *Easley* v. *Cromartie*, 532 U.S. 234, 250 (2001)). The panel called out an expert who set BVAP targets based on a faulty analysis. To draw the sports analogy, Handley promised that the Washington Nationals would win all 162 games this year because she determined that each player on the roster had in the past completed free throws on a basketball court at a rate in excess of 90%. Her conclusion had no relation to the data she analyzed.

Second, there was no reason for the panel to address Handley's expert report or her testimony in the narrow-tailoring portion of the panel's opinion. Contra Appl.28. The *only* portion of Handley's report that suggests a 35-40% BVAP target for Wayne County districts and a 40-45% BVAP target for Oakland County districts pertains to her analysis of the 13 general elections. App.252a-253a. And those pages say nothing about a Black candidate's ability to prevail over a white candidate in a primary election that pairs the poorest Detroit neighborhoods with some of the State's wealthiest suburbs. App.78a. Handley's and the Commission's efforts may very well

have been "sincere", but they certainly were not "well-founded." Contra Appl.28.

Third, it is true that the three-judge panel "did not address any of the *Gingles* preconditions or determine whether the Commission had good reasons to believe they were satisfied." Appl.28. That omission inured only to the Commission's benefit. As explained in Section I above, the Commission had no evidence in its possession at the time it was drawing the maps that suggested any of the *Gingles* preconditions were satisfied. To the contrary, the Black candidate of choice "won" Wayne County in every single one of the 13 general elections that Handley studied. This is not a reason to reverse but a reason to decline probable jurisdiction and the stay request.

Fourth, it is also true that the three-judge panel "did not examine Dr. Handley's polarization analysis," Appl.29, but it is wrong to suggest the panel did not "identify any error or methodology (or anything else) in it," contra *id.* The panel rejected Handley's entire analysis because Handley used irrelevant election data. Courts will not "approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d'être* is a legal mistake." *Cooper*, 581 U.S. at 306.

Fifth, it misunderstands a proper VRA analysis for the Commission to defend itself by asserting that, "without the use of race, the plans would likely have contained districts of more than 70% BVAP and less than 30% BVAP," a purported VRA transgression. Appl.29. The reason districts would have shaken out that way absent any racial consideration is because those BVAPs reflect the natural geographic distribution of Black voters in Detroit. That's not a VRA violation. To be sure, Plaintiffs are not advocating for districts with BVAPs that exceed 70%. But if the Commission

wants to use race as the predominant factor in redistricting, the solution is not to use race to *reduce* BVAPs to absurdly low levels without data to justify them.

Sixth, the Commission's invocation of this Court's decision in *Cooper* is off the mark. Appl.30. *Cooper* simply rejected the argument that if a redistricting body "*can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates." 581 U.S. at 305. Plaintiffs and the three-judge panel here do not maintain otherwise. What Plaintiffs and the panel reject is that a redistricting body must draw down BVAPs to a 35-40% range based on no relevant election data. The panel did not "ignore[] the evidence before the Commission that Detroit-area districts did not need BVAP majorities to enable black voters to elect candidates of their choosing, due to white crossover voting." Contra Appl.30. There was no such evidence. In support of its targets the Commission points to portions of Handley's report (Appl.11, citing App.163a–66a). But the tables Handley references there reveal the real story. Table 5 (Wayne County) and Table 7 (Oakland County), which appear on App.167a and 168a, respectively, reflect Handley's analysis of the 13 general elections that is essentially useless for determining whether Black voters can elect the candidate of their choice in a primary taking place in a Detroit district with a 35% BVAP. The Commission had no idea whether a "50% target" would "have been narrowly tailored," Appl.30, because there was no data supporting any discrete target. The Application cites none.

Seventh, the three-judge panel hardly "asked too much from" the Redistricting Commission. Contra Appl.31 (quoting *Bethune-Hill*, 580 U.S. at 195). The

Commission complains that this Court's decisions have "never held that examining primary elections is essential." Appl.31. But that's because this Court's cases have all involved redistricting where it was the general election that mattered. In an area like Detroit, where the overwhelming majority of Black voters support democrats and where democrats overwhelmingly win the general election, the dispositive election is the primary, as the Commission's VRA counsel readily conceded. App.113a.

Eighth, the Commission says "Dr. Handley *analyzed* primaries and testified they did not provide a basis in evidence to do anything race-related." Appl.31. This is a point in favor of Plaintiffs, not the Commission. If the Commission had no basis in evidence to do anything race-related, then its overwhelming use of race to draw the senate and house maps violated the Equal Protection Clause. Full stop.

Moreover, Handley's cross-exam at trial resulted in several damaging admissions. Regarding the 2018 and 2020 Congressional primary elections, Handley conceded that her analysis of the data did *not* "support a 35 percent BVAP in Wayne County." Trial.Tr.V.57, PageID.3307. In part, this was due to a racially polarized Wayne County primary where the Black candidate of choice, Brenda Jones, lost in a 54.78% BVAP district because 90% of the white voters gave their support to the only two non-Black candidates while only 10% of the white voters voted for Black candidates. Trial.Tr.V.54–55, PageID.3304–05.

Regarding state senate primaries that Handley examined, she again conceded that the data did not "support a 35 percent BVAP in Wayne County." Trial.Tr.V.61, PageID.3311. In part, this was due to Black candidate of choice Alberta Tinsley Talabi

losing her primary in a district with a 44.68% BVAP because she received less than 3% of the white vote. Trial.Tr.V.60–61, PageID.3310–11.

And as for state house primaries, Handley admitted that one Black candidate of choice lost a primary in a 36.04% BVAP district, Trial.Tr.V.66, PageID.3316, and another Black candidate of choice lost her district by 10 points because, although she received 61.9% support from Black voters, 74.9% of white voters selected a different candidate, Trial.Tr.V.70-71, PageID.3320–21. In sum, the 35% BVAP that Handley came up with for Wayne County was driven entirely "based on the 13 general elections," *not* based on any primary contests, Trial.Tr.V.72-73, PageID.3322-3323, which was the panel's point below.

Ninth, the Commission says that the three-judge panel "inexplicably claimed in its stay ruling that 'the Commission had no data indicating how African American candidates of choice performed in the Democratic primaries in Detroit.'" Appl.31 (quoting App.119a–20a). (To be clear, the Commission is actually quoting from the panel's lengthy merits opinion, not its stay ruling.) But the panel made that statement in the context of Handley's 35% BVAP target. App.119a. And as just discussed, Handley admitted at trial that *none* of the primary data justified a 35% BVAP target. That target came only from her analysis of general-election data. The panel said nothing wrong on this point in making its factual finding.

Tenth, and relatedly, the Commission says the three-judge panel "oddly announced that 'everyone agrees' the primary elections supply the relevant information, which was not true and clearly erroneous." Appl.32 (cleaned up). For that proposition,

the Commission cites D. Ct. Doc. 115 at 31–33, i.e., pages 31-33 of the Commission's own post-trial brief—which contains no record citations where any witness testified that a 35% BVAP would be adequate for Black candidates of choice to prevail in Wayne County primaries—and App.276a–77a, pages which do not even address this subject.

So where did the three-judge panel get its radical notion that there was agreement? For one, from a former DOJ Civil Rights Division voting-rights expert, who told the Commission: "I really want to stress to you it's really going to be important to look at primary election results. It's not just going to be about general elections. As we know there are places in every state, certainly Michigan, where the outcome of the primary is determinative of the general election. . . . And in those places, you have to look at primary elections." App.5a (quoting the Commission Hearing Tr. at 2106).

For another, VRA Counsel Adelson told the Commission that "often in areas where there is a propensity to elect minority candidates of choice, the elections are often decided in the primary. Rather than the general." App.19a (quoting Commission Hearing Tr. at 6729).

For another, Anthony Eid, the only Commissioner who testified in support of the Commission at trial, expressed his intuitive discomfort for using Handley's racial targets because "the numbers that we are hitting just makes we question how is that going to work with actually electing a candidate of choice. And I think part of the problem I have with this understanding is the analysis did not include primary election results. . . . I understand that in the general elections, yes. All of these districts

that we draw are going to be democratic districts. But that's not where the choice actually happens in these areas." App.30a (quoting Commission Hearing Transcript at 7483).

For another, the Commission's General Counsel emailed the Commission's counsel (the same counsel that represents the Commission in this Court) near the end of the mapping process to report that "the percentage ranges provided by Dr. Handley in her September presentation/charts and utilized during drafting did not correspond to the information she shared today. The lack of primary election data generally as well as promised information regarding whether the white candidates are candidates of choice . . . are relevant." App.50a (quoting R.114-7, PageID.3984).

Handley herself, in an email to the Commission Chair, conceded that while "the minority preferred candidate wins all of the general election[s] above 35%" BVAP, "[u]nfortunately, we do not have sufficient information to anticipate what might happen in the future Democratic primaries in the proposed districts." App.51a (quoting Pl.'s Ex. 5 at 21).

And as Plaintiffs' expert Sean P. Trende explained in his January 18, 2023 expert report: "every district that has a BVAP of at least 35% is overwhelmingly Democratic. Since Black voters express a consistently strong preference for Democrats in the aggregate, the Black candidate of choice will almost certainly win the general election. General election data is therefore not relevant to our inquiry. The question here is wholly one of whether the Black candidate of choice can emerge victorious from the Democratic primary." PX20 at 26-27. At trial, Mr. Trende testified as to why

primary elections, and not the general, is most crucial. ECF No. 102, PageID.2568-69. Plaintiffs' expert Dr. Brad Lockerbie likewise testified to this. ECF No. 102, PageID.2727 ("I would prefer to make use of primary elections where you can disentangle the effects of race and partisanship."). So, in sum, yes—"everyone agrees."

Eleventh, the Commission claims that the three-judge panel's "suggestion that the Commission was supposed to pick higher BVAP targets based on what it 'simply did not know,' App.113a, cuts against everything this Court has said in recent years about narrow tailoring." Appl.32. That is not at all what the panel said. See App.113a (quoting Handley's email that "we simply do not know" how Black candidates of choice will far in Democratic primaries). The panel's point, see App.113a–14a, was that if the Commission lacked data to show that Black candidates of choice could prevail in Democratic primaries in 35% BVAP districts, then the Commission should not have eliminated majority-minority districts in favor of districts comprised of only one-third Black voters.

Twelfth, the Commission criticizes the three-judge panel for refusing "to prescribe the Commission with a new racial target" and ordering the Commission to "stop using the VRA as a proxy for race." Appl.32–33 (quoting App.120a–121a). But it is not the panel's job to analyze the data and determine what BVAP levels may be appropriate. And the panel did not forbid the Commission from considering race if the data warranted it. The problem is that the Commission used irrelevant general-election data to draw down Detroit-area voting districts to BVAP levels that could not sustain success for Black candidates of choice.

Finally, the Commission claims that the three-judge panel ignored the Commission's "broad discretion" when drawing districts that satisfy VRA § 2, and that this Court has discouraged majority-minority districts in communities where crossover voting allows minority communities to elect candidates of their choice without the need for a majority-minority district. App.33, citing *Shaw* v. *Hunt*, 517 U.S. 899, 917, n.9 (1996), and *Johnson* v. *DeGrandy*, 512 U.S. 997, 1020 (1994). But a redistricting body's "discretion" does not include race-based map drawing that disenfranchises Black voters. And no one has said that the Commission cannot use opportunity districts in Wayne and Oakland County. But, given the highly concentrated Black population in Detroit, the Commission cannot intentionally blow-up majority-minority districts and split the Black vote without serious election-data support. And general-election data does not cut it in an area where winners are picked in the primary.

* * *

As the Commission's Chair testified at trial, the Commission drew Detroit-area districts with shockingly low BVAPs "without any data to support bringing them so low. The data just isn't there." Trial.Tr.I.146, PageID.3727. That was consistent with the three-judge panel's factual finding. And that finding undermines the Commission's narrow-tailoring argument and the merits of every aspect of the Emergency Application. It is not a legal question whether "primary (versus general) election data is essential for the narrow-tailoring inquiry." Contra Appl.35. It is a factual question, and the three-judge panel resolved it based on the uncontradicted statements of the Commission's own members, experts, and attorneys. The Court should deny the Application and allow the remedy phase to proceed below.

III. Applicants fail to make a strong showing on any equitable factor.

A. Applicants cannot demonstrate irreparable injury.

The Commission is not irreparably harmed by being required to draw a race-neutral, constitutionally compliant map. As the Eleventh Circuit put it in *Jacksonville Branch of NAACP* v. *City of Jacksonville*, 2022 WL 16754389 (11th Cir. Nov. 7, 2022): "[g]iven that the district court found the Enacted Plan is substantially likely to be unconstitutional" under the Equal Protection Clause, "we do not see how Appellants would be irreparably harmed by using a different map." *Id*. at *4 (citing *Abbott*, 138 S. Ct. at 2324, and *KH Outdoor, LLC* v. *City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006)).

To the extent that the Commission suggests that permitting a remedy to move forward improperly intrudes upon their legal prerogative under the Michigan Constitution, App.6–7, 36, the Commission recognized federal courts' duties to "override" unconstitutional maps *before* it undertook the process of drawing and adopting the current maps. In its own counsel's memorandum, "Guidance Concerning Procedures For Adoption of Final Plans In Light of Litigation Risks" dated December 1, 2021,[6] the Commission's outside litigation counsel (and counsel before this Court) observed that the new amendments to Michigan's constitution under Mich. Const. 1963, art. IV, § 6(19): "will not bind a federal court, which has authority to remedy federal-law violations under the Supremacy Clause." Pp.11-12. Its counsel further cautioned the Commission that the law "does not restrict the federal courts' authority if equitable considerations counsel in favor of implementing a federal remedy, and frequently, courts impose deadlines and other restrictions on the state redistricting authorities' remedial opportunity." *Id*. at p.12.

[6] https://www.michigan.gov/micrc/-/media/Project/Websites/MiCRC/Nov82021TOJan312022/MICRC_P_and_C_Memo_re_Subsection_14.pdf?rev=cc4c7b6a427642318b2340b0eeb7d8d5&hash=9C4D4EE0C004442A67656F593BD35582

What's more, the three-judge panel minimized any harm by offering the Commission an opportunity to redraw constitutionally compliant maps. ECF.156, PageID.5153. While the Commission has been required to do so on a truncated timeline, such minimal adjustments are necessary to remedy the evil created by the Commission in the first place and are well within the powers federal courts maintain to adjust state election deadlines in similar cases. *E.g.*, *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 201 (1972).

Finally, the Commission claims harm because the three-judge panel did not tell it how to redraw the maps. Appl.37. But the panel could not have been clearer: "stop using the VRA as a proxy for race." App.121a. The Commission has not established any harm, much less irreparable harm.

B. Conversely, a stay would irreparably harm Respondents.

The true irreparable harm, of course, would be to force Detroit's Black voters to be further disenfranchised by suffering through another election and two more years of representation based on what have already been held to be unconstitutionally discriminatory map.

Federal courts strongly disfavor leaving unconstitutional maps in place when new ones can be prepared before the next election cycle, and for good reason: "Deprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause, constitutes irreparable harm." *Johnson* v. *Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (citing *Elrod* v. *Burns*, 427 U.S. 347, 373–74 (1976)). Forcing Plaintiffs to vote again under the Commission's racially gerrymandered maps—and to do so in a presidential election year, when voter turnout is highest, see *Vera* v. *Bush*, 933 F. Supp. 1341, 1348 (S.D. Tex. 1996)—constitutes irreparable harm to them and to the other Black voters in the invalidated districts who have been disenfranchised by the Commission's actions.

This Court has long recognized the societal and dignitary harms resulting from racial gerrymandering. *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Id*. at 639. But "[f]or much of our Nation's history, that right sadly has been denied to many because of race." *Id*. Relying on race as the predominant factor in drawing district lines—as the Commission did here—sends a "pernicious . . . message" to elected representatives to focus on the interests on a certain racial group, not their constituency as whole. *Id.* at 648. To allow such constitutional violations to persist for even a moment longer than necessary would harm Plaintiffs, who have "an interest in having . . . representatives elected in accordance with the Constitution." *Personhuballah* v. *Alcorn*, 155 F. Supp. 3d 552, 560-61 (E.D. Va. 2016).

When a redistricting plan is invalidated as unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to [e]nsure that no further elections are conducted under the invalid plan." *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964). This is not the unusual case.

C. The public interest weighs strongly against a stay.

The public has a strong interest in avoiding the electoral disruption that will unavoidably occur if a stay is granted. And there is no public interest served by delay.

Granting a stay will create *Purcell* concerns and compound them every day a stay proceeds. See *Purcell* v. *Gonzalez,* 549 U.S. 1, 4–5 (2006) (per curiam). Courts have a "duty to cure illegally gerrymandered districts through an orderly process *in advance of elections*." *North Carolina* v. *Covington*, 138 S. Ct. 2548, 2553–54 (2018), citing *Purcell*, 549 U.S. at 4–5 (emphasis added). The three-judge panel has done that here, adopting a Scheduling Order for a remedy that will ensure electoral continuity by remedying the unconstitutional districts without disrupting this year's state house elections. ECF.156, PageID.5153-5155. There is no inherent *Purcell* violation in

ordering a remedy now, nearly 10 months in advance of the next general election. But there will be significant *Purcell* concerns raised by delaying a remedy if the Commission is granted its wish of sitting pat on unconstitutional maps.

Significant election deadlines loom in the near future, including: (A) an April 23 candidate filing deadline, (MCL 168.163); (B) an early August primary election, (MCL 168.641(1)(b)); (C) and a November general election, (MCL 168.641(1)(c)). Additionally, the Secretary of State has indicated that she needs time to prepare the Qualified Voter File for newly drawn districts in advance of any scheduled election. ECF.155, PageID.5126. The three-judge panel has equitable power to adjust these deadlines. *E.g.*, *Sixty-Seventh Minnesota State Senate*, 406 U.S. at 201 (discussing election deadlines and noting "[i]f time presses too seriously, the District Court has the power appropriately to extend the time limitations imposed by state law."); *Larios* v. *Cox*, 305 F. Supp. 2d 1335, 1342–43 (N.D. Ga. 2004) (the "court has broad equitable power to delay certain aspects of the electoral process if necessary" in a racial gerrymandering suit). But electoral stability demands moving quickly, and the Court has done so by its Scheduling Order. ECF.156, PageID.5155.

The Commission recognizes that, as of right now, *Purcell* concerns are minimal, conceding: "To be sure, the Commission recognizes that the timing of the Court's order with sufficient time for a highly compressed redistricting does not so thoroughly threaten 'chaos' such that the *Purcell* principle commands a stay standing alone." Appl.39. Given that the hundreds of thousands of affected voters whose districts may be redrawn, the dozens of candidates who will run in redrawn districts, and the disenfranchised Detroiters have a significant interest in the stability of this election, a stay would be unwise and unwarranted.

CONCLUSION

Nearly a decade ago, Defendant Michigan Secretary of State Jocelyn Benson warned of the "dangers [to Black voters] in allowing influence districts to replace

majority-minority districts[.]" Jocelyn Benson, *Turning Lemons into Lemonade: Making Georgia v Ashcroft the Mobile v Bolden of 2007*, 39 Harv CR-CLL Rev 485, 495 (2004). Based on empirical evidence, Defendant Benson argued that it is "nearly impossible for minority candidates to elect the candidate of their choice outside of districts where more than 50% of the voting age population is a combination of minority groups." *Id*. She "proposed a ban on reductions below 55% of covered minority populations in any currently majority-minority district, unless the jurisdiction can present convincing evidence that racially polarized voting is nonexistent or that minority voters' participation rates will remain unaffected." Alvaro Bedoya, *The Unforeseen Effects of Georgia v Ashcroft on the Latino Community*, 115 Yale LJ 2112, 2141-42 (2006).

The Commission turned a blind eye to its co-Defendant's sound advice. Instead, the Commission pursued a strategy of reducing BVAPs to absurdly low levels—35% to 45%—based on its expert's analysis of 13 general elections, invoked "opportunity districts" to insulate itself from all criticism, and ignored the pleas of Black voters in Detroit who recognize a racial gerrymander when they see one. It makes a mockery of those voters and principled data analysis to complain that "it was not possible to do more than the Commission did" and to claim that the Commission's "district-specific, functional analysis of racial voting patterns … may be the most comprehensive ever adduced at the map-drawing phases of redistricting." Appl.1. Based on an overwhelming factual record, the three-judge panel saw through the Commission's smoke and mirrors, finding that the Commission's use of race was not "narrowly tailored" in any sense of that phrase. This Court's review is not warranted.

Accordingly, Respondents ask that the Court deny the Application, reject the Commission's requests for a stay or administrative stay, and allow the remedy phase to proceed before the three-judge panel below. There are many redistricting cases that present important issues of law that only this Court can resolve. This fact-bound

case is not one of them. The Commission made a grievous error by using racial targets to draw down Detroit-area districts to never-before-seen BVAP levels without a basis in election data to do so. Black voters in Detroit have already lost substantial representation in the Michigan Legislature, and that unconstitutional deprivation will continue until remedial maps are in place.

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Respectfully submitted,

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