UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al*., Plaintiffs, v. JOCELYN BENSON, in her official capacity as the Secretary of State of Michigan, *et al.*, Defendants.	**Case No. 1:22-CV-00054-PLM-SJB** **Three-Judge Panel Requested** **28 U.S.C. § 2284(a)** **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(a), Plaintiffs move this Court for entry of a preliminary injunction prohibiting Defendants from holding any elections using the Michigan congressional districts recently adopted by the Michigan Independent Citizens Redistricting Commission.

The basis for Plaintiffs' requested relief is set forth in the appended Brief in Support and in Plaintiffs' First Amended Complaint.

Dated: January 27, 2022

Respectfully submitted,

/s/ Charles R. Spies
Charles R. Spies (P83260)
Max A. Aidenbaum (P78793)
DICKINSON WRIGHT PLLC
123 Allegan Street
Lansing, Michigan 48933
cspies@dickinsonwright.com
MAidenbaum@dickinsonwright.com
(517) 371-1730 (phone)
(844) 670-6009 (fax)

/s/ Jason B. Torchinsky
Jason B. Torchinsky
Shawn Toomey Sheehy
Edward M. Wenger
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, Virginia 20169
jtorchinsky@holtzmanvogel.com
ssheehy@holtzmanvogel.com
emwenger@holtzmanvogel.com
(540) 341-8808 (phone)
(540) 341-8809 (fax)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al*., Plaintiffs, v. JOCELYN BENSON, in her official capacity as the Secretary of State of Michigan, *et al.*, Defendants.	**Case No. 1:22-CV-00054-PLM-SJB** **Three-Judge Panel Requested** **28 U.S.C. § 2284(a)** **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' BRIEF IN SUPPORT
OF THEIR MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF CONTENTS i
BACKGROUND 1
ARGUMENT 13
I. CONDUCTING THE 2022 MIDTERM CONGRESSIONAL ELECTIONS PREMISED ON MALAPPORTIONED CONGRESSIONAL DISTRICTS WILL INFLICT IMMEDIATE AND IRREPARABLE HARM. 14
II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF BOTH THEIR CLAIMS. 15
A. The Commissioners' congressional map plainly violates the "one-person, one-vote" principle enshrined in Article I, Section 2 of the U.S. Constitution. 15
1. The Plaintiffs' remedy map demonstrates conclusively that the population differences among the districts adopted by the Commissioners can—and must—be eliminated. 17
2. The Defendants cannot show that the population differences among the districts adopted by the Commissioners are necessary to serve a legitimate State interest 17
B. The Commissioners violated the Fourteenth Amendment's Equal Protection Clause by adopting a map with arbitrarily drawn voting-district borders. 20
1. The Commissioners' congressional map does not include "[d]istricts . . . of equal population as mandated by the United States Constitution . . . ." (Article IV, Section 6(13)(a) of the Michigan Constitution). 23
2. The Commissioners' congressional map transgresses the requirement that districts "reflect the state's diverse population and communities of interest" (Article IV, Section 6(13)(c) of the Michigan Constitution). 23
3. The Commissioners' congressional map fails "to reflect consideration of county, city, and township boundaries" (Article IV, Section 6(13)(f) of the Michigan Constitution). 30
4. The Commissioners' congressional map violates the requirement that "[d]istricts shall be reasonably compact" (Article IV, Section 6(13)(g) of the Michigan Constitution). 31
III. BOTH THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST FAVOR ENTRY OF A PRELIMINARY INJUNCTION. 35
CONCLUSION 36
CERTIFICATE OF COMPLIANCE 38
CERTIFICATE OF SERVICE 39

TABLE OF AUTHORITIES

CASES

ACLU of Ky. v. McCreary Cty., Ky., 354 F.3d 438 (6th Cir. 2003) 15

In re Apportionment of State Legislature—1982, 321 N.W.2d 565 (Mich. 1982).....24

In re Apportionment of State Legislature—1992, 486 N.W.2d 639 (Mich. 1992).....24, 25, 29

Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001) 5

Bush v. Gore, 531 U.S. 98 (2000).....20

Bush v. Vera, 517 U.S. 952 (1996) 20, 21

Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535 (6th Cir. 2007) 14

Connection Distrib. Co. v. Reno, 154 F.3d 281 (6th Cir. 1998) 35

D.T. v. Sumner Cty. Sch., 942 F.3d 324 (6th Cir. 2019) 13

Elrod v. Burns, 427 U.S. 347 (1976) 15

Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011).....21, 22

Gaffney v. Cummings, 412 U.S. 735 (1973) 16

Householder v. Ohio A. Philip Randolph Inst., 140 S. Ct. 101 (2019).....9

Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).....21

Jones v. Caruso, 569 F.3d 258 (6th Cir. 2009).....14

Karcher v. Daggett, 462 U.S. 725 (1983)..... *passim*

Kusper v. Pontikes, 414 U.S. 51 (1973).....21

Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) 22, 26

Mahan v. Howell, 410 U.S. 315 (1973) 16

Miller v. City of Cincinnati, 622 F.3d 524 (6th Cir. 2010) 35

NAACP v. Snyder, 879 F. Supp. 2d 662 (E.D. Mich. 2012) 29

Nken v. Holder, 556 U.S. 418 (2009) 35

Obama for Am. v. Husted, 697 F.3d 423 (6th Cir. 2012).....13, 14, 15

Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978 (S.D. Ohio 2019) 9

Reynolds v. Sims, 377 U.S. 533 (1964)..... *passim*

Roman v. Sincock, 377 U.S. 695 (1964) 1

Swann v. Adams, 385 U.S. 440 (1967) 17

Tennant v. Jefferson County Commission, 567 U.S. 758 (2012).....18

Thornburg v. Gingles, 478 U.S. 30 (1986) 20

Traverse City Sch. Dist. v. Attorney General, 185 N.W.2d 9 (Mich. 1971).....27

Vieth v. Pennsylvania, 195 F. Supp. 2d 672 (M.D. Pa. 2002) 16

Vitolo v. Guzman, 999 F.3d 353 (6th Cir. 2021).....35

Washington v. Dawson & Co., 264 U.S. 219 (1924).....16

Wesberry v. Sanders, 376 U.S. 1 (1964).....1, 15, 35

White v. Regester, 412 U.S. 755 (1973).....16

White v. Weiser, 412 U.S. 783 (1973).....16

Williams v. Salerno, 792 F.2d 323 (2d Cir. 1986) 15

Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020) 35

CONSTITUTIONS AND STATUTES

U.S. Const. art. I, § 2.....14, 15, 16, 19

U.S. Const. amend. XIV 14, 16, 20

Mich. Const. art. IV, § 6 ..... *passim*

Mich. Comp. Laws § 4.261.....29

OTHER AUTHORITIES

B. Cardozo, The Nature of the Judicial Process 150 (1921).....16

Michigan, Basic Information, U.S. Census Bureau.....7

Thomas Cooley, *Constitutional Limitations* 81.....27

Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301 (1991).....9

The American Redistricting Project.....34

Viewing Compactness Tests, *ESRI Redistricting Review*.....11

BACKGROUND

After an attempt by certain advocates claiming to seek to reduce the influence of politics on redistricting, the State of Michigan approved a 2018 constitutional amendment that established the Michigan Independent Citizens Redistricting Commission (the "Commission"). Intended to be a politician-free, citizen-comprised entity, the Commission, per Article IV, Section 6 of the Michigan Constitution, has exclusive authority to adopt boundaries for both State and congressional voting districts after each decennial census. *See* Mich. Const. art. IV, § 6(1). The first iteration of the Commission, which includes thirteen Commissioners, convened in September 2020.

The Commissioners, however, do not have *carte blanche* to do as they please. Article I, Section 2 of the U.S. Constitution requires that "[r]epresentatives be chosen 'by the People of the several States'" in a way ensuring that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). The Equal Protection Clause of the Fourteenth Amendment, moreover, mandates that districts shall be drawn using consistent and neutral criteria, and, accordingly, it prohibits arbitrarily and inconsistently drawn voting-district boundaries. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (requiring that legislatures apply traditional redistricting criteria in a consistent and neutral manner).[1]

When Michiganders amended their Constitution in 2018, they added Article IV, Section 6(13). This provision enumerates the traditional redistricting criteria recognized by the U.S. Supreme Court. *See id.* Specifically, Article IV, Section 6(13) provides that the Commissioners "shall abide by the following criteria in proposing and adopting each plan, in order of priority":

[1] *See also Roman v. Sincock*, 377 U.S. 695, 710 (1964) (recognizing certain factors "that are free from any taint of arbitrariness or discrimination").

A. Districts shall be of equal population as mandated by the United States Constitution, and shall comply with the voting rights act and other federal laws.

B. Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.

C. Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates.

D. Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

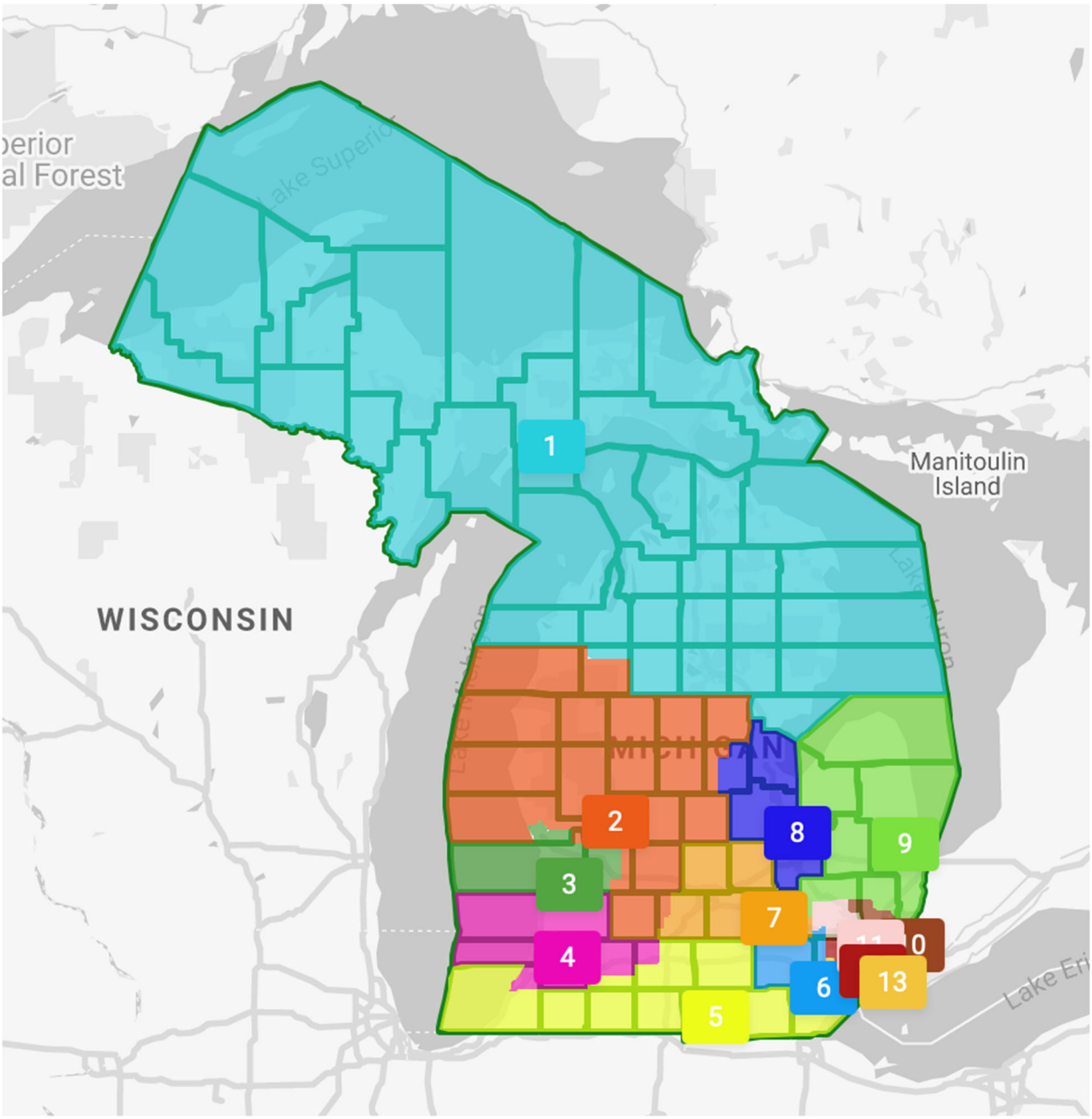
E. Districts shall not favor or disfavor an incumbent elected official or a candidate.

F. Districts shall reflect consideration of county, city, and township boundaries.

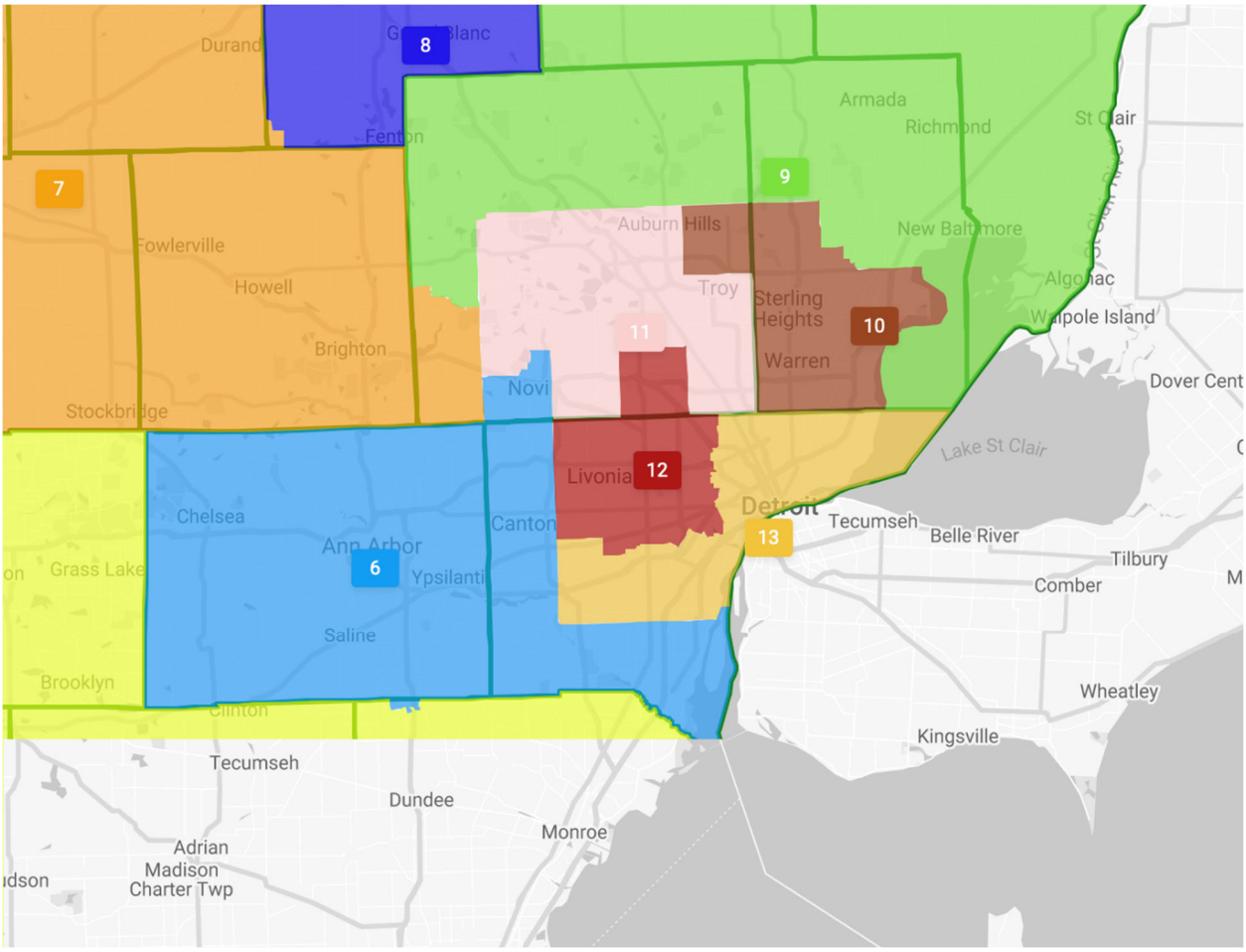
G. Districts shall be reasonably compact.

Mich. Const. art. IV, § 6(13).

During the Commissioners' tenure, five proposed congressional maps emerged as finalists. Three were named after trees ("Apple," "Birch," and "Chestnut") and two after Commissioners ("Lange" and "Szetela"). On December 28, 2021, the Commissioners adopted the "Chestnut" plan:



Available at https://michigan.mydistricting.com/legdistricting/comments/plan/279/23 (last visited Jan. 25, 2022)).



Available at https://michigan.mydistricting.com/legdistricting/comments/plan/279/23 (last visited Jan. 12, 2022)).

According to the 2020 Census, Michigan's population is 10,077,331 persons. If this population were spread equally among each of Michigan's thirteen congressional districts, each district would have 775,179 persons. Every district created by Chestnut, however, deviates from this mean:

DISTRICT	TOTAL PERSONS	DEVIATION
District One	775,375	+196
District Two	774,997	-182
District Three	775,414	+235
District Four	774,600	-579
District Five	774,544	-635
District Six	775,273	+94
District Seven	775,238	+59
District Eight	775,229	+50
District Nine	774,962	-217
District Ten	775,218	+39
District Eleven	775,568	+389
District Twelve	775,247	+68
District Thirteen	775,666	+487

Bryan Decl. ¶ 15 (Table 1).

In other words, the Chestnut map's largest district (District Thirteen) exceeds the mean by 487, while its smallest (District Five) is short by 635. The difference between the largest and smallest districts is 1,122. Of the thirteen districts, only one (District Ten) is within fifty persons of the mean. In an underpopulated district, the vote of a citizen is "overweighted" mathematically. In an overpopulated district, the vote of a citizen is "underweighted." For congressional districts, the U.S. Supreme Court has held that districts must be "apportioned to achieve population equality as nearly as is practicable" to prevent either over or under weighting any person's vote. *Karcher*, 462 U.S. at 730 (citation and quotation marks omitted).

The Commissioners compounded this population divergence by adopting districts that transgress roughly 20 percent of the State's county lines. Of Michigan's eighty-three counties, fifteen of them fall into at least two separate congressional districts:

COUNTY	CONGRESSIONAL DISTRICTS
Berrien County	Fourth & Fifth
Calhoun County	Fourth & Fifth
Eaton County	Second & Seventh
Genesee County	Seventh & Eighth
Kalamazoo County	Fourth & Fifth
Kent County	Second & Third
Macomb County	Ninth & Tenth
Midland County	Second & Eighth
Monroe County	Fifth & Sixth
Muskegon County	Second & Third
Oakland County	Sixth, Seventh, Ninth, Tenth, Eleventh, & Twelfth
Ottawa County	Second, Third, & Fourth
Tuscola County	Eighth & Ninth
Wayne County	Sixth, Twelfth, & Thirteenth
Wexford County	First & Second

Bryan Decl. Appendix A, ¶ 25.

In an illustrative but shocking example, the Chestnut map would have Oakland County residents casting their respective ballots to fill one of *six* separate congressional seats. Bryan Decl. ¶ 21; Appendix A, ¶ 1. Communities of interest—*e.g.*, shared characteristics of the parents

of the 210,000 students in the Oakland County School District—are not reflected through separation and dilution into six separate congressional districts.

The Chestnut Map also splits the following Michigan minor civil divisions[2]:

MINOR CIVIL DIVISION	CONGRESSIONAL DISTRICT
Algoma Township	Second & Third
Arbela Township	Eighth & Ninth
Argentine Township	Seventh & Eighth
Dearborn Heights City	Twelfth & Thirteenth
Detroit City	Twelfth & Thirteenth
Georgetown Charter Township	Third & Fourth
Kalamo Township	Second & Seventh
Laketon Township	Second & Third
Lincoln Charter Township	Fourth & Fifth
Macomb Township	Ninth & Tenth
Milan Township	Fifth & Sixth
Milford Charter Township	Seventh & Ninth
Muskegon Charter Township	Second & Third
North Muskegon City	Second & Third
Novi City	Sixth & Eleventh
Royalton Township	Fourth & Fifth

[2] Minor civil divisions are subdivisions of Michigan's eighty-three counties. *See* Michigan, Basic Information, U.S. Census Bureau, https://www.census.gov/geographies/reference-files/2010/geo/*state-local-geo-guides-2010/michigan.html*.

Wexford Township	First & Second
White Lake Charter Township	Ninth & Eleventh

See Bryan Decl. Appendix A, ¶ 26.

Finally, the Chestnut Map splits the following places:

PLACES	CONGRESSIONAL DISTRICT
Dearborn Heights City	Twelfth & Thirteenth
Detroit City	Twelfth & Thirteenth
Fenton City	Seventh, Eighth, & Ninth
Flatrock City	Fifth & Sixth
Hubbardston Village	Second & Seventh
Lennon Village	Seventh & Eighth
Milford Village	Seventh & Ninth
North Muskegon City	Second & Third
Novi City	Sixth & Eleventh
Otter Lake Village	Eighth & Ninth
Reese Village	Eighth & Ninth
Village of Grosse Pointe Shores City	Tenth & Thirteenth

Bryan Decl. Appendix A.

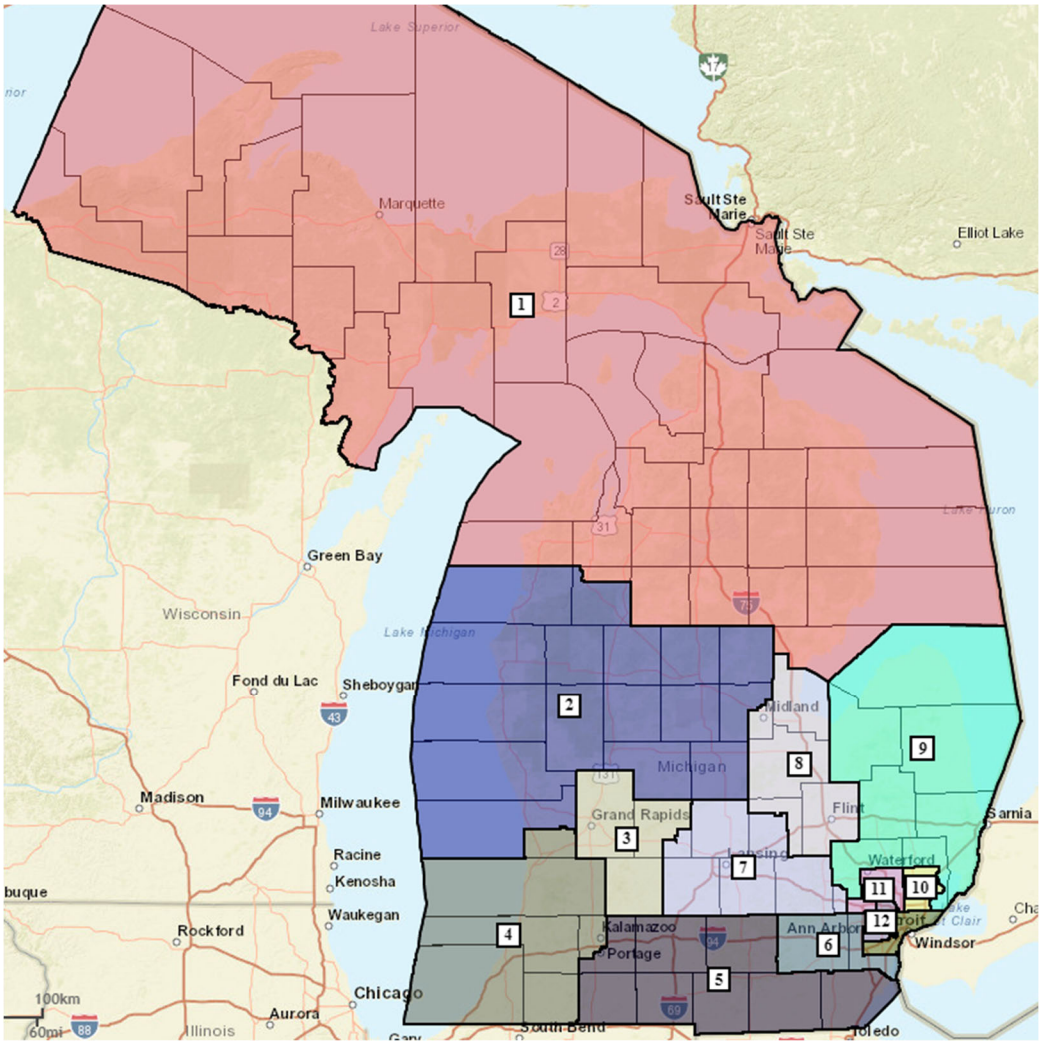
Congressional district "compactness," another Michigan Constitutional requirement, was also overlooked by the Commissioners. Compactness can be assessed using several different

metrices, including the Polsby-Popper Measure[3] and the Reock Measure.[4] *Id.* ¶¶ 22–23. For both measures, numbers closer to 1 are more compact (and thus more favorable), while numbers closer to 0 are less compact (and thus less favorable). *Id.* ¶ 23. As reported by the Commissioners, the average compactness of the Chestnut Map is .41 on the Polsby-Popper measure, and .42 on the Reock Measure, with the least compact districts having scores of .27 and .19 respectively. *Id.* ¶ 24. It also bears noting that, since 1963, no single Michigan congressional district outside the Upper Peninsula touched both the Eastern and Western borders of the State. The Commissioners' map bucks this trend by adopting District Five, which in addition to splitting four of the ten counties it covers, touches *three* (Western, Southern, and Eastern) State borders.

None of these problems were inevitable, nor were the Commissioners' hands tied by trying to satisfy countervailing requirements; the fixes are manifest and straightforward. The districts could, for example, be drawn as follows:

[3] The Polsby-Popper Measure has its roots in a 1991 law review article authored by Professors Daniel D. Polsby and Robert Popper that offered voting-district compactness as a way to reduce partisan gerrymandering. *See* Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).

[4] The Reock Measure "is a ratio of an area for a circle drawn around [a] district." *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1047 (S.D. Ohio 2019) (three-judge court), *vacated on other grounds sub. nom.*, *Householder v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 101 (2019).



See also Exh. A.

This map, offered by Plaintiffs as a remedy, reduces the difference in population among Michigan's thirteen congressional districts to *one* (Nine districts have a population of 775,179 persons and four districts have a population of 775,180). *Id.* ¶ 16, Table 2.

DISTRICT	TOTAL PERSONS	DEVIATION
District One	775,179	0
District Two	775,179	0
District Three	775,179	0
District Four	775,180	+1
District Five	775,179	0
District Six	775,180	+1
District Seven	775,179	0
District Eight	775,180	+1
District Nine	775,179	0
District Ten	775,179	0
District Eleven	775,179	0
District Twelve	775,179	0
District Thirteen	775,180	+1

Bryan Decl. ¶ 16, Table 2.

This proposal reduces the number of split counties from fifteen to ten (and also ensures that no Michigan county finds itself as part of more than four congressional districts). *Id.* ¶ 21. It also reduces the number of split minor civil divisions from fourteen to ten. *Id.*. And it substantially improves the districts' respective compactness scores, *id.* ¶ 24, Appendix C;[5] the average Polsby-Popper Measure for the remedy map is .46 (up from .41), the average Reock measure .45 (up from .42), and the least compact districts improve to .3 (up from .27) and .21 (up from .19), respectively:

[5] Compactness scores provided here are computed using map projections in ESRI Redistricting software. Some popular websites for drawing districts include compactness scores computed using other map projections. This may result in a minor variation between compactness scores computed by different GIS systems. *See* Viewing Compactness Tests, *ESRI Redistricting Review*, https://doc.arcgis.com/en/redistricting/review/viewing-compactness-tests.htm.

DISTRICT	ENACTED PLAN POLSBY-POPPER	REMEDIAL PLAN POLSBY-POPPER
District One	0.40	0.40
District Two	0.41	0.48
District Three	0.30	0.50
District Four	0.41	0.54
District Five	0.27	0.43
District Six	0.39	0.40
District Seven	0.56	0.53
District Eight	0.43	0.42
District Nine	0.53	0.50
District Ten	0.48	0.63
District Eleven	0.41	0.41
District Twelve	0.48	0.43
District Thirteen	0.29	0.30
Average	**0.41**	**0.46**

Bryan Decl. Appendix C.

DISTRICT	ENACTED PLAN REOCK	REMEDIAL PLAN REOCK
District One	0.38	0.38

District Two	0.56	0.54
District Three	0.32	0.49
District Four	0.42	0.59
District Five	0.19	0.32
District Six	0.39	0.39
District Seven	0.52	0.51
District Eight	0.41	0.41
District Nine	0.53	0.52
District Ten	0.47	0.57
District Eleven	0.48	0.44
District Twelve	0.57	0.49
District Thirteen	0.21	0.21
Reock Average	**0.42**	**0.45**

Bryan Decl. Appendix D.

ARGUMENT

"Four factors determine when a court should grant a preliminary injunction: (1) whether the party moving for the injunction is facing immediate, irreparable harm, (2) the likelihood that the movant will succeed on the merits, (3) the balance of the equities, and (4) the public interest." *D.T. v. Sumner Cty. Sch.*, 942 F.3d 324, 326 (6th Cir. 2019) (citation omitted). Where, as here, "a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Obama for Am. v.*

Husted, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). As discussed below, because (1) conducting the rapidly approaching 2022 Congressional Midterm Elections using malapportioned voting districts will plainly inflict irreparable injury on Plaintiffs, (2) the Commissioners' congressional map plainly and needlessly contravenes the U.S. Constitution (both Article I, Section 2, and the Fourteenth Amendment's Equal Protection Clause), and (3) both the balance of equities and the public interest plainly favor correcting these problems before the 2022 Midterm Elections, entry of a preliminary injunction is warranted.

I. CONDUCTING THE 2022 MIDTERM CONGRESSIONAL ELECTIONS PREMISED ON MALAPPORTIONED CONGRESSIONAL DISTRICTS WILL INFLICT IMMEDIATE AND IRREPARABLE HARM.

Should the Court decline to enjoin use of the Commissioners' congressional map, Plaintiffs will, when the 2022 Midterm Elections commence on November 8, 2022, suffer an injury that is not "compensable" at all "by monetary damages," and is therefore irreparable. *See Obama for Am.*, 697 F.3d at 436 (6th Cir. 2012) (quoting *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 550 (6th Cir. 2007)). Denying Plaintiffs their "inalienable right to full and effective participation in the political processes" is the architype of a wrong that cannot be made right once inflicted. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Forcing Plaintiffs—indeed, forcing Michigan's electorate as a whole—to elect their U.S. congressional representatives via maps that were drawn in contravention of the Nation's charter gashes the effectiveness and fairness of their political participation.

The U.S. Supreme Court has underscored the vital importance of safeguarding full and effective political participation. Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," and "[o]ther rights, even the most basic, are illusory if the right to vote is

undermined." *Id*. at 560 (quoting *Wesberry*, 376 U.S. at 17–18).[6] When *any* "constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am.*, 697 F.3d at 436 (6th Cir. 2012) (citing *ACLU of Ky. V. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003)). Indeed, "the Supreme Court held that when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). It follows, then, that "[a] restriction on the fundamental right to vote," the *primordial* fundamental right, must "constitute[] irreparable injury." *Obama for Am.*, 697 F.3d at 436 (citing *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)).

The ability of Michiganders to participate fully, effectively, and on equal terms in the election of their constitutional representatives is on the line in this case. Once the November 2022 Midterm Elections arrive, the injury exacted by the Commissioners' unconstitutional congressional maps will petrify into a permanent, irreparable harm that money damages cannot fix. For these reasons, Plaintiffs satisfy this first prong.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF BOTH THEIR CLAIMS.

A. The Commissioners' congressional map plainly violates the "one-person, one-vote" principle enshrined in Article I, Section 2 of the U.S. Constitution.

The first and most salient defect in the Commissioners' map is that it does not abide by the "high standard of justice and common sense" enshrined in Article I, Section 2, of the U.S. Constitution, which commands "equal representation for equal numbers of people." *Wesberry*,

[6] *See also Reynolds*, 377 U.S. at 561–62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because [it is] preservative of all rights.' 118 U.S.[] at 370.").

376 U.S. at 18. Commonly known as the "one person, one vote" principle, it requires congressional districts to be "apportioned to achieve population equality as nearly as is practicable." *Karcher*, 462 U.S. at 730 (citation and quotation marks omitted). The "'as nearly as practicable' standard requires that the State make a good-faith effort to achieve *precise* mathematical equality." *Id.* (emphasis added) (citation and quotations marks omitted). Even slight deviations, if not justified, fail this standard. *See, e.g.*, *id.* at 727 (striking as unconstitutional a congressional redistricting map where the population of largest district was less than one percent greater than the population of smallest district); *see also id.* at 732 ("As between two standards—equality or something less than equality—only the former reflects the aspirations of Art. I, § 2."); *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 674–78 (M.D. Pa. 2002) (three-judge court) (holding that Pennsylvania's congressional district maps violated the "one person, one vote" requirement where the total population deviation was nineteen persons and Pennsylvania could not justify the deviation).[7]

To assess Plaintiffs' one-person, one-vote challenge, the Court must answer "two basic questions." *Karcher*, 462 U.S. at 730. "First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith

[7] While the Commission had some leeway when drafting State legislative voting districts, the Supreme Court has consistently demanded "that absolute population equality be the paramount objective of apportionment . . . in the case of congressional districts, for which the command of [Article I, Section 2], as regards the National Legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures." *Karcher*, 462 U.S. at 732–33 (citing *White v. Weiser*, 412 U.S. 783, 793 (1973)); *White v. Regester*, 412 U.S. 755, 763 (1973); *Mahan v. Howell*, 410 U.S. 315, 321–23 (1973); *Washington v. Dawson & Co.*, 264 U.S. 219, 237 (1924) (Brandeis, J., dissenting); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921)). The equal population requirement for congressional districts comes from Article I, Section 2, while the population equality rules for other representative bodies comes from the Equal Protection Clause of the Fourteenth Amendment. *See Gaffney v. Cummings*, 412 U.S. 735, 741–42 (1973) (discussing *Reynolds*, 377 U.S. at 533).

effort to draw districts of equal population"; for this prong, Plaintiffs bear the burden. *Id*. at 730–31. "If . . . the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality," then the burden shifts to the State to "prov[e] that each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 731 (citation omitted).

1. *The Plaintiffs' remedy map demonstrates conclusively that the population differences among the districts adopted by the Commissioners can—and must—be eliminated.*

The alpha and omega of this prong is attached as Exhibit A. The Supreme Court has held that if a plaintiff can show that "resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality," it has carried its burden. *Karcher*, 462 U.S. at 739 (citation and quotation marks omitted); *see also Swann v. Adams*, 385 U.S. 440, 445–46 (1967). Plaintiffs' remedy map does precisely that: the congressional districts it creates differ from one another by no more than *one* person. For this reason, the burden shifts to Defendants to justify the population deviations.

2. *The Defendants cannot show that the population differences among the districts adopted by the Commissioners are necessary to serve a legitimate State interest.*

Although some "consistently applied legislative policies might justify some variance," *Karcher*, 462 U.S. at 740, Defendants must—but here cannot—show "with some specificity that a particular objective *required* the specific deviations in its plan." *Id.* at 741 (emphasis added). The only priorities the Commissioners were to consider are those enumerated by the Michigan Constitution, and the Michigan Constitution establishes the order of priority that the Commissioners were to apply. *See* Mich. Const. art. IV, § 6(13). The first (*i.e.*, highest) priority the Commissioners were tasked with effectuating is:

> Districts shall be of equal population as mandated by the United States Constitution[] and shall comply with the voting rights act and other federal laws.

Id. art. IV, § 6(13)(a). By State Constitutional decree, then, the Commissioners were *not* justified in elevating any consideration above achieving "*precise* mathematical equality." *Karcher*, 462 U.S. at 767 (emphasis added). This fact alone resolves Plaintiffs' one-person, one-vote challenge in their favor.

Indeed, the Michigan Constitution's express requirement that equal-population distribution receives highest priority distinguishes this case from the handful of cases in which courts have allowed population deviations to survive constitutional scrutiny. In *Tennant v. Jefferson County Commission*, for instance, the U.S. Supreme Court allowed West Virginia to adopt a map with a 0.79 percent population variance among its three congressional districts, but only because the State could not achieve absolute population equity while also "avoiding contests between incumbents," "not splitting political subdivisions," and "limiting the shift of population between old and new districts." 567 U.S. 758, 764 (2012). In so holding, the Court eschewed any suggestion that "anytime a State must choose between serving an additional legitimate objective and achieving a lower variance, it may choose the former." *Id.* at 765. And where, as here, (1) population equality is enumerated in the State Constitution as the factor that must be given first precedence, *see* MICH. CONST. art. IV, § 6(13)(a), and (2) Plaintiffs' remedy map animates other legitimate State interests better than the Commissioners' map, *see infra* at 20–35, while simultaneously equalizing the population among all thirteen congressional districts, *see supra* at 15–18, cases like *Tennant* are wholly inapposite.

In any event, the remedy map not only achieves "absolute population equality," *Karcher*, 462 U.S. at 732–33 (citations omitted); it also represents an improvement over the Commissioners' map on most of the other considerations enumerated in the Michigan

constitution (and performs at least as well on all the others). *See* Bryan Decl. ¶¶ 15–16, 20–21, 24; Appendix A–D. As noted above, the remedy map splits fewer counties and minor civil divisions, and for the ones it does split, it splits them among fewer districts (MICH. CONST. art. IV, § 6(13)(f); *see also* Bryan Decl. ¶¶ 20–21; Appendix A–B. By so doing, it also respects a higher proportion of Michigan's communities of interest (as that phrase has been historically understood)[8] (*id*. art. IV, § 6(13)(c. And, moreover, it increases the compactness of the congressional districts (*id*. art. IV, § 6(13)(g); *see also* Bryan Decl. ¶ 24, while maintaining contiguity (*id.* art. IV, § 6(13)(b); *see also* Bryan Decl. ¶ 17, and avoiding any preference for a political party or incumbent (*id.* a*rt*. IV, §§ 6(13)(d)–(e).

* * *

The Commissioners' map violates the one-person, one-vote standard enshrined in Article I, Section 2 of the U.S. Constitution. "[T]here are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2, without justification." *Karcher*, 462 U.S. at 734. The deviations among the districts are not necessary; Plaintiffs' remedy map makes this point unassailable. Bryan Decl. ¶ 15. Nor can they be justified; the remedy map performs more favorably (or at least as favorably) as the Commissioners' map with regard to respect for county, city, and township boundaries (as reflected in Article IV, Section 6(13) of the Michigan Constitution). Bryan Decl. ¶ 20; Appendix A–B. Entry of a preliminary injunction is thus plainly warranted.

[8] *See* Exhibit B (Memorandum to Michigan Independent Commission from Stephen Markman, Michigan Supreme Court Justice (retired)); *see also* discussion *infra* at 23–30.

B. The Commissioners violated the Fourteenth Amendment's Equal Protection Clause by adopting a map with arbitrarily drawn voting-district borders.

The Commissioners' constitutional errors do not end with their one-person, one-vote transgression. Rather, they similarly failed to abide by the rudiments of the Fourteenth Amendment's Equal Protection Clause. Distilled to its core, the Fourteenth Amendment requires that the entity creating voting districts do so in a way that is not arbitrary, inconsistent, or non-neutral. *See Bush v. Gore*, 531 U.S. 98, 104–05 (2000) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."). Historically, federal courts have looked to whether voting districts were drawn in a way that consistently and neutrally applied traditional redistricting criteria. *See Karcher*, 462 U.S. at 740. For example, courts have recognized that, among other considerations, maximizing compactness, respecting communities of interest, and ensuring that districts are contiguous all serve to limit various forms of gerrymandering and vote dilution.[9]

Michigan's constitutional requirements of keeping counties and townships whole, as well as maintaining communities of interest, serve to limit the Commissioners' authority to group voters in various districts. This limitation serves the dual function that congressional officials represent voters and that they capably represent the interests of the communities within which

[9] *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (imposing a compactness requirement to determine whether § 2 of the Voting Rights Act requires the drawing of a majority-minority district); *Bush v. Vera*, 517 U.S. 952, 979 (1996) ("If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district."); *id*. at 962 (stating that in proving a racial gerrymandering claim under the Fourteenth Amendment's Equal Protection Clause, "[t]he Constitution does not mandate regularity of district shape . . . and the neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be subordinated to race.").

voters live. *See Vera*, 517 U.S. at 1049 (1996) (Souter, J., dissenting); *see also id.* at 964 (citing with approval Justice Souter's recognition that communities of interest play an important role in our system of representative democracy). Voting is both an expression of an individual's preference in a congressional representative, and it is an associational act in choosing a congressional representative to represent fellow voters in a community. *See id*. at 1049 (Souter, J., dissenting).[10]

Thus, when the Commissioners arbitrarily and inconsistently applied its State Constitutional requirements of keeping counties and townships whole and maintaining communities of interest, it violated the Equal Protection Clause. The Commissioners arbitrarily assigned voters to various locations without concern for Plaintiffs' rights to associate with their fellow citizens in their communities to advance the interests of their counties, townships, and communities. The associational harm diminishes the effectiveness of Plaintiffs' representation. Representing communities with vastly different interests limits the Representatives ability to effectively represent counties, townships, and communities. *See Fletcher v. Lamone*, 831 F. Supp. 2d 887, 899 (D. Md. 2011) (three-judge court) (rejecting that the suburbs of Baltimore and the suburbs of Washington, D.C. formed a community of interest because the two areas formed different media markets and had vastly different economies), *sum. aff.*, 567 U.S. 930 (2012).[11]

---

[10] *See also Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (recognizing that ballot access restrictions burden both the voters' associational rights—there the ability of a voter to associate with the party of one's choice for the advancement of commonly held political beliefs—and the right of the voter to cast an effective vote); *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973) ("There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments . . . . [U]nduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments." (citation omitted)).

[11] *See also Fletcher*, 831 F. Supp. 2d at 903 (although rejecting a racial gerrymandering claim, the court lamented that one congressional district divided communities of interest such

Arbitrarily applying state constitutional criteria harms the fundamental First Amendment rights of voters to associate and advance the interests of their communities. The Commissioners therefore violated the Equal Protection Clause.

Larios v. Cox is instructive. In that case, a Northern District of Georgia three-judge panel examined whether the Georgia legislature applied traditional redistricting criteria in a way that ran afoul of the Fourteenth Amendment. *See* 300 F. Supp. 2d 1320, 1346–47 (N.D. Ga. 2004) (three-judge court). Despite Georgia's "strong historical preference for not splitting counties outside the Atlanta area," the *Larios* Court noted that the Georgia legislature seemed uninterested in avoiding county splits when it drew its new map. *Id*. at 1350. The number of county splits, moreover, exceeded Georgia's previous legislative map. *Id*. at 1349–50. And regarding the preservation of the prior district's cores, the Northern District of Georgia concluded that "it was done in a thoroughly disparate and partisan manner, heavily favoring Democratic incumbents while creating new districts for Republican incumbents . . . ." *Id*. at 1350. Because Georgia's resulting map was not "supported by any legitimate, consistently[]applied state interests but, rather, resulted from the arbitrary and discriminatory objective," *Larios* Court concluded that the map violated the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 1352. (emphasis omitted).

The arbitrariness and inconsistency that doomed the map at issue in *Larios* pales in comparison to the arbitrariness and inconsistency tainting the Commissioner's congressional map. In addition to the federal courts, the Michigan Constitution now mandates adherence to

---

that a farmer in rural Oakland shared a congressman with a federal contractor who lived in the wealthy suburb of Potomac); *id*. at 906 (Titus, J., concurring) (noting that the representational interests of voters in one congressional district are harmed because the congressman must represent the interests of those who love bear hunting and work in mines as well as the interests of those voters who live in suburban Washington who abhor the idea of hunting bears and do not know what a coal mine looks like).

most of the commonly recognized traditional redistricting criteria. *See* Mich. Const. art. IV, § 6. In adopting their congressional map, however, the Commissioners (1) ignored four of the seven criteria listed in the Michigan Constitution, Bryan Decl. Appendix A–D; (2) to the extent they applied any criteria, they did so out of the order of priority mandated by the Michigan Constitution,); and (3) by splitting so many counties and minor civil divisions, the Commissioners appear to have used a wholly novel and arbitrary definition of the phrase "communities of interest," In other words, the map they adopted includes voting-district boundaries that are arbitrarily drawn under any conceivable definition of the word. For that reason, they have run afoul of the Fourteenth Amendment.

1. *The Commissioners' congressional map does not include "[d]istricts . . . of equal population as mandated by the United States Constitution . . . ." (Article IV, Section 6(13)(a) of the Michigan Constitution).*

Unfortunately, the Commissioners stumbled right out of the gate. As discussed above, the map they adopted did not include "[d]istricts . . . of equal population as mandated by the United States Constitution." Mich. Const. art. IV, § 6(13)(a). They had an obligation to give this consideration top priority, *see id.* § 13, and their failure to do so began a pattern of arbitrariness that infected the rest of their work.

2. *The Commissioners' congressional map transgresses the requirement that districts "reflect the state's diverse population and communities of interest" (Article IV, Section 6(13)(c) of the Michigan Constitution).*

Plaintiffs expect that, in opposition to this motion, Defendants will offer some defense of the Commissioners' map based on the requirement that the map's congressional boundaries "reflect the state's diverse population and communities of interest." Mich. Const. art. IV, § 6(13)(c). According to the Michigan Constitution, "[c]ommunities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests," but may "not include relationships with political parties, incumbents, or political

candidates." *Id.* Because the phrase "communities of interest" has a long- and well-established definition in Michigan law, and because the Commissioners appear to have deviated substantially from this phrase's pedigree, the Commissioners cannot rely on this requirement to justify the other aberrations discussed throughout this filing. Instead, the Commissioners' apparent decision to stray from the established "communities of interest" definition adds to, rather than detracts from, the constitutionally violative arbitrariness that remains fatal to the Commissioners' congressional map.

The somewhat nebulous "communities of interest" provision adopted via Michigan Constitutional Amendment in 2018 does not give the Commissioners plenary authority to demarcate "communities of interest" however they see fit. The phrase has a rich context in Michigan law, none of which was abrogated when the Commission was created. As traditionally understood by the Michigan Supreme Court, communities of interest include those housed in specific counties; indeed, some Justices went so far as to consider county lines "inviolate," *see In re Apportionment of State Legislature—1982*, 321 N.W.2d 565, 584 & n.46 (Mich. 1982) (Levin and Fitzgerald, J.J., concurring), and took pains to ensure that "count[ies]" were "kept . . . intact *as . . . communit[ies] of interest*," *id.* at 584 n.8 (Levin and Fitzgerald, J.J., concurring) (emphasis added).[12] In recognition of "the importance of local communities, and the harm that

[12] *See also In re Apportionment of State Legislature—1982*, 321 N.W.2d at 584 n.8 ("The Court again concluded that the concept of preserving counties *as communities of interest* to the fullest extent possible required that the township or set of townships with the fewest people necessary should be shifted.") (emphasis added); *id*. at 584 ("The flaw in this method [of redistricting] is that it artificially divides the counties into two groups, treating one group differently than another . . . . The historical [redistricting] practice of following county lines never rose to the level of a principle of justice, [but] it has always been simply a device for controlling gerrymandering, facilitating elections and *preserving communities of interest*.") (emphasis added); *cf. In re Apportionment of State Legislature—1992*, 486 N.W.2d at 641 n.50 ("Nor did the parties' proofs sufficiently demonstrate *a community of interest* between and

would result from splitting the political influence of these communities," several iterations of Michigan's Constitution (1835, 1850, and 1908) "explicitly protected jurisdictional lines," including counties and townships. *In re Apportionment of State Legislature—1992*, 486 N.W.2d 639, 641 (Mich. 1992).[13]

Thus, although Article IV, Section 1 6(13)(c) of the Michigan Constitution states that the Commissioners "may" (not shall) "include . . . populations that share cultural or historical characteristics or economic interests" within a "community of interest," the Commissioners are not writing on a blank slate. At a minimum, roughly half a century of Michigan Supreme Court caselaw suggests that counties, cities, and townships form the primary communities of interest that the Commissioners must try to leave intact. Imposing this gloss on the phrase "communities of interest" not only demonstrates fealty to the Michigan Supreme Court's rich redistricting jurisprudence but also serves an important prophylactic purpose. Without the local jurisdictional boundaries serving as a guardrail, "communities of interest" could become proxies for, among other things, political parties.[14] This, of course, would contravene the very purpose for the

---

among the voter populations of Oakland County and the voter populations of the City of Detroit and Wayne County." (emphasis added)).

[13] *See also In re Apportionment of State Legislature—1992*, 486 N.W.2d at 641 n.6 ("[T]he 1835 constitution said that no county line could be broken in apportioning the Senate. . . . The 1850 constitution repeated that rule[] and added that no city or township could be divided in forming a representative's district. . . . As originally enacted, the 1908 constitution continued those rules, though it permitted municipalities to be broken where they crossed county lines." (citations omitted)).

[14] This possibility was acutely concerning to former Justice Markman. In commenting on a suggestion from a report submitted to the Commission from the University of Michigan's Center for Local, State, and Urban Policy at the University of Michigan, which suggested that the Commission construe "communities of interest" to include those "link[] to a set of public policy issues that are affected by legislation," Justice Markman stated:

Commission's existence. *See* Mich. Const. art. IV, § 6(13)(c). It is also one of the many issues that informed the Northern District of Georgia's finding of federal unconstitutionality in *Larios*. *See* 300 F. Supp. 2d at 1350 (faulting maps as being drawn "in a thoroughly disparate and partisan manner.").

It also bears noting that the ordinary Michigander would understand a "community of interest" to include counties, cities, and towns. As elegantly stated by former Michigan Supreme Court Justice Stephen Markman:

> Why must this be so? What if a "community" is simply distinguished by the warmth and neighborliness of its people; by people with a common love for the outdoors and who revel in local recreational opportunities; by people enamored with the peace and quiet of the community; by people who relish the quality of local schools, libraries, shops or restaurants; or by people who simply appreciate its proximity to their place of work or to family members, or its affordability? What, of course, is logically implicit but unstated in the Report's assertion is that there must also be some *common* point-of-view on the "public policy issue that [is] affected by legislation," lest the "community of interest" join people among whom there is actually an *absence* of agreement on the "public policy issues." And if there must be a common point-of-view on a "public policy issue that [is] affected by legislation," how is this consideration any different from the partisan considerations that were meant to be precluded by the Amendment in the first place? After all, attitudes toward "public policy issues that [are] affected by legislation" are exactly what characterizes American political parties. They are not fraternities or sororities, social clubs, or charitable societies, but rather groupings of citizens, broadly sharing "common points-of-view" on the role and responsibilities of government, and separated from other groupings of citizens, broadly sharing "contrary points-of-view." Indeed, by the Report's own understanding, the political party itself might be defined as a "community of interest," except that it was a dominant purpose of the Amendment to *reduce* partisan influence within the redistricting process, not to heighten it.

See Exhibit B (Memorandum to Michigan Independent Commission from Stephen Markman, Michigan Supreme Court Justice (retired)).

> Such communities are where the people reside; where they sleep, play, relax, worship, and mix with families, friends and neighbors; where their children attend schools, make and play with friends, compete in sports, participate in extracurricular activities, and grow to maturity; where they work, shop, dine, and participate in acts of charity; where their taxes are paid, votes cast, and library books borrowed; and where their police and firefighters serve and protect. In short, these places are meaningful to every Michigander, for they serve to define what we call "home[,]" and they signify to the rest of the world where we are "from."

See Exh. B, at 23 (Memorandum to Michigan Independent Commission from Stephen Markman, Michigan Supreme Court Justice (retired)). Because the Michigan Constitution must be construed in the "sense most obvious to the common understanding"; *i.e.*, as "as reasonable minds, the great mass of the people themselves, would give it," *Traverse City Sch. Dist. v. Attorney General*, 384 185 N.W.2d 9, 14 (Mich. 1971) (quoting Thomas Cooley, *Constitutional Limitations* 81), the Court should do so here.

Lest the Court have any lingering doubt, it bears noting that most districts adopted by Commissioners unnecessarily contravene some traditionally understood communities of interest:

- The Commission made no attempt to keep Oakland County remotely intact, and, instead, carved it into six different congressional districts, even though Plaintiffs' Remedy Map split Oakland County four districts. Bryan Decl. Appendix A–B.

- District Two (which is underpopulated by 182 people) unnecessarily splits Ottawa County. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B.

- District Three (which is overpopulated by 235 people) appears to have been drawn without any regard to numerous comments regarding split communities of interest in the Grand Rapids area. Additionally, District Three connects Grand Rapids with Muskegon, creating unnecessary county splits in the process.

- District Four (which is underpopulated by 579 persons) reflects the Commissioners' decision to disregard concerns about split communities of interest in Western Michigan. As a result, the Commissioners' enacted map splits Kalamazoo, Calhoun, and Berrien Counties. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B.

- District Five (which is underpopulated by 635 persons) unnecessarily split three counties (Berrien, Calhoun, and Kalamazoo) into two congressional districts. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B.

- District Six (which is overpopulated by ninety-four persons) unnecessarily plucks 65,559 people from thoroughly whittled Oakland County. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B.

- District Seven (which is overpopulated by fifty-nine persons) is part of Oakland County's six-way split. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B. It adds, for good measure, a split of Argentine Township to pull 173 persons.

- District Eight (which is overpopulated by fifty people) splits Arbela Township, grabbing 1,398 people. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B.

- District Nine (which is underpopulated by 217 people) is part of Oakland County's six-way split. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B. In addition to the County, District Nine splits a number of towns as well, including Arbela Township, Macomb Township, Milford Charter Township, and White Lake Charter Township. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B.

- District Ten (which is overpopulated by thirty-nine people), is, too, part of the six-way Oakland split. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B. Because District Ten could fit entirely within Macomb County, this split is particularly egregious. and appears driven by politics. Bryan Decl. ¶¶ 15–16 (Table 1, Table 2); Appendix A–B. District Ten's incursion into Rochester and Rochester Hills Township in Oakland County accomplished little other than adding voters who cast ballots in favor of President Biden during the 2020 General Election. If District Ten was wholly contained in Macomb County, the additional population would have picked up more Republican voters.

The Commissioners never provide a reason why they decided to carve up such a substantial proportion of the State's longstanding local units of government, some of which have existed since the time of the American Founding. (The boundaries of Wayne County, for example, were established in 1796.) And although the remedy map splits Wayne County, it does so in a manner that unites split municipalities. *See* Bryan Decl. Appendix A–B.

For decades, maintaining local jurisdictional boundaries (has been emphasized unwaveringly by the Michigan Supreme Court. *See, e.g.*, *In re Apportionment of State Legislature—1992*, 486 N.W.2d at 643 (discussing the twelve "Apol Standards,"[15] five of which emphasize the importance of maintaining county and municipal boundary lines while redistricting). And as shown by the remedy map (Exhibit A), slivering counties in this fashion is entirely unnecessary. *See* Bryan Decl. ¶¶ 20-21; Appendix A–B. If adopted, the remedy map would reduce the number of split counties to ten of eighty-three (12 percent), reduce the number of ways in which split counties are divided (*i.e.*, no split county covers more than four congressional districts and most of the split counties cover only two), and comply more faithfully with the other requirements of the federal and State Constitutions (*see* discussion *supra* at 15–28; *infra* at 30–35; Bryan Decl. ¶¶ 15–16, 21, 24; Appendix A–D).[16]

For all these reasons, the Commissioners violated their responsibility to adopt congressional districts that reflect "communities of interest," as that phrase has been construed by the Michigan Supreme Court and would be understood by the average Michigander. MICH. CONST. art. IV, § 6(13)(c). Doing so was entirely arbitrary, and, accordingly, runs afoul of the Fourteenth Amendment's Equal Protection guarantee because voters are arbitrarily denied their ability to associate together with their community to advance the communities interests.

---

[15] The Apol standards are named after Michigan's former elections director, Bernie Apol. *See NAACP v. Snyder*, 879 F. Supp. 2d 662, 680 n.2 (E.D. Mich. 2012) (three-judge court). Per Section 4.261 of the Michigan Compiled Laws, they apply to "[r]edistricting plan[s] for" the State "senate and house of representatives."

[16] Some splits are mathematically required. Bryan Decl. ¶ 19. Three counties (Wayne, Oakland, and Macomb) have populations greater than a single congressional district and therefore must be split into multiple "segments." *Id.* ¶ 19. The remaining eighty counties do not have a large enough population to equal a congressional district by themselves, so they must be combined with all or part of neighboring counties to equalize population. *Id.* ¶ 19.

3. *The Commissioners' congressional map fails "to reflect consideration of county, city, and township boundaries" (Article IV, Section 6(13)(f) of the Michigan Constitution).*

For all these reasons discussed above, *see supra* at 23–29, the Commissioners' map violates Article IV, Section 6(13)(f) of the Michigan Constitution. As noted throughout this filing, the Commissioners' decision to dissect so many Michigan counties, cities, and townships compels the conclusion that it acted arbitrarily.

It bears noting that these divisions affect each Plaintiff in a real and concrete way. For example:

- Plaintiff Michael Banerian, who resides in the Commissioners' overpopulated Eleventh Congressional District, lives in Oakland County. Banerian Decl. ¶¶ 4–5. The Commissioners' map splits Oakland County between six congressional districts, while the remedy map reduces that number to four. *Id*. ¶ 7.

- Plaintiff Michon Bommarito, who resides in the Commissioners' underpopulated Fifth Congressional District, lives in Calhoun County. Bommarito Decl. ¶¶ 4–5. The Commissioners' map splits Calhoun County between the Fourth and Fifth Congressional District, while the remedy map keeps it whole. *Id*. ¶ 6.

- Plaintiff Peter Colovos, who resides in the Commissioners' underpopulated Fourth Congressional District, lives in the northeast corner of Berrien County. Colovos Decl. ¶¶ 4–5. This northeast corner of Berrien County is the only portion contained in the Commissioners' Fourth Congressional District (which is anchored in Western Michigan); the rest of Berrien County would vote in the Commissioners' Fifth Congressional District (which includes the Detroit suburbs). *Id*. ¶¶ 6–7. The remedy map keeps Berrien County whole. *Id*. ¶ 7.

- Plaintiff Joseph Graves, who resides in the Commissioners' overpopulated Eighth Congressional District, lives in Genesee County. Graves Decl. ¶¶ 4–5. The Commissioners' map splits Genesee County between the Eighth Congressional District (which is based in Flint and Saginaw) and the Seventh Congressional District (which is based in Lansing). *Id*. ¶¶ 6–7. The remedy map keeps Genesee County whole. *Id*. ¶ 7.

- Plaintiff Sarah Paciorek, who resides in the Commissioners' overpopulated Third Congressional District, lives in Kent County. Paciorek Decl. ¶¶ 4–6. The Commissioners' map splits Kent County

between the Second and Third Congressional Districts. *Id*. ¶ 7. The former includes Lansing suburbs and extends north and west to include the Huron-Manistee National Forest. *Id*.. The latter is anchored in Grand Rapids. *Id*.. The remedy map, in contrast, keeps Kent County whole. *Id*..

- Plaintiff Cameron Pickford, who resides in the Commissioners' overpopulated Seventh Congressional District, lives in Eaton County. Pickford Decl. ¶¶ 4–6. The Commissioners' map splits Eaton County between the Second and Seventh Congressional Districts; the former is anchored in Western Michigan and includes the Huron-Manistee National Forest while the latter is anchored in Lansing. *Id*. ¶ 7. The remedy map keeps Eaton County whole. *Id*..

- Plaintiff Harry Sawicki, who resides in the Commissioners' overpopulated Twelfth Congressional District, lives in the City of Dearborn Heights. Sawicki Decl. ¶¶ 4–6. The Commissioners' map splits the City of Dearborn Heights between the Twelfth Congressional District (which includes Detroit) and the Thirteenth Congressional District (which is more suburban). *Id*. ¶ 7. The remedy map keeps the City of Dearborn Heights whole. *Id*..

The counties, cities, and townships that the Commissioners have diced are "meaningful to every Michigander, for they serve to define what [they] call 'home[,]' and they signify to the rest of the world where we are from.'" *See* Exh. B, at 23 (Memorandum to Michigan Independent Commission from Stephen Markman, Michigan Supreme Court Justice (retired)). They certainly matter to Plaintiffs, and, as noted above, *see supra* at 15–30, arbitrarily divvying them up inflicts real and concrete associational and representational harm. For that reason, the Commissioners' map cannot stand.

4. *The Commissioners' congressional map violates the requirement that "[d]istricts shall be reasonably compact" (Article IV, Section 6(13)(g) of the Michigan Constitution).*

As noted above, congressional-district compactness can be assessed through a variety of metrics. *See* Bryan Decl. ¶ 23. Two—the Polsby-Popper Measure and the Reock Measure—are widely accepted among redistricting experts. *Id.*. On both, the Plaintiffs' Remedy Map outperforms the Commissioners' congressional map. *Id.* ¶ 24, Appendix C-D. Regarding the

former, the Commissioners' map's average compactness score is .41 and its least compact district is .27; on the latter, the average compactness score is .42 and the least compact district's is .19. *Id.* ¶ 23, Appendix C–D. The remedy map demonstrates that this failure was avoidable; its average Polsby-Popper Measure is .46 (up from .41) and its least compact district scores at .3 (up from .27), while its average Reock measure comes in at .45 (up from .42), and its least compact district improves to .21 (up from .19).

DISTRICT	ENACTED PLAN POLSBY-POPPER	REMEDIAL PLAN POLSBY-POPPER
District One	0.40	0.40
District Two	0.41	0.48
District Three	0.30	0.50
District Four	0.41	0.54
District Five	0.27	0.43
District Six	0.39	0.40
District Seven	0.56	0.53
District Eight	0.43	0.42
District Nine	0.53	0.50
District Ten	0.48	0.63
District Eleven	0.41	0.41
District Twelve	0.48	0.43
District Thirteen	0.29	0.30
Average	**0.41**	**0.46**

Bryan Decl. Appendix C.

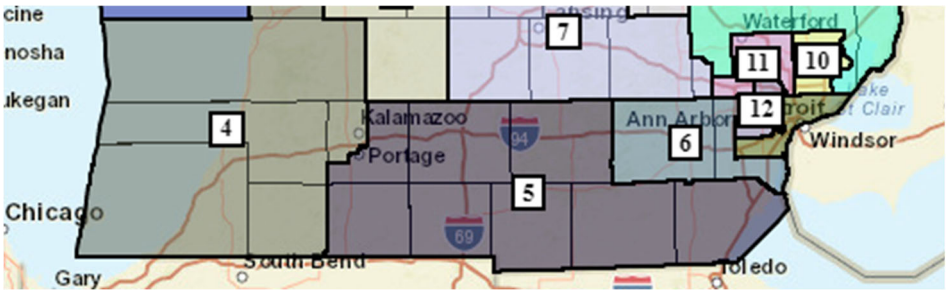
DISTRICT	ENACTED PLAN REOCK	REMEDIAL PLAN REOCK
District One	0.38	0.38
District Two	0.56	0.54
District Three	0.32	0.49
District Four	0.42	0.59
District Five	0.19	0.32
District Six	0.39	0.39
District Seven	0.52	0.51
District Eight	0.41	0.41
District Nine	0.53	0.52
District Ten	0.47	0.57
District Eleven	0.48	0.44
District Twelve	0.57	0.49
District Thirteen	0.21	0.21
Reock Average	**0.42**	**0.45**

Bryan Decl. Appendix D.

At a more conceptually straightforward level, it cannot be said that the Commissioners' map creates "compact" districts in any normal sense of the word. Not since at least 1963 has Michigan seen a congressional district (outside of the Upper Peninsula) that touches both its

Eastern and Western borders.[17] The Commissioners' District Five breaks that streak by extending across the entirety of Michigan's roughly 200-mile Southern border, joining Lake Erie with Lake Michigan.

As with the other flaws blighting the Commissioners' map, the remedy map solves this problem:



See Exh A.

* * *

The Commissioner's congressional map does not equalize population across all districts. Bryan Decl. ¶ 15. They adopt a wholly standardless definition of "community of interest" and then apply this definition to draw boundaries that transgress scores of Michigan county, city, and township lines. *Id.* Appendix A. Finally, they make no serious attempt to satisfy any degree of compactness, in any sense of that word, and instead draw a district traversing, for the first time in almost fifty years, the entire southern border of the State.

[17] Michigan's historic district boundaries are available at The American Redistricting Project, https://thearp.org/maps/congress/2020/MI (last visited Jan. 12, 2022).

None of this was unavoidable. Each of these problems would have been solved had the Commissioners applied, consistently and neutrally, the traditional redistricting criteria recognized by the U.S. Supreme Court and now enshrined in the Michigan Constitution. The Commissioners' failure to do so renders the congressional map it adopted entirely arbitrary. And for this reason, the Commissioners have violated the Fourteenth Amendment rights of Plaintiffs.

III. BOTH THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST FAVOR ENTRY OF A PRELIMINARY INJUNCTION.[18]

If the Court agrees that the Commissioners' map likely violates the U.S. Constitution (and to be sure, it does), then both the balance of the equities and the public interest tilt strongly in favor of preliminary-injunctive relief. Virtually every court has recognized that "[w]hen a constitutional violation is likely . . . [,] the public interest militates in favor of injunctive relief because 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)). Some have gone further, holding that, because "no cognizable harm results from stopping unconstitutional conduct," it is "*always* in the public interest to prevent violation of a party's constitutional rights." *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) (emphasis added).

At issue in this case, however, is not a mine-run constitutional right. Instead, the issues touch on the one right that "is preservative of other basic civil and political rights," *Reynolds*, 377 U.S. at 561–62; *i.e.*, "having a voice in the election," the most "precious [right] in a free country," *Wesberry*, 376 U.S. at 17. For that reason, the Supreme Court has lent its imprimatur to the notion that, "once a State's legislative apportionment scheme has been found to be

[18] The final two factors "'merge when the Government is the opposing party.'" *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

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*, 377 U.S. at 585. This is not that unusual case.

Simply put, the irreparable injury that Plaintiffs will suffer absent this Court's intervention far eclipses any conceivable nuisance the State might experience by entry of a preliminary injunction. Granting the injunction might send the Commission back to the drawing board (literally and figuratively); but as shown by the remedy map (Exh. A), bringing Michigan's congressional districts into compliance with the U.S. and Michigan Constitutions would require no more than a few modest alterations. And if this proves too onerous, the Court could alleviate the Commission's burden by assuming jurisdiction, appointing a special master, and establishing constitutionally compliant congressional districts itself (or, of course, adopting Plaintiffs' proffered remedy map). In either event, it cannot be said that the balance of the equities, or the interest of the public, would be well served by allowing the Commission's congressional map to remain in effect.

CONCLUSION

As of the date of this filing, the 2022 Midterm Elections are 285 days away. Michiganders must be given the opportunity to elect their congressional representatives in a way that complies with the U.S. Constitution. Because the Commission's congressional map does not, and given the irreparable injury that will arise on November 8, 2022 if these violations are not remedied, Plaintiffs respectfully request that the Court preliminarily enjoin the State from using this map for any congressional election in Michigan.

January 27, 2022

Respectfully submitted,

/s/ Charles R. Spies
Charles R. Spies (P83260)
Max A. Aidenbaum (P78793)
DICKINSON WRIGHT PLLC
123 Allegan Street
Lansing, Michigan 48933
cspies@dickinsonwright.com
MAidenbaum@dickinsonwright.com
(517) 371-1730 (phone)
(844) 670-6009 (fax)

/s/ Jason B. Torchinsky
Jason B. Torchinsky
Shawn Toomey Sheehy
Edward M. Wenger
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, Virginia 20169
jtorchinsky@holtzmanvogel.com
ssheehy@holtzmanvogel.com
emwenger@holtzmanvogel.com
(540) 341-8808 (phone)
(540) 341-8809 (fax)

Attorneys for Plaintiffs Michael Banerian, Michon Bommarito, Peter Colovos, William Gordon, Joseph Graves, Beau LaFave, Sarah Paciorek, Cameron Pickford, Harry Sawicki, and Michelle Smith.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, in reliance on the word processing software used to create this Brief, that:

1. This Brief complies with the word-count limitation of W.D. Mich. LCivR 7.2(b)(i) because this Brief in support of a dispositive motion (i.e., a motion for injunctive relief (*see* W.D. Mich. LCivR 7.2(a))) contains 9,172 words (including headings, footnotes, citations, and quotations but not the case caption, cover sheets, table of contents, table of authorities, signature block, attachments, exhibits, or affidavits).

2. The word processing software used to create this Brief and generate the above word count is Microsoft Word 2016.

Dated: January 27, 2022

/s/ Charles R. Spies
Charles R. Spies (P83260)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 27, 2022, I caused to be filed with the Court, via submission to the Court's ECF system, Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Brief in Support of Their Motion for Preliminary Injunction.

I FURTHER CERTIFY that, in accordance with Fed. R. Civ. P. 4, I will cause such Motion and Brief to be served on each Defendant together with the Summons and Second Amended Complaint.

Dated: January 27, 2022

/s/ Charles R. Spies
Charles R. Spies (P83260)