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

Hon. Raymond M. Kethledge
Hon. Paul L. Maloney
Hon. Janet T. Neff

and

JOAN SWARTZ MCKAY; GRACE HUIZINGA; SAMANTHA NEUHAUS; JORDAN NEUHAUS; CAYLEY WINTERS; GLENNA DEJONG; MARSHA CASPAR; HEDWIG KAUFMAN; COLLIN CHRISTNER; MELANY MACK; ASHLEY PREW; SYBIL BADE; SUSAN DILIBERTI; LISA WIGNET; MATTHEW WIGNET; PAMELA TESSIER; and SUSANNAH GOODMAN,

Intervenor-Defendants.

INTERVENOR-DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Charles R. Spies
Dickinson Wright PLLC
123 Allegan Street
Lansing, MI 49833
(517) 371-1730
cspies@dickinsonwright.com
Counsel for Plaintiffs Michael Banerian, Michon Bommarito, Peter Colovos, William Gordon, Joseph Graves, Beau LaFave, Sarah Paciorek, Cameron Pickford, Harry Sawicki, and Michelle Smith

Sarah S. Prescott (P70510)
Salvatore Prescott Porter & Porter, PLLC
105 E. Main Street
Northville, MI 48168
(248) 679-8711
sprescott@spplawyers.com
Counsel for Intervenor-Defendants

Max Abram Aidenbaum
Dickinson Wright PLLC (Detroit)
500 Woodward Ave., Ste. 4000
Detroit, MI 48226-3425
(313) 223-3093
maidenbaum@dickinsonwright.com
Counsel for Plaintiffs Michael Banerian, Peter Colovos, William Gordon, Joseph Graves, Beau LaFave, Cameron Pickford, and Harry Sawicki

Edward M. Wenger
Holtzman Vogel Baran Tochinsky & Josefiak PLLC (Washington)
2300 N. St., NW, Ste. 643a
Washington DC 20037
(202) 737-8808
emwenger@holtmanvogel.com
Counsel for Plaintiffs Michael Banerian, Peter Colovos, William Gordon, Joseph Graves, Beau LaFave, Cameron Pickford, and Harry Sawicki

Jason Torchinsky
Shawn Sheehy
Holtzman Vogel Baran Torchinsky & Josefiak PLLC
15405 John Marshall Hwy.
Haymarket, VA 20169
(540) 341-8808
jtorchinsky@HoltzmanVogel.com
ssheehy@hvjt.law
Counsel for Plaintiffs Michael Banerian, Peter Colovos, William Gordon, Joseph Graves, Beau LaFave, Cameron Pickford, and Harry Sawicki

Marc E. Elias
Emma Olson Sharkey
Melinda K. Johnson
Aaron M. Mukerjee
Raisa Cramer
Elias Law Group LLP
10 G St NE, Ste 600
Washington, DC 20002
(202) 968-4490
melias@elias.law
eolsonsharkey@elias.law
mjohnson@elias.law
amukerjee@elias.law
rcramer@elias.law
Counsel for Intervenor-Defendants

INTERVENOR-DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy that should only be granted if the moving party can show that the circumstances clearly demand it. The circumstances here demand no such thing. As explained in Intervenor-Defendants' motion to dismiss, ECF No. 34 at 4–8,

Plaintiffs' claim under Count II fails as matter of law. Additionally, Plaintiffs will suffer no irreparable harm in an election proceeding under this map, and the balance of equities weighs against granting relief here. Accordingly, the preliminary injunction must be denied.[1]

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington–Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). Courts must balance "four factors . . . when considering a motion for a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (internal citation omitted). "When 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.'" *City of Pontiac*, 751 F.3d 427, 430 (6th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)).

ARGUMENT

I. Plaintiffs are not likely to succeed on the merits of Count II.

A. Plaintiffs fail to identify a federal claim.

[1] Intervenor-Defendants take no position on the merits or equities of Count I of Plaintiffs' Amended Complaint, which challenges the population distribution of the districts. If the Court sees fit to grant an injunction based on Count I, relief should be narrowly limited to correcting the minor population deviations challenged in that claim. *See Howe v. City of Akron*, 801 F.3d 718, 753 (6th Cir. 2015) ("The district court should limit the scope of the injunction to the conduct 'which has been found to have been pursued or is related to the proven unlawful conduct.'" (quoting *E.E.O.C. v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994)).

As explained in Intervenor-Defendants' Motion to Dismiss at 4–8, ECF No. 34, Plaintiffs fail to allege a federal claim as part of Count II. Instead, they attempt to invent a new right under the Fourteenth Amendment's Equal Protection Clause, claiming that "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." Pls.' Mot. for Prelim. Inj. at 21, ECF No. 9 (hereinafter "ECF No. 9"). But there is no legal basis for the proposition that an alleged violation of a state constitutional provision is sufficient to allege a *de facto* violation of the federal Equal Protection Clause.

Plaintiffs' claim is, at best, an alleged violation of state law, and Count II is accordingly barred by *Pennhurst State Sch. & Hosp. v. Halderman*, which holds that "the principles of federalism that underlie the Eleventh Amendment" prohibit a federal court from granting "relief against state officials on the basis of state law, whether prospective or retroactive." 465 U.S. 89, 106 (1984); *see also Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005) (citing *Pennhurst*, 465 U.S. at 106) (holding that "the States' constitutional immunity from suit prohibits *all* state-law claims filed against a State in federal court, whether those claims are monetary or injunctive in nature") (emphasis in original); *In re Ohio Execution Protocol Litig.*, 709 F. App'x 779, 782 (6th Cir. 2017) (holding that "a federal court may issue prospective injunctive and declaratory relief compelling a state official to comply with federal law . . . . [b]ut that exception does not extend to prospective injunctive or declaratory relief based on alleged violations of state law").

Plaintiffs' claim under Count II rests entirely on the Commission's alleged failure to comply with the redistricting criteria mandated under the state constitution. Plaintiffs complain that "the Commissioners ignored roughly half the criteria listed in the Michigan Constitution," Am. Compl. ¶ 122, and that "[t]o the extent the Commissioners (im)properly applied any criteria,

they did so out of the order of priority mandated by the Michigan Constitution," *id.* ¶ 123. From this Plaintiffs conclude that "[t]hus, when the Commissioners arbitrarily and inconsistently applied their state constitutional requirements of keeping counties and townships whole and maintaining communities of interest, they violated the Equal Protection Clause." *Id.* ¶ 121. In other words, Plaintiffs argue that the Commission's alleged violation of the state constitution triggers—and is synonymous with—a violation of the U.S. Constitution. There is no authority for this proposition, and under the *Pennhurst* doctrine this Court has no authority to enter the relief requested.[2]

B. The Commission properly applied the Michigan Constitution's communities of interest criteria in drawing the congressional map.

Even if this Court were inclined to recognize Plaintiffs' novel and unsupported claim under Count II, the Commission properly applied the redistricting criteria required by the Michigan Constitution, and Plaintiffs have failed to establish any basis for this Court to find otherwise.

---

[2] Apparently recognizing the deficiency in their claim, Plaintiffs attempt to save it by citing *Bush v. Gore*, 531 U.S. 98 (2000), in their Motion for Preliminary Injunction. *See* ECF No. 9 at 20. That case is entirely inapposite. The core holding of *Bush v. Gore* was that "[w]hen a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." 531 U.S. at 109. As other courts have found, *Bush v. Gore* simply has no relevance to whether a redistricting commission, acting in accordance with the criteria enshrined in the state constitution, could be found to violate the federal constitution's equal protection clause when it splits political boundaries. *See Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 284 F. Supp. 2d 1240, 1247–48 (D. Ariz. 2003) (holding that "despite Plaintiffs' repeated citations to *Bush v. Gore* . . . their claims are founded on state, not federal law . . . ." because "*Bush v. Gore* involved a challenge to Florida's use of inconsistent standards in its vote-counting process . . . . [i]n contrast, Plaintiffs here advance a different claim, which is that the state must apply consistent standards in redistricting, a different but related aspect of the states' regulation of the voting process. States are generally free to conduct redistricting according to any standards they choose, unless they run afoul of certain constitutional or statutory prohibitions."); *see also In re Constitutionality of House Joint Resol. 1987*, 817 So. 2d 819, 832 (Fla. 2002) ("We do not read the Supreme Court's decision in Bush as requiring the Florida Legislature to announce extraconstitutional standards which the Legislature would be required to follow in its reapportionment decisions.").

Plaintiffs repeatedly assert that the Michigan Constitution tracks what they deem "traditional redistricting criteria." *See* Am. Compl. ¶ 48 ("The criteria enumerated in the Michigan Constitution track the traditional (and traditionally accepted) redistricting criteria used in several jurisdictions across the Nation."); *id.* ¶ 80 (arguing that the Commissioners failed to abide by the constitutionally imposed traditional redistricting criteria (as reflected by the Michigan constitution)); ECF No. 9, at 22–23 (citing Mich. Const. art. IV, § 6) (stating that "the Michigan Constitution now mandates adherence to most of the commonly recognized traditional redistricting criteria").

Plaintiffs then allege that the Commission failed to apply the redistricting criteria as required, contending specifically that the Commission failed to preserve "communities of interest" by splitting political boundaries (*i.e.* counties, cities, and townships), contending that this effectively "arbitrarily and inconsistently applied the phrase 'communities of interest'" in violation of the Equal Protection Clause. Am. Compl. ¶¶ 117-121. But the Michigan Constitution makes clear that, under Michigan law, "communities of interest" are distinct from political boundaries, and that the Commission must prioritize the former over the latter. *See* Mich. Const. Art. IV, § 6(13) (listing criteria "in order of priority," with respect for "communities of interest" listed before "consideration of county, city, and township boundaries"). Plaintiffs' contention that the Commission "appear[s] to have used a wholly novel definition" of "communities of interest" by not equating the term with "counties, cities, and townships," Am. Compl. ¶¶ 116-17, takes issue not with the Commission or the congressional map, but with the Michigan Constitution itself. While Plaintiffs might prefer, as a policy matter, that the Michigan Constitution require the Commission to consider geographic boundaries as "true communities of interest," *id.* ¶ 116, it

simply does not do so. The fact that communities of interest and political boundaries are separate criteria is fatal to Count II of Plaintiffs' claim.

At core, Plaintiffs ask this Court to set a federal standard for what constitutes a community of interest in the redistricting context—a standard that would invalidate the clear distinctions between communities of interest and political boundaries contained in the Michigan Constitution. That standard is neither required by federal law nor based on any factors specific to Michigan. The people of Michigan voted for a constitutional amendment that required the Commission to keep communities of interest together and, as a lower-priority criteria, to give consideration to political boundary lines. In accordance with that mandate, the Commission heard hours of testimony and received numerous public comments to help inform its understanding of what constitutes communities of interest in Michigan. The Commission then made decisions about how to best keep communities of interest together in Michigan. These facts alone are fatal to Plaintiffs' claims.

But also, as a practical matter, Plaintiffs have failed to establish that political subdivision boundaries *in Michigan* are necessarily coextensive with communities of interest. As reflected in the expert report of Paul Gronke, attached as Exhibit A, the extent to which "county or city boundaries, are coterminous with communities of interest . . . . in any given state is an empirical question." Exhibit A ¶ 21. As Professor Gronke finds, it "is extremely common for residents of the [Michigan] counties examined [in his report] to cross county boundaries to work and to travel along transportation corridors that connect them to other counties." *Id.* ¶ 38. As a result, "[i]t does not seem unreasonable, therefore, that a map that prioritizes communities of interest may divide up some county and cities." *Id.* ¶ 38. As Professor Gronke's analysis establishes, "the term 'communities of interest' in Michigan is both more expansive than and distinctive from 'counties, cities, and townships,'" *Id.* ¶ 4.

Professor Gronke also explains why the report filed by Mr. Thomas M. Bryan, which is focused on political boundary splits, "is inaccurate and incomplete because it misstates the redistricting criteria in the Michigan Constitution and performs a narrow and misleading analysis based solely on splits of existing political units." *Id.* ¶ 4. Indeed, in comparing the enacted plan to Plaintiffs' proposed plan, Mr. Bryan cherry-picks only those criteria that fit Plaintiffs' narrative. Expert Report of Thomas M. Bryan ¶ 13 (noting that "an assessment of communities of interest (c), partisan politics (d), incumbency (e) are not included in [his] analysis.").[3]

In sum, Plaintiffs have presented no evidence that the Commission made these policy choices in an irrational or arbitrary manner. They have failed to establish that they are likely to succeed on their Count II.

II. Plaintiffs are not facing immediate, irreparable harm.

Plaintiffs have failed to assert immediate, irreparable harm. Plaintiffs argue that their ability "to participate fully, effectively, and on equal terms in the election of their constitutional representatives is on the line in this case." ECF No. 9, at 15. But statements like these are merely window dressing, intended to obscure the reality that Plaintiffs have no cognizable federal claim and therefore no cognizable legal harm. In other words, Plaintiffs' alleged harm rises and falls with the merits of their claims. *See, e.g.*, *id.* at 14 (describing harm as electing "congressional representatives via maps that were drawn in contravention of the Nation's charter"). As a result, if the Court disagrees with Plaintiffs on the merits, their harm argument also falls flat. *See, e.g.*, *Platt*

[3] A three-judge panel in the Northern District of Alabama recently "question[ed] [Mr. Bryan's] credibility as an expert witness" for almost precisely this reason. *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *60 (N.D. Ala. Jan. 24, 2022). That court noted that "Mr. Bryan's work was considerably less thorough [than other experts]" and that other experts "based their opinions on a wide-ranging consideration of the requirements of federal law and all or nearly all traditional redistricting criteria, but Mr. Bryan considered only three or four traditional redistricting criteria (depending on the report)." *Id*.

v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct., 769 F.3d 447, 455 (6th Cir. 2014) ("[Plaintiff] has not shown irreparable harm, largely because he has not demonstrated a strong likelihood of success on the merits."); *O'Toole v. O'Connor*, 802 F.3d 783, 792 (6th Cir. 2015) (same).

III. The equities weigh against the grant of Plaintiffs' preliminary injunction.

As discussed, Plaintiffs have suffered no legal harm, and will suffer none in the absence of an injunction. On the other hand, granting a preliminary injunction would cause harm to Intervenor-Defendants and millions of other Michigan residents who supported Michigan's independent redistricting process and approved the specific criteria spelled out in the Michigan Constitution that Plaintiffs now seek to upend. Michigan voters overwhelmingly chose to adopt the constitutional amendment that implemented the Commission in 2018. The Commission, in accordance with this process, adopted a congressional map that complies with the Michigan Constitution as it relates to consideration of communities of interest and political boundaries. The harm of displacing that process, enjoining the congressional map, and ordering an entirely new map in connection with Count II is far greater than any speculative harm that Plaintiffs assert.

Plaintiffs had the opportunity to submit testimony to the Commission and may not now seek relief in federal court to displace the democratic deliberations that took place in the months prior. Sending the map back the Commission or adopting a brand-new map because the map does not keep certain counties together would elevate the voices of the Plaintiffs in this case over those of not only the Intervenor-Defendants and other Michiganders who took part in the public process to make their voice heard, but also every Michigander who voted to adopt Article IV, Section 6. These interests significantly outweigh the associational harm alleged by the Plaintiffs.

IV. It is contrary to the public interest to enjoin the Commission map and adopt an alternative map.

Granting a preliminary injunction would also undermine the public interest. The Michigan Constitution outlines a process for adopting new congressional maps. Article IV, Section 6 requires that the Commission be constituted of 13 citizen members every ten years. Mich. Const. Art. IV, § 6(1). It lays out specific guidelines for the consideration of maps which includes, among others, contiguity, consideration of the state's diverse population and communities of interest, political subdivision boundaries, and compactness. *Id*. § 6(13)(a)-(g). Here, the Commission followed that process. The Commission partook in hours and hours of testimony and expert opinions before it decided to adopt the Chestnut Plan. *See Meeting Notices & Materials,* Mich. Indep. Citizens Redistricting Comm'n, https://www.michigan.gov/micrc/0,10083,7-418-106525---,00.html (accessed Feb. 18, 2022) (listing the Commission's public meetings along with transcripts, expert reports, and public comment received at those meetings). If this Court were to order the map reconstituted based on Plaintiffs' allegation in Count II, it would substitute its judgment about which communities of interest should be prioritized over others without the same lengthy public process.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for preliminary injunction in connection with Count II.

Date: February 18, 2022

Respectfully submitted,

/s/ Sarah S. Prescott
Sarah S. Prescott (P70510)
SALVATORE PRESCOTT &
PORTER & PORTER, PLLC
105 E. Main Street
Northville, MI 48168
(248) 679-8711
sprescott@spplawyers.com

Marc E. Elias
Emma Olson Sharkey
Aaron M. Mukerjee
Raisa Cramer
Elias Law Group LLP
10 G St NE, Ste 600
Washington, DC 20002
Tel.: (202) 968-4490
melias@elias.law
eolsonsharkey@elias.law
amukerjee@elias.law
rcramer@elias.law

Counsel for Intervenor-Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(b)(ii), counsel for Intervenor-Defendants certify that this brief contains 3,166 words, as indicated by Microsoft Word 2021, inclusive of any headings, footnotes, citations and quotations, and exclusive of the caption, cover sheets, table of contents, table of authorities, signature block, any certificate, and any accompanying documents.

Date: February 18, 2022

Respectfully submitted,

/s/ *Sarah S. Prescott*
Sarah S. Prescott

CERTIFICATE OF SERVICE

Sarah S. Prescott certifies that on the 18th day of February, 2022, she served a copy of the above document in this matter on all counsel of record and parties via the ECF system.

Date: February 18, 2022

Respectfully submitted,

/s/ Sarah S. Prescott
Sarah S. Prescott