UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al.*,

Plaintiffs

v.

JOCELYN BENSON, in her official capacity as Secretary of State of Michigan, *et al.*,

Defendants

and

COUNT MI VOTE d/b/a VOTERS NOT POLITICIANS,

and

JOAN SWARTZ McKAY, *et al.*,

Intervenor-Defendants.

Case No. 1:22-CV-00054-PLM-SJB

Circuit Judge Raymond Kethledge
District Judge Paul L. Maloney
District Judge Janet T. Neff

INTERVENOR-DEFENDANT VOTERS NOT POLITICIANS'
BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs' motion for a preliminary injunction should be denied. Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims, a likelihood of irreparable harm absent preliminary relief, or that the balance of harms and public interest support the entry of a preliminary injunction. *See Winter v. Nat'l Resources Defense Council*, 555 U.S. 7, 20 (2008). Moreover, their second cause of action is barred by Eleventh Amendment immunity and in any event not cognizable even if the Court had jurisdiction to consider it.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The Sixth Circuit has held that these are "factors to be balanced, not prerequisites to be met." *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Jones v. City of Monroe, MI*, 341 F.3d 474, 476 (6th Cir. 2003)). However, where there is simply no likelihood of success on the merits," a preliminary injunction should not be issued. *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408 (6th Cir. 2010) (quoting *Mich. State AFL–CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir.1997)). A preliminary injunction is an "extraordinary and drastic remedy" that should "only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Southern Glazer's Distributors of Ohio, LLC v. The Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017) (internal quotations omitted).

ARGUMENT

I. Plaintiffs Cannot Establish a Strong Likelihood of Success on their Malapportionment Claim.

In Count I, Plaintiffs contend the Commission's congressional map—which has a population deviation of 0.14%—violates the "one person, one vote" provision of the Constitution. This claim is vastly overstated. The Constitution "establishes a 'high standard of justice and common sense' for the apportionment of congressional districts: 'equal representation for equal numbers of people.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)). But because "[p]recise mathematical equality . . . may be impossible to achieve in an imperfect world[,] . . . the 'equal representation' standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality 'as nearly as is practicable.'" *Id*. (quoting *Wesberry*, 376 U.S. at 7-8, 18). Any number of nondiscriminatory and consistently applied legislative policies might justify minor population deviations if the State can show "with some specificity that a particular objective required the specific deviations in its plan[.]" *Id.* at 740-41. "The extent to which equality may practicably achieved may differ from State to State and from district to district" and must be judged based on the "circumstances of each particular case." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969). There is no fixed numerical cut-off. The Supreme Court has invalidated congressional maps with deviation as low as 0.698%, *Karcher* 462 U.S. at 727-28, and tolerated deviation as high as 0.79%, *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 761 (2012).

The Supreme Court's test has two parts. First, Plaintiffs "bear the burden of proving the existence of population differences that 'could practicably be avoided.'" *Id.* at 760 (quoting *Karcher*, 462 U.S. at 734). If they do so, the State can then justify the population deviation by showing that the population differences were necessary to achieve legitimate redistricting goals.

Id. The deviations in the plan are sufficiently miniscule that the Commission could justify them by explaining why they were necessary to achieve legitimate redistricting goals—such as satisfying the mandatory criteria listed in the Michigan Constitution. *See* Mich. Const. art. IV, § 6(13).[1]

A. Plaintiffs Have Not Proven that the Adopted Map's Population Deviation Could Practicably Be Avoided.

To meet their burden, Plaintiffs must prove that the population deviation "could practicably be avoided" and "that [they] were not the result of a good faith effort to achieve equality." *Karcher*, 462 U.S. at 730-31, 734. VNP does not dispute that the enacted map has a population deviation of 0.14%. But the only evidence Plaintiffs offer to prove that this deviation could be avoided is a single alternative map allegedly drawn with more precise numerical equality. Pls.' Mot. for Prelim. Inj., No. 9, at 17, PageID.116; *id.*, Ex. A, No. 9-1, PageID.139-140. Because Plaintiffs filed their map only in .pdf format, Intervenor-Defendant Count MI Vote d/b/a Voters Not Politicians ("VNP") cannot verify the alternative map's population deviation and the geographic splits and compactness scores tabulated by Plaintiffs' expert Mr. Thomas Bryan. *See id.*; Decl. of Thomas M. Bryan, No. 9-3, Page.ID.153-157.

Even if Plaintiffs are correct that their map achieves closer numerical equality with fewer geographic splits and marginally higher compactness scores, this is insufficient to prove that the enacted map's population deviation could have practicably been avoided. The Michigan Constitution requires the Commission to draw equal population congressional districts while also abiding by all of the other mandatory criteria set out in Article IV, section 6(13)—not just

[1] Because the State Defendants are best positioned to articulate the justifications for the map adopted by the Commission, VNP defers to the explanations provided by the State Defendants as to why the population deviations in the adopted map were necessary to comply with the mandatory districting criteria in the Michigan Constitution and other legitimate state interests.

contiguity, compactness, and consideration of local political boundaries, but also compliance with the Voting Rights Act (VRA), preservation of communities of interest, and partisan fairness. *See* Mich. Const. art. IV, § 6(13). Plaintiffs present no evidence that any map with closer numerical equality could practicably be drawn to balance these mandatory criteria. *See* No. 9-3, PageID.146 (excluding an analysis of communities of interest, partisan fairness, and VRA compliance). Nor do Plaintiffs provide any evidence that the enacted map's 0.14% deviation was "not the result of [the Commission's] good-faith effort to achieve equality." *Karcher*, 462 U.S. at 731. Plaintiffs have therefore failed to carry their burden on the first element.

B. The Commission Could Justify a Small Population Deviation with its Legitimate Interest in Balancing the Michigan Constitution's Mandatory Redistricting Criteria.

Even if Plaintiffs are able to prove that the enacted map's population differences could practically be avoided, the Commission must have the opportunity to demonstrate that this slight population deviation was necessary to achieve legitimate objectives. *Tennant*, 567 U.S. at 760. The Court has described this burden as "flexible," as it "depend[s] on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.* (quoting *Karcher*, 462 U.S. at 741) (alteration original). Courts defer to states' redistricting goals if they are neutrally applied and "consistent with constitutional norms, even if they require small differences in the population of congressional districts." *Id.* (citation omitted); *see also id.* at 764. Here, this Court should likewise defer to the State Defendants' justifications for the minor population deviations in the enacted map.

The Supreme Court has identified several legitimate interests that can justify minor population deviations: maintaining compactness and contiguity, *Bethune-Hill v. Virginia State Bd.*

of Elections, 137 S. Ct. 788, 795 (2017); respecting communities of interests, *id.*; avoiding political subdivision splits, *Tennant*, 567 U.S. at 764; minimizing population shifts between districts, *id.*; minimizing contests between present incumbents, *Karcher*, 462 U.S. at 740; accounting for known flaws in census data with substantial precision, *id.*; and anticipating certain population shifts, *Kirkpatrick*, 394 U.S. at 535. This list of possible justifications is "not exclusive." *Tennant*, 567 U.S. at 764.

The Michigan Constitution supplies several legitimate interests that may explain the Congressional map's specific population deviations. Mich. Const. art. IV, § 6(13). To be sure, the state Constitution requires that some criteria take priority over others—equal population and VRA compliance, for example, are at the top, *id.* § 6(13)(a), while consideration of political subdivision boundaries and compactness are at the bottom, *id.* § 6(13)(f), (g). But the state Constitution nevertheless makes clear that the Commission "shall abide" by them all, *id.* § 6(13); *see also* § 6(14) (requiring the Commission to test the adopted map for compliance with all the criteria).

The enacted map's population deviation, 0.14%, is also miniscule. It is significantly less than the 0.79% deviation the Supreme Court upheld in West Virginia's 2010 congressional map. *See Tennant*, 567 U.S. at 761. In that case, the West Virginia Legislature considered a map with virtually absolute equal population but set it aside in favor of a map with 0.79% deviation that satisfied the state's rules against splitting counties, putting incumbents in the same district, and moving one-third of the state population from one district to another. *Id.* at 760-61. The Court held that all three interests were valid, neutral redistricting policies that could justify the "small" population deviation. *Id.* at 765.

Plaintiffs insist that *Tennant* is "inapposite" for two reasons, but neither has merit. First, Plaintiffs point out that equal population is the top priority criterion under the state Constitution,

see No. 9 at 18, Page.ID.117, but as explained above, the Michigan Constitution still mandates consideration and balancing of the other seven criteria, all of which are legitimate interests that can justify small population deviations, not unlike the three interests asserted by West Virginia to justify the larger deviation upheld in *Tennant*. Second, Plaintiffs claim that, unlike in *Tennant*, it is possible here to draw a map (i.e., their preferred map) that better satisfies Michigan's redistricting criteria with lower population deviation than the enacted map. *See id.*, PageID.117. However, Plaintiffs have nowhere explained how their map complies at all with at least three of the criteria required by the Michigan Constitution: VRA compliance, consideration of communities of interest,[2] and partisan fairness. *Tennant*, in other words, supplies a relevant benchmark to conclude that the population deviation at issue here is very small and within the bounds of the Constitution.

VNP defers to the Secretary of State and the Commissioners with respect to the specific interests that justify the enactment of the current Congressional map. But given the size of the deviation and the existence of multiple other mandatory constitutional criteria that reflect important state interests, it is clear that the Commission can constitutionally justify a 0.14% deviation. Plaintiffs certainly have not made the clear showing of likely success necessary to justify the extraordinary remedy of injunctive relief. In any event, reducing the population deviation in the plan would require minor adjustments, not the radical redesign—contrary to the Commission's priorities to which this Court must defer—that Plaintiffs proffer in their demonstration map.

[2] Plaintiffs appear to conflate the criterion requiring districts to "reflect the state's diverse population and communities of interest" with the wholly separate criterion requiring "consideration of county, city, and township boundaries." This reading of Michigan's Constitution defies several basic tenets of statutory construction. *See infra* Part II.C.

II. Plaintiffs Cannot Establish a Strong Likelihood of Success on their Equal Protection Claim.

As VNP explained in its Motion to Dismiss, No. 32, PageID.475-476, Plaintiffs have failed to state a valid claim for a violation of the Equal Protection Clause, much less demonstrated the strong likelihood of success on the merits required to justify the "extraordinary remedy" of a preliminary injunction.[3] The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. That Clause "prevents states from making distinctions that (1) burden a fundamental right; (2) target a suspect class; or (3) intentionally treat one individual differently from others similarly situated without any rational basis." *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (citing *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005).

A. Plaintiffs' Equal Protection Claim Is Barred by the Eleventh Amendment

As explained in detail in VNP's Motion to Dismiss, even if Plaintiffs had been able to articulate a valid Equal Protection Claim, they are asking this Court to issue an impermissible injunction ordering state officials (Secretary Benson and the Commissioners) to comply with the requirements of state law. Such an injunction is prohibited under well-established Supreme Court and Sixth Circuit precedent. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117-21 (1984); *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 521 (6th Cir. 2007).

Plaintiffs make no attempt to hide the fact that their entire equal protection claim is premised on their allegations that the Commission failed to comply with several provisions of the Michigan Constitution. Every subheading in the section of their Preliminary Injunction brief dedicated to their equal protection claim references a clause of the state Constitution that the

[3] Plaintiffs incorporate by reference the arguments in their Motion to Dismiss in their entirety.

Commission allegedly violated. *See* No. 9, PageID.122 ("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)") (alteration original); *id*., PageID.122 ("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)"); *id*., PageID.129 ("The Commissioners' congressional map fails 'to reflect consideration of the county, city, and township boundaries' (Article IV, Section 6(13)(f) of the Michigan Constitution)"); *id*., PageID.130 ("The Commissioners' congressional map violates the requirement that '[d]istricts shall be reasonably compact' (Article IV, Section 6(13)(g) of the Michigan Constitution)") (alteration original).

Instead, in clear defiance of Supreme Court precedent, Plaintiffs seek to have this Court order a "permanent commission in the legislative branch" of the State of Michigan to follow its own Constitution. Mich. Const. art. IV, § 6(1). That is precisely the type of federal court intervention that *Pennhurst* forbids: "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Ohio Republican Party v. Brunner*, 543 F.3d 357, 360-61 (6th Cir. 2008) (quoting *Pennhurst*, 465 U.S. at 106).

If Plaintiffs truly believe that the Commission failed to comply with its duties under the Michigan Constitution, that Constitution itself provides the appropriate remedy: an original action in the Michigan Supreme Court to "direct the secretary of state or the commission to perform their respective duties . . . review a challenge to any plan adopted by the commission, and . . . remand a plan to the commission for further action." Mich. Const. art. IV, § 6(19). In any event, this Court

lacks jurisdiction to entertain such a request, and certainly should not issue preliminary relief on that basis.

B. Plaintiffs Have Failed to Plausibly Allege an Equal Protection Violation

Even if Plaintiffs' claim were not barred under *Pennhurst*, they have not plausibly alleged an equal protection violation. The Equal Protection Clause "govern[s] a State's drawing of congressional districts," but applying equal protection principles "to electoral districting is a most delicate task." *Miller v. Johnson*, 515 U.S. 900, 905 (1995) (citing *Shaw v. Reno*, 509 U.S. 630, 642 (1993)). A classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *Daunt v. Benson*, 425 F. Supp. 3d 856, 881, 887-88 (W.D. Mich. 2019) (citing *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012)). When plaintiffs fail to demonstrate that a challenged law imposes a severe burden on a protected right and do not belong to any suspect classification, an Equal Protection claim must fail. *Id.*

As VNP demonstrated in its Motion to Dismiss, Plaintiffs have failed to even state a claim under the Equal Protection Clause, much less establish a strong likelihood of success on such a claim. Plaintiffs do not assert membership in a suspect classification, nor do they explain how they are treated differently than other similarly situated voters—because they are not. Plaintiffs' entire Equal Protection claim appears to be premised on the incorrect assertion that the Commission failed to comply with the redistricting criteria set forth in the Michigan Constitution, and instead adopted "a map with arbitrarily drawn voting-district borders," which then violated the Equal Protection Clause. No. 9, PageID.119. But as explained herein, the Commission's map was not "arbitrarily drawn," such that it would give rise to an Equal Protection violation.

In support of this argument, Plaintiffs cite numerous inapposite cases. *See Thornburg v. Gingles*, 478 U.S. 30 (1986); *Bush v. Vera* 517 U.S. 952 (1996). *Gingles* was a case under § 2 of the Voting Rights Act of 1965, which has no relevance here. And *Vera* involved a racial gerrymandering claim, in which plaintiffs alleged that voting districts were drawn in a manner that impermissibly subordinated traditional districting criteria to race. *Vera* 517 U.S. at 962. But here, Plaintiffs have not alleged that the Commission's map dilutes the voting strength of racial minorities or that race was the predominant motivating factor absent some compelling justification; thus, the Court's discussion of "traditional districting criteria" vis-à-vis race in those cases is not relevant.

Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), also relied on by Plaintiffs, is similarly distinguishable. There, the Georgia General Assembly adopted a state legislative map with a total population deviation of 9.98%. *Id*. at 1327. The plaintiffs there claimed the Georgia General Assembly's map intentionally discriminated against Republican incumbents, in violation of the Equal Protection Clause. Ultimately, the District Court agreed, concluding that those deviations were "not the result of an effort to further any legitimate, consistently applied state policy[,]" but instead were "systematically and intentionally created (1) to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state; and (2) to protect Democratic incumbents" at the expense of Republican incumbents. *Id*. at 1338, 1329-30. Population deviation intentionally crafted "for the purpose of allowing the people of certain geographic regions of a state to hold legislative power to a degree disproportionate to their population is plainly unconstitutional." *Id*. at 1338. Likewise, "the protection of incumbents is a permissible cause of population deviations *only* when it is limited to the avoidance of contests between incumbents and

is applied in a consistent and nondiscriminatory manner." *Id*. Because Georgia's map drawers intentionally created a consistent geographic imbalance and only sought to protect the incumbents of one party by discriminating against incumbents of the other, the map violated the Equal Protection clause. *Id*.

Here, Plaintiffs do not even allege—let alone present evidence—that the minimal population deviation in the Michigan congressional map was adopted "for the purpose of" increasing the political power of certain geographic regions of Michigan at the expense of others. *Id*. Nor do they argue that the deviation is the result of discriminatory protection of one party's incumbents—with good reason, as the Commission clearly followed the Michigan Constitution's command not to draw districts that "favor or disfavor an incumbent elected official or a candidate." Mich. Const. Art. IV § 6(13)(e). Because the congressional map adopted by the Commission did not result from either of these impermissible motives, the analysis in *Larios* is inapplicable.

Plaintiffs have not even clearly articulated an Equal Protection violation in this case, much less shown the "strong likelihood of success on the merits" required to obtain a preliminary injunction. *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012). Their Motion should be denied.

C. Plaintiffs Have Failed to Establish a Violation of the Michigan Constitution

Even if this Court had jurisdiction to issue the relief Plaintiffs seek, and even if it were possible to bootstrap state law requirements into an equal protection claim, Plaintiffs still fail to show a likelihood of success on the merits.

The Michigan Constitution, as amended by Proposal 18-2, sets forth the following seven distinct districting criteria, in descending order of priority:

(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).

First, as explained above, the Commission's adopted map contains minor population deviations of 0.14%, potentially justified by the Commission's legally valid balancing of the other mandatory redistricting criteria specified by the Michigan Constitution. *See supra* Part I.

Plaintiffs' next argument that the Commission's map arbitrarily disregards communities of interest is based entirely on Plaintiffs' redefinition of the phrase "communities of interest" to mean the same thing as "county, city, and township boundaries"—a distinct redistricting criterion listed explicitly as having less priority than "communities of interest." Conflating these two separate criteria in the manner Plaintiffs suggest would render the separate inclusion of "county, city, and township boundaries" as a distinct criterion superfluous, defying a basic principle of statutory construction. *See In re Certified Questions From United States District Court, Western District of Michigan, Southern Division*, 958 N.W.2d 1, 14 (Mich. 2020) ("[A] court should avoid a construction that would render any part of the statute surplusage or nugatory."); *Baker v. General Motors Corp.*, 297 N.W.2d 387, 398 (Mich. 1980).

To support their radical reorganization of the Michigan Constitution (in express contravention of the will of the people of Michigan who adopted these districting criteria in 2018), Plaintiffs rely on decisions by the Michigan Supreme Court interpreting previous constitutional

language that is no longer operative. *See* No. 9, PageID.123-25 (citing *In re Apportionment of State Legislature—1982*, 321 N.W.2d 565 (Mich. 1982); *In re Apportionment of State Legislature—1992*, 486 N.W.2d 639 (Mich. 1992)). Indeed, as Plaintiffs point out, the Michigan Supreme Court's 1992 Apportionment decision was based in part on the fact that the 1835, 1850, and 1908 Michigan Constitutions "explicitly protected jurisdictional lines, including cities and townships." No. 9, PageID.124 (citing *In re Apportionment of State Legislature—1992*, 486 N.W.2d at 641). But it is no longer 1835, 1850, or 1908. The Michigan Constitution was amended by the people of the State of Michigan in 2018 to adopt a new set of districting criteria. The "roughly half a century of Michigan Supreme Court caselaw" that Plaintiffs rely on to support their claim that "counties, cities, and townships form the primary communities of interest that the Commissioners must try to leave intact" is precisely the archaic districting scheme that the people of Michigan rejected at the ballot box in 2018.[4] *Id.*, PageID.124.

To be clear, the Michigan Constitution does instruct the Commission to consider county, city, and township boundaries as one of many criteria when drawing district lines. Mich. Const. art. IV, § 6(13)(f). But consideration of those existing political subdivision boundaries is the second-lowest priority districting criterion listed in the Constitution, three spots lower than the communities of interest criterion. *Compare id. with* Mich. Const. art. IV, § 6(13)(c). Likewise, Plaintiffs' claim that the Commission failed to draw reasonably compact districts is similarly misplaced, because compactness is the lowest priority districting criterion listed in the Michigan

[4] To underline the weakness of their legal position, Plaintiffs dedicate nearly a full page of their brief to a footnote containing an extensive quote from a memorandum by Retired Michigan Supreme Court Justice Stephen Markman. *See* No. 9, PageID.124-125, n.14. While perhaps "elegantly stated," Justice Markman's out-of-court commentary in his personal capacity cannot overcome the plain fact that the people of Michigan have listed communities of interest and existing political subdivision boundaries as separate districting criteria in the Michigan Constitution. Mich. Const. art. IV, §§ 6(13)(c), 6(13)(f).

Constitution. *See id.* § 6(13)(a)-(g). That the Commission could have drawn more compact districts and maintained more whole political subdivisions but instead placed greater emphasis on other, higher-priority criteria demonstrates that they *followed* the Michigan Constitution—not violated it.

In short, Plaintiffs have failed to demonstrate that the Commission has violated either the Michigan Constitution or the Equal Protection Clause; thus, their request for a preliminary injunction must be denied.

III. Plaintiffs Have Not Shown that they Will Suffer Irreparable Harm Absent a Preliminary Injunction

When a plaintiff seeks a preliminary injunction for an alleged constitutional violation, "the factors of irreparable harm and consideration of the public interest largely depend on whether a constitutional violation exists." *Daunt*, 425 F. Supp. 3d at 873 (citing *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014)). For the same reasons that they cannot establish a likelihood of success on the merits of either of their claims, Plaintiffs have suffered no injury at all, let alone an irreparable one. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2007) (describing irreparable harm as an injury that is not compensable by monetary damages) (quoting *Tenke Corp.*, 511 F.3d at 550).

Plaintiffs have failed to demonstrate in any way how they will suffer irreparable harm absent entry of a preliminary injunction. In their Motion for Preliminary Injunction, Plaintiffs simply recite the definition of irreparable harm and state in conclusory fashion that they will suffer such harm without any further explanation. No. 9, PageID.113-114.

To be sure, a "restriction on the fundamental right to vote . . . constitutes irreparable injury," *Obama for Am.*, 697 F.3d at 436. The U.S. Supreme Court has characterized the right to vote as a "basic constitutional right[]" found in the First and Fourteenth Amendments that guarantees "the

right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Zielasko v. State of Ohio*, 873 F.2d 957, 960 (6th Cir. 1989) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 787 n.7 (1983)). But Plaintiffs have not identified any restriction or limitation on their ability to cast their votes or to associate with others to advance their political beliefs. The fact that Plaintiffs may be unhappy with the lawful decisions of the Commission does not alone form the basis of a constitutional injury when they retain their right to associate and express their views through voting for a candidate of their choice—no one is guaranteed the right to vote in a specific district or for a specific individual. *Zielasko*, 873 F.2d at 961. Because Plaintiffs have failed to identify a constitutional injury or any irreparable harms they will suffer in the absence of a preliminary injunction, their request for this "extraordinary" relief must be denied. *Southern Glazer's Distributors of Ohio, LLC*, 860 F.3d at 849.

IV. The Balance of Harms and the Public Interest Weigh Against Plaintiffs' Requested Relief

"The final two stay factors, the harm to others and the public interest, 'merge when the Government is the opposing party.'" *Daunt*, 425 F. Supp. 3d at 873 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). "[T]he public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim and ultimately . . . upon the will of the people of Michigan being effected in accordance with Michigan law." *Id.* at 882 (citing *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006)).

Here, the public's interest in the implementation of the Commission's adopted maps is especially strong because the Commission and the redistricting criteria outlined in the Michigan Constitution were adopted through the clearly expressed will of the people of Michigan, as

demonstrated by the 61% vote in favor of Proposal 18-2. Plaintiffs' requested preliminary injunction would frustrate—not promote—the public interest by denying the people of Michigan the citizen-led congressional map-drawing process that they voted for. The public interest here plainly weighs in favor of allowing the map enacted through the process adopted and ratified by the people of the State of Michigan to be utilized without interference by Plaintiffs or this Court.

CONCLUSION

For the reasons stated above, Plaintiffs have failed to meet their burden to justify the "extraordinary and drastic remedy" they seek. *Southern Glazer's Distributors of Ohio, LLC*, 860 F.3d at 849. This Court should deny Plaintiffs' Motion for Preliminary Injunction.

Date: February 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Western District of Michigan by using the CM/ECF system on February 18, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the using the CM/ECF system.

February 18, 2022

/s/ Andrew M. Pauwels
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Counsel for Intervenor-Defendant VNP

CERTIFICATE OF COMPLIANCE
WITH LCivR 7.2(b)(ii)

Pursuant to Local Rule 7.2(b)(ii), I hereby certify that this document was prepared using Microsoft Word, and that the word count for this document as provided by that software is 4,857, which is less than the 10,800-word limit for a brief filed in support of a dispositive motion.

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