**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

MICHAEL BANERIAN, et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants,

and JOAN SWARTZ MCKAY, et al.,

Intervenor-Defendants.

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

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

Rarely is a court asked to inflict so much havoc for so little alleged benefit. Plaintiffs complain that Michigan's 2021 congressional plan (the Chestnut plan) has a total population deviation of 1,112 persons or 0.14%. This deviation is less than one fifth the size of the population deviation the Supreme Court approved in *Tennant v. Jefferson County Comm'n*, 567 U.S. 758 (2012). In that per curiam order, the Court promptly stayed and then vacated a three-judge panel's ruling that a congressional plan violated the equal-population rule. Plaintiffs, nonetheless, invite this Court to follow that same path—in a case where the equal-population claim is far weaker.

Meanwhile, Plaintiffs ask this Court to rewrite the Michigan Constitution by eliminating the "communities of interest" criterion and replacing it with another enumerated criterion of lower priority concerning political-subdivision lines. They build on this odd state-law theory—which they brought in the wrong court—both in Count I to attack the Commission's compelling justifications for the Chestnut plan's minor population variances and in Count II to mount a stand-alone traditional-districting-principles challenge. But they ignore, first, that the equal-population framework turns on the *State's* justifications, not a *plaintiff's* view about what the State's goals *should* have been and, second, that traditional districting principles are not mandated by the federal Constitution. That is the holding of *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which could not have been clearer that "traditional criteria such as compactness and contiguity cannot" be "used as the basis for relief" in a redistricting case. *Id.* at 2500 (quotation marks omitted).

Undeterred, Plaintiffs ask this Court to adopt their remedial plan for the November 2022 elections as *provisional* relief. But that is not a means of preserving the status quo, and doing so would work a severe dignitary injury to Michigan's sovereignty. Plaintiffs' plan was

drawn in secret without public input, but the Michigan public recently rejected that approach, demanding that no redistricting plan govern the State unless drawn by the Michigan Independent Citizens Redistricting Commission (the Commission) in public and based on the public's extensive input. Besides, it is impossible for the State's election officials to implement a new redistricting plan at this stage. A plan imposed today could not be implemented without "heroic efforts," and "even heroic efforts likely would not be enough to avoid chaos and confusion." *Merrill v. Milligan*, --S. Ct.--, 2022 WL 354467, at *2 (Feb. 7, 2022) (Kavanaugh, J., concurring). Yet again, Plaintiffs ask this Court to follow a condemned path, this time of overhauling the State's congressional elections apparatus without even addressing equitable "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

Nothing in Plaintiffs' motion commends itself to this Court's exceptional equitable powers, which should not be so recklessly exercised, as Plaintiffs demand. Every element of the preliminary-injunction test is unmet, and the motion should be denied.

## BACKGROUND

1. For most of Michigan's history, redistricting was conducted by the State Legislature or, when that process failed, a court. Exhibit A, Ronald Liscombe & Sean Rucker, *Redistricting in Michigan Past, Present, and Future*, 99 Mich. Bar J. 18, 19–22 (Aug. 2020). This process enabled politicians and other partisan actors to draw redistricting plans in secret, without public input, and for narrow interests. *See League of Women Voters of Mich v. Benson*, 373 F. Supp. 3d 867, 882–93 (E.D. Mich. 2019), *vacated sub nom,* 140 S. Ct. 429 (2019).

In 2018, the nonpartisan advocacy organization Voters Not Politicians (VNP) successfully placed an initiative on the statewide ballot (Proposal 18-2) proposing that redistricting authority be transferred to an independent citizens commission. *Citizens Protecting Mich.'s*

*Const. v Sec'y of State*, 921 N.W.2d 247, 250–51 (Mich. 2018). VNP argued that redistricting plans should be oriented around communities of interest defined by residents of those communities, and it represented to the public that, under Proposal 18-2, members of the public would be able to "tell the Commission how they want their communities defined through a series of public hearings and online public comment opportunities before any maps are drawn." Exhibit B, VNP FAQ Website. ("What are communities of interest and how will the Commission incorporate them into the maps?"). Proposal 18-2 was "overwhelmingly" approved by Michigan voters and codified at Article IV, Section 6 of the State Constitution ("Section 6"). *In re Indep. Citizens Redistricting Comm'n for State Leg. & Cong. District's Duty to Redraw Districts by Nov. 1, 2021*, 961 N.W. 2d 211 (Mich. 2021) (Welch, J., concurring).

2. Section 6 mandates a balanced, bi-partisan body of Commissioners lacking prior political experience, Mich. Const. art. IV, § 6(1), and requires that all members of the public have the opportunity to provide input throughout the map-drawing process. First, before drafting even begins, the Commission must "hold at least ten public hearings throughout the state for the purpose of . . . soliciting information from the public about potential plans." *Id.* art. IV, § 6(8). Second, after drafting a set of plans, the Commission must again "hold at least five public hearings throughout the state for the purpose of soliciting comment from the public about the proposed plans." *Id.* art. IV, § 6(9). Third, before voting on a final plan the Commission must "provide public notice of each plan that will be voted on and provide at least 45 days for public comment on the proposed plan or plans." *Id.* art. IV, § 6(14)(b). The Michigan Constitution also requires that the Commission "conduct all of its business at open meetings," that it "conduct its hearings in a manner that invites wide public participation throughout the state," that it "use technology to provide contemporaneous public observation

and meaningful public participation in the redistricting process during all meetings and hearings," and that it "shall keep a record of all proceedings . . . ." *Id.* art. IV, § 6(10) and (17).

Subsection 13 of Article IV, Section 6 provides a list of criteria the Commission must utilize in descending "order of priority." *Id.* art. IV, § 6(13). Third on the list is the following criterion:

> 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.

*Id.* art. IV, § 6(13)(c). That criterion is separate from, and ranked ahead of, another criterion providing that "[d]istricts shall reflect consideration of county, city, and township boundaries." *Id.* art. IV, § 6(13)(f).

The people of Michigan made clear that they want the above-described process—and *only* that process—to be the source of plans governing their elections. The Michigan Constitution provides that the Commission's "functions" are "exclusively reserved to the commission" and that "[i]n no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state." *Id.* art. IV, § 6(19). The Michigan Constitution also recognizes that the Commission's plans must be implemented in time for the State's even-year elections. It therefore requires that the Commission conclude its work and adopt final plans "[n]ot later than November 1 in the year immediately following the federal decennial census." *Id.* art. IV, § 6(7).

3. The Commission convened for its inaugural session in September 2020. But it could not begin redistricting until August 2021 because the census results were released "six months late" due to the global Covid-19 pandemic. *In re Indep. Citizens Redistricting Comm*, 961 N.W.2d at 212–13 (Welch, J., concurring). Nevertheless, the Commission "act[ed] diligently

pursuant to its constitutional mandate" and did not wait to begin its work. *Id.* But it was impossible for the Commission to meet the November 1 deadline. The Commission, instead, adopted a fallback deadline of December 30.

Prior to the data's release, the Commission began conducting hearings across the State to receive public input. All told, the Commission held at least 139 public hearings, including 16 hearings prior to drafting, and received nearly 25,000 comments through its online portal.

The Commission met its deadline by adopting a congressional plan, known as the Chestnut plan, in late December.[1] The plan was initially drafted in September 2021 by Commissioner Anthony Eid. The Chestnut plan was built on public comments. Commissioner Eid began by working with "heat maps" created by the Metric Geometry and Gerrymandering Group ("MGGG") Redistricting Lab, which collected the numerous public comments into a database and created visual representations of the thrust of public input. See MGGG Public Comment Portal Reports.[2] From that starting point, Commissioner Eid relied on the public input he personally heard and then worked with fellow commissioners to revise and refine the Chestnut plan in the manner that, in their judgment, best reflected the overarching public will. As the appended Declaration of Commissioner Eid shows, every district was informed by public comments, and every district was drawn to achieve unique and tailored communities-of-interest goals. Exhibit C, Eid Decl. ¶¶ 6–28.

The Chestnut plan was published alongside others at public hearings and published again for a 45-day notice-and-comment period. The Chestnut plan has a minor population deviation between the largest and smallest districts of 0.14%. This was apparent when the

[1] Commissioners named many proposed plans after tree species (e.g., the Hickory plan, the Palm plan, the Cherry plan, and the Birch plan).

[2] Available at https://www.michigan.gov/micrc/0,10083,7-418-106530---,00.html (last visited Feb. 18, 2022).

plan was published in October. On December 28, 2021, the Commission voted on and adopted the Chestnut plan by an 8–5 vote, with the five commissioners in the minority splitting their votes between two alternative plans.

4. Plaintiffs waited until January 20 to sue and January 27 to file the controlling amended pleading, ECF 7, (the Complaint). Plaintiffs also moved for a preliminary injunction on January 27. They present an alternative congressional plan, which was drawn in secret and incorporates no public input. Plaintiffs criticize the Commission's communities-of-interest choices; contend that, contrary to the Michigan Constitution, only "county, city, and township boundaries" qualify as communities of interest; and ask the Court to impose Plaintiffs' policy preferences on Michigan by "adopting Plaintiffs' proffered remedy map" as provisional relief for use in the November 2022 elections. Preliminary Injunction Brief (PI Br.), ECF 9, at PageID.118, 135.

## THE LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The standard factors for deciding a preliminary-injunction motion are "(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 Cnty. Sch.*, 942 F.3d 324, 326 (6th Cir. 2019). However, where a requested injunction implicates "the public interest in orderly elections," *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018), courts are "required to weigh . . . considerations specific to election cases and its own institutional procedures," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Even if this principle does not (as it may) hold "that a district court may *never* enjoin a State's election laws in the period close to an election," it holds at the very least that a plaintiff must establish "(i) the underlying merits are

entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill v. Milligan*, --S. Ct.--, 2022 WL 354467, at *2 (Feb. 7, 2022) (Kavanaugh, J., concurring).

## ARGUMENT

### I. Plaintiffs Are Unlikely To Succeed on the Merits

#### A. Count II

Plaintiffs have no serious prospect of success on Count II, which straddles the line between asserting state law against the State and asserting an equal-protection claim that is neither justiciable nor cognizable. Neither framing of this count affords it merit, and Plaintiffs' state-law arguments are, besides, legally incorrect.

##### 1. The Eleventh Amendment Bars This State-Law Claim

This Court lacks jurisdiction to order the Commission to comply with "the Michigan constitutional criteria." Compl. ¶ 108. "Case law is legion that the Eleventh Amendment to the United States Constitution directly prohibits federal courts from ordering state officials to conform their conduct to state law." *Johns v. Supreme Ct. of Ohio*, 753 F.2d 524, 526 (6th Cir. 1985). Because the rationale of the *Ex Parte Young* sovereign-immunity exception is "wholly absent . . . when a plaintiff alleges that a state official has violated *state* law," the Supreme Court held in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), that such suits are jurisdictionally barred. *Id.* at 106. There is no election-lawsuit exception. *See, e.g.*, *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 471 (6th Cir. 2008); *Ala. Legis. Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1304 (M.D. Ala. 2013) (three-judge court) (per Pryor, J.).

Count II contravenes this doctrine. *See Pennhurst*, 465 U.S. at 121 ("A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment."). To begin, there can be no doubt that Plaintiffs' suit is against the State. The suit names each commissioner "solely" in that commissioner's "official capacity" and the Secretary of State "solely in her official capacity." Compl. ¶¶ 29, 32–44. The Defendants share the State's immunity under the doctrine that "a suit against a state official in his or her official capacity . . . is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).[3] The Commission exercises "legislative functions" as a department of the Michigan government. Mich. Const. art. IV, § 6(22). Because the Commission "is a state agency, and suits against officials in their official capacities are suits against the state," sovereign immunity applies. *Koch v. Dep't of Nat. Res.*, 858 F. App'x 832, 835 (6th Cir.), *cert. denied*, 142 S. Ct. 241 (2021). The Secretary of State enjoys the same immunity. *See, e.g.*, *Malnes v. Arizona*, 705 F. App'x 499, 500 (9th Cir. 2017).

Nor can there be any serious doubt that Count II alleges violations of Michigan law. The Complaint could not be more explicit in alleging that the Chestnut Plan "fails to comply with or properly apply . . . criteria" enumerated in Article IV, Section 6 of the Michigan Constitution. Compl. ¶ 109. Although Count II intersperses alleged violations of the federal Equal Protection Clause, *id.* ¶¶ 99, 103, 118, 122, these assertions carry no significance apart from allegations concerning "state constitutional requirements, *id.* ¶ 121. The Complaint alleges that the "arbitrary boundary drawing" allegedly "in violation of the Fourteenth Amendment's equal-protection guarantee" is a "failure" in the "respect" of the Commission's alleged non-

[3] Thus, there is no legal significance to the Complaint's assertion that the Commission is a "[n]on-party." Compl. ¶ 30. Because "[o]fficial-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent,' . . . an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) (citations omitted).

compliance with "neutral, and traditionally accepted, redistricting criteria . . . codified at Article IV, Section 6(13) of the Michigan Constitution." *Id.* ¶¶ 6–7; *see also id.* ¶ 106; PI Br. PageID.119, 122, 129-130 (alleging state-law violations in prominent headings).

Where pleadings assert state and federal violations in parallel, the question becomes "the extent to which *federal*, rather than State, law must be enforced to vindicate the federal interest." *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 293 (4th Cir. 2001) (quotation marks omitted). For example, the three-judge court in *Alabama Legislative Black Caucus* rejected an equal-protection claim lacking any identified standard other than "the whole-county provisions of the Alabama Constitution," concluding "that we lack the subject-matter jurisdiction to entertain a claim that state officials violated state law." 988 F. Supp. 2d at 1304. Count II is no different. It calls for relief that would, in effect, "instruct[] state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106.

**2. The Equal Protection Clause Does Not Mandate Traditional Redistricting Criteria**

Count II, in addition, has no federal constitutional underpinnings. No authority holds that "[a] Fourteenth Amendment Equal Protection violation arises when a legislature or commission implements traditional redistricting criteria in an inconsistent and arbitrary manner." Compl. ¶ 103; *see also* PI Br. PageID.119 (citing no authority for this rule). To the contrary, the Supreme Court has held that "[t]he Constitution does not mandate regularity of district shape." *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality opinion); *see also id.* at 1000–01 (Scalia, J., concurring).

Plaintiffs misstate the significance of traditional districting principles. Courts "have recognized" these principles, PI Br. PageID.119, only for their *evidentiary* value in signaling independently significant constitutional harms, such as where a redistricting authority "subordinated traditional race-neutral districting principles . . . to racial considerations" subject to

strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The Supreme Court has made clear that "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798 (2017) (quoting *Miller*, 515 U.S. at 798). "The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." *Id.*

Thus, even if "maximizing compactness, respecting communities of interest, and ensuring that districts are contiguous all serve to limit various forms of gerrymandering and vote dilution," PI Br. PageID.119, the Constitution does not directly incorporate these principles. Even a "stark manifestation" of departure from traditional districting principles is not "a constitutional violation." *Miller*, 515 U.S. at 913. Plaintiffs' authorities outside the racial-gerrymandering context concern the "legislative policies might justify some variance" from equality of population in districts, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also Larios v. Cox*, 300 F. Supp. 2d 1320, 1346–47 (N.D. Ga. 2004) (three-judge court), and the compactness threshold requirement governing Section 2 Voting Rights Act claims, *see Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (plurality opinion). They cite no federal authority invalidating a redistricting plan solely for failure to satisfy a court's notion of good-government values.

Plaintiffs' theory cannot withstand *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which held that claims of "partisan gerrymandering" are non-justiciable in federal court. *Id.* at 2494. In the process, it rejected the argument that "fairness should be measured by adherence to 'traditional' districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents." *Id.* at 2500. The Court explained the problem with constitutionalizing these principles:

> If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

*Id.* at 2501. Thus, the Court again dismissed the notion that traditional districting principles are constitutionally mandated; it endorsed a prior opinion of Justice Kennedy concluding that "traditional criteria such as compactness and contiguity 'cannot'" be "'used as the basis for relief,'" *id.* at 2500 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring in the judgment)); and it reiterated the Court's prior rejection of a challenge to a Pennsylvania congressional plan, even though "Pennsylvania's legislature 'ignored all traditional redistricting criteria, including the preservation of local government boundaries,'" *id.* at 2498 (quoting *Vieth*, 541 U.S. at 272–73 (plurality opinion)). The traditional-districting-principles argument gained traction only in the dissent, which argued that fairness should be measured "[u]sing the criteria the State itself has chosen." *Rucho*, 139 S. Ct. at 2521 (Kagan, J., dissenting).

It is of no moment that Plaintiffs are not arguing that the Commission's "intent was to discriminate against voters who supported" a given party's candidates, as the plaintiffs in *Rucho* argued. *Id.* at 2492 (citation omitted). That only makes for a weaker equal-protection claim. If traditional districting principles cannot serve as a baseline "to measure how extreme a partisan gerrymander is," *id.* at 2505, they certainly cannot be enforced in federal court by their own terms. The problem in *Rucho* was that there are no "judicially manageable standards for deciding" gerrymandering claims, *id.* at 2491, and the Supreme Court has concluded that

"[t]raditional redistricting principles . . . are numerous and malleable." *Bethune-Hill*, 137 S. Ct. at 799. They are no more manageable here than in *Rucho*.[4]

Besides, Plaintiffs' claim is, on its face, just a watered-down claim of "gerrymandering," as they themselves put it. PI Br. PageID.119. They contend that traditional districting principles ensure that voters are "selecting a candidate that can represent both the individual's interests and the common interests of the community within the district," Compl. ¶ 110; that voters' "right to vote is" is protected, as is "their right to associate with their fellow citizens to advance the interests of the community, township, and county," *id.* ¶ 113; that "voters will be able to elect candidates who can represent the interests of both the individual and the community," *id.* ¶ 118; and that voters' "expression of an individual's preference for a congressional representative" will be recognized, *id.* ¶ 119. These are non-justiciable policy arguments with no connection to the Constitution. Because Plaintiffs do not argue that the Chestnut plan was "motivated by a racial purpose or object," *Miller*, 515 U.S. at 913,[5] and because Count II does not rely on any recognized vote-dilution or denial standard, the claim must be dismissed.

**3. Plaintiffs Misinterpret the Michigan Constitution**

Count II also lacks merit under state law. Subsection 13 of Article IV, Section 6 establishes seven criteria ranked "in order of priority." Mich. Const. art. IV, § 6(13). Plaintiffs ask the Court to rewrite the priority. No court enjoys that license.

[4] Plaintiffs' passing reference to "the First Amendment," PI Br. PageID.121, also invokes a theory rejected in *Rucho*. *See* 139 S. Ct. at 2504.

[5] In fact, the Michigan Supreme Court recently held that the Commission correctly avoided racial classifications. *Detroit Caucus v. Indep. Citizens Redistricting Comm'n*, --N.W.2d--, 2022 WL 329915 (Mich. Feb. 3, 2022).

The cornerstone of Plaintiffs' state-law attack is that the third-ranked criterion, "communities of interest," Mich. Const. art. IV, § 6(13)(c), refers to "counties, cities, and townships," PI Br. PageID.124; *see also id.* at PageId.123. Plaintiffs, in turn, contend that the Chestnut plan "unnecessarily contravene[s] some traditionally understood communities of interest," PI Br. PageID.127, and that their alternative plan "reduce[s] the number of split counties" and "the number of ways in which split counties are divided," PI Br. PageID.128, which Plaintiffs interpret to mean the Commission violated Subsection 13(c).

The problem with Plaintiffs' argument is "the plain meaning of the text at the time of ratification." *Adair v. Michigan*, 860 N.W.2d 93, 99 (Mich. 2014). The Constitution plainly provides that "[c]ommunities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests." Mich. Const. art. IV, § 6(13)(c). Not only does this text not limit the Commission to political-subdivision lines, it expressly authorizes the Commission to consider communities of interest from other perspectives, expansively defined.

Additional textual indicia bear this out. First, Subsection 13(c) is not limited to "communities of interest," as Plaintiffs would have it. Instead, Subsection 13(c) provides that "[d]istricts shall reflect *the state's diverse population and* communities of interest." Mich. Const. art. IV, § 6(13)(c) (emphasis added). Even if the phrase "communities of interest" were restricted to political subdivisions, Plaintiffs have not shown that the phrase "diverse population" is so limited. Second, Subsection 13 provides for "consideration of county, city, and township boundaries" in a *lower-ranked* criterion. Mich. Const. art. IV, § 6(13)(c). Plaintiffs acknowledge this by lodging an objection under this criterion as well, PI Br. PageID.129, but they fail to explain how the phrase "communities of interest" means nothing but "counties, cities, and townships," PI Br. PageID.124, when the Constitution separately references

"county, city, and township boundaries," Mich. Const. art. IV, § 6(13)(c). Michigan courts read text "in the light of the document as a whole," *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 462–63 (2007), but Plaintiffs rip the phrase "communities of interest" from context and alter the order of priority of the criteria, moving political-subdivision lines up three spots in ranking.

Plaintiffs' contrary positions are unpersuasive. Plaintiffs' contention that "roughly half a century of Michigan Supreme Court caselaw" treats "counties, cities, and townships" as "the primary communities of interest," PI Br. PageID.124, ignores that common-law doctrines "must give way to the Constitution to the extent they are 'repugnant' to it." *Detroit News, Inc. v. Indep. Citizens Redistricting Comm'n*, --N.W.2d--, 2021 WL 6058031, at *7 (Mich. Dec. 20, 2021) (quoting Mich. Const. art. III, § 7). The Michigan Supreme Court recently held that Article IV, Section 6 of the Michigan Constitution abrogates the Commission's attorney-client privilege, even though that privilege "is the oldest of the privileges for confidential communications and is founded upon . . . necessity . . . ." *Id.* at *6–7 (quotation marks omitted). So too here.

Plaintiffs also complain that the Constitution's definition of communities of interest affords the Commission too much discretion. *See* PI Br. PageID.123. But that is by constitutional design. The phrasing itself—identifying what communities of interest "may include, but shall not be limited to," Mich. Const. art. IV, § 6(13)(c)—exudes discretion. Further, the constitutional framework circumvents mischief by controlling the Commission's composition, its access to public input, and its adoption of a plan. The Constitution creates "a detailed procedure for the selection of commissioners," to, inter alia, exclude "individuals with current or recent political connection." *Daunt v. Benson*, 999 F.3d 299, 304, 311 (6th Cir. 2021). It also requires the Commission to hold at least 10 public hearings before drafting a single plan, to

conduct at least five more public hearings after drafting plans, to convene all its sessions in public with the opportunity for public input, and to publish all plans subject to a vote in a 45-day notice-and-comments process. Mich. Const. art. IV, § 6(8), (9), (10), (14)(b). At every step it must "conduct its hearings in a manner that invites wide public participation throughout the state." *Id.* art. IV, § 6(10). Then, at the voting stage, the Constitution requires plans to receive support from at least two commissioners of each party and two independent commissioners, at least at the initial stage of voting. *Id.* art. IV, § 6(14).

The broad discretion the Commission is afforded in defining communities of interest makes sense in this larger context. The Constitution creates a trustworthy selection process, maximizes both public input and commissioner agreement to enact a plan, and then affords discretion to the Commission to utilize the information made available to it. The proponents of Proposition 18-2 represented in the ratification debates that members of the public would be able to "tell the Commission how they want their communities defined through a series of public hearings and online before any maps are drawn." VNP FAQ Website. ("What are communities of interest and how will the Commission incorporate them into the maps?").[6] The Commission's ability to account for idiosyncratic concerns expressed by members of different communities is a feature of the constitutional framework, not a bug. There is no basis in the constitutional text for a court—especially a federal court—to usurp the Commission's role.

[6] Michigan precedent looks to "the circumstances surrounding the adoption of the provision and the purpose sought to be accomplished by the provision" to ascertain its meaning. *Taxpayers for Mich. Const. Gov't v. Dep't of Tech. , Mgmt. & Budget*, --N.W.2d--, 2021 WL 3179659, at *6 (Mich. July 28, 2021).

### B. Count I

Plaintiffs' one-person, one-vote claim also has minimal prospects of success. The deviation challenged here is less than one fifth the size of the deviation the Supreme Court approved in *Tennant* and is justified by the Commission's legitimate—indeed, compelling—redistricting goals. Plaintiffs' contrary arguments show not that the Commission could have achieved *its* goals at lower population deviation, but that the Commission could have achieved *Plaintiffs'* goals at a lower population deviation. That is not the right analysis.

#### 1. The Chestnut Plan Satisfies the Equal-Population Rule

The Supreme Court has interpreted Article I, Section 2 of the U.S. Constitution to require that congressional districts be "as nearly as is practicable one man's vote in a Congressional election it to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7–9 (1964). This "standard does not require that congressional districts be drawn with 'precise mathematical equality,' but instead that the State justify population differences between districts that could have been avoided by 'a good-faith effort to achieve absolute equality.'" *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 759 (2012) (quoting *Karcher*, 462 U.S. at 730 (1983)). The claim is governed by a "two-part test." *Id.* at 760. "First, the parties challenging the plan bear the burden of proving the existence of population differences that 'could practicably be avoided.'" *Id.* (citation omitted). "If they do so, the burden shifts to the State to 'show with some specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" *Id.* (citation omitted).

##### a. Count I Fails at Step One

Plaintiffs have not proven that the population deviation of 0.14% could practicably be avoided. It is not correct that "[t]he alpha and omega of this prong is" Plaintiffs' illustrative plan. PI Br. PageID.116.

First, that plan was not presented to the Commission, and Plaintiffs point to no evidence that the Commission had before it a plan with a deviation below 0.14%, as occurred in *Karcher* and *Tennant*. *Karcher*, 462 U.S. at 738 ("[S]everal other plans introduced in the 200th Legislature had smaller maximum deviations than the [Adopted] Plan."); *Tennant*, 567 U.S. at 760–61 ("[T]he State conceded that it could have adopted a plan with lower population variations," because a plan before the legislature "achieved a population difference of a single person"). This *post hoc* showing sheds no light on whether "real differences among the districts" "could have been avoided or significantly reduced with a good-faith effort to achieve population equality." *Karcher*, 462 U.S. at 738. *Karcher* rejected the notion "that a plan cannot represent a good-faith effort whenever a court can conceive of minor improvements." *Id.* at 740 n.10. Plaintiffs here show that they conceive of minor improvements, not that the Commission did or could have.

Second, Plaintiffs do not account for the Census Bureau's new policy called "Differential Privacy," which "injects a calibrated amount of noise into the raw census data to control the privacy risk of any calculation or statistic." *Alabama v. United States Dep't of Com.*, -- F. Supp. 3d--, 2021 WL 2668810, at *3 (M.D. Ala. June 29, 2021). For the first time in census history, the Bureau determined that, for the 2020 census, its legal obligation to protect confidentiality of census responses obligated it to inject small amounts of error into results—including the reported census-block-level population counts—"to obscure the presence or absence of any individual (in a database), or small groups of individuals, while at the same time preserving statistical utility." Exhibit D, Census Bureau, *Disclosure Avoidance for the 2020 Census*, 6 (November 2021).[7] The Bureau therefore warns that "[d]ata for very small geographic

[7] Available at https://www2.census.gov/library/publications/decennial/2020/2020-census-disclosure-avoidance-handbook.pdf (last accessed Feb. 18, 2022).

areas, such as census blocks, may be noisy," i.e., inaccurate. *Id.* at 2. And academics have concluded that this purposeful error "affects the ability to draw redistricting maps that adhere to [the] equal population principle" and renders population deviations, measured in small increments, to be of "of unknown magnitude." Exhibit E, Christopher T. Kenny, et al., *The use of differential privacy for census data and its impact on redistricting: The case of the 2020 U.S. Census*, Science Advances 6 (Oct. 6, 2021).[8] Plaintiffs cannot show that an alternative plan differing from the Chestnut plan only by a few hundred individuals is any more accurate, given the noise in the underlying data that impacts these very small differences.

To be sure, *Karcher* rejected the argument that the first prong is not met where a challenged plan's deviation "is smaller than the predictable undercount in available census data." 462 U.S. at 731. But the argument here is fundamentally different. The problem is not "the mere existence of statistical imprecision," *id.* at 735, but the purposeful introduction of inaccuracy in the census results that render small differences impossible to distinguish from each other. As in *Abrams v. Johnson*, 521 U.S. 74 (1997), where "population shifts and changes" after the decennial census rendered "the tinkerings [the challengers] propose[d]" "futile" because the number were slightly inaccurate "in any event," *id.* at 100, the Bureau here as introduced small doses of inaccuracy rendering a dispute over about 1,000 residents immaterial. Without question, it is now impossible to claim absolute population equality in any plan drawn using census data. The bullseye for population equality cannot be smaller than the diameter of the target arrow.

[8] Available at https://imai.fas.harvard.edu/research/files/DAS.pdf (last accessed Feb. 18, 2022).

**b. Count I Fails at Step Two**

The deviation of 0.14% is amply justified by "legitimate state objective[s]." *Tennant*, 567 U.S. at 760 (citation omitted). The Commission's "burden is a 'flexible one, which 'depends 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.* (citation and edit marks omitted). This standard acknowledges that "redistricting 'ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment,'" and that federal courts must "defer to [such] state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts." *Id.* at 760 (quoting *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam), and *Karcher*, 462 U.S. at 740). The Chestnut plan satisfies this test.

**Size of the Deviations**. The starting point is the "size of the deviations." *Tennant*, 567 U.S. at 760 (citation omitted). The Chestnut plan has a deviation of 0.14%. By comparison, *Tennant* ruled that a deviation more than five times as large, 0.79%, was "small." 567 U.S. at 765. The Chestnut plan's even smaller deviation requires even less justification than was provided in *Tennant*. *See Larios*, 300 F. Supp. 2d at 1356 ("The showing required to justify population deviations is proportional to the size of the deviations.").

**Importance of the Interests**. The State's interests are of the highest magnitude. The State Constitution obligated the Commission to make an assessment of "the state's diverse population and communities of interest" according to a broad array of factors, drawing on information received at 139 meetings and hearings open to the public across the State, and craft districts to "reflect" those interests. Mich. Const. art. IV, § 6(13)(c). This is "clearly a

valid, neutral state policy." *Tennant*, 567 U.S. at 764; *see, e.g.*, *Abrams*, 521 U.S. at 100 (holding that "communities of interest," inter alia, justified deviation in court-drawn plan of 0.35%).

The Commission carried out its constitutional mandate, crafting each district around communities of interest identified through months of hearings and weeks of deliberations:

- District 1 unites northern Michigan's communities of interest including in the Upper Peninsula and the northern rural counties, including Native American communities. Eid Decl. ¶ 5.
- District 2 creates a mid-Michigan district of rural communities of interest, including Barry County and other farming communities that share culture and political needs. *Id.* ¶ 6. This configuration was supported by Republican commissioners who desired to see it in the final map. *Id.*
- District 3 was oriented around a community of interest shared by Grand Rapids, Muskegon, Grand Haven, and Rockford, which public commenters identified as sharing a common identity. *Id.* ¶ 8.
- District 4 establishes a western Michigan district that also unites Battle Creek and Kalamazoo, and this choice also was informed by public comments that these two communities—which are joined by a common highway—would best be served in the same district and by the input of Commissioner Orton, who is familiar with the region. *Id.* ¶ 10.
- District 5 joins communities on Michigan's southern border, which yet again was the product of residents' comments attesting that these rural areas share unique interests of border communities that engage in frequent intercourse with neighboring states. *Id.* ¶ 12.
- District 6 links Ann Arbor, Washtenaw County, and the University of Michigan with suburban communities in Detroit, most notably in Novi, whose culture, according to public commenters, is akin to Ann Arbor's. *Id.* ¶ 14. Another purpose was to separate

Washtenaw County from Jackson and Livingston Counties, which public commenters attested do not share common interests. *Id.*

- District 7 unites a tri-county area of Clinton, Eaton, and Ingham Counties around Lansing, based on overwhelming public comment supporting the configuration and complaining that the tri-county area was split in the 2011 redistricting plan. *Id.* ¶ 16.
- District 8 was drawn to maintain Midland County as whole as possible by excluding only a few sparsely population sections of the county. *Id.* ¶ 18.
- District 9 is centered around the so-called thumb area north and west of Detroit on Lake Huron, which shares a rural community of interest. *Id.* ¶ 20.
- District 10 was drawn to preserve communities of interest between Rochester Hills and the Macomb County communities of Sterling Heights, Warren, and St. Clair Shores, which share cultural communities. *Id.* ¶ 22.
- District 11 encompasses communities of interest in and around Oakland County, such as the cities of Wixom, Walled Lake, Commerce, West Bloomfield, Troy, and Farmington Hills, identified by a meticulous review of neighborhood similarities and differences. *Id.* ¶ 24. For example, the Commission strove to keep together an LGBTQ community of interest in the Ferndale, Royal Oak, and Oak Park neighborhoods and to exclude Southfield, whose residents stated a closer affinity with Detroit than with Oakland County. *Id.*
- District 12 creates a districting centered on the east side of Detroit and joining that area with similar communities, and the Commission also chose to include Livonia because its blue-collar workforce aligned with District 12's communities in Detroit, Dearborn, and Southfield. *Id.* ¶ 26. Commissioners familiar with Detroit had extensive input in the configuration to keep neighborhoods together based on their shared interests. *Id.*

- District 13 establishes a Detroit-centered district, and the configuration also preserves the townships of Wayne and southern portions of Dearborn Heights. *Id.* ¶ 28.

These configurations consist of innumerable choices made with an enormous quantity of public input. The Chestnut map originated in "heat" maps created identifying communities of interest based on a methodological gathering of public comments, and it evolved over the course of months through the collaborative effort of many commissioners and by reference to thousands of public comments, including at packed public auditoriums around Michigan and through online portals. *Id.* ¶ 4. There can be no serious question that the State's interest in listening to its citizens and incorporating their will is a *compelling* state interest, not to mention a "valid" one. *Tennant*, 567 U.S. at 764.

**Consistency**. The consistency element also weighs in the Commission's favor. *See Tennant*, 567 U.S. at 760. As shown, each of the 13 congressional districts was configured to achieve legitimate communities-of-interest goals, informed by the comprehensive hearings held in a systematic manner around the state and enabling the broadest possible participation. No district or region was excepted, and Commissioner Eid attests that he is unaware how he the Chestnut plan could have achieved the Commission's goals at a lower population deviation. Eid Decl. ¶ 30.

To be sure, each district does not achieve the *same* communities-of-interest objective, but to require this would replace a "flexible" burden with an inflexible one. *Tennant*, 567 U.S. at 760. Obviously, every district cannot contain Ann Arbor or unite the western shoreline, and the governing framework requires no such thing. The standard recognizes "that redistricting 'ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment,'" so it cannot be construed to preclude that judgment. *Tennant*, 567 U.S. at 760 (citation omitted). In *Tennant*, the Supreme

Court recognized that a state's "interest in limiting the shift of population between old and new districts" can be achieved in numerous, idiosyncratic ways and rebuked a lower court's rigid criticism of *how* the West Virginia legislature went about achieving this goal. *Id.* at 764. Likewise, the goal of communities of interest necessarily involves bespoke treatment of districts and regions. The question is not whether a federal court can imagine different ways of achieving the goals, but whether the *state's* method was "nondiscriminatory." *Karcher*, 462 U.S. at 740. Plaintiffs do not even allege that the Commission selectively considered communities of interest or discriminated against particular regions of Michigan and no such allegation could be tendered.

**Alternatives**. As in *Tennant*, no alternative comes "close to vindicating . . . the State's legitimate objectives while achieving a lower variance." 567 U.S. at 765. Plaintiffs' sole alternative plan does not purport to achieve the Commission's actual communities of interest goals. Rather, Plaintiffs criticize the Commission's discretion under Michigan law, argue against its communities-of-interest choices, and ask this Court to deliver a novel and completely atextual reading of Subsection 13 under the guise of a one-person, one-vote ruling. PI Br. PageID.114-118. In this regard, the state-law errors undergirding Count II equally infect Count I, for reasons described at Section I.A.3, *supra*.

Predictably, Plaintiffs' alternative plan shows that *their* goals could be met with no population deviation not that the *Commission's* goals could be met in that way. For example:

- Plaintiffs overtly criticize District 5 and reject the Commission's careful design of uniting communities along the Ohio and Indiana border. PI Br. PageID.132-133. But the Commission chose this configuration because people who live in the region asked to be united in a single congressional district, telling the Commission they share the unique circumstance of working, shopping, and praying across state lines. Eid Decl. ¶¶ 12–13. Plaintiffs'

assertion that such a configuration had not been seen "since at least 1963," PI Br. PageID.132, ignores that Michiganders *changed* the redistricting process because they wanted redistricting to be done *differently*, not the same as before.

- Plaintiffs' alternative plan separates Battle Creek from Kalamazoo, overriding the Commission's determination that people in the region consider these cities to have similar interests and belong in one district. Eid Decl. ¶ 11.
- Plaintiffs' alternative plan includes Barry County with Grand Rapids, but the Commission heard testimony from that county's residents of that they wanted to be in a rural district, not with Grand Rapids. *Id.* ¶ 9.
- Plaintiffs' rendition of District 8 dismantles a carefully crafted compromise between Republican and Democratic commissioners in resolving competing views about handling Midland City and Midland County. *Id.* ¶ 19.
- Plaintiffs' alternative includes Wixom and Walled Lake with the upper thumb region, but these have no common interests. *Id.* ¶ 21.
- Plaintiffs' version of District 10 excludes Rochester Hills from the culturally similar Macomb County and resulted in the exclusion of Walled Lake, White Lake, Wixom, and Commerce from Plaintiffs' version of District 11, notwithstanding the stated desire of residents of these communities to be included in Oakland County. *Id.* ¶ 23.
- Plaintiffs' rendition of District 11 incorporates the Novi community, but the Commission viewed Novi as more culturally akin to Ann Arbor and so included it in District 6. *Id.* ¶ 25.
- Plaintiffs' version of District 12 excludes Livonia and includes it with the Ann Arbor area in District 6, which divides similar communities in Novi and Ann Arbor and joins different communities in Livonia and Ann Arbor. *Id.* ¶ 27.

These examples, which are only a portion of Plaintiffs' departures from the Commission's goals recorded in the Eid declaration, show that Plaintiffs did not even try to prove "the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Tennant*, 567 U.S. at 760 (citation omitted). Commissioner Eid attests that he would not have voted for Plaintiffs' alternative, that it would not likely have achieved the requisite support on the Commission, and that it appears not to attempt to achieve the Commission's goals concerning communities of interest. Eid Decl. ¶¶ 29–33.

And there is more. Plaintiffs' zeal for equality population resulted in locality splits that are—viewed functionally—preposterous. Plaintiffs claim to have done a better job with political-subdivision splits, but the splits that do occur involve tiny handfuls of people—e.g., just 13 out of Southfield Township and 19 out of Ross Township. Exhibit F, Brace Decl. ¶ 18. This not only means that a handful of individuals have been isolated out of their communities, but also that these people will have different ballots and it will be possible to reverse engineer *their individual voting choices* based on precinct returns. *Id.* The Commission's locality splits make functional sense, and there are no instances of extremely small populations isolated from their political subdivisions. These and other facts, *see generally* Brace Decl., show the folly of single-minded population-equalizing exercise.

**2. Plaintiffs' Arguments Are Unavailing**

Plaintiffs' efforts to overcome the Commission's overwhelming evidentiary basis to support minimal population deviations are unpersuasive.

First, Plaintiffs contend that the Commission cannot justify any deviation because Subsection 13 prioritizes the "equal population" rule "as mandated by the United States Constitution[]." PI Br. PageID.117 (quoting Mich. Const. art. IV, § 6(13)(a)). But the United

States Constitution "does not require that congressional districts be drawn with 'precise mathematical equality.'" *Tennant*, 567 U.S. at 761. The Commission's criteria—which are not enforceable as such against the Commission in federal court—plainly permit "the State [to] justify population differences." *Id.* at 761.

Second, Plaintiffs suggest that the Commission can only justify population deviations with evidence linking each deviation to the State's interest. *See* PI Br. PageID.117. But *Tennant* reversed a district court for requiring precisely that. *See* 67 U.S. at 762–63 (rejecting lower court's view that a state must "create a contemporaneous record to show that [the] entire . . . variance—or even a discrete, numerically precise portion thereof—was attributable to the State's interest" (quotation marks omitted)). And, to the extent Plaintiffs suggest that only the state interests recognized in *Tennant* qualify, *Tennant* expressly held that the "list of possible justification [is] not exclusive." *See id.* at 764

Third, Plaintiffs' argument that their alternative "represents an improvement over the Commissioners' map," PI Br. PageID.117, is factually untenable. It was drawn in secret where the people of Michigan wanted their plans drawn in public. It ignores the entire corpus of public comments, where Michiganders passed a constitutional amendment demanding to be heard. Plaintiffs' plan defined communities of interest in flat contravention of the Michigan Constitution. It replaces the discretion of a constitutionally created body with the secret goals of a private interest group. And, as shown, it overtly rejects innumerable goals informed by a thorough and serious process inundated with public input. Michigan deserves better, and it received better with the Commission's plan.

## II. The Equities, Standing Alone, Militate Against an Injunction

The equities in this case could hardly be more one-sided. On the one side of the scale are the miniscule population deviations that create an imperceptible impact on Plaintiffs' voting rights. On the other side, Plaintiffs ask this Court to compromise the integrity of Michigan elections, undermine its administration, risk an election meltdown impacting millions of voters, impose a plan adopted in secret in violation of the Michigan Constitution, and reject the work of a citizens Commission informed by 139 public hearings. The Court should have no trouble rejecting Plaintiffs' demands.

1. The equities analysis in an election case is governed by the *Purcell* principle, "which establish[es] (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Merrill*, 2022 WL 354467, at *1 (Kavanaugh, J., concurring) (citing *Purcell*, 549 U.S. at 1). This principle, in fact, antecedes the *Purcell* decision by two generations, having its genesis in *Reynolds v. Sims*, 377 U.S. 533 (1964). *Reynolds* ruled that the lower court "acted wisely in declining to stay the impending primary election in Alabama," *id.* at 586, even though "[p]opulation-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House," *id.* at 545. That is larger than the population deviation at issue here by orders of magnitude.

"*Sims* has been the guidon to a number of courts that have refrained from enjoining impending elections," *Chisom v. Roemer*, 853 F.2d 1186, 1190 (5th Cir. 1988), "even in the face of an undisputed constitutional violation," *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003); *see, e.g.*, *Chisom*, 853 F.2d at 1190 (vacating *Chisom v. Edwards*, 690 F. Supp. 1524 (E.D. La. July 7, 1988)); *Kilgarlin v. Martin*, 252 F. Supp. 404, 444 (S.D. Tex. 1966), *aff'd in relevant part sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967) (February

2 was too late to implement remedy for that year's elections); *Cardona v. Oakland Unified Sch. Dist., Cal.*, 785 F. Supp. 837, 843 (N.D. Cal. 1992) (February 25 was too late to interfere with that year's elections); *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), *aff'd sub nom. Ely v. Klahr*, 403 U.S. 108 (1971); *In re Pa. Cong. Districts in Reapportionment Cases*, 535 F. Supp. 191, 195 (M.D. Pa. 1982); *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1362 (M.D. Ala.1986); *Watkins v. Mabus*, 771 F. Supp. 789, 805 (S.D. Miss. 1991); *Ashe v. Bd. of Elections in City of N.Y.*, 1988 WL 68721, at *1 (E.D.N.Y. June 8, 1988).

In cases where a lower court has chosen differently, "the Supreme Court" has consistently "stayed [that] district court's hand." *Chisom*, 853 F.2d at 1190; *see also Tennant*, 567 U.S. at 763 ("We stayed the district court's order . . . and now reverse."); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers) (issuing stay); *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (same); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (same); *North Carolina v. Covington*, 138 S. Ct. 974 (2018) (same); *Abbott v. Perez*, 138 S. Ct. 49 (2017) (same); *North Carolina v. Covington*, 137 S. Ct. 808 (2017) (same); *Perry v. Perez*, 565 U.S. 1090 (2011) (same); *Miller v. Johnson*, 512 U.S. 1283 (1994) (same); *Chabot v. Ohio A. Philip Randolph Inst.*, 139 S. Ct. 2635 (2019) (same); *Mich. Senate v. League of Women Voters of Mich.*, 139 S. Ct. 2635 (2019) (same); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (same); *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020) (same); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (same); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (same).

*Merrill* is just the Supreme Court's latest correction of this all-too-familiar error. There, the Supreme Court intervened both to stay a three-judge panel's redistricting injunction—issued nearly four weeks ago—and to take jurisdiction of the matter for itself. 2022 WL 354467. According to the two Justices whose votes were decisive, the strength of the *Purcell* principle, standing alone, compelled that result. *Id.* at *1–3 (Kavanaugh, J., concurring). The

principle, at a minimum, "heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Id.* at *2. The fight in *Merrill* did not concern a few hundred voters, but the assertion—substantiated in extensive preliminary-injunction proceedings—that the federal Voting Rights Act commanded an additional majority-minority district. *Id.* at *5 (Kagan, J., dissenting) ("Staying [the lower court's] decision forces Black Alabamians to suffer what under that law is clear vote dilution.").

2. Plaintiffs' opening brief says nothing of *Purcell* and does not even cite it. PI Br. PageID.98, 134-135. Instead, Plaintiffs provide a perfunctory analysis bypassing all relevant authority and treating the equitable factors as automatically favoring an injunction merely if a constitutional violation is asserted. PI Br. PageID.134. As shown, that is profoundly wrong in the elections context.

Plaintiffs have since impliedly acknowledged this error. Two days after *Merrill* issued, they abruptly announced that *Purcell* is not only relevant to this case but "could have a large impact on the ability of this Court to grant relief." ECF No. 25 at PageID.427. That motion provided a discussion of *Purcell*, identified purported "factual issues present in this case," procedures necessary to implement an injunction (such as "remand[ing] this matter back" to the Commission), and the possibility "of a special master," and it cited redistricting case law on these matters.[9] *Id.* at 4–5. But why is none of that in Plaintiffs' opening brief? Courts "have consistently held . . . that arguments made . . . for the first time in a reply brief are waived." *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010). It was established law long before "Justice Kavanaugh's position in *Caster* and *Milligan*" was issued, ECF No. 25 at PageID.427, that

[9] Oddly the motion refers to a "post-judgment process," *id.* at 5, but there is no possibility of a post-*judgment* process without a final *judgment*. The present motion is for *preliminary* relief.

courts are "*required to weigh*, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." *Purcell*, 549 U.S. at 4 (emphasis added).

3. Plaintiffs' cannot, in any event, overcome their "heighten[ed]" *Purcell* "showing." *Merrill* 2022 WL 354467, at *2.

a. *Election in Progress*. The "State's election machinery is already in progress," *Reynolds*, 377 U.S. at 585, such that "the changes in question are [not] feasible before the election without significant cost, confusion, or hardship," *Merrill*, 2022 WL 354467, at *2 (Kavanaugh, J., concurring). The deadline for candidates to collect signatures and file nominating petitions for accessing the primary ballot is April 19, 2022, Mich. Comp. Laws § 168.133, as Plaintiffs acknowledge in their motion to expedite (but not their preliminary-injunction brief), ECF No. 25 at PageID.424. That is the *deadline* for signatures to be *collected*, not when collection *starts*. To be valid, signatures must be from "registered electors *residing in the district*." Mich. Comp. Laws § 168.133 (emphasis added). It is already too late to change district boundaries.

And that is not the only deadline that cannot be met if a new plan is adopted *today* (which is itself impossible). Challenges are due to nominating petitions by April 22, Mich. Comp. Laws 168.552, the State constitutional deadline for absentee ballots to be made available to voters is June 23, Mich. Const. art. II § 4, the statutory deadline for ballots to be delivered to county clerks and overseas military voters is June 18, Mich. Comp. Laws 168.759a, *id.* at 168.714, and the primary is August 2. To meet those deadlines, the Michigan Bureau of Elections must use the governing redistricting plans to update Michigan's qualified voter file (QVF), which is an electronic list of all registered voters in the state. *Id.* at 168.509o. The QVF contains a list of the electoral district of residence for each voter—at every level of

government, e.g., Congress, state house and senate, local school board, county board, etc. The QVF must be updated when a new plan is released, and this took *six months* last decade. Exhibit G, Secretary Jocelyn Benson's Brief Regarding Election Administrative Implementation, *League of Women Voters v. Independent Citizens Redistricting* Commission, No. 164022 at *1 (Mich., Feb. 9, 2022).

Even if the Bureau started *today*, it would struggle to finish updating the QVF before the primary date, but that updating must be *complete* before ballots are printed in time for delivery in June. As in *Merrill*, Plaintiffs' demanded relief "would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion." 2022 WL 354467, at *2 (Kavanaugh, J., concurring).

b. *Adopting a Remedy*. But the Bureau cannot start implementing any remedy today because there is no remedial plan in place today. The State is a long way off from being able to adopt a remedial plan.

First, it is Michigan's express public policy, enshrined in its Constitution, that "[i]n no event shall any body, except the [Commission] . . . , promulgate and adopt a redistricting plan or plans for this state." Mich. Const. art. IV, § 6(19). Plaintiffs' motion to expedite (but not their preliminary-injunction brief) acknowledges that federal courts defer to such policies and that this Court will be "required to remand this matter back to the" Commission if it issues an injunction. ECF No. 25 at PageID.427-428. The Commission, however, is subject to the State Constitution, which requires it to hold public hearings, post plans to be voted on in a 45-day notice-and-comment period, and achieve support for any enacted plan from all political wings of the Commission. Mich. Const. art. IV, § 6(9) and (14). An injunction issued today would likely result in, at best, a new plan in June.

Second, it is also not adequate for Plaintiffs to respond that "a special master" could draw Michigan's congressional plan. ECF No. 25 at PageID.428. For one thing, to replace a plan lawfully prepared by the Commission over a period of months, informed by 139 meetings and hearings open to the public and innumerable public comments, with a special master's plan would impose a severe injury on Michigan's paramount sovereign interests. That has been recognized since *Reynolds*. *See* 377 U.S. at 585–86. To do so at the *preliminary-injunction* stage would appear to be unprecedented. Courts routinely reject the notion that crafting a new redistricting plan is appropriate provisional relief. *See, e.g.*, *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 596 (E.D. Pa. 2012) (taking it as a given that a redistricting plan could not be created and imposed at the preliminary-injunction stage and thus observed that preliminary injunction could take only the form of delaying an election); *Diaz v. Silver*, 932 F. Supp. 462, 468–69 (E.D.N.Y. 1996) (cataloguing cases rejecting Plaintiffs' demanded relief); *see also Cardona v. Oakland Unified Sch. Dist., Cal.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) (denying preliminary injunctive relief in redistricting case); *Kostick v. Nago*, 878 F. Supp. 2d 1124, 1147 (D. Haw. 2012) (same); *NAACP-Greensboro Branch v. Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516, 530 (M.D.N.C. 2012) (same); *Perez v. Texas*, 2015 WL 6829596, at *4 (W.D. Tex. Nov. 6, 2015); *Valenti v. Dempsey*, 211 F. Supp. 911, 912 (D. Conn. 1962); *Shapiro v. Berger*, 328 F. Supp. 2d 496, 501 (S.D.N.Y. 2004). A special master's plan is not the "status quo." *Adams v. Baker*, 951 F.3d 428, 429 (6th Cir. 2020). The Chestnut plan is the status quo.

For another thing, federal courts do not issue special-master plans instantaneously. Plaintiffs' motion to expedite (at 5) cites *Bethune-Hill v. Virginia State Board of Elections*, 368 F. Supp. 3d 872 (E.D. Va. 2019), which adopted a special master's remedy. But that decision

was issued eight months after the liability ruling, which in turn was issued after final judgment, *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018), and five years after the case was filed, *see id.* at 136.

Third, Plaintiffs' demand that this Court impose *their* plan as a remedy hardly merits comment. That would even be a more pronounced dignitary injury to Michigan's overriding interests, erase the Commission's months of hearing public input, contravene the State's express public policy, and take Michigan back to being governed by plans drawn in secret and divorced from Michiganders' voices.

c. *Plaintiffs' Dilatory Conduct*. Plaintiffs have "unduly delayed bringing the complaint to court." *Merrill*, 2022 WL 354467, at *2 (Kavanaugh, J., concurring). "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek*, 138 S. Ct. at 1944. Here, the Commission adopted the plan on December 28, 2021, PI Br. PageID.101, but Plaintiffs fail to explain why they did not sue until January 20, 2022, ECF No. 1, or move for an injunction until January 27, ECF No. 9. It could not have been for lack of knowledge of the claim. The Chestnut plan and its population deviations were posted for public comment in November 2021. A colorable one-person, one-vote injury is readily knowable for the same reason it is "easily administrable," i.e., there are "three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts." *Vieth*, 541 U.S. at 290 (plurality opinion). The basis of the alleged injury was clear in December 2021, but Plaintiffs' delay of weeks to seek injunctive relief squandered precious time necessary to their claim for provisional remedial relief in an election year. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018).

d. *No Obvious Right to Relief.* It also may be relevant that Plaintiffs cannot show that "the underlying merits are entirely clearcut in [their] favor." *Merrill*, 2022 WL 354467, at

*2 (Kavanaugh, J., concurring). Assuming *Purcell* is not "absolute and that a district court may *never* enjoin a State's election laws in the period close to an election," a plaintiff must at least meet a more demanding standard than typically applies to a preliminary injunction motion. *Id.* at *2. As in *Merrill*, Plaintiffs fail even under this "relaxed version of *Purcell*." *Id.* at *3. As shown above, the population deviation is less than one fifth the size of the deviation approved in *Tennant*, and the Commission has a robust fact-based defense.

Finally, assuming arguendo that there is a violation here, it would clearly have a minimal impact on the weight of votes, and Plaintiff's claim stands unrecognized by decades of Supreme Court and lower-federal-court jurisprudence. In the balance of equities, a deviation one fifth the size of the deviation approved in *Tennant* does not outweigh the paramount public and State interests in voting in an orderly election under the plan of the Commission the people created.

## CONCLUSION

The motion should be denied.

Dated: February 18, 2022

Respectfully submitted,

/s/ David H. Fink

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.3(b)(ii), Counsel for the Commission certifies that this brief contains 10,572 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, signature block, any certificate, and any accompanying documents.

Dated: February 18, 2022

/s/ David H. Fink
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 18, 2022, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

/s/Nathan J. Fink
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