UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al*.,

Plaintiffs,

v.

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

Defendants.

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

Three-Judge Panel
28 U.S.C. § 2284(a)

PLAINTIFFS' RESPONSE TO THE COMMISSIONER DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

When it comes to the weight of a voter's vote, rarely has a legislative body been so cavalier. The Commissioners characterize the Chestnut Plan's population deviation of 1,122 persons as "immaterial" and "*de minimis*" despite decades of Supreme Court jurisprudence saying otherwise. And when Plaintiffs ask that the Commissioners act neutrally and consistently in applying their criteria, the Commissioners belittle the Plaintiffs' remedy map as the product of an interest group drafting in secret. But Plaintiffs' remedy map better adheres to Michigan's county, village, and township lines, is more compact, has a population deviation near zero, and respects communities of interest. This Court should grant Plaintiffs' requested injunction.

ARGUMENT

Plaintiffs are likely to succeed on their equal population claim. Plaintiffs have shown that the population deviations in the enacted Chestnut plan were avoidable and Plaintiffs better adhere to Michigan's criteria.

Plaintiffs are also likely to succeed on their Equal Protection Claim. The Commissioners failed to adduce any standards that guided their decision-making.

Plaintiffs are further entitled to an injunction because there are five months remaining before the primary election and nine months until the general election. Here, the Supreme Court's *Purcell* principle is attenuated.

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

A. Plaintiffs Are Likely To Succeed On The Merits Of Their One Person, One Vote Claim.

One person, one vote claims are governed under *Karcher*'s two-step analysis. *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). First step, Plaintiffs bear the burden of proving "the existence of population differences that could practicably be avoided." *Tennant v. Jefferson*

County Comm'n, 567 U.S. 758, 760 (2012).[1] If Plaintiffs succeed, the burden then shifts to the Commissioners to "show with some specificity that the population differences were necessary to achieve some legitimate state objective." *Id*.

1. Plaintiffs Satisfy Their Burden Of Proving That Population Differences Among Michigan's Congressional Districts Could Have Been Reduced.

The Chestnut map has a total population deviation of 1,122 persons. *See* Bryan Decl. ¶ 15 (ECF No. 9-3, PageID.148). Plaintiffs' remedy map reduces the population variance among Michigan's congressional districts to one person. *See* Bryan Decl. ¶ 16 (ECF No. 9-3, PageID.149). Because Plaintiffs demonstrated that the total population deviation was avoidable and could have been eliminated, *Karcher*, 462 U.S. at 730-31, *Tennant*, 567 U.S. at 760, and because Plaintiffs' map reduced county, village, and townships splits, and was more compact than the Chestnut plan, Plaintiffs have satisfied their burden at *Karcher* step one. *See* Pls.' Op.Br. at 17 (ECF No. 9, PageID.116); Bryan Decl. ¶¶ 15-21, (ECF No. 9-3, PageID.148-150). *see Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675-76 (M.D. Pa. 2002) (three-judge court) (finding that plaintiffs surpassed *Karcher* step one where the enacted map had a population deviation of 19 persons and plaintiffs submitted a map to the court—not to the legislature—that had a population deviation of just one person, demonstrating the deviation was avoidable), *appeal dismissed as moot*, *Schweiker v. Vieth*, 537 U.S. 801 (2002).

[1] The Commissioners heavily rely on *Tennant*. Their reliance is ironic. Although West Virginia's congressional districts had an overall population deviation, the map kept counties whole and avoided contests between incumbents. *Tennant*, 567 U.S. at 761. By contrast, the proposed plan in *Tennant* that had a population deviation of almost zero split counties and pitted incumbents against each other. *Id*. at 760-61. Here, The Commissioners map splits more counties, townships, and villages than Plaintiffs' proposed map, is less compact than Plaintiffs' proposed map, and still has a higher population deviation than Plaintiffs. *Tennant* does not save the Commissioners. Bryan Decl. ¶¶ 15-21, (ECF No. 9-3 PageID.148-150).

The Commissioners first urge this Court to reject Plaintiffs' remedy map because it was not submitted to the Commission or subject to public scrutiny.[2] Commissioners' Br. in Opp. at 17 (ECF No. 42, PageID.743). But *Karcher* and *Tennant* do not require that a one person, one vote plaintiff submit a map to the legislative body drawing the new districts. Although the facts of *Karcher* involved a map that was submitted to the legislature, the Court repeatedly stated that the first step of the analysis asks whether it was *possible* to draw districts with a lower population deviation. *See Karcher* 462 U.S. at 730-31 (stating that the first step asks whether population differences "*could* have been reduced or eliminated altogether" and requiring plaintiffs to show that population differences "*could* have been avoided") (emphasis added); *see also Vieth*, 195 F. Supp. 2d at 681 n.3 (rejecting argument that courts should consider only maps submitted to the legislature because it would enable legislators to achieve the lowest population deviation presented, not population equality).

Second, the Commissioners assert that because of the Census Bureau's use of differential privacy, it is unknown what the true population deviation is in Michigan's congressional map. Commissioners' Br. in Opp. at 17-18 (ECF No. 42, PageID.743-744). Accordingly, to the Commissioners, a population deviation exceeding 1,000 is "immaterial." *Id*. at 18 (ECF No. 42, PageID.744).[3]

But the Supreme Court has already rejected this argument. At the outset, "there are no *de minimis* variations which could practically be avoided, but nonetheless meet the standard of Art.

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[2]. But a map with zero population deviation was submitted to the Commission. *See, e.g.*, MI Redistricting Public Comment Portal, *Maple Syrup – Fair and Compliant*, (Oct. 31, 2021), https://www.michigan-mapping.org/submission/o8230

[3] *Tennant* does not support the assertion that the deviations here are small. The Court in *Tennant* considered the deviations "minor" because of the state's goal of keeping counties whole. 567 U.S. at 764. Here, the Plaintiffs keep more counties whole and have a lower population deviation.

I, § 2 without justification." *Karcher*, 462 U.S. at 732, 738. Even deviations of 19 persons, if avoidable are material. *Vieth*, 195 F. Supp. 2d at 675-76.

Additionally, the Court rejected New Jersey's argument that their population deviations were the functional equivalent of equal population because their deviations were "smaller than the predictable undercount in available census data." *Karcher*, 462 U.S. at 731. But the Court rejected this argument because accepting it meant adopting a standard "other than population equality, *using the best census data available*[]" and adopt New Jersey's standard would erode the constitutional command of equality *Id*. at 731-32 (emphasis added).

The Commissioners contend that *Karcher*'s conclusion does not apply because here the Bureau intentionally injected inaccuracy into the Census data. Commissioners' Br. in Opp. at 18 (ECF No. 42, PageID.744). But the Supreme Court knew that the Census data, particularly in some jurisdictions, "are outdated long before they are completed[]" but still constituted the "best population data available[.]" *Karcher*, 462 U.S. at 732, 738. Accordingly, Census data "is the only basis for good-faith attempts to achieve population equality." *Id.* at 732. Whether the errors were intentional or otherwise makes no difference here.[4] The Plaintiffs have satisfied their burden.

2. The Commissioners Have Not Justified Their Deviations From Population Equality.

It is the Commissioners' burden "to justify each [population] variance, no matter how small[]" and they are required to show with specificity that each population variance was *necessary* to achieve a legitimate goal. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969); *Karcher*, 462 U.S. at 731, 741. The Commissioners can justify deviations through consistent, nonarbitrary,

[4] *Abrams v. Johnson* does not alter the constitutional command of population equality. 521 U.S. 74, 100-01 (1997). Instead, the Supreme Court recognized that Georgia had undertaken multiple rounds of redistricting and litigation. *Id*. at 79-85. It was therefore better to use a court-ordered plan containing population deviations that were substantially lower than prior enacted plans than order the legislature to undergo another round of redistricting.

and nondiscriminatory application of legitimate policies. *Karcher*, 462 U.S. at 740-41; *See Roman v. Sincock*, 377 U.S. 695, 710 (1964).

Plaintiffs' remedy map shows that the state can achieve the constitutional criteria, such as keeping counties, townships, and villages whole, keeping districts compact, and achieving near population equality. *See* Pls.' Op.Br. at 18-19, 49-53 (ECF No. 9, PageID.117-118); Bryan Decl. ¶ 15 (ECF No. 9-3, PageID.148). These county, city, township, and village lines were, for generations, the backbone of Michigan's understanding of the term "communities of interest." Pls.' Op.Br. at 24-26 (ECF No. PageID.123-25).

Knowing that Plaintiffs' remedy map better adheres to the equal population requirement, and contains fewer county, village, and township splits, and is more compact than the Chestnut Plan, the Commissioners defend their map the only way they can: Claiming that various communities of interest drove the Commission's decision-making. *See generally* Eid Decl. (ECF 42-4, PageID.778-786). But the Commissioners apply this criterion in an inconsistent and arbitrary manner.

a. <u>The Commissioners' Reliance On One Commissioner's Affidavit Is Insufficient To Justify The Commission's Decisions.</u>

As an initial matter, it is problematic, to say the least, to rely upon the views of one Commissioner for the reasons why the entire thirteen-member Commission enacted the Chestnut Plan. *First*, the Commission did not enact Commissioner Eid's statements and reasons for the lines; the Commissioners enacted the map, and nothing more. That is what is authoritative. *Exxon Mobil Corp. v. Allapattah Servs*., 545 U.S. 546, 568 (2005); *Royal Truck & Trailer Sales & Serv. v. Kraft*, 974 F.3d 756, 761 (6th Cir. 2020) ("[Legislative history] is not merely a waste of research time and ink; it is a false and disruptive lesson in the law. . . . The greatest defect of legislative history is its illegitimacy.") (alterations in original). Furthermore, "legislative history is itself often murky,

ambiguous, and contradictory." *Exxon Mobil Corp.*, 545 U.S. at 568. This is especially true because "it is folly to talk about the purpose of the statute when the statute reflects a compromise between multiple purposes." *Patel v. USCIS*, 732 F.3d 633, 636 (6th Cir. 2013) (internal quotation marks omitted). Consequently, when interpreting a statute, reviewing statements of legislators is an exercise in "looking over a crowd and picking out your friends." *Exxon Mobile Corp.*, 545 U.S. at 568. Relying on one commissioner's explanation for the map gives that commissioner "both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id*.

Even if Commissioner Eid's affidavit *were* demonstrative of the Commission's intent, it is illuminating that only one of thirteen commissioners signed it. That the Commissioners did not submit an affidavit articulating their agreed-upon reasons for each district configuration demonstrates that Commissioner Eid's rationale does not reflect even a majority of the Commissioners' views, let alone represent the Commission's views. Mr. Eid's affidavit presents the legislative process of redistricting decisions among the Commissioners as straightforward when, in all likelihood, it was obscured by legislative trade-offs and compromise. *See Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1450 (D.C. Cir. 1988).

Finally, Commissioner Eid's declaration is unsupported. Commissioner Eid asserts that various district lines were drawn to maintain communities of interest that public commenters requested. But he provides no citation to these comments. Commissioner Eid's affidavit is therefore a post-hoc justification for the district lines in response to litigation.[5]

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[5] Commissioner Eid has been roundly criticized in the media, *See* Collin Anderson, *Independent' Michigan Redistricting Commissioner Actually a Bernie Bro* Free Beacon (Aug. 31, 2021) *available at* https://freebeacon.com/elections/independent-michigan-redistricting-commissioner-actually-bernie-bro/ (last visited Feb. 22, 2022). Additionally, in public submissions, commenters have also questioned Commissioner Eid's abilities. *See, e.g.,* MI Redistricting Public Comment

Accordingly, this Court should afford Commissioners' Eid's explanations for the congressional districts' configurations very little weight.

b. Because The Commission's Use Of The Term "Communities Of Interest" Is Nebulous, The Commission Cannot Apply It Neutrally And Consistently.

Unfettered discretion vested in state officials violates the right to "fair and evenhanded treatment." *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969) (three-judge court); *Mann v. Powell*, 333 F. Supp. 1261, 1267 (N.D. Ill. 1969) (three-judge court) (making preliminary injunction permanent) (declaring unconstitutional Illinois statute that gave discretion to the Secretary of State to place a candidate higher on the ballot when candidate declaration petitions were filed simultaneously), *aff.'d mem.* 398 U.S. 955 (1970).

In *Bush v. Gore*, the U.S. Supreme Court analyzed whether the recount procedures that the Florida Supreme Court promulgated were "consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." 531 U.S. 98, 105 (2000). The Court held that the recount procedures violated the Equal Protection Clause because there were no "specific standards to ensure" that the intent of the voter standard was applied in an equal and consistent manner. *Id*. at 105-06; *see also id*. at 106-09 (describing trial testimony where different counties were applying different versions of the standard and one county applied multiple different versions of the standard); *see* Pls.' Opp'n. to VNP Mot. To Dismiss at 8-9(ECF No. 37, PageID 606-07); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 97 (1972) (condemning statutes that empower officials to selectively enforce statutes infringing fundamental rights). Vesting broad

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Portal, comment ID c3300 (Aug. 31, 2021) (alleging that Commissioner Eid was breaking communities of interest for partisan gain); *see id*. comment ID c2727 (Aug. 24, 2021) (stating that despite more than 20 comments asserting a community of interest between two counties, Commissioner Eid separated these two counties).

discretion in government officials with authority over fundamental rights violates the Fourteenth Amendment.

The term "communities of interest" cannot constitutionally vest in the Commissioners an arbitrary power to determine "communities of interest" however they see fit. *See* Pls.' Op.Br. at 24 (ECF No. 9, PageID.123). Nor has the Commission adopted a plan to determine how to consistently and neutrally honor assertions of communities of interest from public commenters. Rather, the Commission asserts that Michigan's Constitution "exudes discretion." Commissioners' Br. in Opp. at 12 (ECF 42, PageID.740). This is the problem—the discretion is standardless. As a matter of law, the Commission cannot apply its "communities of interest" criterion in a consistent and neutral way because there is no standard to measure whether it is applied in a consistent and neutral way. *See, e.g., Bush*, 531 U.S. at 105-06. This is especially true if Commissioners discard the state judicial opinions interpreting communities of interest as primarily based on county, city, and township lines. Population deviations cannot survive if the justifications are tainted with arbitrariness or discrimination. *Roman*, 377 U.S. at 710.

c. <u>In Fact, The Commission Did Not Apply Its Communities Of Interest Criterion In A Neutral And Consistent Manner.</u>

Because the Commissioners' "communities of interest" criterion is standardless, the Commissioners applied it in an arbitrary and inconsistent manner. Pls.' Op.Br. at 23-29 (ECF No. 9, PageID 122-128).

For example, Congressional District 5 in the Chestnut Plan contains the entire southern border of Michigan stretching from South Rockwood, Michigan, a Detroit suburb on the Canadian border at Lake Erie, to New Buffalo on the Indiana border at Lake Michigan. From east to west, the district is approximately 300 miles, and might require a drive into Ohio first. Unsurprisingly, only one of the community of interest clusters mention connecting the southeastern portion of

Michigan with the southwest. Bryan Supp. Decl. ¶¶14-16 (attached as **Exhibit A**). To Commissioner Eid, that district constitutes a community of interest. Commissioners' Br. in Opp. at 18 (ECF 42, PageID.746); Eid Decl. ¶12 (ECF No. 42-4, PageID 781).

But the Supreme Court rejected Texas's attempt to assert a community of interests between two Latino communities that were 300 miles apart. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 421, 441-442 (2006). And a three-judge panel in Maryland rejected a community of interest assertion between Baltimore and Washington, D.C., a distance of approximately 40 miles because they had different economies and television markets. *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 899 (D. Md. 2011) (three-judge court) *sum. aff.*, 567 U.S. 930 (2012); Bryan Supp. Decl. ¶¶16-18 (describing this district as approximately 300 miles in length, having five different media markets, and are not connected economically).

The communities that are established across Michigan's southern border are divided into five different media markets. Bryan Supp. Decl. ¶17. There is simply a dearth of public data to support Commissioner Eid's bold assertion that Michigan's southern border counties constitute a single community. Eid Decl. ¶¶ 8-9 (ECF No. 42-4, PageID. 780). Commissioner Eid's affidavit alone proves that the economies are quite different: some people commute to Indiana for work on the southwestern portion of Michigan, while others commute to Ohio on the southeastern portion. *Id*. Those are two different economies. *Fletcher*, 831 F. Supp. 2d at 899.

Furthermore, in the eastern portion of the district, people live in Detroit suburbs. This presents vastly different economic opportunities than those present in rural Berrien County where residents there work in the southwestern portion of Michigan. *See id*. at 899, 903.

The hundreds mile long southern border does not represent a community of interest. The Commissioners have not satisfied their burden. *See Karcher*, 462 U.S. at 743-44 (rejecting New

Jersey's asserted justification as not supported by the evidence). Plaintiffs map better represents the communities of interest by splitting the southern border into two districts and better adheres to Michigan's other criteria. *Cf. Tennant*, 567 U.S. at 765 (approving West Virginia's plan because no other plan substantially vindicates the state's interests and approximates population equality); Bryan Decl. ¶¶ 15-24 (ECF No. 9-3, PageID 148-152).

Next, the Third Congressional District is overpopulated and splits Kent County between the Second and Third Congressional Districts. *See* Pls.' Op.Br. at 31 (ECF No. 9, PageID 130); Paciorek Decl. ¶7 (ECF No. 9-10, PageID 183-84). The Commissioner assert that District 3 was drawn to satisfy public comments that wanted to keep Berry County with other rural counties, and keep Muskegon and Grand Rapids together. Commissioners' Br. in Opp. at 18 (ECF 42, PageID.746); Eid Decl. ¶¶ 8-9 (ECF 42-4, PageID. 780).

But Muskegon and Grand Rapids have not been joined in the same congressional district since the 1890s. Bryan Supp. Decl. ¶13. In fact, there were approximately 70 comments expressing the opposite view that Muskegon and Grand Rapids should not be unified.[6] Furthermore, beginning May 6, 2021 through December 11, 2021, over 40 comments were submitted to the Commission requesting that Kent County be kept whole.[7] Instead, the Commission ignored this request and split Kent County and unified Muskegon and Grand Rapids.

Plaintiffs' remedy map better adheres to the communities of interest and keeps Kent County and Berry County whole. Bryan Decl. ¶28 (ECF No. 9-3, PageID 155). Despite at least one comment asking to keep Barry County with other rural counties—Commissioner Eid does not

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[6] *See MI Redistricting Public Comment Portal* available at https://www.michigan-mapping.org/search (last visited Feb 22, 2022) ((comment ID number, e.g., p956, p5622, o4818, w9137, w6958).

[7] *See id.* (comment ID number P56 and w9288).

specify how many comments the Commission received—Barry County is more connected to Grand Rapids and the surrounding area. 75.2% of those employed in Barry County work outside of the county and towards Kent County and Grand Rapids. Barry County has a strong community of interest with Grand Rapids and Kent County.[8]

Furthermore, Commissioner Eid faults the Plaintiffs' map for not keeping Muskegon and Grand Rapids together. Eid Decl. ¶ 8-9 (ECF No. 42-4, PageID 780). But only a fraction, 1.6%, of Muskegon residents work in Grand Rapids, Michigan. Bryan Supp. Decl. ¶12. And few, if any, of Muskegon's residents go to Kent County for work. *Id*. ¶11.

Plaintiffs' remedy map better adheres to keeping counties whole and better adheres to communities of interest, including honoring the comments made at public hearings.[9]

B. Plaintiffs Are Likely To Succeed On The Merits Of Their Equal Protection Claim.

Plaintiffs' Second Count is a standard equal protection claim that the Commissioners arbitrarily and inconsistently placed Plaintiffs in various districts thereby burdening their fundamental right to vote. FAC ¶¶67-74, 80, 106-121, (ECF No. 7, PageID.69-70, 73-75). Plaintiffs further demonstrate that the Commissioners treated Plaintiffs arbitrarily and inconsistently because the phrase "communities of interest," detached from its meaning distilled through generations of Michigan Supreme Court precedent, is a nebulous term giving the Commissioners "plenary authority to demarcate communities of interest however they see fit." Pls.' Op.Br. at 24-25 (ECF 9, PageID.123-124). Rather than respond with limits to their authority

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[8] *See* U.S. Census *On The Map*, *Inflow/Outflow Analysis* for Barry County, Michigan, *available at* https://onthemap.ces.census.gov/ (last visited Feb. 22, 2022).

[9] The Brace report notes that Plaintiffs' plan splits small slivers of population, e.g., 13 people in Smithfield Township, risking the secrecy of the voter's ballot. Brace Decl. ¶ 11, 14 (ECF 42-7, PageID 854-55). But this 13 person segment in Southfield is split by an existing Voter Tabulation District. Additionally, the Enacted Plan contains split segments with as little as 4 persons. Bryan Supp. Decl. ¶¶20-21.

to determine communities of interest, the Commissioners respond by claiming that the communities of interest provision in Michigan's constitution "exudes discretion." Commissioners' Br. in Opp. at 12 (ECF 42, PageID.740). The Commissioners' limitless discretion has harmed Plaintiffs. Pls.' Op.Br. at 30-31 (ECF No. 9, PageID.129-130). This arbitrary and inconsistent action has burdened Plaintiffs' fundamental right to vote. *Id*. at 20-21, 27-28 (ECF No. 9, PageID.119-120, 126-27). The Eleventh Amendment, or structural sovereign immunity, does not apply. *See generally* Pls.' Opp.'n to VNP's Mot. To Dismiss at 7-14 (ECF 37, PageID.605-616).[10]

Additionally, Plaintiffs are not asking this Court to rule that traditional redistricting criteria are constitutionally mandated, Commissioners' Br. in Opp. at 7-10 (ECF 42, PageID.735-738), just that they are applied neutrally and consistently. Nor are the Plaintiffs asking this Court to determine "how much deviation from [traditional redistricting criteria is constitutionally acceptable…?" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) but to require the Commissioners to apply redistricting principles in a neutral and consistent manner, not arbitrarily and inconsistently. Far from a "watered-down claim of gerrymandering," Commissioners' Br. in Opp. at 10 (ECF 42, PageID.738), Plaintiffs raise an equal protection claim that lawmakers did not apply the law in a neutral and consistent manner.

When the Commissioners address the gravamen of Plaintiffs' claim of arbitrary and inconsistent treatment, they admit that Michigan's Constitution "exudes discretion." Commissioners' Br. in Opp. at 12 (ECF 42, PageID 740). But to prevent arbitrary and inconsistent treatment, the Commission offers neither standards nor limits. Instead, the Commission claims that

[10] *Alabama Legislative Black Caucus v. Alabama* does not shield the Commissioners here because plaintiffs there alleged an equal protection violation when Alabama deviated from absolute equality unless necessary to comply with a state constitutional provision. 988 F. Supp. 2d 1285, 1304 (M.D. Ala. 2013) (three-judge court). Plaintiffs here allege that the Commissioners applied their criteria arbitrarily and inconsistently. *See Bush*, 531 U.S. at 105-09.

the Michigan Constitution prevents mischief by excluding individuals with political connections, ensuring a public process, and requiring that a plan must have at least two votes each from Republicans, Democrats, and independents to become law. Commissioners' Br. in Opp. at 12-13 (ECF 42, PageID.740-741).

But these procedures provide administrative guardrails. None of these criteria provide standards to prevent the Commissioners from acting arbitrarily and inconsistently.

In Florida in 2000, the "intent of the voter" standard was subject to multiple and inconsistent applications causing some votes to be counted and others rejected in violation of the Equal Protection Clause. *See Bush*, 531 U.S. at 105-09. Here, the Commissioners received public input in trying to ascertain communities of interest, but nothing guides the Commissioners in how to apply that requirement in a consistent and neutral manner. If the Commissioners are no longer bound by county, city, or township lines as guideposts of communities of interest or otherwise establish clear guideposts, Commissioners' Br. in Opp. at 11-12 (ECF 42, PageID.739-40, then nothing limits the Commissioners' determination of what constitutes a community of interest to preserve in spite of county, city, township. *Mann*, 314 F. Supp. at 678-79 (granting a preliminary injunction where statute vested Secretary of State with unfettered discretion to decide the order of candidates on the ballot when petitions are received simultaneously because statute was standardless).

Accordingly, Plaintiffs are entitled to an injunction as to Count 2.

II. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST FAVOR A PRELIMINARY INJUNCTION. [11]

The Commissioners' *Purcell* argument tries to patch with hyperbole what it lacks in merit. Commissioners' Br. in Opp. at 15 (ECF 42, PageID.743. It need not command the Court's attention for long.

First, neither *Merrill v. Milligan*, Nos. 21A375 (21-1086), 21A376 (21-1087), 2022 U.S. LEXIS 760, (Feb. 7, 2022), nor Justice Kavanaugh's *Milligan* Concurrence, *id.* at *1-*10, adds anything that helps the Commissioners. On February 7, 2022, the *Merrill* Court stayed an injunction that would have affected tremendously an Alabama March 30, 2022 primary election—*i.e.*, seven-weeks from the date of the High Court's order. *Id.* at *3 (Kavanaugh, J., concurring). The Michigan primary election will occur on August 2, 2022—*five months* from now. *See* Secretary's Br. at 11 (ECF No. 47, PageID.998). "How close to an election is too close . . . depend[s] in part on the nature of the election law at issue, and how easily the State could make the change without undue collateral effects." *Milligan*, at 2022 U.S. LEXIS 760 *27 n.1 (Kavanaugh, J., concurring). Here, the election is it far enough away, and the fixes are easy enough to accomplish, to eviscerate the Commissioners' *Purcell* argument. Commissioners' Br. in Opp. at 29 (ECF 42, PageID.756).

Second, the Secretary herself—*i.e.*, the Michigan official charged with administering the 2022 General Election—has refrained from arguing *Purcell* and has intimated that she can get the work done if the Court's remedy comes soon enough. *See See* Secretary's Br. at 19 (ECF No. 47, PageID.1006). She, naturally, can provide the Court with the most accurate portrayal of what she and her office can accomplish, and even she apparently thinks that the Commissioners' argument

[11] The Commissioners do not contest Plaintiffs' arguments that they will be irreparably harmed absent the grant of an injunction. Pls.' Op.Br. at 14-15 (ECF No. 9, PageID 113-14.

is not meritorious enough to offer herself. Plaintiffs, for their part, agree with her suggestion that the Court should "order the Commission to complete the plan under an expedited timeline" and consider extending certain election-related deadlines. *Id.* at 19-20 (ECF No. 47, PageID.1006–07).

Finally, the Commissioners' arguments regarding waiver and dilatory conduct are frivolous. Their motion to expedite was not a reply brief, and the Commissioners have (notwithstanding its lack of merit) had the opportunity to argue *Purcell*. They also cite precisely nothing to show that a *twenty-three-day* period (which included two intervening federal holidays) was too much time to draft, polish, and file a one-hundred twenty-one paragraph federal complaint. And because the Commission listed among the final maps it was considering at least one that equalized population throughout all thirteen congressional districts, Plaintiffs indeed "lack[ed] . . . knowledge of the claim" until, essentially, New Year's Eve. They certainly cannot be faulted for (wrongly) assuming that the Commissioners might comply with their responsibilities under the federal constitution.

CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Preliminary Injunction.

Dated: February 23, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that:

1. This Brief complies with the word-count limitation of W.D. Mich. LCivR 7.2(b)(i) because this Brief contains 4,496 words (including headings, footnotes, citations, and quotations but not the case caption, cover sheets, table of contents, table of authorities, signature block, attachments, exhibits, or affidavits).

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

Dated: February 23, 2022

/s/ Charles R. Spies
Charles R. Spies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on February 23, 2022.

Dated: February 23, 2022

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