

**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' OPPOSITION TO DEFENDANT COMMISSIONERS' SUPPLEMENTAL
BRIEF**

INTRODUCTION

The Constitution requires legislative bodies to draw congressional districts “to achieve population equality as nearly as is practicable.” *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). Although precise mathematical equality “may be impossible to achieve in an imperfect world,” states must still make a good-faith effort to achieve precise mathematical equality. *See id.* When there are deviations beyond mathematical equality, states “must justify each variance, no matter how small.” *Id.* Anything less than mathematical equality would tempt legislators to strive for that number and not equality. *Id.* at 731.

With such clear mandatory rules from the Supreme Court, it is unsurprising that most every state in the Nation has drawn congressional districts with precise mathematical equality as nearly as is practicable, including California. What is surprising, is that Michigan is one of only four states with a population deviation of over 1,000 persons. Pls. Supp. Br. in Support for Prelim. Inj. (ECF No. 62, PageID.1994-95). And yet, Commissioners applaud themselves because they reduced the population deviation from 0.37% to 0.14%. Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61, PageID.1161). But they fail to assert that they could not reduce the population deviation any further. Like the Pennsylvania General Assembly in *Vieth* whose congressional district map was declared unconstitutional, the Commissioners arrived at 0.14% and stopped. *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 680 (2002); *see* Eid Decl. ¶¶ 29-30 (ECF No. 42-4, PageID.786).

But Plaintiffs’ Remedy Map as Exhibit A demonstrated that the Commission could go further, splitting fewer counties, townships, and villages. Bryan Decl. ¶¶ 16, 25-30 (ECF No. 9-3, PageID.149, 153-55). Plaintiffs have also shown that their remedy map better adheres to the communities of interests assertions in the comments. Pls. Supp. Br. in Support for Prelim. Inj.

(ECF No. 62, PageID.1999, 2003) (stating that over forty comments were submitted requesting that the Commission keep Grand Rapids and Muskegon separate, which Plaintiffs did, and no one requested that the Commission split Dearborn Heights and at least seven comments requested Dearborn Heights remain whole, which Plaintiffs did as well). And Plaintiffs have shown that they accomplished all of this *and* still had a population deviation that is consistent with the majority of states throughout the Nation: +/- 1 person.

The Commission arrives at its high population deviation because it applied its communities of interest criterion in an inconsistent manner. The Commission also applied its communities of interest criterion in a non-neutral and apparently pretextual manner, which is belied by their Supplemental Memorandum where they cite to public comments, but provide no context regarding whether those comments were in the majority or simply cherry-picked. At times they are simply wrong, for example using comments from residents in one county to infer that residents in another county formed a community of interest.

Accordingly, the Commission fails at *Karcher*'s step 2. This Court should therefore grant Plaintiffs' request for a preliminary injunction.

ARGUMENT

I. THE COMMISSION'S APPLICATION OF ITS COMMUNITIES OF INTEREST CRITERION WAS INCONSISTENT.

The Commissioners applied their cultural and religious community of interest criterion inconsistently. And documents submitted with the Commissioners' filing prove the inconsistency.

First, the documents that the Commission submitted confirmed that Arab-American residents of Dearborn painstakingly informed the Commission that Dearborn is the national capital of their community, and that Dearborn and Dearborn Heights have the largest Arab-American community in the country. Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim.

Inj. (ECF No. 61-9, PageID.1782, 1786-1788). And although commenters expressed support for the Chestnut Plan, Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1787), still others expressed that “it is essential that our central communities in Dearborn and Dearborn Heights are not fragmented” Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1782). Dr. Duchin’s report recognizes this too as many commenters requested that the Commission keep Dearborn and Dearborn Heights whole. Appx. Vol. VII, Pt. 2 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-10, PageID.1805). One commenter noted that according to the Census American Community Survey, 47% of Dearborn’s population is Arab-American. Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1748, 1747-1752). This commenter noted that Dearborn and Dearborn Heights form a community of interest because they share a common history, heritage, and culture. Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1749). Many residents of Dearborn have family in Dearborn Heights, and many resident Dearborn Heights work in Dearborn, and vice-versa. *Id.* Accordingly, the commenter objects to the Commission placing Dearborn in with Ann Arbor and Ypsilanti, while cutting Melvindale into another district removing it from the Arab population in Dearborn and Dearborn Heights. Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1751). The commenter also notes that splitting Dearborn Heights makes it impossible for Arab residents there to elect a representative who can represent their shared needs. Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1749) But the Commission chose to divide this community by splitting Dearborn Heights. The Commission applied their criterion inconsistently. In doing so, it split an Arab Middle Eastern, North African community, despite comments exhorting the Commission to

keep this community whole.¹ By contrast, Plaintiffs kept Dearborn Heights whole in their remedy map and had a population deviation of +/-1. Bryan Decl. ¶¶ 16, 27, 30 (ECF No. 9-3, PageID.149, 153-55).

Second, documents that the Commission submitted confirms that Jewish residents of Southfield identified a community of interest with Oakland County and wanted to be kept with their neighbors in Oakland County.² Instead, the Jewish community in Southfield was split from Oak Park and Oakland County into Congressional Districts 11 and 12. Dr. Duchin’s report notes that the City of Oak Park is home to “large chunk of Metro Detroit’s Orthodox community.” Appx. Vol. VII, Pt. 3 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-11, PageID.1860). Dr. Duchin also notes that Southfield has a “predominantly” Jewish community. *Id.* Southfield and Oak Park are less than 5 miles apart. And still the two localities are split into separate congressional districts, dividing the Jewish community.

The irony here is that the Commission contends that the entire approximately 300 mile southern border of Michigan, a border that covers the suburbs of Detroit in the east to the suburbs of Chicago on the west, is a community of interest. Pls.’ Reply Br. (ECF No. 53, PageID.1087-88). The Commission asserts that they share a community in part because the residents cross into Ohio and Indiana to pray. Eid Decl. ¶ 12 (ECF No. 42-4, PageID.781). If residents of different faiths hundreds of miles apart share a community of interest—one that the Commission honored—then the Commission certainly acted inconsistently when it split a community of the same faith a mere five miles apart. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 421, 441-442

¹ See Comment of Mariam Akanan, *available at* <https://www.michigan-mapping.org/submission/c1510> (last visited March 21, 2022)

² Comment of Carol Singer on Chestnut Map, *available at* <https://michigan.mydistricting.com/legdistricting/comments/plan/254/23> (click on red pin near center of District 12 to view comment) (last visited March 24, 2022).

(2006) (rejecting a majority-minority Latino district because the two concentrations of Latino population were 300 miles apart, representing different communities of interest); *see also* Pls. Reply Br. (ECF No. 53, PageID.1087-89) (explaining that the Fifth Congressional District did not establish a community of interest); *see also* Bryan Supp. Decl. ¶¶16-18 (ECF No 53-2, PageID.1104-05) (describing this district as approximately 300 miles in length, having five different media markets, and are not connected economically).

II. THE COMMISSION LACKED JUSTIFICATION FOR ITS ACTIONS.

The Commission's supplemental filing prove what the Plaintiffs stated, that there is no evidence to support the Commission's decisions. Out of a total 25,000 comments submitted through the Commission's online portal, Def. Br. in Opp. to Pls. Mot for Prelim. Inj. (ECF No. 42, PageID.731), the Commission relies upon a *de minimis* number of comments to justify their decisions. But upon closer inspection, these comments do not justify the Commission's decision.

First, in Congressional District 2, the Commission submits approximately 20 pages of comments to support drawing Barry County in with Ionia, Montcalm, Gratiot, and Isabella. Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61, PageID.1162). But then, out of these twenty comments, only one comment asks the Commission to draw all four counties together. Appx. Vol. I to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-1, PageID.1221). Two comments assert that Barry County is rural, but makes no mention of being drawn into the remaining four counties. Appx. Vol. I to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-1, PageID.1222-23). The remaining comments are from residents in the other four counties and none of them request to be drawn in with Barry County or even mention Barry County. The Commission's assertion that they had at least 16 comments to support the enacted district is inaccurate. Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No.

61-9, PageID.1162). Plaintiffs better adhere to Barry County's community of interest. Pls.' Reply Br. (ECF No. 53, PageID.1090; Bryan Supp. Decl. (ECF No 53-2, PageID.1102).

Next, in Congressional District 3, none of the comments the Commission submitted advocates for the localities of Grand Rapids, Grand Haven, Muskegon, and Rockford into one district. Although there are comments advocating for the Commission to draw Grand Rapids and Muskegon together, Appx. Vol. II, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-2, PageID.1238), Muskegon and Kent County together, *id.* (ECF No. 61-2, PageID.1231), Muskegon, Grand Rapids, and Grand Haven together, *id.* (ECF No. 61-2, PageID.1234), Grand Haven, Grand Rapids, and Rockford together, *id.* (ECF No. 61-2, PageID.1237), there are no comments advocating the Commission to draw all four localities together. And again, there were comments urging the Commission keep Grand Rapids and Muskegon separate. Pls. Supp. Br. in Support for Prelim. Inj. (ECF No. 62, PageID.1998-99).

Additionally, in Congressional District 10, Plaintiffs' asserted that no comments in Dr. Duchin's report support keeping Rochester Hills and Rochester with Macomb County.³ In contrast, however, 25 comments were submitted opposed to this configuration.⁴ These comments overwhelmingly supported keeping Rochester and Rochester Hills in with Oakland County and not Macomb.⁵ Moreover, the comments mentioning the Chaldean communities request that the

³ See, e.g., Comment from Michael Webber, available at <https://www.michigan-mapping.org/submission/c1548> (last visited March 21, 2022) (delineating a COI around Rochester and Rochester Hills that does not extend to Macomb County).

⁴ See, e.g., Comment from David Blair, available at <https://www.michigan-mapping.org/submission/c3183> (last visited March 21, 2022); Comment from Nancy, available at <https://www.michigan-mapping.org/submission/c3369> (last visited March 21, 2022); Comment from Julia, available at <https://www.michigan-mapping.org/submission/c3377> (last visited March 21, 2022).

⁵ See, e.g., Comment from David Blair, available at <https://www.michigan-mapping.org/submission/c3183> (last visited March 21, 2022); Comment from Nancy, available at <https://www.michigan-mapping.org/submission/c3369> (last visited March 21, 2022); Comment from Julia, available at <https://www.michigan-mapping.org/submission/c3377> (last visited March 21, 2022).

Commission draw a district from Troy to Sterling Heights.⁶ Not once do these comments mention Rochester and Rochester Hills. The Commissioners submission confirms Plaintiffs' assertions.

Commissioner Eid initially asserted that this district was drawn to preserve the communities of Rochester Hills, Sterling Heights, Warren, and St. Clair Shores. Eid Decl. ¶ 22 (ECF No. 42-4, PageID.784). Only five comments discuss Rochester Hills and all five mention Sterling Heights. Appx. Vol. V to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-7, PageID.1645-46, 1650-52). But only one mentions Warren. And none of the comments mention St. Clair Shores.

Then, in Congressional District 11, Plaintiffs asserted that neither Dr. Duchin's report nor the comments in the public comment portal support the notion that Royal Oak, Ferndale, or Oak Park represent an LGBTQ Community of Interest. Instead, the report identified only two comments referencing Hazel Park as having a "visible" LGBTQ population.⁷ The Commission's response confirms Plaintiffs' assertions. None of the comments mention Royal Oak as forming an LGBTQ community of interest. Additionally, there were only three comments mentioning an LGBTQ community of interest in the area. Appx. Vol. VI to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-8, PageID.1661, 1663-64). Again, none mentioned Royal Oak.

Additionally, for the proposition that the Commission should exclude Southfield from Oakland County because it is more aligned with Detroit, the Commission adduced only one comment. Appx. Vol. VI to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1685, 1690) (duplicate comments). And at the behest of that one comment, the

⁶ Multiple comments indicated that Detroit's Chaldean community stretches to Farmington Hills, Troy, and Warren. *See, e.g.*, Comment from Yousif, *available at* <https://www.michigan-mapping.org/submission/p7744> (last visited March 21, 2022) ; Comment from Yousif, *available at* <https://www.michigan-mapping.org/submission/p7624> (last visited March 21 2022); Comment from Yousif, *available at* <https://www.michigan-mapping.org/submission/p7499> (last visited March 21, 2022).

⁷ Duchin Report at 48 (citing two comments from Charlotte Massey).

Commission split Southfield's Jewish community from the Jewish community in Oak Park. Lastly, the Commission drew this district in part to include Wixom, Walled Lake, and Commerce together. But none of the comments that the Commission adduced mentioned any of these three localities as part of a community of interest with the remainder of the district.

Furthermore, Plaintiffs asserted that there is a dearth of commentary regarding Livonia and its workforce. Commissioner Eid does not cite any public comments here. Instead, he relies upon the input from other Commissioners. There were in fact three comments requesting that the Commission not include Livonia with Dearborn.⁸ The Commissioners' filing proves Plaintiffs' point. Here, Commissioners' cite Appx. Vol. VI to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-8, PageID.1701) to support this District. But Appx. Vol. VI to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-8, PageID.1701) is a submission from a Livonia resident who proposed a district that included Plymouth, Northville, and Farmington. None of these localities made it into the final map.

Finally, in Congressional District 13, Plaintiffs asserted that none of the comments supported splitting Dearborn and Dearborn Heights. Pls. Supp. Br. in Support for Prelim. Inj. (ECF No. 62, PageID.2003). In fact, two in-person public commenters requested that Dearborn and Dearborn Heights be kept in the same district. Six comments submitted on the Chestnut map public portal also requested that Dearborn and Dearborn Heights remain in the same district.⁹ The Commission's submission confirms Plaintiffs' argument.

⁸ Comment from Jean Cosola, *available at* <https://www.michigan-mapping.org/submission/c3190> (last visited March 21, 2022); Comment from Margaret, *available at* <https://www.michigan-mapping.org/submission/c3169> (last visited March 21, 2022); Comment from Katie, *available at* <https://www.michigan-mapping.org/submission/c2941> (March 21, 2022).

⁹ *See, e.g.*, Comment from Mariam Akanan, *available at* <https://www.michigan-mapping.org/submission/c1510> (last visited March 21, 2022); Comment from JN, *available at* <https://www.michigan-mapping.org/submission/c1076> (last visited March 21, 2022); Comment from Joe, *available at* <https://www.michigan-mapping.org/submission/c1829> (last visited March 21, 2022); Comment from Mary Jo Durivage, *available at* <https://www.michigan-mapping.org/submission/c1861> (last visited March 21, 2022).

The Commissioners' submission contained at least eight comments that contradict Commissioner Eid's stated goals. Appx. Vol. V to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-7, PageID.1636); . Appx. Vol. VI to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-8, PageID.1713); Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1749, 1758, 1766-67, 1770); Appx. Vol. VII, Pt. 2 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-10, PageID.1807); Appx. Vol. VII, Pt. 3 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-11, PageID.1865).

At least one comment explicitly urged the Commission to keep Dearborn and Dearborn Heights whole. Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1758). Other comments were irrelevant to Commissioner Eid's assertions. Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1727) (simply asks to keep Detroit's community of interest intact), Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1743-44) (a commenter from Ann Arbor asking Commission to keep an LGBTQ community of interest together in Detroit and Palmer Park), Appx. Vol. VII, Pt. 1 to Def. Supp. Br. in Opp. to Pls. Mot. for Prelim. Inj. (ECF No. 61-9, PageID.1764) (asking Commission not to split a Latino community of interest in Detroit). Nor does the Commission adduce any justification for splitting Dearborn and Dearborn Heights.

CONCLUSION

Plaintiffs respectfully request that this Court grant their requested injunction. The Commission applied its communities of interest criterion in an inconsistent manner and assert justifications that are factually inaccurate and with no neutral rationale presented..

Dated: March 25, 2022

Respectfully submitted,

/s/ Charles R. Spies

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that:

This Brief complies with the word-count limitation of W.D. Mich. LCivR 7.2(b)(i) because this Brief contains 3,002 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: March 25, 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 March 25, 2022.

Dated: March 25, 2022

/s/ Charles R. Spies
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