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' SUPPLEMENTAL RESPONSE MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

SUPPLEMENTAL RESPONSE MEMORANDUM

Plaintiffs' arguments "fail[] to afford appropriate deference to [Michigan's] reasonable exercise of its political judgment." *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 759 (2012). Plaintiffs continue to dress up their policy views as a one-person, one-vote claim, and their contentions concerning Commissioner Eid's declaration are inaccurate.[1]

1. The justification inquiry entails a "flexible" test, "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." *Tennant*, 567 U.S. at 760 (citation omitted). It is undisputed that the first factor (deviation size) and the fourth (available remedies) favor the Commission. Without contest, Plaintiffs are already down two to zero.

2. Plaintiffs are also unlikely to succeed on the remaining two factors.

a. *Consistency*. Plaintiffs allege "glaring inconsistency" in the Commission's communities-of-interest goals. ECF No. 62 at 2 (PageID.1995). They cite three public comments related to three districts (Districts 11, 12, and 13) as their complete Q.E.D. *Id.* at 2–3 & nn. 7–9 (PageID.1995–96). The argument fails twice over.

First, the facts. Three comments regarding three districts is an underwhelming showing. By comparison, the Commission provided a 787-page appendix supporting its communities-of-interest goals and has addressed each and every district in two briefs, the appendix, and the Eid declaration. *See* ECF No. 42-4 (PageID.778–86); ECF No. 42 at 19–22 (Page

[1] Plaintiffs begin not with this case but with assertions regarding other states. ECF No. 62 at 1–2 (PageID.1994–95). Their acknowledgment that states like Rhode Island, West Virginia, and Hawaii, with *smaller* populations than Michigan, have *larger* deviations undermines their cause—if the issue is even relevant, *see Tennant*, 567 U.S. at 6–7 (criticizing lower court for speculating about "the practice of *other* States").

ID.746–48); ECF No. 61 (PageID.1161–1170); ECF Nos. 61-1–61-11 (PageID.1174–1992). Moreover, it is unclear that the comments Plaintiffs cite say what Plaintiffs represent them to say. The link in note 7 contains no meaningful commentary. The comment linked in note 9 urged the Commission to include Dearborn Heights and Dearborn in the same district. *See also* App.547–548 (same comment). The Chestnut plan does that, *see* ECF No. 42-7 at 36 (PageID.885), so this bolsters the Eid declaration, *see* ECF No. 42-4 ¶¶ 26, 28 (PageID.785). Plaintiffs' reference to a small section of the "southern portion of Dearborn Heights" placed in District 13, *see* ECF No. 62 at 4 (PageID.1996), fails to explain why that particular potion of Dearborn Heights is significant. Plaintiffs cite no comment protesting that choice or evidence that "it split an Arab Middle Eastern, North African community." *Id.* at 3.

Second, the law. The Commission had no obligation "to keep together cultural and religious communities who request accommodation." *Id.* The Commission must adopt a plan that "reflect[s] the state's diverse population and communities of interest," expansively defined, Mich. Const. art. 4, § 6(13)(c), not one that achieves every resident's every goal. When the Supreme Court has said that "redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment," *Perry v. Perez*, 565 U.S. 388, 393 (2012), it meant this, *see Tennant*, 567 U.S. at 759; *see also Easley v. Cromartie*, 532 U.S. 234, 250 (2001) (criticizing lower court for "expressing disdain for a process that we have cautioned courts to respect"); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (reiterating that "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating [redistricting] claims"). That discretion embraces determining which comments to incorporate and to what degree.

The consistency element does not override "state legislative policies." *Tennant*, 567 U.S. at 760 (citation omitted). The Commission's communities-of-interest goals achieve "consistency" as to "the plan as a whole," *id.* at 763, because no portion of Michigan, and no district, was neglected. Public comments were received, reviewed, and implemented with respect to all regions, and every district—covering every inch of the State—was crafted to utilize that information in an intensely local appraisal. There is no allegation that the Commission failed to conduct a communities-of-interest analysis with respect to certain regions or that the Commission lumped some residents into "leftover" districts without localized attention. Further, this case is not like *Karcher v. Daggett*, 462 U.S. 725 (1983), where redistricting goals pertaining only to Newark were proffered as the basis for deviations elsewhere in New Jersey. *Id.* at 743–44. Nor is it like those where the Supreme Court has found redistricting goals to be discriminatory, such as where redistricting authorities rigged population deviations to favor some groups with underpopulated districts and burden others with overpopulated districts. *See Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56–57 (1970); *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004). The goals here were even-handed, even if not all citizens agreed with them.

In arguing that, to "be applied consistently," the Commission's communities-of-interest goals must achieve every citizen's request, ECF No. 62 at 3 (PageID.1996), Plaintiffs are actually arguing that the Commission's communities-of-interest goals cannot justify population deviations at all. *But see Abrams v. Johnson*, 521 U.S. 74, 100 (1997) (finding that communities-of-interest goals justified population deviation). It would be impossible to satisfy Plaintiffs' consistency standard because, in redistricting, "various interests *compete* for recognition." *Miller*, 515 U.S. at 914 (emphasis added). If the mere choice between competing interests rendered the choice itself "inconsistent," then no goal could be consistent. Here, for example, if

Plaintiffs were correct that placing a small section of Dearborn Heights in District 13 conflicted with a request to maintain Dearborn and Dearborn Heights in the same district (which, as shown, was actually achieved), the Commission would have been obligated to include some other territory, as Plaintiffs' (abandoned) map does, *see* ECF No. 42-7 at 36 (PageID.885) (splitting Livonia from Dearborn), in conflict with other comments, *see, e.g.*, App. 502 (requesting that Livonia be maintained with Dearborn); App. 551 (similar); App. 240 (similar); App. 243 (similar). *Tennant* does not demand the unattainable.[2] And the record suggests that the Commission accommodated as much of *both* sets of concerns as possible (which proves the virtue in a flexible standard).

b. *Legitimacy*. Plaintiffs do not deny "the importance of the State's interests" in creating districts that reflect communities of interest. *Tennant*, 567 U.S. at 760 (citation omitted). Instead, Plaintiffs contend that "Commissioner Eid's description of what the public requested are often inaccurate and demonstrate a lack of neutrality," ECF No. 62 at 3 (PageID1996), from which they infer his testimony "appears to be a post hoc justification," *id.* at 10 (PageID.2003). Plaintiffs are not likely to show this at trial. For one thing, the time to attack the veracity of Commissioner Eid's attestations (assuming that is what Plaintiffs are doing) has passed. The Court asked the parties "[w]hether limited, expedited discovery before the March 16, 2022, hearing date is desired by any party," ECF No. 55 at 2 (PageID.1127), and the parties, including Plaintiffs, chose to rest their position on the papers, *see* ECF No. 56 at 17 (PageID.1144) ("The Parties have conferred and no Party seeks expedited discovery prior to the hearing on March 16, 2022.") How can Plaintiffs decline to ask for discovery to test Commissioner Eid's declaration and then ask this Court to reject them as post hoc

[2] Indeed, *Tennant* rejects Plaintiffs' position. It was the district court that leveraged the one-person, one-vote principle as a tool to argue against legislative policy. *See Jefferson Cty. Comm'n v. Tennant*, 876 F. Supp. 2d 682, 689–91 (S.D.W. Va. 2012). The Supreme Court addressed and rejected its position. *See* 567 U.S. at 764–65.

inventions at the provisional stage on the papers? Commissioner Eid is a constitutional officer of Michigan entitled to "a presumption of good faith." *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 442 (6th Cir. 2020) (citation omitted).

Plaintiffs' arguments, in any event, do nothing to undermine Commissioner Eid's testimony. As an initial matter, Plaintiffs say nothing of his attestations regarding Districts 1, 5, 7, 8, and 9. Their arguments on the remaining districts fail on the record.

First, concerning District 2, Plaintiffs insist that no public comment "requested a district that included Ionia, Montcalm, Gratiot, and Isabella." ECF No. 62 at 4 (PageID.1997). But numerous public comments asserted that "Gratiot associates with Montcalm and Ionia counties," App. 035, that "there are a lot more ties between Isabella and northern Gratiot," App. 033, that "Gratiot, Isabella, Mecosta and Montcalm counties" share educational interests, App. 034, that "Montcalm County" should be grouped with "Mecosta, Isabella, [and] Gratiot" Counties, App. 036, and so forth, *see* App. 038–039; App. 040; App. 041; App. 042; App. 043. Plaintiffs then insist that "only two residents of Barry County" supported "a district of rural connections," ECF No. 62 at 4 (PageID.1997), but at least five did, including two Plaintiffs cite, *see id.* at 4 n.11, and others, *see* App. 044; App. 045; App. 046. Plaintiffs next allege that those commenters did not "mention[] wanting a district that included Ionia, Montcalm, Gratiot, and Isabella," ECF No. 62 at 4 (PageID.1997), but they stated that Barry County "would go much better with Ionia, Montcalm and Gratiot that are also rural." App. 044. Plaintiffs also cite proposed maps by residents of Kent County, Hillsdale, and Battle Creek which suggest different configurations centered around *their* communities, *see* ECF No. 62 at 4 & nn. 11–14 & cited materials (PageID.1997), but the Commission was justified in looking to the testimony of persons *from Barry County* in deciding where to place Barry County. *See* App. 044 (Barry County resident); App. 045 (same); App. 046 (same).

Second, concerning District 3, Plaintiffs admit that commenters "requested that the Commission draw Grand Rapids and Muskegon together," ECF No. 62 at 5 (PageID.1998), as Commissioner Eid attested, ECF No. 42-4 ¶¶ 8–9. Undeterred, Plaintiffs make a confusing argument based on counting the number of specific comments related to discrete clusters in the MGGG Redistricting Lab heat-map reports.[3] *See* ECF No. 62 at 5 (PageID.1998). That only makes up in convolution what it lacks in relevance. The truth is simple: at least 20 commenters asked that Grand Rapids and Muskegon be in the same district. App. 050; App. 051; App. 052; App. 054; App. 055; App. 056; App. 60; App. 061; App. 072; App. 073; App. 076; App. 077; App. 078; App. 080; App. 081; App. 083; App. 084; App. 085; App. 086; App. 088. Plaintiffs say more than 40 "opposed" this, but they cite only six. ECF No. 62 at 6 & n.20 (PageID.1999). And none actually "opposed" but rather proposed different configurations, often without mentioning Muskegon or Grand Rapids. *Id.* at 6 n.20 & cited materials. Moreover, Plaintiffs' argument that "only three comments asked the Commission to draw all four localities" identified by Commissioner Eid "into one district," *id.* at 5, misses the strong support for the overall configuration, App. 089–103. Nor do the comments cited at note 21 say that "comments request[ed] that the Commission keep the Rockford suburbs within its own communities of interest because they rely on the same services." ECF No. 62 at 6 & n.21 (PageID.1999). They are generic mapping proposals with no reference to "services." *Id.*

Third, concerning District 4, Plaintiffs concede again that Commissioner Eid was accurate in attesting that public commenters "requested that the Commission draw[] Kalamazoo and Battle Creek together," ECF No. 62 at 6 (PageID.1999), and their obstinate challenge to his testimony relies on characterization ("a mere seven") and further convoluted

[3] Plaintiffs focus almost exclusively comments addressed in the MGGG Redistricting Lab's heat-map reports, but those were produced in early September—before more than 17,000 of the total number of comments (i.e., well over half) were received by the Commission. Plaintiffs, then, appear not to be working with the Commission's full record.

breakdowns of comments by heat-map cluster, *id.* Better to keep it simple: the Commission had reason to believe at least 116 members of the public supported drawing Kalamazoo and Battle Creek into one district. App. 104 (two comments); App. 105; App. 106 (two comments); App. 107; App. 108 (two comments); App. 109 (reporting that "over 50 people signed on" to this view); App. 111–19 (seven comments); App. 119 (two comments); App. 120–178 (52 comments). Plaintiffs claim others disagreed, but it is again a mystery where they get their numbers (e.g., their reference to "55 comments" for one cluster cites six, ECF No. 62 at 7 n.28 (PageID.2000)). And many citations do not support Plaintiffs: some commenters (e.g., Bill Rees, Les and Linda Ecklund, Hal Longman, and Starla Witzki) expressed no view on grouping Battle Creek with Kalamazoo, and others (e.g., Mary Anne Charron, Nancy Moran, Bonnie Kazmar, Jill Stout) appear to have lived in rural portions of Calhoun County outside Battle Creek and opposed being included with Kalamazoo. ECF No. 62 at 7 nn.27–28 & cited materials. The Chestnut plan largely accomplishes this by drawing most of Calhoun County into the rural-oriented District 5 and only the more urban Battle Creek into District 4 with Kalamazoo. *See* ECF No. 42-7 at 28–29 (PageID.877–78). Any conflict in views was, besides, the Commission's to resolve.

Fourth, concerning District 6, Plaintiffs contend that "only one comment asked that the Commission draw Novi and Ann Arbor together," ECF No. 62 at 8 (PageID.2001), but that is demonstrably false, *see* App. 239; App. 240; App. 241; App. 242; App. 243; App. 245; App. 246; App. 249; App. 250; App. 253; App. 255; App. 281. What *is* unsubstantiated is Plaintiffs' assertion that "six comments asked that the Commission keep Novi and Ann Arbor separate": they cite just two, one does not mention Ann Arbor, and the other does not mention Novi. *See* ECF No. 62 at 8 n.31 & cited materials (PageID.2001).

Fifth, concerning District 10, Plaintiffs claim that "[n]o comments in Dr. Duchin's report support keeping Rochester Hills and Rochester with Macomb County," ECF No. 62 at 8 (PageID.2002), but comments to the Commission supported including Rochester and Rochester Hills with communities *within* Macomb County, "like Sterling Heights," App. 450, *see also* App. 455, App. 457, "Mt. Clemens," App. 451, and "Shelby Township," App. 456. Plaintiffs concede (as they must, *see* ECF no. 61 at 9–10 (PageID.1169–70)) that "comments mention[] the Chaldean communities," but contend "[n]ot once do these comments mention Rochester and Rochester Hills." ECF No. 62 at 9 (PageID.2002). Not so. *See* App. 456.[4]

Sixth, Plaintiffs are simply wrong in arguing that Commissioner Eid's attestations concerning an LGBTQ community in Royal Oak, Ferndale, and Oak Park lacks support in the public comments. *See* App. 463 ("This submission addresses the concerns of the LGBTQ community in Ferndale, Southfield, Pleasant Ridge, Hazel Park, Oak Park and Huntington Woods."); App. 465 (similar); App. 466–67(similar); App. 518. And, concerning District 12, they argue that "there is a dearth of commentary regarding Livonia." ECF No. 62 at 9 (PageID.2002). That commentary abounds. *See* App. 502–03; App. 551; App. 240; App. 510.

Plaintiffs have no factual or legal basis for an injunction. Commissioner Eid's testimony enjoys enormous record support. Plaintiffs have no alternative map, no evidentiary record, no witness, and no competent evidence. The burden to establish each preliminary injunction factor is theirs. They show none of them. The motion should be denied.

[4] To be sure, some commenters from the Chaldean community appeared to favor the Birch plan. *See, e.g.*, App. 456. But the Birch plan had a population deviation of nearly double the Chestnut plan's deviation. App. 787. This only underscores that there is no basis to believe *any* of Plaintiffs' communities-of-interest assertions would have, if adopted, lowered the total-population deviation—which is why *Tennant* directs the Court to consider "the availability of alternatives," *Tennant*, 567 U.S. at 760 (citation omitted).

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(b)(ii), Counsel for the Commission certifies that this brief contains no more than eight pages, 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: March 25, 2022

/s/ David H. Fink
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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 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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