No. 22-92

In The
Supreme Court of the United States

MICHAEL BANERIAN, *et al.*,
Appellants,
v.

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF MICHIGAN, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Western District of Michigan

REPLY BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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ARGUMENT

Despite filling over a hundred pages, Appellees and Intervenors, collectively, offer barely a third of those pages in defense on the merits of the three-judge court's decision to allow the Commissioners to buck the U.S. Constitution's one-person, one-vote requirement for, at bottom, any reason they prefer (or for no reason at all). Some lob up technicalities regarding this case's current procedural posture without acknowledging that the summary affirmance they request would ossify the Commission's unconstitutional power grab into binding Supreme Court precedent. For their part, the Commissioners dismiss as "small" the twelve-hundred-person difference between Michigan's largest and smallest congressional districts while turning a blind eye to the fact that their map dilutes the votes of two-thirds of the State's ten million citizens. "[T]he right of suffrage can be denied by a . . . dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964), and the Commissioners have done their level best to reanimate the danger leading to that cautionary statement from this Court some fifty years ago.

Emerging from the dust kicked up by the Appellees are these unassailable points: First, there is not a single provision of Michigan law that elucidates or otherwise cabins the definition of "communities of interest," as that phrase is set out in the Michigan constitution. Second, the Commissioners have claimed unreviewable discretion to decide when a community of interest exists, and they have disclaimed any responsibility to apply their (non)definition consistently throughout the State. See ECF No. 42 at 740. And third, the three-

judge court has lent federal-court imprimatur to the Commissioners' practice of relying on this (non)definition to deviate from the U.S. Constitution's "plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964).

The legal question raised by Plaintiffs is both straightforward and profoundly important: If a state draws its congressional voting boundaries in a way that inflates the value of some of its electorate's votes while diluting the value of others, can those malapportioned districts withstand constitutional scrutiny if a federal court has no way to determine whether the imbalances arose from application of both "valid" and "neutral" state interests? *Tennant* v. *Jefferson Cnty. Comm'n*, 567 U.S. 758, 764 (2012) (citing *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983)).[1] The issue remains live; should this Court acquiesce and summarily affirm, then the three-judge court's ill-conceived capitulation of its ability to review state action for federal constitutional compliance becomes this Court's binding precedent.[2] And if the lower court's renunciation

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[1] See also *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2500 (2019) (federal-court review of voting-district boundaries requires "clear, manageable, and politically neutral" criteria).

[2] See *Ill. State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182 (1979) ("[T]he precedential effect of a summary affirmance" extends to "'the precise issues presented'" (quoting *Mandel* v. *Bradley*,

becomes this Court's precedent, it will govern congressional redistricting well beyond the 2030 census for the twenty-one states that already employ a communities-of-interest criterion, as well as any others that may choose to do so over the next decade.

Drawing congressional boundaries will always involve attempts to maximize political power in one direction or another. Article I, Section 2 prevents map drawers from doing so at the expense of "equal representation for equal numbers of people." *Wesberry*, 376 U.S., at 18. In other words, "*absolute population equality*" must remain "the paramount objective." *Karcher*, 462 U.S., at 732 (emphasis added). Retreating from this exacting standard by tolerating population differences based on an indisputably standardless "communities-of-interest" criterion means that map makers will "doubtless strive" for the fudge-factor "rather than equality," *id.*, at 731, comfortable in the assurance that federal courts will not stop them because standardless exercises of discretion are by definition unreviewable.

The Constitution entitles voters to more protection than the three-judge court was prepared to afford them. Michiganders are now relying on this Court's fealty to Article I, Section 2. This Court should either summarily reverse or set this case for argument.

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432 U.S. 173, 176 (1977)); accord, *Hand* v. *Scott*, 888 F.3d 1206, 1208–09 (11th Cir. 2018).

I. THIS CASE REMAINS LIVE.

Acting as the pace setter for transparent (yet meritless) attempts to avoid this Court's review are the Individual Voter Intervenor-Appellees, who argue mootness and (maybe) forfeiture. Worse, their section titled "Appellants Attempt to Raise Issues That Are Not Properly Before This Court" mostly spirals into irrelevant tangents about things like whether the Commission itself is constitutional. The claim Plaintiffs have consistently litigated is live and will remain so. Although they have suffered the irreparable injury of casting their 2022 General Election votes for candidates running in malapportioned districts, they will continue to suffer the same irreparable injury in 2024 (or earlier if special elections for the House are necessary in Michigan) if the Court stays its hand now. And if this Court summarily affirms, the purely legal issue raised in the Appellants' question presented becomes both law-of-the-case and binding U.S. Supreme Court precedent, *Ill. State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182 (1979), governing disposition of this case through final judgment and every one-person, one-vote case in the future until this Court takes action and revitalizes the one-person, one-vote principles set out in *Karcher* and *Tennant*. In other words, the Appellees' mootness/posture arguments fail as a matter of black-letter law and rudimentary logic.

But even if their arguments had any validity, they would still not prevent the Court from addressing the issue now. Without the Court's intervention, the Plaintiffs will suffer the same injury in 2024 or perhaps even earlier. See *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). "Capable of repetition but

evading review" reaches its apex in election-related cases. See *Libertarian Party of Mich.* v. *Johnson*, 714 F.3d 929, 932 (6th Cir. 2013). Congressional elections come every two years. District-court stage election-related claims routinely take longer than that to litigate. See *Davis* v. *FEC*, 554 U.S. 724, 735 (2008).[3] In *Abbott* v. *Perez*, 138 S. Ct. 2305, 2313–19 (2018), it took the district court four years to adjudicate Texas's 2013 congressional maps. And given the definitive way in which the three-judge court in this case resolved the legal question raised by Plaintiffs, it bucks reality to suggest that, after perhaps another four years of litigation, the three-judge court will change its mind. In other words, the same parties currently before the Court will be back before the Court at that point—except another, if not two more, congressional elections will have occurred under the auspices of constitutionally malapportioned districts.

The Court need not ignore the commonsensical desirability to resolve now this tremendously important legal issue. Doing so has the obvious advantage of negating additional infliction of irreparable injury as more congressional elections come to pass. It will also prevent the colossal waste of judicial resources that will arise if the three-judge panel spends years litigating this case, only to have a poison-pill legal issue render untold hours of work nothing but sunk costs.

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[3] Just last month, a district court resolved a challenge to a Georgia election law that had been filed almost four years earlier. See *Fair Fight Action, Inc.* v. *Raffensperger*, No. 1:18-CV-5391-SCJ, 2022 U.S. Dist. LEXIS 179889 (N.D. Ga. Sep. 30, 2022).

Plaintiffs have never suggested that the 2022 Elections represent the alpha and omega of their irreparable injuries. The same harm will recur every time the State of Michigan holds a regular or special congressional election with the current, malapportioned boundaries. Unless the Court acts now, Michigan will proceed to hold more congressional elections using the current, malapportioned boundaries. And despite the Appellees' lamentations to the contrary, this Court has already agreed with Plaintiffs in similar cases. See, e.g., *WRTL II*, 551 U.S., at 462 (finding challenge to BCRA for the 2006 election not moot even though 2004 election had passed).

Commissioners last try to dodge the merits by asserting that the jurisdictional statement did not present a question that resolves this case. See Mot. of Comm'rs 18. That is simply incorrect. *Tennant*, as here, involved an interlocutory appeal from a three-judge district court's preliminary injunction decision. This Court reversed the lower court's order enjoining the implementation of congressional map because "the District Court misapplied the standard for evaluating such challenges set out in *Karcher* [], and failed to afford appropriate deference to West Virginia's reasonable exercise of its political judgment." *Tennant*, 567 U.S., at 759 (citation omitted). Therefore, misapplication of the *Karcher* standard or misapplication of deference to States are independent, reversible errors, and reversible even at the preliminary interlocutory appeal stage. Plaintiffs have consistently argued that finding Michigan justified under COI was such an error. See Juris. Statement 2. The question presented in the Jurisdictional Statement is, then, dispositive for

this appeal of a denial of a preliminary injunction, contra Mot. of Comm'rs 18.

II. THE DISTRICT COURT ERRED BY DEFERRING TO MICHIGAN'S CONSTITUTIONALLY ABNORMAL EMPLOYMENT OF THE "COMMUNITIES OF INTEREST" CRITERION.

Before the three-judge court's deviation, one-person, one-vote jurisprudence was relatively uncomplicated. The Court's pronouncements have been unequivocal: "[T]he constitutional guarantee of one person, one vote under Article I, § 2 . . . . [requires that] 'absolute population equality [be] the paramount objective.'" *Abrams* v. *Johnson*, 521 U.S. 74, 98 (1997) (quoting *Karcher*, 462 U.S., at 732)). Any deviation triggers a two-step burden-shifting inquiry: (1) if the challengers show that the deviations could have practicably been avoided; (2) then the State must "'show with some specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" *Tennant*, 567 U.S., at 760.

As best as the Plaintiffs can tell,[4] none of the Appellees or Intervenors argue that the deviations could

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[4] It's not clear whether the Commissioners intend to rely on some off-the-cuff oral-argument remarks to revive a *Karcher* Step 1 argument that they have otherwise plainly conceded. If they are trying to do so, they have failed. As an initial matter, the three-judge court assumed that the Plaintiffs carried their *Karcher* Step 1 burden, and the Commissioners did not cross-appeal. Or perhaps the Commissioners are referring to the exemplar map in the Step 2 context, which itself would wrongly imply the Plaintiffs have

not have been avoided (practically or otherwise). What remains—the question presented here—is whether Michigan bore its burden of justifying "with particularity" the nearly twelve-hundred-person difference between its most populous and least populous congressional districts. *Karcher*, 462 U.S., at 739–40. This Court has insisted that a State do so based on "consistently applied legislative policies" that are "consistent with constitutional norms." *Id*. The three-judge court allowed the State to do so based on a districting criterion (communities of interest) that cannot be examined for neutral application.[5] This legal error requires correction.

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the burden at *Karcher* Step 2. In any event, Plaintiffs have consistently crafted their arguments using their exemplar map and continued to do so in post-argument briefing. See, e.g., ECF No. 62 at 3; ECF No. 65 at 2; see also *Fed. Express Corp.* v. *Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 967 (6th Cir. 1991) (disregarding concession at oral argument where post-argument briefing retracted the concession and party had consistently made an argument). Whatever the Commissioners intend to do with this line of argument, the Court should see it for what it is—another ill-fated attempt to distract from a faulty three-judge court legal ruling.

[5] In fact, the District Court below dismissed other claims advanced by Plaintiffs about communities of interest arguments, essentially concluding they were a standardless criterion not susceptible to review by a federal court. *Banerian* v. *Benson*, No. 1:22-cv-54, 2022 U.S. Dist. LEXIS 38188 (W.D. Mich. Mar. 4, 2022).

Distilled to its core, the Commissioners' argument is that (1) under *Tennant*, some variations can be justified based on neutrally applied traditional redistricting criteria and (2) in *Bethune-Hill* v. *Virginia State Board of Elections*, the Court recognized that consideration of communities of interest might be a valid redistricting consideration. 580 U.S. 178, 183 (2017). Those two points are both true and utterly irrelevant for purposes of this case. The abyss between the Commissioners' argument and the correct view of this Court's one-person, one-vote jurisprudence is the *neutrally applied* qualifier—i.e., the standard that allows a federal court to conclude whether a variance is constitutionally justified.

By virtue of Article I, Section 2, federal courts must assess one-person, one-vote challenges. And this Court has placed beyond peradventure the notion that federal-court review of *any* redistricting challenges requires "clear, manageable, and politically neutral" criteria. *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2500 (2019). *That's* what is missing here. And *that's* the chasm that the Commissioners have never once tried to fill.

Trotting out the preliminary-injunction record does nothing but prove the futility of the Commissioners' position. Constitutional adjudication does not, nor has it ever, devolved to the sort of public-comment nose-counting that, according to the Commissioners, show that "the Commission's goals [are] ascertainable and [the district court] in fact ascertained them." Opp. 28. They make no attempt to explain why "more than 40 public comments of residents stating that 'Grand Rapids and Muskegon have similar concerns'" justifies otherwise unconstitutional vote dilution, nor

could they. If a court is to assess whether the Commission applied the communities-of-interest criterion neutrally and non-arbitrarily, then a results-oriented search for public comments has no more talismanic value than, say, perusing Facebook to see how many followers "like" a particular media market's local weatherman, or using a heat map to show which neighborhoods have the greatest concentration of subscribers to a teenage influencer's Tik-Tok channel.

This isn't how law is done. It does, however, necessarily follow from the test adopted by the district court and advanced by the Commissioners here. Both adhere to the notion that, so long as the Commissioners give *some* reason why a community of interest exists, deference commands that the court allow maintenance of that alleged COI to trump Article I, Section 2's "paramount objective"—i.e., "absolute population equality." *Karcher*, 462 U.S., at 732 (emphasis added).

To be certain, the Plaintiffs are not asking for a "new standard." The Commissioners' accusation that this is a "novel theory," Mot. of Comm'rs 31, is simply incorrect. Prohibitions against arbitrariness and inconsistency have been in the case law since the beginning. Consistency with "constitutional norms" has been the watchword of this Court's one-person, one-vote jurisprudence since the Johnson Administration. Arbitrary application, in turn, is anathema to any notion of "constitutional norms."

"[C]lear, manageable, and politically neutral" criteria offers the only enforceable standard that allows courts to serve as sentinels against arbitrariness. *Rucho*, 139 S. Ct., at 2500. The "readily ascertainable" standard is no more than a shorthand for what this

Court has recognized repeatedly. Adherence to "readily ascertainable" criteria is why *Tennant* and *Abrams* came out the way they did—*not*, as the Commissioners would have it, because the deviations in those cases were "small" or because a quasi-legislative body shrieked "deference!" The decisions in *Tennant* and *Abrams* also relied upon the fact that the communities of interest in both cases were so longstanding that they justified the small population deviations. The Commissioners here, to the contrary, acknowledge the communities-of-interest criterion came about in response to a "quite recent episode of Michigan's history." Mot. of Comm'rs 23.

It bears reiterating the long-reaching effect that the three-judge court's legal determination will have if this Court exalts it with a summary affirmance. States all over the country have begun using arbitrary and unascertainable communities-of-interest criteria to construct their congressional maps. See, e.g., Ariz. Const., Art. IV, pt. 2, § 1(14)(D) (requiring independent redistricting commission to use entirely undefined communities-of-interest criterion for congressional redistricting); Cal. Const., Art. XXI, § 2(d)(4) (not limiting, as in Michigan, what independent redistricting commission may define as communities of interest). And that is no surprise: "If state legislators knew that a certain *de minimis* level of population differences was acceptable, they would doubtless strive to achieve that level rather than equality." *Karcher*, 462 U.S., at 731.

This Court should not incentivize other jurisdictions to follow Michigan's lead. Resolving this issue now is both procedurally proper and eminently prudent. Declining to do so will not only create a massive

waste of judicial resources but ensure that the three-judge court's decision will lie around like a loaded gun for the next set of map drawers to erode Article I, Section 2's "plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry*, 376 U.S., at 18.

CONCLUSION

For all these reasons, this Court should either summarily reverse the decision of the three-judge court below or note probable jurisdiction.

October 14, 2022 Respectfully submitted,

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