UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al.*, Plaintiffs v. JOCELYN BENSON, in her official capacity as Secretary of State of Michigan, *et al.*, Defendants	**Case No. 1:22-CV-00054-PLM-SJB** Circuit Judge Raymond Kethledge District Judge Paul L. Maloney District Judge Janet T. Neff

INTERVENOR-DEFENDANT VOTERS NOT POLITICIANS'
PARTIAL MOTION TO DISMISS

Intervenor-Defendant Count MI Vote d/b/a Voters Not Politicians (hereinafter, "VNP") respectfully moves this Court to dismiss Count II of Plaintiffs' First Amended Complaint ("FAC") (PageID.57-77) pursuant to Fed. R. Civ. P. 12(b).

As explained further in the accompanying brief, Plaintiffs' FAC in this case asks this Court to render judgment against state government officials based on an alleged violation of state law by attempting to smuggle those state law claims into a purported federal claim they have wholly invented, with no basis in law or fact. This Court lacks jurisdiction to render such a judgment and should dismiss Plaintiffs' Count II pursuant to Rule 12(b)(1). *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)

Alternatively, even if Plaintiffs' Count II were not barred by *Pennhurst*, they have still failed to adequately state even the bare minimum allegations to establish a denial or infringement of any rights guaranteed under the Equal Protection Clause of the 14th Amendment. Because Plaintiffs have failed to state a claim upon which relief can be granted, this Court should dismiss Plaintiffs' Count II pursuant to Rule 12(b)(6).

Wherefore, Intervenor-Defendant VNP respectfully requests that this Court dismiss Count II of Plaintiffs' FAC for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or, in the alternative, for failure to state a claim pursuant to Rule 12(b)(6).

Dated: February 11, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Western District of Michigan by using the CM/ECF system on February 7, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the using the CM/ECF system.

February 11, 2022

/s/ Andrew M. Pauwels
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INTERVENOR-DEFENDANT VOTERS NOT POLITICIANS'
BRIEF IN SUPPORT OF PARTIAL MOTION TO DISMISS

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INTRODUCTION

For the reasons stated herein, Intervenor-Defendant Count MI Vote d/b/a Voters Not Politicians (hereinafter, "VNP") respectfully moves this Court to dismiss Count II of Plaintiffs' First Amended Complaint ("FAC") (No. 7, PageID.57-77) for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

Count II of Plaintiffs' FAC improperly asks this Court to render a judgment against state officials based upon state law, in violation of the State of Michigan's immunity from such judgments in federal court under the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-101 (1984). The court lacks jurisdiction to entertain such a claim. Alternatively, Count II of Plaintiffs' FAC fails to state a cognizable claim under the Equal Protection Clause of the Fourteenth Amendment, and should be likewise dismissed on that basis.

STATEMENT OF MATERIAL FACTS

Michigan's Independent Citizens Redistricting Commission

Proposed Intervenor-Defendant VNP was the drafter and chief sponsor of Proposal 18-2 (the "Amendment"), which called for an amendment to the Michigan Constitution "to establish a commission of citizens with exclusive authority to adopt district boundaries for the Michigan Senate, Michigan House of Representatives, and U.S. Congress." *See Daunt v. Benson*, 999 F.3d 299, 303 (6th Cir. 2021). On November 6, 2018, Michigan voters overwhelmingly voted in favor of Proposal 18-2, and the Michigan Constitution was amended effective December 22, 2018, to establish the Michigan Independent Citizens Redistricting Commission (the "Commission") and set forth new redistricting criteria for the Commission to use when drawing legislative and Congressional districts. *Id*. at 304; *see also* 2018 Michigan Election Results, MICHIGAN DEP'T OF

STATE, Nov. 26, 2018, https://mielections.us/election/results/2018GEN_CENR.html (visited Feb. 5, 2022).

The Michigan Constitution, as amended by Proposal 18-2, establishes the Commission as a "permanent commission in the legislative branch" composed of thirteen members. Mich. Const. Art. IV § 6. The Amendment also sets forth the selection process and criteria for the commissioners, four of whom each are affiliated with one of the two major political parties, and five of whom are not affiliated with either party. *Id*. § 6(2). The Commission's work, including the cost of any legal defense of an adopted plan, is entirely funded by the State through legislative appropriations of funds from the state treasury. *Id*. §§ 6(5)-(6).

The Amendment also established the following criteria for the Commission's use in developing and adopting new redistricting plans, in order of priority:

> (a) Districts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws.
>
> (b) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.
>
> (c) 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.
>
> (d) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.
>
> (e) Districts shall not favor or disfavor an incumbent elected official or a candidate.
>
> (f) Districts shall reflect consideration of county, city, and township boundaries.

(g) Districts shall be reasonably compact.

Id. § 6(13).

Before adopting a plan, "the [C]ommission shall ensure that the plan is tested, using appropriate technology, for compliance with the criteria described above." *Id*. § 6(14)(a). The Commissioners are directed to perform their duties "in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process." *Id*. § 6(10).

The 2020 Redistricting Cycle

The U.S. Census Bureau released the 2020 Census Redistricting Data (Pub. L. 94-171) Summary File to states and the public on September 16, 2021. *See* Press Release, *Census Bureau Delivers 2020 Census Redistricting Data in Easier-to-Use Format*, U.S. CENSUS BUREAU, Sept. 16, 2021, https://www.census.gov/newsroom/press-releases/2021/2020-census-redistricting-data-easier-to-use-format.html (visited Feb. 5, 2022). According to the 2020 Census, Michigan has a total population of 10,077,331 persons. *Quick Facts: Michigan*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/MI (visited Feb. 5, 2022). Based on that count, Michigan was apportioned 13 congressional districts. *2020 Census: Apportionment of the U.S. House of Representatives*, U.S. CENSUS BUREAU, April 26, 2021, https://www.census.gov/library/visualizations/2021/dec/2020-apportionment-map.html (visited Feb. 5, 2022).

Following the release of the 2020 Census data by the Bureau, the Commission held its first public meeting over two days on September 17-18, 2020. *See* Approved Minutes of September 17, 2020 Meeting, MICHIGAN INDEP. CITIZENS REDISTRICTING COMM'N, https://www.michigan.gov/documents/sos/Approved_9_17_AND_9.18__ICRC_Mins_711693_7.pdf (visited Feb. 5, 2022). The Commission continued to meet at least monthly (and often, more

frequently) following that initial meeting, with the most recent meeting occurring on January 27, 2022. Meeting Notices and Materials, MICHIGAN INDEP. CITIZENS REDISTRICTING COMM'N, https://www.michigan.gov/micrc/0,10083,7-418-106525---,00.html (visited Feb. 5, 2022). On December 28, 2021, the Commission adopted the "Chestnut" plan for Congressional districts, which is available at https://michigan.mydistricting.com/legdistricting/comments/plan/279/23 (visited Feb. 5, 2022).

Procedural History

On January 20, 2022, Plaintiffs filed their Complaint in the instant case, challenging the Congressional district map adopted by the Commission for alleged Constitutional deficiencies. (No. 1). On January 27, 2022, Plaintiffs filed their First Amended Complaint ("FAC"), (No. 7), which contains two counts. Count I of Plaintiffs' FAC alleges that the Congressional district map violates the "one person, one vote" standard articulated by the U.S. Supreme Court in *Wesberry v. Sanders*, 376 U.S. 1 (1964). (PageID.71-72). Count II alleges that the Commission failed to apply the correct redistricting criteria as set forth in the Michigan Constitution, which Plaintiffs purport is a violation of the Equal Protection Clause of the Fourteenth Amendment. (*Id*., PageID.72-76). Plaintiffs' FAC seeks a declaration from this Court that the Congressional plan violates the "one person, one vote" principle and the Fourteenth Amendment's Equal Protection Clause, as well as injunctive relief that, *inter alia*, prohibits Defendants from holding congressional elections using the adopted map and requires the Commission to redraw the Congressional map by a court-appointed deadline. (*Id*., PageID.76-77). Concurrently with the FAC, Plaintiffs filed a motion with this Court seeking "entry of a preliminary injunction prohibiting Defendants from holding any elections using the Michigan congressional districts recently adopted by the Michigan Independent Citizens Redistricting Commission." (No. 9, PageID.94).

On February 2, 2022, a group of Michigan voters moved to intervene as Defendants in this case. (No.16). Their Motion remains pending. On February 4, 2022, Plaintiffs filed a motion to expedite consideration of their motion for preliminary injunction. (No. 20).

LEGAL STANDARD

Rule 12(b)(1) permits a defendant to move to dismiss a claim for "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). It is a well-established principle that, under the Eleventh Amendment, federal courts lack jurisdiction to enjoin state officials on the basis of state law. *See Gati v. Western Ky. Univ.*, 762 F. App'x 246, 253 (6th Cir. 2019) (citing *Pennhurst*, 465 U.S. at 98-101). When a complaint raises multiple claims, the court "must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Gati*, 762 F. App'x at 253.

Pursuant to Rule 12(b)(6), a claim may be dismissed for "failure to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). To defeat a motion to dismiss under Rule 12(b)(6), the complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 570 (2007). When considering a motion to dismiss, the court views the complaint in the light most favorable to the plaintiff, accepting as true all well-pled factual allegations and drawing all reasonable inferences in favor of the plaintiff. *Gavitt v. Born*, 835 F.3d 623, 639–40 (6th Cir. 2016). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

In their efforts to undermine the Commission's authority to draw fair Congressional maps for the State of Michigan—and thereby undermining the will of the People of Michigan who

established the Commission by enacting Proposal 18-2 at the ballot box—Plaintiffs have invented a claim that is entirely without merit or basis in federal law. Instead, they attempt to advance half-baked arguments premised wholly on state law by disguising them in the trappings of the Equal Protection Clause to sneak them into federal court. This wholly invented "federal" claim is barred by Eleventh Amendment immunity and should be dismissed for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), or in the alternative, for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. The Eleventh Amendment Bars the Court's Consideration of Count II

This Court lacks jurisdiction to enjoin state officials on the basis of state law violations under the Eleventh Amendment. *See Pennhurst*, 465 U.S. 98-101. In their FAC, Plaintiffs allege an Equal Protection violation based entirely on the Commission's alleged failure to comply with the redistricting criteria set forth in the Michigan Constitution. (No. 7, PageID.72-126). Because the Commission is an arm of Michigan's legislative branch, it is entitled to Eleventh Amendment immunity, which neither Congress nor the State have waived in this context. As such, this Court should dismiss Count II for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

A. *Count II is Based Entirely on Purported Violations of Michigan State Law.*

Despite their invocation of the language of the Equal Protection Clause of the Fourteenth Amendment, Plaintiffs' Count II is premised entirely on the Commission's alleged violations of the Michigan Constitution and Michigan law. In their FAC, Plaintiffs allege that the Commission "applied the Michigan constitutional criteria in an inconsistent and arbitrary manner." (No. 7, PageID.74 ¶ 108). Specifically, Plaintiffs assert that the Commission "fail[ed] to comply with or properly apply" four of the enumerated redistricting criteria in the Michigan Constitution when

adopting the Congressional district plan. (*Id.*, PageID.74 ¶ 109). Although Count II of Plaintiffs' FAC is replete with citations to Michigan's Constitution, (*see generally id.*, PageID.72–76 ¶ 97–126), it contains no reference to any caselaw or other legal authority suggesting that a state agency's alleged failure to comply with state constitutional requirements constitutes a violation of the Equal Protection Clause—nor could it. Such claims are barred by longstanding Supreme Court and Sixth Circuit precedent. "Federal courts are simply not open to such state law challenges to official state action, absent explicit state waiver of the federal court immunity found in the Eleventh Amendment, irrespective of the type of relief sought." *Gati*, 762 F. App'x at 253 (citing *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 521 (6th Cir. 2007)). Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 360–61 (6th Cir. 2008) (quoting *Pennhurst*, 465 U.S. at 106).

B. *Defendants are Entitled to Eleventh Amendment Immunity.*

When an action is brought against a public agency or institution (or its officers acting in their official capacity), the question of whether Eleventh Amendment immunity applies "turns on whether said agency or institution can be characterized as an arm or alter ego of the state, or whether it should be treated instead as a political subdivision of the state." *Hall v. Medical Coll. of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). In *Hall*, the Sixth Circuit recognized that the most important factor in making such a determination is whether a judgment, if obtained, would be paid out of the state treasury. 742 F.2d at 304.

As set forth above, the Commission is a "permanent commission in the legislative branch" of the State of Michigan. *See* Mich. Const. Art. IV § 6(1). The Commission is entirely funded by

legislative appropriations out of the state treasury, including the provision of "adequate funding to allow the commission to defend any action regarding an adopted plan." Mich. Const. Art. IV §§ 6(5)-(6). As an arm of Michigan's legislative branch funded entirely by the state treasury, the Commission is clearly entitled to Eleventh Amendment immunity.

C. *Neither the State nor the Commission Have Waived Immunity.*

Regardless of the form of relief requested, the states (and their departments and agencies) are immune under the Eleventh Amendment from suit in federal court, unless the state has waived immunity or Congress has expressly abrogated Eleventh Amendment immunity by statute. *Brock v. Mich. State. Univ.*, No. 1:21-cv-436, 2022 WL 178681, at *2 (W.D. Mich. Jan. 20, 2022). Congress has not expressly abrogated Eleventh Amendment immunity by statute generally, *Quern v. Jordan*, 440 U.S. 332, 341 (1979), nor has the State of Michigan consented to civil rights suits in federal court. *See Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986).

Neither the State nor Congress have issued an explicit waiver of sovereign immunity such that the Commission would be subject to federal jurisdiction for a claim based in state law. Thus, this Court is without jurisdiction to entertain Plaintiffs' request for an injunction instructing the Commission on the requirements of the Michigan Constitution and Michigan law. *See Experimental Holdings*, 503 F.3d at 521. Indeed, the Michigan Constitution provides the Michigan Supreme Court with original jurisdiction to "direct the secretary of state or the commission to perform their respective duties . . . review a challenge to any plan adopted by the commission, and . . . remand a plan to the commission for further action if the plan fails to comply with the requirements of [the Michigan] constitution, the constitution of the United States, or superseding federal law." Mich. Const. art. IV § 6(19). Count II must be dismissed under Rule 12(b)(1).

II. Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted

A. *Plaintiffs' Count II Fails to State a Federal Claim for Relief.*

When considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), courts must "construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true, and examine whether the complaint contains 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 793 (6th Cir. 2016) (quoting *Iqbal*, 556 U.S. at 678). Critically, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

As explained in further detail in Section I.A above, Plaintiffs' Count II is based entirely on allegations involving state law, with only cursory references to the Fourteenth Amendment and § 1983. To state a claim under the Equal Protection Clause in the Sixth Circuit, "a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." *Katz v. Village of Beverly Hills*, 677 F. App'x 232, 237 (6th Cir. 2017) (citing *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990)). Plaintiffs allege no membership in a protected class, nor have they alleged intentional discrimination or disparate treatment on the basis of a suspect classification.

Nor do they refer to any standard for Equal Protection violations in the redistricting context that would entitle them to relief in federal court. *Cf. Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (holding that a redistricting plan violates the Equal Protection Clause when districts substantially deviate from equal population requirements); *Shaw v. Reno*, 509 U.S. 630, 910–12 (1993) (holding that a redistricting plan violates the Equal Protection clause when a state impermissibly uses race to draw district lines). They merely assert that the Commission's application of the state

constitutional redistricting criteria was arbitrary and inconsistent, and therefore violated the Equal Protection Clause. (No. 7, PageID.75-76 ¶¶ 121–125). This perfunctory citation to the Fourteenth Amendment is precisely the kind of "threadbare recital[] of the elements of a cause of action, supported by mere conclusory statements" prohibited by the Supreme Court in *Iqbal*. 556 U.S. at 678.

B. *Even if Plaintiffs Had Articulated a Cognizable Federal Claim, Count II Fails to State a Claim that the Commission Violated the Michigan Constitution.*

Even if the purported violations of state law in Plaintiffs' FAC could constitute a federal claim, Plaintiffs have failed to state a sufficient claim that the Commission violated the Michigan Constitution.

In Count II, Plaintiffs allege that the Commission "applied the Michigan constitutional criteria in an inconsistent and arbitrary manner." (No. 7, PageID.74 ¶ 108). Plaintiffs further allege that the Commission applied the criteria "out of the order of priority mandated by the Michigan Constitution." (*Id.* at PageID.75 ¶ 123). In support of these allegations, Plaintiffs argue that the Commission failed to correctly apply the "communities of interest" criterion by splitting counties, cities, and townships across multiple Congressional districts. (*Id.* at PageID.74–75 ¶¶ 114-118). But in doing so, Plaintiffs improperly conflate multiple constitutional criteria and subvert the order of priority that Michigan voters adopted when they amended their state's constitution in 2018.

The Michigan Constitution sets forth the following criteria that the Commission must use when drawing new electoral maps, in the priority in which they must be used.

> (a) Districts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws.
>
> (b) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.
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> (c) 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

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> (f) Districts shall reflect consideration of county, city, and township boundaries.
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> (g) Districts shall be reasonably compact.

Mich. Const. art. IV § 6(13).

Notably, the requirement that the Commission protect communities of interest is a distinct criterion from the consideration of existing political boundaries. *Id.* Protecting communities of interest is the third criterion in order of priority, and maintenance of county, city, and township boundaries is the sixth criterion—only geographic compactness is a lower priority criterion. *Id.* Plaintiffs' attempt to conflate communities of interest with Michigan's existing internal political subdivisions is expressly contravened by the language of the Michigan Constitution. (*See* No. 7, PageID.75 ¶¶ 116–117). Even if their allegations were taken as true, Plaintiffs' grievance appears to be that the Commission followed the instructions in the Michigan Constitution in the priority in which they were written—a priority they merely disagree with. But Plaintiffs' displeasure with the redistricting criteria in the Michigan Constitution hardly renders the Commission's adherence to those criteria "inconsistent or arbitrary," and certainly does not form the basis of a violation of the Michigan Constitution or federal law.

CONCLUSION

For the foregoing reasons, Intervenor-Defendant VNP respectfully requests that this Court dismiss Count II of Plaintiffs' First Amended Complaint.

Date: February 11, 2022

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I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Western District of Michigan by using the CM/ECF system on February 11, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the using the CM/ECF system.

February 11, 2022

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CERTIFICATE OF COMPLIANCE
WITH LCivR 7.2(b)(ii)

Pursuant to Local Rule 7.2(b)(ii), I hereby certify that this document was prepared using Microsoft Word, and that the word count for this document as provided by that software is 3,268, which is less than the 10,800-word limit for a brief filed in support of a dispositive motion.

Dated: February 11, 2022

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