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 BRIEF TO INTERVENOR-DEFENDANTS VOTERS NOT POLITICIANS' MOTION TO DISMISS

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INTRODUCTION

In attempting to shoehorn themselves into a position to assert a sovereign immunity defense, Intervenor-Defendants, Voters Not Politicians ("VNP"), twist and contort Plaintiffs' claim so that it is unrecognizable and, ultimately, is unconnected to the pleading. VNP coils what is a standard federal equal protection claim into a policy difference over a state constitutional amendment. Thus, for VNP, either sovereign immunity bars Plaintiffs' second count or Plaintiffs' second count fails to state a claim.

But as a private non-profit corporation, no amount of contortionist actions will permit VNP to assert a defense that belongs solely to the Secretary of State and the Commissioners of the Michigan Citizens Independent Redistricting Commission ("MCIRC" and collectively the "State Defendants"). Furthermore, Plaintiffs do indeed state a claim that the State Defendants' actions violated the Fourteenth Amendment's Equal Protection Clause. The North Star of the Equal Protection Clause is that when taking state action, state actors must treat people equally and not arbitrarily or inconsistently. Plaintiffs' Count 2 alleges that in crafting Michigan's congressional redistricting maps, the State Defendants have arbitrarily and inconsistently applied Michigan's State Constitution's traditional redistricting criteria and therefore harmed Plaintiffs' fundamental right to vote. This arbitrary and inconsistent treatment demonstrates the equal protection violation. Plaintiffs bring a straightforward federal equal protection claim against state officials in federal court for redress of federal law violations.

This Court should therefore deny the Intervenor-Defendants' Motion to Dismiss.

STANDARD OF REVIEW

When analyzing the sufficiency of a complaint against a motion to dismiss for failure to state a claim, this Court construes "the complaint in the light most favorable to the plaintiff[s],

accept[s] its allegations as true, and draw[s] all reasonable inferences in favor of the plaintiff[s]." *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538-39 (6th Cir. 2012) (citation omitted). Plaintiffs are required only to provide a "short and plain statement of the claim showing that the [Plaintiffs are] entitled to relief." Fed. R. Civ. P. 8(a)(2). Therefore, the complaint must contain either "direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Handy-Clay*, 695 F.3d at 538 (citation omitted). To survive a motion to dismiss, all Plaintiffs must show is that their claims are not merely speculative, but plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The claims do not need to rise above the level of plausible to persuasive. *Handy-Clay*, 695 F.3d at 548. Nor does the plausibility requirement rise to the level of probability. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs are therefore not required to provide detailed factual allegations. *Twombly*, 550 U.S. at 555.

All that Plaintiffs must do at this stage of the proceedings is plead sufficient factual matter that allows this Court "to draw the reasonable inference" that the Defendants are "liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663. The threshold to survive a motion to dismiss is low because an appellate court affirms dismissal of a complaint only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Handy-Clay*, 695 F.3d. at 538 (citation omitted).

Generally, this deferential standard also governs this Court's review of a motion to dismiss under Fed. R. Civ. P. 12(b)(1). *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1045 (6th Cir. 2015). This Court does not, however, "presume the truth of factual allegations" that concern the Court's jurisdiction. *See id*. And although it is the Plaintiffs' burden to prove jurisdiction, *id*, it is VNP's burden to prove it is entitled to the personal privilege of sovereign immunity. *See, e.g.*, *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2262 (2021); *Heike v. Guevara*, 654

F. Supp. 2d 658, 668 (E.D. Mich. 2009) (stating that the defendant raising the sovereign immunity defense "has the burden to show that it is entitled to immunity") (citing *Gragg v. Ky Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002)). Ultimately, the burden to prove that this Court has jurisdiction at the pleadings stage is light. *See Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992). The burden imposed on a plaintiff to prove jurisdiction depends on the stage of litigation. *Id*. And at the pleading stage "general factual allegations of injury resulting from the defendant's conduct may suffice[.]" *Id*. This is because when reviewing a motion to dismiss for lack of jurisdiction, courts still presume that a plaintiff's "general allegations embrace those specific facts that are necessary to support the claim." *Id*. (internal quotation marks and alterations omitted).

ARGUMENT

Voters Not Politicians' ("VNP") major premise—that Plaintiffs have brought a state-law claim against State Defendants in federal court—leads VNP to mistakenly conclude that Plaintiffs' second count is barred by sovereign immunity. *See* VNP Mot. to Dismiss at 6-7 (ECF No. 32, PageID 472-473). But VNP's sovereign immunity defense fails for two reasons: *First*, VNP lacks the capacity to raise the sovereign immunity defense; *second*, Plaintiffs' second count raises a straightforward *federal* equal protection claim against Michigan's state officers in federal court to restrain violations of federal law. This is permissible under *Ex Parte Young*.

Plaintiffs have indeed raised a viable equal protection claim. They have alleged that the Commissioners applied Michigan's traditional redistricting criteria in an arbitrary and inconsistent manner that burdened Plaintiffs' fundamental right to vote. Accordingly, this Court should deny VNP's Motion to Dismiss.

I. VNP LACKS THE CAPACITY TO RAISE THE AFFIRMATIVE DEFENSE OF SOVEREIGN IMMUNITY.

Although the assertion of sovereign immunity is jurisdictional, it is fundamentally different from assertions that a Court lacks subject matter jurisdiction under Article III of the Constitution. In a certain sense, sovereign immunity is more akin to personal jurisdiction—waivable and the Court is not required to raise it—than subject matter jurisdiction.

Article III of the U.S. Constitution places limits on federal court jurisdiction. Federal courts are limited to hearing cases and controversies. *See Fialka-Feldman v. Oakland Univ. Bd. of Trs*., 639 F.3d 711, 713 (6th Cir. 2011). Accordingly, when a live case or controversy does not exist, the federal court lacks jurisdiction. *See id*. at 713-14. "No party need assert the defect. No party can waive the defect, or consent to jurisdiction." *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (citation omitted). Furthermore, "[n]o court can ignore [a jurisdictional] defect; rather a court, noticing the defect, must raise the matter on its own." *Id*.

By contrast, "while the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, the defense is not coextensive with the limitations on judicial power in Article III." *Nair v. Oakland Cnty. Cmty. Mental Health Auth.*, 443 F.3d 469, 474 (6th Cir. 2006) (quotation omitted). Rather, the Eleventh Amendment "grants the State a legal power to assert a sovereign immunity defense *should it choose to do so*." *Schact*, 524 U.S. at 389 (emphasis added). Importantly, the State, if it so chooses, may waive the defense. *Id*; *see also Nair*, 443 F.3d at 476 ("The most salient difference between sovereign immunity and subject-matter jurisdiction is that the former may be altered by the parties' litigation conduct while the latter may not be."). Because the State may waive the defense, this Court can ignore the issue. *Schact*, 524 U.S. at 389; *see also Heike*, 654 F. Supp. 2d at 668 (stating that the defendant raising the sovereign

immunity defense "has the burden to show that it is entitled to immunity") (citing *Gragg*, 289 F.3d at 963).

In other words, the immunity "promised by the Eleventh Amendment must be proved by the party that asserts it and *would benefit from its acceptance*." *Gragg*, 289 F.3d at 963 (emphasis added) (quoting *ITSI TV Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993)). Indeed, a defendant seeking Eleventh Amendment immunity must show that it was an arm of the state. *Id*. (citing *Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000)). Put more bluntly, the Eleventh Amendment vests *states* with this affirmative defense, and because *states* may waive it, sovereign immunity can be raised only by *states*. *See Gragg*, 289 F.3d at 963 (holding that purported government agencies failed to satisfy their burden to prove they were entitled to sovereign immunity defense because "defendants have pointed to nothing in the record, and we have been unable to find anything in the record, that would establish that they are arms of the state entitled to . . ." sovereign immunity); *see also Nair*, 443 F.3d at 476 (stating that only the state's litigating conduct may alter the sovereign immunity defense). The affirmative defense of sovereign immunity, therefore, is not one that a non-profit corporation can raise. *See Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 32-33 (1994) (concluding that the Port Authority Trans-Hudson Corporation is not an organ of the State and therefore does not qualify for the Eleventh Amendment immunity "that a State enjoys"); *see also PennEast Pipeline Co., LLC*, 141 S. Ct. at 2262 ("[T]he Eleventh Amendment . . . confer[s] a personal privilege which a State may waive at pleasure.") (quotation omitted). In fact, even though a charitable organization might perform functions that one "would expect the State to shoulder" does not mean that, for example, the American Red Cross "acquires the States' Eleventh Amendment immunity." *Hess*, 513 U.S. at 51.

States have two sources of sovereign immunity. The first source derives from the structure of the Constitution itself. *See Franchise Tax Bd. v. Hyatt,* 139 S. Ct. 1485, 1493-94 (2019). This immunity applies to suits where, like here, the plaintiffs are citizens of Michigan suing Michigan officials. *See Allen v. Cooper,* 140 S. Ct. 994, 999-1000 (2020) (citizen of North Carolina suing North Carolina in federal court and North Carolina invoking the "general rule that federal courts cannot hear suits brought by individuals against nonconsenting States"). And, again, this structural immunity defense is waivable. *See Schact*, 524 U.S. at 389; *see id*. at 394 (Kennedy, J., concurring) (stating that Eleventh Amendment immunity, in a case involving a citizen of Wisconsin suing a Wisconsin government agency, sounds in personal jurisdiction).

By contrast, the Eleventh Amendment applies "only if the plaintiff is not a citizen of the defendant State." *Allen*, 140 S. Ct. at 1000. Although Eleventh Amendment immunity is a convenient shorthand, *Alden v. Maine*., 527 U.S. 706, 713 (1999), structural sovereign immunity and Eleventh Amendment immunity are two different concepts. Because this case involves citizens of Michigan suing Michigan state officials in federal court, VNP is wrong to assert that Eleventh Amendment immunity applies here. If any sovereign immunity applies, it is structural sovereign immunity.

In any event, structural sovereign immunity does not "confer a personal privilege" on the non-profit VNP here. *PennEast Pipeline Co., LLC*, 141 S. Ct. at 2262. Unlike the Voter-Defendants, VNP attempts to show that the *State Defendants* are entitled to the protections of sovereign immunity. VNP Mot. to Dismiss at 6-8 (ECF No. 32, PageID.472-474).[1] But similar to

[1] Because the State Defendants can waive sovereign immunity, when and if the State Defendants raise the defense, Plaintiffs will then address whether the State Defendants are entitled to the defense of sovereign immunity. Ultimately, the sovereign immunity defense is inapplicable here because Plaintiffs bring federal claims against state officers in federal court.

the Voter-Defendants, VNP never demonstrates that *it* is entitled to the defense of sovereign immunity. VNP is not the State of Michigan, nor is it an agency of the State of Michigan. It is a non-profit advocacy organization. VNP Mot. to Intervene at 2 (ECF No. 22, PageID.352).

Accordingly, VNP has not satisfied its burden to show that *it* is entitled to the affirmative defense of sovereign immunity. *See Gragg*, 289 F.3d at 963. VNP therefore lacks the capacity to raise the affirmative defense of sovereign immunity.

II. PLAINTIFFS' SECOND COUNT IS A STANDARD FEDERAL 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. Contrary to VNP's mischaracterization of Plaintiffs' claim that a violation of a state constitutional provision is an equal protection violation,, VNP Mot. to Dismiss at 7 (ECF No. 32, PageID.473), Plaintiffs do not allege that violations of Michigan's Constitution constitute a federal equal protection violation. Instead, Plaintiffs allege the Commissioners' arbitrary and inconsistent application of traditional redistricting criteria (which, as of 2018, happen to be reflected in the Michigan Constitution) runs afoul of their Equal Protection rights.

A. The Equal Protection Clause Prohibits State Action That Treats People Arbitrarily or Inconsistently in a Way That Burdens Fundamental Rights.

It is foundational law that the Equal Protection Clause prohibits states from arbitrarily discriminating among citizens. *See Schweiker v. Wilson*, 450 U.S. 221, 242-43 (1981) ("[T]he equal protection requirement does place a substantive limit on legislative power. At a minimum, the legislature cannot arbitrarily discriminate among citizens."). This prohibition against arbitrary state action applies in the context of state procedures for counting votes, because voting is a fundamental right. *See Bush v. Gore*, 531 U.S. 98, 105 (2000) ("The recount mechanisms

implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right."). And it also applies in the redistricting context. In a case never mentioned by VNP, a three-judge court from the Northern District of Georgia held that when a "state's reapportionment intrudes upon the fundamental right to vote for what can be characterized only as discriminatory and arbitrary reasons," an equal-protection claim arises and it is the duty of the federal courts to step in. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga. 2004) (three-judge court) *sum. aff'd* 542 U.S. 947 (2004).

In *Bush v. Gore*, the U.S. Supreme Court analyzed whether the recount procedures that the Florida Supreme Court promulgated "are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." 531 U.S. at 105. 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. During the trial, one recount official testified that he observed "three members of the count canvassing board appl[ying] different standards in defining a legal vote." *Id*. at 106. Another witness testified that Palm Beach County changed its standards to ascertain the intent of the voter multiple times throughout the process. *Id*. at 106-07. Each county was permitted to use a different standard to ascertain a legal vote, and some counties applied more forgiving standards than others. *Id*. at 107. The Court concluded that these procedures, among others, were "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount . . .". *Id*. at 109; *see also id.* at 133-34 (Souter, J., dissenting) (agreeing with the *per curiam* opinion that petitioners presented a meritorious equal protection claim because "I can conceive of no legitimate state interest served by these differing treatments

of the expressions of voters' fundamental rights. The differences appear wholly arbitrary."); *id*. at 145-46 (Breyer, J., dissenting) (also recognizing an equal protection violation). The lack of consistent standards coupled with the inconsistent approach to ascertaining the "intent of the voter," thereby burdening a fundamental right, constituted a violation of the Equal Protection Clause.

These principles are equally applicable in the redistricting context. Inconsistent application of traditional redistricting principles is evidence of a constitutional violation. *See, e.g.*, *Larios*, 300 F. Supp. 2d at 1333-34, 1342 (three-judge court) (noting that Georgia's population deviations were not justified because to the extent the legislature was attempting to maintain the cores of districts, this standard was applied inconsistently in favor of Democrat districts and to the detriment of Republican districts and that the traditional redistricting criteria of incumbent protection was similarly applied inconsistently); *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983) (stating that traditional redistricting principles, when consistently applied, may justify some population variances). In racial gerrymandering cases, inconsistent applications of traditional redistricting criteria are often necessary elements to prove a Fourteenth Amendment violation. *Bush v. Vera*, 517 U.S. 952, 962 (1996) ("The Constitution does not mandate regularity of district shape . . . and the neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*."). The Michigan electorate's decision to enshrine traditional redistricting criteria in its constitution does not, and cannot, divest federal courts of jurisdiction to remedy the federal equal protection violation that arises when a State discriminates against voters based on application of arbitrary and inconsistent redistricting criteria.

Plaintiffs allege that in classifying voters into various districts, the Commissioners applied their state constitutional criteria in an arbitrary and inconsistent manner, burdening a fundamental right. *See, e.g.*, FAC ¶¶ 67-74, 80, 108-118 (ECF No. 7, PageID.69-70, 74-75). This violates the Equal Protection Clause just as the various counties in Florida inconsistently and arbitrarily applied Florida's "intent of the voter" standard in the aftermath of the 2000 presidential election, thereby burdening the right to vote of Florida's voters. *See Bush*, 531 U.S. at 105-09.

Accordingly, even if VNP could raise the sovereign immunity defense, it would not apply here because Plaintiffs are asking this Court to restrain state officials from violating federal law. *Pennhurst*, therefore, does not bar Plaintiffs' claim. *See, e.g.*, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 527 (2021).

i. Inconsistent and Arbitrary Application of Michigan's Traditional Redistricting Criteria Harms Plaintiffs' Fundamental Right To Vote.

When legislatures classify voters into districts arbitrarily by inconsistently applying their traditional redistricting criteria, and violate the criteria for reasons unrelated to adhering to one person, one vote, the rights of voters guaranteed under the Equal Protection Clause are violated. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995) (stating that, in the racial gerrymandering context where race predominates over traditional redistricting principles, where voters are placed in redistricting is a form of classification for equal protection purposes). This is because "[t]he fundamental tenet" underlying traditional redistricting criteria is that "voting is more than an atomistic exercise." *Vera*, 517 U.S. at 1048-49 (Souter, J., dissenting). Voters cast their ballots for candidates that will best represent the voter as an individual and also best represent the community within which the individual lives. *See id.* at 1049 (Souter, J., dissenting) ("[T]he notion of representative democracy within the federalist framework presumes that States may group individual voters together in a way that will let them choose a representative not only acceptable

to individuals but ready to represent widely shared interests within a district."); *see also id.* at 964 (citing with approval Justice Souter's recognition that communities of interest play an important role in our system of representative democracy). Voters are therefore harmed when their community is split between multiple districts, diluting the ability of the community's voters to elect a person that best represents the community. FAC ¶¶ 80, 106-121 (ECF No. 7, PageID.70, 73-75).

ii. To Sustain an Equal Protection Claim Involving a Fundamental Right, It Is Not Necessary to Assert Intentional Discrimination and Membership in a Protected Class.

VNP counters that Plaintiffs have failed to state a claim because Plaintiffs have not alleged membership in a protected class and Plaintiffs have not alleged that they were intentionally discriminated against. VNP Mot. to Dismiss at 9 (ECF No. 32, PageID.475). But the Equal Protection Clause does not require these allegations when the alleged harm is to the fundamental right to vote.

"The Equal Protection Clause safeguards against the disparate treatment of similarly situated individuals as a result of government action that either burdens a fundamental right, targets a suspect class, or has no rational basis." *Paterek v. Vill. of Armada*, 801 F.3d 630, 649 (6th Cir. 2015) (internal quotation marks omitted). As the Sixth Circuit has held, the "threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (citation omitted). Equal protection claims alleging that a government action burdens fundamental rights are distinct from equal protection claims alleging that a government action targets a suspect class. *See Cahoo v. SAS Analytics Inc.,* 912 F.3d 887, 905 (6th Cir. 2019). There was, for example,

no allegation in *Bush v. Gore* that Florida discriminated against a suspect class. Thus, contrary to VNP's assertion, Mot. to Dismiss at 9 (ECF No. 32, PageID.475), membership in a suspect class is not a necessary element of an equal protection claim.[2]

Nor is it necessary to plead and prove intentional discrimination. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) ("In determining whether the Illinois signature requirements for new parties and independent candidates as applied in the city of Chicago violate the Equal Protection Clause, we must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification."). For example, there was no allegation in *Bush v. Gore* that Florida intentionally discriminated against Florida voters. The violation at issue in that case was the arbitrary and inconsistent application of the "intent of the voter" standard that burdened a fundamental right. *See Bush*, 531 U.S. at 105-09. That was sufficient to sustain a violation of the Equal Protection Clause. Accordingly, it is sufficient to allege that the challenged statute arbitrarily or inconsistently creates distinctions that burden a fundamental right.

Plaintiffs have alleged that the Michigan Commissioners classified Plaintiff voters into different districts. But in drawing the district lines and classifying voters within each district, the Commissioners applied Michigan's traditional redistricting criteria in a manner that was arbitrary and inconsistent. It so happens that these traditional redistricting criteria have recently been enshrined in the Michigan Constitution, but this fact does not, and cannot, divest federal courts of

[2] *See also Cahoo*, 912 F.3d at 905 (stating that equal protection claims alleging burden on fundamental rights are distinct from burdens on a protected class); *Aldridge v. City of Memphis*, 404 F. App'x 29, 42 (6th Cir. 2010) ("The Supreme Court has recognized that plaintiffs may assert a claim under the Equal Protection Clause even if they do not claim membership in any class or group[.]"); *Harlen Assocs. v. Inc. Vill. of Mineola,* 273 F.3d 494, 499 (2d Cir. 2001) ("[T]he equal protection guarantee . . . extends to individuals who allege no specific class membership but are nonetheless subjected to invidious discrimination at the hands of government officials.").

jurisdiction to resolve a claim that the Commissioners' discriminatory treatment of Plaintiffs' federal constitutional rights amounts to a federal constitutional violation. In other words, the Commissioners' failure to abide by the state constitution is a coincidence that underscores, rather than eliminates, the federal constitutional violation that Plaintiffs seek to redress. Simply put, the Commissioners burdened these Plaintiffs' fundamental right to vote as protected by the federal constitution. By disconnecting voters from their communities or splitting their counties arbitrarily or unnecessarily, the Commissioners have burdened Plaintiffs' right to vote in violation of the Equal Protection Clause. FAC ¶¶ 80, 106-114, 118-121 (ECF No. 7, PageID.71, 73-75); Pls. Mot. For Prelim. Inj. at 27-28, 30-31 (ECF No. 9, PageID.127-128, 129-130); *see infra* at 14-16. That is the gravamen of Plaintiffs' Count 2. Because Plaintiffs Count 2 arises under the federal constitution, VNP's motion to dismiss has no merit.

B. Plaintiffs' Second Count Plausibly Alleges an Equal Protection Violation.

Plaintiffs began their Second Count citing the Fourteenth Amendment's Equal Protection Clause and asserting that traditional redistricting criteria "serve as guardrails to ensure compliance with the . . . Equal Protection Clause." FAC ¶¶ 99, 101 (ECF No. 7, PageID.73). In fact, the traditional redistricting criteria codified in Michigan's Constitution ensure compliance with the U.S. Constitution and federal law. FAC ¶ 105 (ECF No. 7, PageID.73). The Complaint further asserted that an equal protection violation arises "when a legislature or commission implements traditional redistricting criteria in an inconsistent and arbitrary manner." FAC ¶¶ 103, 112 (ECF No. 7, PageID.73-74). The Complaint then alleged that the Commissioners applied Michigan's traditional redistricting criteria in an inconsistent and arbitrary manner, thereby imposing federal constitutional injuries on the Plaintiffs. FAC ¶¶ 106-08 (ECF No. 7, PageID.73-74).

Compliance with traditional redistricting criteria protects the voters' ability to cast their vote for a candidate that will best represent the interests of the individual and that individual's community. FAC ¶¶ 110, 113 (ECF No. 7, PageID.74); *see Vera*, 517 U.S. at 1048-49 (Souter, J., dissenting) *see also id.* at 964 (citing with approval Justice Souter's recognition that communities of interest play an important role in our system of representative democracy). Elsewhere, in the racial gerrymandering context, the Supreme Court has recognized that a voter who lives in a district where the lines were drawn predominately for racial reasons rather than traditional redistricting criteria is harmed because their elected representative does not think she needs to represent the voter, but instead the particular dominant racial group. *Hays*, 515 U.S. at 744-45 (defining that a plaintiff's harm in a racial gerrymandering claim is both the classification on the basis of race and the risk that the plaintiff's elected official will represent only members of the particular racial group instead of a district as a whole).. Stated differently, traditional redistricting criteria protects the individual's right to vote for a candidate that best represents the voter and the voter's community as a whole. FAC ¶¶ 80, 110, 106-113, 119-121 (ECF No. 7, PageID.70 73-75).

Then, the Complaint presents factual assertions that make the equal protection allegations plausible. *First*, it was possible to draw a map that split fewer counties. FAC ¶ 115 (ECF No. 7, PageID.75). The enacted map splits 15 of Michigan's 83 counties. In fact, Oakland County was split into six separate congressional districts. FAC ¶¶ 64-65 (ECF No. 7, PageID.68). But, as Plaintiffs' remedy map demonstrates, it was possible to draw a map with five fewer county splits, including reducing the number of Oakland County splits from six to four. FAC ¶¶ 69-70 (ECF No. 7, PageID.69). The remedy map also demonstrates that it was possible to draw a map with fewer

township and village splits than the enacted map. FAC ¶ 71 (ECF No. 7, PageID.69); *see also* Decl. of Thomas Bryan ¶¶ 20-21 (ECF No. 9-3, PageID.150-151).[3]

Next, the remedy map is more compact than the enacted map. Plaintiffs' remedy map has an average Polsby-Popper score of 0.46 and an average Reock score of 0.45. By contrast, the enacted map has an average Polsby-Popper score of 0.41 and an average Reock score of 0.42. FAC ¶¶ 76-79 (ECF No. 7, PageID.70). And, importantly, Plaintiffs' remedy map splits fewer county, township, and village boundaries, has better compactness scores than the enacted map, and the Plaintiffs' remedy map has a population deviation near 0. FAC ¶¶ 63, 69-79 (ECF No. 7, PageID.68-70). The fact that the enacted map violates traditional redistricting criteria substantially more than Plaintiffs' map and the enacted plan has a substantially higher population deviation makes it plausible that when implementing Michigan's constitutional criteria, the Commissioners acted inconsistently and arbitrarily. This is especially true when the Commissioners deviated from adherence to Michigan's constitutional criteria such as achieving equal population among the districts. *See, e.g.*, FAC ¶¶ 62-66 (ECF No. 7, PageID.68-69).

Accordingly, based upon these allegations (which, at this stage, the Court must accept as true), it is likely, and indisputably plausible, that the State Defendants applied Michigan's traditional redistricting criteria in an arbitrary and inconsistent manner. Plaintiffs' remedy map demonstrates that it is possible to apply Michigan's traditional redistricting criteria in a consistent manner to create a map that contains districts of nearly equal population, splits fewer counties, townships, and villages, and is more compact. It is therefore plausible that the State Defendants violated the Equal Protection Clause. FAC ¶¶ 113-125 (ECF No. 7, PageID.74-76).

[3] This Court may consider those documents that are in the record when reviewing a motion to dismiss. *See Meyers v. Cincinnati Bd. of Educ.*, 983 F.3d 873, 880 (6th Cir. 2020).

In response, VNP again mischaracterizes Plaintiffs' claim insisting that Plaintiffs' claim is that the Commissioners violated the Michigan Constitution. VNP Mot. to Dismiss at 10-11 (ECF No. 32, PageID.476-477). VNP further asserts that the Commissioners adhered to the Michigan Constitution and that Plaintiffs' complaint essentially amounts to a policy difference with the Michigan Constitution's prioritization of traditional redistricting criteria. VNP Mot. to Dismiss at 11 (ECF No. 32, PageID.477).

But as is demonstrated *supra* at 11-12, Plaintiffs' claim is that the Commissioners applied the Michigan Constitution's criteria in an inconsistent and arbitrary manner in violation of the Equal Protection Clause, thereby burdening a fundamental right. As evidence, Plaintiffs submitted a remedial map showing that it was possible to decrease the overall number of county and township splits while also lowering the population deviation to just one person. VNP's assertion that the Commission complied with Michigan's constitutional criteria is belied by Plaintiffs' substantially more compliant remedy map. VNP Mot. to Dismiss at 11 (ECF No. 32, PageID.477). That Plaintiffs' remedy map has a population deviation of nearly 0 and splits fewer counties, townships, and villages is also evidence that the Commissioners did not comply with the Michigan Constitution because the Commissioners failed to adhere to its highest mandate, that "Districts shall be of equal population . . .". Mich. Const. Art. IV, § 6(13)(a); *see also* FAC ¶¶ 62, 109 (ECF No. 7, PageID.68, 74).

Furthermore, Plaintiffs' allegations that the Commissioners violated Michigan's constitution are not raised to allege an independent state law violation but to demonstrate that the Commissioners departed from their own procedures for making redistricting law. The Commissioners were required by their own Constitution to draw districts of equal population. Mich. Const. Art. IV, § 6(13)(a). The Commissioners did not achieve this and still split more

counties, townships, and villages than the remedial map. That Plaintiffs' remedy map substantially improves on adherence to the Michigan Constitution's constitutional criteria is evidence of an equal protection violation. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.").

Far from "threadbare recital[s]," VNP Mot. to Dismiss at 10 (ECF No. 32, PageID.476), Plaintiffs allege sufficient facts demonstrating that the Commissioners plausibly applied traditional redistricting criteria in an inconsistent and arbitrary manner that resulted in burdening Plaintiffs' fundamental right. Nothing more is required.

III. BECAUSE PLAINTIFFS STATE A CLAIM FOR VIOLATION OF FEDERAL LAW, PLAINTIFFS' SECOND COUNT STATES A CLAIM THAT FITS WITHIN THE *EX PARTE YOUNG* EXCEPTION.

An exception to the sovereign immunity defense is the *Ex Parte Young* exception. 209 U.S. 123 (1908). Under this exception, the Eleventh Amendment cannot bar actions in federal court that seek to restrain state officials from enforcing state laws that violate federal law. *See, e.g.*, *Whole Woman's Health*, 142 S. Ct. at 527.

Plaintiffs allege that the Commissioners of the Michigan Independent Citizens Redistricting Commission enacted a state law that inconsistently and arbitrarily applied state criteria in violation of the Equal Protection Clause. FAC ¶¶ 7, 121 (ECF No. 7, PageID.58, 75). Further, Plaintiffs allege that the Michigan Secretary of State is enforcing this map, a map that violates the rights of Michigan's citizens guaranteed under the Equal Protection Clause. FAC ¶ 29 (ECF No. 7, PageID.61). Michigan is not insulated from this Court's review when Michigan's officers are circumventing "a federally protected right." *Gray v. Sanders*, 372 U.S. 368, 381

(1963). Plaintiffs' Complaint alleges that state officials are violating rights guaranteed to Michiganders under the U.S. Constitution. This claim fits neatly within the *Ex Parte Young* exception.

CONCLUSION

Plaintiffs respectfully request that the Court deny VNP's Motion to Dismiss Count II of the Complaint.

Dated: February 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, in reliance on the word processing software used to create this Brief, that:

1. This Brief complies with the word-count limitation of W.D. Mich. LCivR 7.2(b)(i) because this Brief contains 5,368 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 18, 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 18, 2022.

Dated: February 18, 2022

/s/ Charles R. Spies
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