UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al*.,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as the Secretary of State of Michigan, *et al.*,

Defendants.

Case No. 1:22-CV-00054-PLM-SJB

Three-Judge Panel
28 U.S.C. § 2284(a)

PLAINTIFFS' OPPOSITION TO DEFENDANT COMMISSIONERS' MOTION TO DISMISS COUNT II OF AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs have brought a claim under the Fourteenth Amendment's Equal Protection Clause, but the Defendant Commissioners (the "Commissioners") are adamant that they allege only a state-law injury. Hence, the Commissioners argue that Eleventh Amendment sovereign immunity bars Plaintiffs' Count II, or, in the alternative, that Count II fails to state a cognizable federal equal protection claim. Neither argument is correct.

Although the doctrine of sovereign immunity shields state officers from being hailed into federal court under state-law causes of action, *Ex Parte Young* permits an exception when state officers are alleged to have violated *federal* law as Plaintiffs allege here. Furthermore, Plaintiffs in Court II *do* state a valid claim that the Commissioners' official actions in redistricting have violated the Equal Protection Clause of the Fourteenth Amendment. Federal case law is clear: The federal Equal Protection Clause is violated when state officers pursue state action that treats individuals arbitrarily or inconsistently. Plaintiffs allege that in crafting Michigan's new congressional district map, the Commissioners arbitrarily and inconsistently applied Michigan's state constitutional redistricting criteria and therefore harmed Plaintiffs' fundamental right to vote as protected by the federal constitution. This arbitrary and inconsistent treatment in violation of a federally secured right establishes an equal protection violation, and nothing the Commissioners argue should confuse the nature of the claim. Plaintiffs have brought a straightforward federal equal protection claim against state officials in federal court for redress of federal law violations.

This Court should therefore deny the Commissioners' Partial 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 must construe "the complaint in the light most favorable to the plaintiff[s], accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff[s]."

Handy-Clay v. City of Memphis, 695 F.3d 531, 538-39 (6th Cir. 2012). 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. 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." *Id*. 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.

In general, the preceding 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*. at 1045, it is the Commissioners' burden to prove that its members are entitled to sovereign immunity in this instance. *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 (W.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. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). The burden imposed on a plaintiff to prove jurisdiction depends on the stage of litigation, 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

The Commissioners' major premise—that Plaintiffs have brought a state-law claim against State Defendants in federal court—leads the Commissioners to mistakenly conclude that Plaintiffs' Count II is barred by sovereign immunity. *See* Commissioners Mot. to Dismiss at 8-10 (ECF No. 41, PageID.712-714). But the Commissioners' sovereign immunity defense fails because Plaintiffs' Count II presents a straightforward *federal* equal protection claim against Michigan's state officers in federal court. When state officers undertake state action that violates federal law, they lose the shield of sovereign immunity per *Ex Parte Young*.

Furthermore, Plaintiffs have raised a viable federal equal protection claim. They have alleged that the Commissioners applied traditional redistricting criteria contained in the state constitution in an arbitrary and inconsistent manner that has burdened Plaintiffs' fundamental right to vote as secured by the Fourteenth Amendment. Accordingly, this Court should deny the Commissioner' Motion to Dismiss.

I. SOVEREIGN IMMUNITY DOES NOT BAR PLAINTIFFS' CLAIM BECAUSE COUNT II FITS WITHIN THE *EX PARTE YOUNG* EXCEPTION.

The Commissioners argue that "[t]his Court lacks jurisdiction to order the Commission to comply with" the state constitution and therefore that the Commissioners' sovereign immunity bars Plaintiffs' Count II. Commissioners Mot. to Dismiss at 8 (ECF No. 41, PageID.712). This would be true if Plaintiffs were seeking to compel compliance with the state constitution, but they are not. Plaintiffs have brought a federal equal protection claim premised on the Commissioners' violation of traditional redistricting criteria; although Article IV, Section 6 of the Michigan Constitution now reflects these traditional criteria, it is not the sole source of these standards and it is not the law that Plaintiffs seek to enforce in this action.

States derive sovereign immunity from two constitutional sources, and the protections that state officers draw from these sources, although similar in effect, are different in kind. The first form of sovereign immunity is inferred from the structure of the Constitution itself. *See Franchise Tax Bd. v. Hyatt,* 139 S. Ct. 1485, 1493-94 (2020). 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"). This structural immunity defense is waivable if not raised by state officials. *See Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998); *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 sovereign immunity that the Commissioners invoke here applies "only if the plaintiff is *not* a citizen of the defendant State." *Allen*, 140 S. Ct. at 1000 (emphasis added). Although Eleventh Amendment immunity is often used as a convenient

shorthand, *Alden v. Maine*, 527 U.S. 706, 713 (1999), structural sovereign immunity and Eleventh Amendment immunity are two different concepts that should be properly distinguished. Because this case involves citizens of Michigan suing Michigan state officials in federal court, the Commissioners are wrong to assert that Eleventh Amendment immunity applies here. If any form of sovereign immunity applies, and Plaintiffs contend that it does not, then it is structural sovereign immunity.

Even assuming that the Commissioners have correctly invoked structural sovereign immunity, however, its defense still fails because it sidesteps the relevant *Ex Parte Young* exception. 209 U.S. 123 (1908). The Supreme Court has repeatedly affirmed that "the States have retained their traditional immunity from suit, 'except as altered by the plan of the Convention or certain constitutional amendments'" such as the Fourteenth Amendment. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011) (quoting *Alden*, 527 U.S. at 713). Under the *Ex Parte Young* doctrine, the Eleventh Amendment cannot bar actions in federal court that seek to restrain state officials from enforcing state laws when the challenged state action violates federal law. *See, e.g.*, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 527 (2021). Because state laws that violate the federal constitution are void, any state official who enforces such a law "'comes into conflict with the superior authority of [the] Constitution,' and therefore is 'stripped of his official [] character . . . . The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.'" *Va. Office for Prot. & Advocacy*, 563 U.S. at 254 (quoting *Ex Parte Young*, 209 U.S. at 159-60). The Commissioners cannot infer from the structure of the federal constitution the authority to act in violation of that very document.

Plaintiffs allege that the Commissioners enacted a new congressional district map that inconsistently and arbitrarily applied traditional redistricting criteria in violation of the Equal

Protection Clause. FAC ¶¶ 7, 121 (ECF No. 7, PageID.58, 75). Further, Plaintiffs allege that the Defendant Secretary of State is enforcing this unconstitutional map, thereby violating the rights of Michigan's citizens as guaranteed by the Equal Protection Clause. FAC ¶ 29 (ECF No. 7, PageID.61). The official actions of Michigan state officials are 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; the fact that the state action challenged here simultaneously violates Article IV, Section 6 of the Michigan Constitution is related but incidental to the merits of Plaintiffs' federal claim. This claim therefore fits neatly within the *Ex Parte Young* exception and the Commissioners are not entitled to immunity from a lawsuit intended to enforce compliance with the Fourteenth Amendment's Equal Protection Clause.

The Commissioners fall back on *Pennhurst State School & Hospital v. Halderman*, citing that case for the proposition that the *Ex Parte Young* exception is inapplicable "when a plaintiff alleges that a state official has violated state law." 465 U.S. 89 (1984). But this confuses Plaintiffs' evidence with their cause of action. Plaintiffs allege that the State Defendants have violated the Equal Protection Clause by arbitrarily and inconsistently assigning Plaintiffs to districts. As evidence in support of this argument, Plaintiffs point to the Commissioners' failure to adhere to traditional redistricting criteria that require equal district populations and the minimization of splits of political subdivisions; although these traditional criteria have been applied by other courts in other states, they have also been reflected since 2018 in Article IV, Section 6 of Michigan's state constitution. It is nonsensical to claim that the fact Michigan voters decided to codify traditional redistricting criteria gives the Commissioners carte blanche to violate that same criteria; otherwise, states can immunize themselves from the strictures of federal law by simply copying-and-pasting

it into their own constitutions. Accordingly, structural sovereign immunity does not shield the Commissioners' actions from federal judicial review 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).

II. PLAINTIFFS HAVE PLEADED SUFFICIENT FACTS TO DEMONSTRATE AN EQUAL PROTECTION INJURY.

Plaintiffs' Count II is a run-of-the-mill federal equal protection claim that the Commission arbitrarily and inconsistently placed voters in various districts without regard to traditional redistricting criteria, thereby burdening their fundamental right to vote. Contrary to the Commissioners' repeated assertion, Commissioners Mot. to Dismiss at 6 (ECF No. 41, PageID.714), Plaintiffs do not allege that violations of Michigan's Constitution constitute an 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 but are a broadly applied metric used to evaluate the compliance of redistricting plans with federal law) violates their Fourteenth Amendment 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 their 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 lawmaking applies in the context of state procedures for counting votes, because voting is a fundamental right protected by the federal constitution. *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."). Accordingly, when a "state's reapportionment intrudes upon the fundamental right to vote for what can be characterized only as discriminatory and arbitrary reasons" 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 in the wake of the disputed 2000 presidential election were "consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." 531 U.S. 98, 105 (2000). The Court held that Florida's 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 county canvassing board applied 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 used 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 standards coupled with the

inconsistent approach to applying 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 federal constitutional violation, despite the Commissioners' efforts to downgrade their analytical value. *See, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320, 1333-34, 1342 (N.D. Ga. 2004) (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, it 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 the racial gerrymandering context, 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.").

Plaintiffs allege that in classifying voters into various districts, the Commissioners applied Michigan's state constitutional criteria (which track the factors typically recognized as traditional redistricting criteria but are not the Plaintiffs' cause of action in this case) in an arbitrary and inconsistent manner, burdening Plaintiffs' fundamental right to vote. *See, e.g.*, FAC ¶¶ 67-74, 108-114 (ECF No. 7, PageID.69, 74). This violates the Equal Protection Clause, just as the inconsistent and arbitrary application of various "intent of the voter" standards in Florida in 2000 violated the

Equal Protection Clause by treating voters differently depending upon the county in which they resided. *See Bush*, 531 U.S. at 105-09.

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

When legislatures—or those exercising legislative powers, as the Commissioners did here—classify voters into districts arbitrarily by inconsistently applying traditional redistricting criteria, and violate those criteria for reasons unrelated to necessary adherence to equal population rules, 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, the assignment of voters to particular unconstitutional districts is a form of classification for equal protection purposes). The Commissioners claim that Plaintiffs' argument "has no federal constitutional underpinnings" and notes pointlessly that "[t]he Constitution does not mandate regularity of district shape[,]" Commission Mot. to Dismiss at 11 (ECF No. 41, PageID.715), but Plaintiffs have not challenged the *shape* of any district adopted by the Commissioners. Instead, they have challenged the Commissioners' failure to equalize population, maximize compactness, and minimize political subdivision splits, all of which are traditional redistricting criteria recognized and applied by Supreme Court precedents.

The Supreme Court has long held that the federal constitution compels congressional districts to be drawn to ensure that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The enforcement of traditional redistricting criteria such as the equal population requirement is not merely the judicial imposition of "good-government values[,]" but a federal constitutional

requirement that secures a fundamental right. Commission Mot. to Dismiss at 12 (ECF No. 41, PageID.716).

This is because "the fundamental tenet" underlying traditional redistricting criteria is that "voting is more than an atomistic exercise." *Vera*, 517 U.S. at 1048-49. Voters cast their ballots for candidates that will best represent the voter as an individual and also best represent the community within which that individual lives. *See Vera*, 517 U.S. 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 entire community. FAC ¶¶ 106, 110, 113 (ECF No. 7, PageID.73-74).

C. Plaintiffs' Count II Plausibly Alleges a Federal Equal Protection Violation.

Plaintiffs begin Count II by 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 now codified in the Michigan Constitution help to 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 the 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 is harmed when they reside in a district where a racial rationale predominated over traditional redistricting criteria in crafting district lines because the voter's elected representative does not think she needs to represent the voter, but instead the dominant racial group within the district. *Hays*, 515 U.S. at 744-45. Stated differently, traditional redistricting criteria protects the individual's right to vote for a candidate that best represents the voter and the voters' community as a whole. FAC ¶¶ 110, 113 (ECF No. 7, PageID.74).

Then, the Complaint presents the factual assertions that make its equal protection allegations plausible. *First*, it was entirely possible to draw a map that split fewer counties into multiple congressional districts. 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.150-51).[1]

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 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, which is assigned a higher priority among the criteria contained in Article IV, Section 6(13) of the Michigan Constitution than the Commissioners' favored "communities of interest" factor. *See, e.g.*, FAC ¶¶ 62-66 (ECF No. 7, PageID.68-69).

Accordingly, based upon these allegations, it is 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 that contains districts of nearly equal population, splits fewer counties,

[1] 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).

townships, and villages, and is more compact overall. It is therefore plausible that the State Defendants violated the Equal Protection Clause. FAC ¶¶ 121, 125 (ECF No. 7, PageID.75-76).

This is not a "non-justiciable policy argument[] with no connection to the [federal] Constitution." Commission Mot. to Dismiss at 14 (ECF No. 41, PageID.718). Rather, Plaintiffs claim that the Commissioners applied Michigan's constitutional criteria in an inconsistent and arbitrary manner in violation of the Equal Protection Clause, thereby burdening Plaintiffs' fundamental right to vote. As evidence in support of their theory, Plaintiffs submitted a remedial map showing that it was possible to decrease the number of county and township splits while also lowering the population deviation to just one person. The Commissioners argue that it did comply with Michigan's constitutional criteria (and, at the same time, that it was not required to do so to construct a constitutional map), but that claim is belied by Plaintiffs' remedy map. Commission Mot. to Dismiss at 11 (ECF No. 41, PageID.715). 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* prescribed procedures for designing a constitutional district map. The Commissioners were required by their own Constitution to draw districts of equal population. Mich. Const. Art. IV, § 6(13)(a). This state constitutional mandate ranks higher than both the Commissioners' favored "communities of interest" factor and the requirement that map-drawers minimize splits of political subdivisions, which are their own form of "community of

interest." The Commissioners failed to achieve population equality and still managed to split more counties, townships, and villages than did Plaintiffs' remedial map, which faithfully fulfilled both mandates. That Plaintiffs' Remedy Map substantially improves on adherence to multiple of Michigan's constitutional criteria is itself 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 a "patently incorrect" interpretation of the Michigan Constitution, Commission Mot. to Dismiss at 10 (ECF No. 41, PageID.709), Plaintiffs allege sufficient facts plausibly demonstrating that the Commissioners applied traditional redistricting criteria (now codified in the Michigan Constitution) in an inconsistent and arbitrary manner that burdened Plaintiffs' fundamental right to vote. Nothing more is required from Plaintiffs at this stage of the proceedings.

III. THE COMMISSION MISCHARACTERIZES STATE CONSTITUTIONAL REQUIREMENTS.

Finally, although Plaintiffs' Amended Complaint does not present a claim under state law, Plaintiffs write to address the Commissioners' argument that "Plaintiffs ask the Court to rewrite the priority" of the redistricting criteria found in Article IV, Section 6(13) of the Michigan Constitution. Commission Mot. to Dismiss at 14 (ECF No. 41, PageID.718). Not so—Plaintiffs reasonable expect those traditional redistricting criteria to be enforced in the hierarchy prescribed by state law, however, which the Commissioners have failed to do here.

The Commissioners build their argument upon a single foundation: The claim that the constitutional text does "not limit the Commission to political-subdivision lines" when identifying communities of interest, but "expressly authorizes the Commission to consider communities of interest from other perspectives, expansively defined." Commission Mot. to Dismiss at 14 (ECF

No. 41, PageID.718). There are two problems with this argument. First, it assumes without explaining that political subdivisions can be readily ignored whenever the Commissioners identify an amorphous "diverse population" community of interest simply because the political subdivision factor appears "in a *lower-ranked* criterion" in the Michigan Constitution. Commission Mot. to Dismiss at 15 (ECF No. 41, PageID.719). Most importantly, the Commissioners carefully elide the criteria that appear *higher* than their favored "community of interest" factor—namely, the state constitution's top-ranked requirement that "[d]istricts shall be of equal population as mandated by the United States Constitution," a mandatory and unambiguous requirement that admits for no wiggle room. Mich. Const. Art. IV, § 6(13)(a). With regard to the preeminence of this factor, which Plaintiffs allege the Commission failed to adequately follow, the Commissioners offer only silence.

CONCLUSION

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

Dated: February 23, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that:

1. This Brief complies with the word-count limitation of W.D. Mich. LCivR 7.2(b)(i) because this Brief contains 4,793 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 23, 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 23, 2022.

Dated: February 23, 2022

/s/ Charles R. Spies
Charles R. Spies

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