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' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs submit this reply in response to Intervenor-Defendant Voters Not Politicians' ("VNP") Brief in Opposition, ECF No. 36, and in support of Plaintiffs' Motion for Preliminary Injunction, ECF No. 9. For the reasons detailed in the Motion and further elucidated below, the Court should grant Plaintiffs' Motion.

ARGUMENT

Plaintiffs are likely to succeed on their one person, one vote claim. Plaintiffs have shown that the population deviations in the enacted Chestnut plan were avoidable. Plaintiffs further show that the Commissioners' stated objective of drawing districts that reflect communities of interests was applied in an inconsistent and arbitrary manner.

Plaintiffs are also likely to succeed on their Equal Protection Claim. VNP fails to offer any reviewable standards that might have guided the Commission's decision making, instead arguing only that the federal equal protection standard advocated by Plaintiffs is inapplicable here.

Plaintiffs are further entitled to an injunction because there are six months remaining before the primary election and nine months until the general election. The Supreme Court's principle announced in *Purcell* is not triggered. There is sufficient time to adjust petition circulation deadlines. Absent the grant of an injunction, Plaintiffs' voting rights will be irreparably harmed for the 2022 elections.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

Plaintiffs are likely to succeed on the merits of their claims because the map adopted by the Commission clearly violates the "one person, one vote" mandate of Article I, Section 2 of the U.S. Constitution and ignores traditional redistricting criteria by arbitrarily and inconsistently assigning voters to districts in a manner that flouts even the requirements of the state constitution.

A. Plaintiffs Are Likely to Succeed on the Merits of Their One Person, One Vote Claim.

As explained in their Motion, Plaintiffs contend that the Commission map violates the constitutional principle of "equal representation for equal numbers of people" by enacting districts that contain wildly different populations. Pls. Mot. For Prelim. Inj. at 21-22 (ECF No. 9, PageID.114-115) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)). The population deviation between the largest and smallest districts on the Commission map is 1,122 people. Pls. Mot. For Prelim. Inj. at 11 (ECF No. 9, PageID.104). This is an large deviation that dilutes the voting power of residents of the overpopulated districts in a manner that could easily be rectified by modern redistricting technology, as demonstrated by Plaintiffs in their Remedial Map. Pls. Mot. For Prelim. Inj. at 16-17 (ECF No. 9, PageID.109-110).

VNP, by contrast, argues that the Commission map's 0.14% deviation is of no consequence, quoting *Wesberry* for the proposition that "[p]recise mathematical equality . . . may be impossible to achieve in an imperfect world[,] . . . the 'equal representation' standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality 'as nearly as is practicable.'" *Karcher v. Daggett*, 469 U.S. 725, 730 (1983) (quoting *Wesberry v. Sanders*, 376 U.S. at 18). But the Supreme Court has already rejected the notion that *de minimis* deviations are acceptable. The Court ruled that "there are no *de minimis* variations which could practically be avoided, but nonetheless meet the standard of Art. I, § 2 without justification." *Karcher*, 462 U.S. at 732, 738. Accordingly, deviations of 19 persons, if avoidable are consequential and unconstitutional. *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675-76 (M.D. Pa. 2002) (three-judge court) *appeal dismissed as moot*, *Schweiker v. Vieth*, 537 U.S. 801 (2002). The current map does not provide "equal representation for equal numbers of people" as mandated by Article I, Section 2, and that error must be rectified.

VNP identifies the correct two-step *Karcher* test for evaluating population equality but arrives at the wrong conclusion after applying it. According to the Supreme Court, "[f]irst, the parties challenging the plan bear the burden of proving the existence of population differences that 'could practically be avoided.' If they do so, the burden shifts to the State to 'show with some specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 760 (2012) (quoting *Karcher*, 462 U.S. at 741).[1]

1. Plaintiffs Satisfy Their Burden Of Proving That Population Differences Among Michigan's Congressional Districts Could Have Been Reduced.

The enacted map has a total population deviation of 1,122 persons. *See* Bryan Decl. ¶ 15 (ECF No. 9-3, PageID.148). Plaintiffs' remedy map reduces the population variance among Michigan's congressional districts to one person. *See* Bryan Decl. ¶ 16 (ECF No. 9-3, PageID.149). Nevertheless, VNP implausibly claims that Plaintiffs have failed to surpass the first step of the *Karcher* test because VNP "cannot verify the alternative map's population deviation and the geographic splits and compactness scores tabulated by Plaintiffs' expert" based on the PDF version that Plaintiffs filed. VNP's Br. in Opp. at 7-8 (ECF No. 36, PageID.580-581). In other words, they suspect—without any evidence—that Plaintiffs are lying. Plaintiffs have provided accurate

[1] VNP relies heavily on *Tennant*. Its reliance is ironic. Although the congressional districts challenged in *Tennant* exhibited a population deviation, the map kept counties whole and avoided contests between incumbents. *Tennant*, 567 U.S. at 761. By contrast, the proposed remedial plan in *Tennant* that had a population deviation of almost zero split counties and pitted incumbents against each other. *Id*. at 760-61. Here, the enacted map splits more counties, townships, and villages than Plaintiffs' proposed map, is less compact than Plaintiffs' proposed map, and *still* has a higher population deviation than Plaintiffs. Bryan Decl. ¶¶ 15-21, (ECF 9-3, PageID.148-150). *Tennant* does not save the Commission map.

analysis of their remedial plan and can easily provide the relevant shapefile to the Court if needed to alleviate any concern over accuracy.[2]

The rest of VNP's step one argument is equally nonsensical. It claims that even if Plaintiffs' map *does* succeed where the Commission failed at achieving population equality, that does not matter because "[t]he Michigan Constitution requires the Commission to draw equal population congressional districts while also abiding by all of the other mandatory criteria set out in Article IV, section 6(13)." VNP's Br. in Opp. at 7-8 (ECF No. 36, PageID.580-581). This implies that the criteria enumerated in Article IV, Section 6(13) are of equal weight, but they are not; that provision clearly requires the Commission to "abide by the [] criteria in proposing and adopting each plan, *in order of priority*[.]" Mich. Const. Art. IV, § 6(13) (emphasis added). The very first factor listed—in other words, the factor to be given priority over all other constitutional criteria—is the requirement that "[d]istricts shall be of equal population as mandated by the United States Constitution, and shall comply with the voting rights act and other federal laws." *Id.* § 6(13)(a). VNP argues that "Plaintiffs present no evidence that any map with closer numerical equality could practically be drawn to balance these mandatory criteria," VNP's Br. in Opp. at 8 (ECF No. 36, PageID.581), but "balance" is not the applicable standard; prioritization in descending order is. Plaintiffs have adequately demonstrated that population differences "could practically be avoided" because they submitted a remedial map that eliminated the deviation while simultaneously reducing splits of political subdivisions and increasing compactness, and because it is clear that other population-balanced plans were submitted to the Commission.[3] *Karcher*, 462 U.S. at 741;

[2] Plaintiffs provided the shapefile of the proposed remedy map to the Commission Defendants and would have provided the same file to VNP had it made a similar request. The Commission Defendants did not challenge Plaintiffs' assertions that the map equalizes populations.

[3] Even if Plaintiffs' remedial map was not itself submitted to the Commission, it still had access to other maps that eliminated any population deviation between districts. See, e.g., MI

see also Vieth, 195 F. Supp. at 675-76 (finding that plaintiffs surpassed *Karcher* step one where the enacted map had a population deviation of 19 persons and plaintiffs submitted a map to the court—not to the legislature—that had a population deviation of just one person, demonstrating the deviation was avoidable).

2. VNP Has Not Offered A Legitimate Justification For The Enacted Map's Deviations From Population Equality.

VNP repeats its mistake with regard to the second step of the *Karcher* test. It is the Commission's burden "to justify each [population] variance, no matter how small[]," which requires showing with specificity that each population variance was *necessary* to achieve a legitimate goal. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969); *Karcher*, 462 U.S. at 731, 741. The Commission can justify deviations through the consistent, nonarbitrary, and nondiscriminatory application of legitimate policies. *Karcher*, 462 U.S. at 740-41; *see Roman v. Sincock*, 377 U.S. 695, 710 (1964). VNP, of course, has little to offer on *Karcher* step two beyond guesswork as to what the Commission was thinking.

As an initial matter, VNP claims that courts should "defer to states' redistricting goals if they are neutrally applied and 'consistent with constitutional norms, even if they require small differences in the population of congressional districts." VNP's Br. in Opp. at 8 (ECF No. 36, PageID.581) (quoting *Tennant*, 567 U.S. at 760). For the reasons discussed in Section I(B), the Commission did not neutrally and consistently apply Michigan's constitutional redistricting goals; but even if it had, *Tennant* does not support the proposition that the existing deviation is small or otherwise inconsequential. The Court in *Tennant* considered the 0.79% deviation in that case "minor" because the challenged map advanced the state's overriding redistricting goal of keeping

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Redistricting Public Comment Portal, Maple Syrup – Fair and Compliant, (Oct. 31, 2021), https://www.michigan-mapping.org/submission/o8230 (submitted map with zero population deviation).

counties whole. 567 U.S. at 764. Here, the Plaintiffs' remedial map keeps more counties whole than the enacted map while simultaneously achieving a lower population deviation.

VNP again claims that the deviations on the Commission map are justified by its "legitimate interest in balancing the Michigan Constitution's mandatory redistricting criteria." VNP's Br. in Opp. at 8 (ECF No. 36, PageID.581). Again, "balance" is not what the state constitution requires; even though the relevant provision requires the Commission to "abide by" all seven criteria, it establishes a clear hierarchy within which population equality ranks first. Mich. Const. Art. IV, § 6(13). The Commission was not entitled to skip down the list until it found a factor that it considered more important. It was "not justified in elevating any consideration above achieving "*precise* mathematical equality." Pls. Mot. For Prelim. Inj. at 24 (ECF No. 9, PageID.117).

As demonstrated in their Motion, Plaintiffs' Remedial Map "represents an improvement over the Commissioners' map on most of the other considerations enumerated in the Michigan constitution (and performs at least as well on all the others)." Pls. Mot. For Prelim. Inj. at 24-25 (ECF No. 9, PageID.117-118). Plaintiffs' map demonstrates how the state can satisfy the constitutional criteria, such as keeping counties, townships, and villages whole, creating compact districts, and eliminating population deviations between districts. *See* Pls. Mot. For Prelim. Inj. at 24-25 (ECF No. 9, PageID.117-118); Bryan Decl. ¶¶ 15-21, (ECF 9-3, PageID.148-152). Finally, at the conclusion of their argument in this section, VNP concedes that it is only guessing as to which interests the State Defendants will ultimately use to justify the enacted map, so its assessment of the various legitimate interests the map allegedly supports should be treated as what it is: Baseless speculation. VNP's Br. in Opp. at 10 (ECF No. 36, PageID.583).

Contrary to VNP's contentions, "there are no *de minimis* variations which could practically be avoided, but nonetheless meet the standard of Art. I, § 2 without justification." *Karcher*, 462 U.S. at 732, 738. Even deviations of 19 persons, if avoidable, are material. *Vieth*, 195 F. Supp. 2d at 675-76. VNP offers no justification that adequately supports the Commission's avoidable failure to satisfy one person, one vote.

B. Plaintiffs Are Likely to Succeed on the Merits of Their Equal Protection Claim.

Plaintiffs' Second Count is a standard equal protection claim that the Commission arbitrarily and inconsistently placed Plaintiffs in various districts thereby burdening their fundamental right to vote. FAC ¶¶ 67-74, 80, 106-121 (ECF No. 7, PageID.69-70, 73-75). As explained in Plaintiffs' Motion and by the U.S. Supreme Court, "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." Pls. Mot. For Prelim. Inj. at 26 (ECF No. 9, PageID.119) (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)). Federal courts have historically looked to a variety of traditional redistricting criteria, including "maximizing compactness, respecting communities of interest, and ensuring that districts are contiguous[,]" to determine whether votes have been unconstitutionally diluted. Pls. Mot. For Prelim. Inj. at 26 (ECF No. 9, PageID.119). These criteria also appear in the Michigan Constitution, and the requirements to maintain communities of interest and respect political subdivision boundaries constrain the discretion of the Commission when assigning voters to particular districts. *See Bush v. Vera*, 517 U.S. 952, 1049 (1996) (Souter, J., dissenting) (noting that voting is both an expression of individual preference and an associational act of selecting a community representative); *id.* at 964 (citing Justice Souter's recognition of the importance of communities of interest with approval).

Plaintiffs are not asking this Court to rule that traditional redistricting criteria are constitutionally mandated, but only requests that they be applied neutrally and consistently in

accordance with federal law. Nor are Plaintiffs asking this Court to determine "how much deviation from [traditional redistricting criteria] is constitutionally acceptable . . . ?" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) but to require the Commission to apply those principles in a neutral and consistent manner, not arbitrarily and inconsistently.

VNP claims that Plaintiffs cannot succeed on the merits of their equal protection claim because the State Defendants are shielded by sovereign immunity. VNP mistakenly believes that sovereign immunity is applicable here because it has misconstrued the nature of Plaintiffs' claim as fundamentally "premised on their allegations that the Commission failed to comply with several provisions of the Michigan Constitution." VNP's Br. in Opp. at 12 (ECF No. 36, PageID.584). But this is not the gravamen of Plaintiffs' complaint: They allege that the Commission has violated traditional redistricting principles which are routinely applied in redistricting processes nationwide, and only recently codified in Michigan's state constitution. Pls. Mot. For Prelim. Inj. at 27 (ECF No. 9, PageID.121). The Commission's arbitrary and inconsistent application of the state constitutional criteria is just evidence in support of Plaintiffs' contention that the State Defendants have violated federal law. Sovereign immunity does not prevent a federal court from ordering state officials to conform their conduct to federal law.

VNP further alleges that, even if not barred by sovereign immunity, Plaintiffs' claim still fails because "Plaintiffs do not assert membership in a suspect classification, nor do they explain how they are treated differently than other similar situated voters[.]" VNP's Br. in Opp. at 13 (ECF No. 36, PageID.587). This does not misconstrue Plaintiffs' claim, but it does ignore relevant principles of federal constitutional law. As VNP notes elsewhere in its brief, the Equal Protection Clause "prevents states from making distinctions that (1) burden a fundamental right; (2) target a suspect class; or (3) intentionally treat one individual differently from others similarly situated

without any rational basis." VNP's Br. in Opp. at 11 (ECF No. 36, PageID.584). Plaintiffs allege the violation of a fundamental right—their federally guaranteed right to vote—an argument which VNP curiously ignores.

VNP claims that Plaintiffs' caselaw is inapposite because this case does not involve a claim of partisan or racial gerrymandering. *Bush v. Gore*, of course, did not involve such claims either; in that case, the Supreme Court stopped a Florida recount under which votes were being counted using radically different standards in counties across the state. 531 U.S. at 104-05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."). The injury in *Bush v. Gore* amounted from the application of inconsistent and arbitrary standards that resulted in voters being treated differently across the state, just as the Commission's inconsistent application of traditional redistricting criteria has here. Similarly, in *Larios v. Cox* the plaintiffs' injury resulted from the inconsistent application of traditional redistricting criteria in different regions of the state "in a thoroughly disparate and partisan manner." 300 F. Supp. 2d 1320, 1350 (N.D. Ga. 2004). But VNP misinterprets the injury in *Larios* as stemming from the partisan nature of the gerrymandering in Georgia, rather than the arbitrary application of the state's redistricting criteria. VNP's Br. in Opp. at 14-15 (ECF No. 36, PageID.587-588). The motive did not matter there, nor does it matter here—the disparate implementation of supposedly uniform standards is what is relevant.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

As Plaintiffs explain in their Motion, if the 2022 congressional elections are allowed to go forward on the enacted map, an injury will result "that cannot be made right once inflicted." Pls. Mot. For Prelim. Inj. at 20 (ECF No. 9, PageID.113). Plaintiffs have alleged a federal constitutional injury, and "[w]hen *any* 'constitutional rights are threatened or impaired, irreparable injury is

presumed.'" Pls. Mot. For Prelim. Inj. at 21 (ECF No. 9, PageID.114) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

VNP acknowledges that a "restriction on the fundamental right to vote . . . constitutes irreparable injury," but claim that "Plaintiffs have not identified any restriction or limitation on their ability to cast their vote or to associate with others to advance their political beliefs." VNP's Br. in Opp. at 18-19 (ECF No. 36, PageID.591-592). Plaintiffs are clear about the injury they will suffer if the current map is used in the upcoming election: "Forcing Plaintiffs—indeed, forcing Michigan's electorate as a whole—to elect their U.S. congressional representatives via maps that were drawn in contravention of the Nation's charter gashes the effectiveness and fairness of their political participation." Pls. Mot. For Prelim. Inj. at 20 (ECF No. 9, PageID.113). Faced with Plaintiffs' allegations that they will be forced to vote in congressional districts that have been unconstitutionally constructed, VNP offers only the consolation that they will still be able to cast a vote with no regard to the fact that their efforts to associate with others in their community will be effectively defeated.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR THE PLAINTIFFS.

As Plaintiffs explain in their Motion, "[w]hen a constitutional violation is likely . . . [,] the public interest militates in favor of injunctive relief because 'it is always in the public interest to prevent violation of a party's constitutional rights.'" Pls. Mot. For Prelim. Inj. at 41 (ECF No. 9, PageID.134) (quoting *Miller v. City of Cincinnatti*, 622 F.3d 524, 540 (6th Cir. 2010)). The right to vote that is implicated in this case is fundamental and "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

VNP contends that "the public's interest in the implementation of the Commission's adopted maps is especially strong because the Commission and the redistricting criteria outlined

in the Michigan Constitution were adopted through the clearly expressed will of the people of Michigan[.]" VNP's Br. in Opp. at 19 (ECF No. 36, PageID.592). The first proposition does not flow naturally from the latter; the fact that Michigan voters supported the creation of the Commission says nothing about whether the public favors the result that Commission produced, and the fact that voters also codified traditional redistricting criteria indicates an equally strong public interest in seeing those criteria enforced as drafted. And, as demonstrated by Plaintiffs' proposed Remedial Map, the alterations required to fix the inherent constitutional violations would not be particularly onerous or time-consuming—the remedy "would require no more than a few modest alterations." Pls. Mot. For Prelim. Inj. at 42 (ECF No. 9, PageID.135). Hence, Plaintiffs' requested preliminary injunction should be awarded so that the 2022 congressional elections can take place on a map that is compliant with the federal constitution.

CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Preliminary Injunction.

Dated: February 23, 2022

Respectfully submitted,

/s/ Charles R. Spies
Charles R. Spies (P83260)
Max A. Aidenbaum (P78793)
DICKINSON WRIGHT PLLC
123 Allegan Street
Lansing, Michigan 48933
cspies@dickinsonwright.com
maidenbaum@dickinsonwright.com
(517) 371-1730 (phone)
(844) 670-6009 (fax)

Jason B. Torchinsky
Jason B. Torchinsky
Shawn Toomey Sheehy
Edward M. Wenger
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, Virginia 20169
jtorchinsky@holtzmanvogel.com
ssheehy@holtzmanvogel.com
emwenger@holtzmanvogel.com
(540) 341-8808 (phone)
(540) 341-8809 (fax)

Attorneys for Plaintiffs Michael Banerian, Michon Bommarito, Peter Colovos, William Gordon, Joseph Graves, Beau LaFave, Sarah Paciorek, Cameron Pickford, Harry Sawicki, and Michelle Smith

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 3,372 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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