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 Voter-Intervenors' Brief in Opposition, ECF No. 39, 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 Equal Protection Claim. Voter-Intervenors fail 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.

Importantly, Voter-Intervenors "take no position on the merits or equities" of Count I of Plaintiffs' Amended Complaint. Voter-Intervenors' Br. in Opp. at 3 n.1 (ECF No. 39, PageID.642). Further, the Voter Intervenors do not address the arguments advanced in Plaintiffs Motion for a Preliminary Injunction concerning Count I. Plaintiffs, therefore, do not address Count I herein.

Plaintiffs are likely to succeed on the merits of their equal protection claim, Count II, because the map adopted by the Commission arbitrarily and inconsistently assigns voters to districts in a manner that flouts the protections guaranteed under the Equal Protection Clause.

A. Plaintiffs Have Pleaded an Equal Protection Claim Rooted in Federal Law.

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). Since 2018 these traditional criteria have also been reflected 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.

Voter-Intervenors claim that Plaintiffs cannot succeed on the merits of their equal protection claim because the State Defendants are shielded by sovereign immunity, but this argument is premised on a misinterpretation of Plaintiffs' claim. Voter-Intervenors' Br. in Opp. at 4 (ECF No. 39, PageID.643). Voter-Intervenors allege that "there is no legal basis for the proposition that an alleged violation of a state constitutional provision is sufficient to allege a *de facto* violation of the federal Equal Protection Clause," but that is not *all* that Plaintiffs have alleged. Voter-Intervenors' Br. in Opp. at 4 (ECF No. 39, PageID.643). The gravamen of Plaintiffs' complaint is an allegation 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.

Voter-Intervenors sidestep the *Ex Parte Young* doctrine, which is directly relevant to this case. *Ex Parte Young* holds that States have "no power to impart to [their officers] any immunity from responsibility to the supreme authority of the United States[,]" and therefore the Eleventh Amendment does not bar actions in federal court that seek to restrain state officials from implementing state action that violates federal law. 209 U.S. 123, 160 (1908). State laws that violate the federal constitution, such as the new district map enacted by the Commission, are void, and 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'" and of any sovereign immunity he might otherwise enjoy. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011) (quoting *Ex Parte Young*, 209 U.S. at 159-60). It might seem axiomatic, but neither

State Defendants nor Voter-Intervenors can infer the authority to violate the Constitution from the structure of that very document.

Voter-Intervenors incorrectly interpret Plaintiffs' equal protection claim as resting "entirely on the Commission's alleged failure to comply with the redistricting criteria mandated under the state constitution." Voter-Intervenors' Br. in Opp. at 4 (ECF No. 39, PageID.643). But "[d]istilled to its core, the Fourteenth Amendment requires that the entity creating voting districts do so in a way that is not arbitrary, inconsistent, or non-neutral." Pls. Mot. For Prelim. Inj. at 26 (ECF No. 9, PageID.119). If this were not what the Equal Protection Clause required, then the State would be entitled to, "by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). The Supreme Court has made clear that such is constitutionally impermissible, because the initial award of the franchise is not *all* that the Equal Protection Clause guarantees to voters. *Id.* Voter-Intervenors' attempt to analogize this case to a 2003 Arizona District Court decision that rejected the applicability of *Bush v. Gore* is unavailing, because in that case the plaintiffs' "claims [we]re founded on state, not federal law" and the federal issue was raised for the first time in the plaintiffs' motion for summary judgment. By contrast, here, Plaintiffs allege a federal injury. *Ariz. Minority Coal. For Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 284 F. Supp. 2d 1240, 1245, 1247-48 (D. Ariz. 2003). Even if "States are generally free to conduct redistricting according to any standards they choose," the standards applied must not "fun afoul of certain constitutional or statutory prohibitions" such as the Equal Protection Clause. *Id.*

To the extent that Plaintiffs claim that "the Commissioners ignored roughly half the criteria listed in the Michigan Constitution," this is only further evidence of Plaintiffs' harm. Voter-Intervenors' Br. in Opp. at 4 (ECF No. 39, PageID.643) (quoting Am. Compl. ¶ 122). The criteria

now enumerated in Article IV, Section 6(13) of the Michigan Constitution roughly track the traditional redistricting criteria that federal courts have long used to evaluate alleged gerrymanders. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (imposing a compactness requirement to determine whether Section 2 of the Voting Rights Act requires the creation of a majority-minority district); *Vera*, 517 U.S. at 962 (stating that to demonstrate a racial gerrymander, "the neglect of traditional districting criteria is merely necessary, but not sufficient"). Although Plaintiffs could potentially bring an action in Michigan state court for the Commission's failure to strictly adhere to the requirements of Article IV, Section 6(13), that is not the action they have brought here. This lawsuit seeks to vindicate Plaintiffs' *federal* guarantee of equal protection under the law, and any simultaneous violation of state law requirements, although related, is incidental to that federal constitutional injury.

B. The Commission Applied Their Criteria In An Inconsistent And Arbitrary Manner.

As Plaintiffs have repeatedly explained, their references to Article IV, Section 6(13) of the state constitution are justified by the fact that "the Michigan Constitution now mandates adherence to most of the commonly recognized traditional redistricting criteria." Pls. Mot. For Prelim. Inj. at 28-29 (ECF No. 9, PageID.121-122). Voter-Intervenors focus on the fact that "under Michigan law, 'communities of interest' are distinct from political boundaries, and [] the Commission must prioritize the former over the latter." Voter-Intervenors' Br. in Opp. at 6 (ECF No. 39, PageID.645). This explanation skips past the fact that the Commission has failed to properly implement the factor that ranks above both communities of interest and political subdivisions: Namely, the requirement that "Districts shall be of equal population as mandated by the United States Constitution, and shall comply with the voting rights act and other federal laws." Mich.

Const. Art. IV, § 6(13)(a). The 1,122-person population deviation in the Commission map makes abundantly clear that the Commission violated the state constitutional criteria from the very start.

Furthermore, even if "communities of interest" is a capacious category that encompasses populations that do not fit neatly within the boundaries of political subdivisions, that does not mean that political subdivisions cannot themselves constitute communities of interest. In previous redistricting cycles, the Michigan Supreme Court has taken pains to ensure that "count[ies] were kept . . . intact as . . . communities of interest." Pls. Mot. For Prelim. Inj. at 30 (ECF No. 9, PageID.123) (quoting *In re Apportionment of State Legislature-1982*, 321 N.W.2d 565, 585 n.8 (Mich. 1982) (Levin & Fitzgerald, J.J., concurring)). Plaintiffs acknowledge that some Michigan counties have populations that are too large to be contained within a single congressional district, but there is no lawful excuse for splitting a county such as Oakland six different ways.

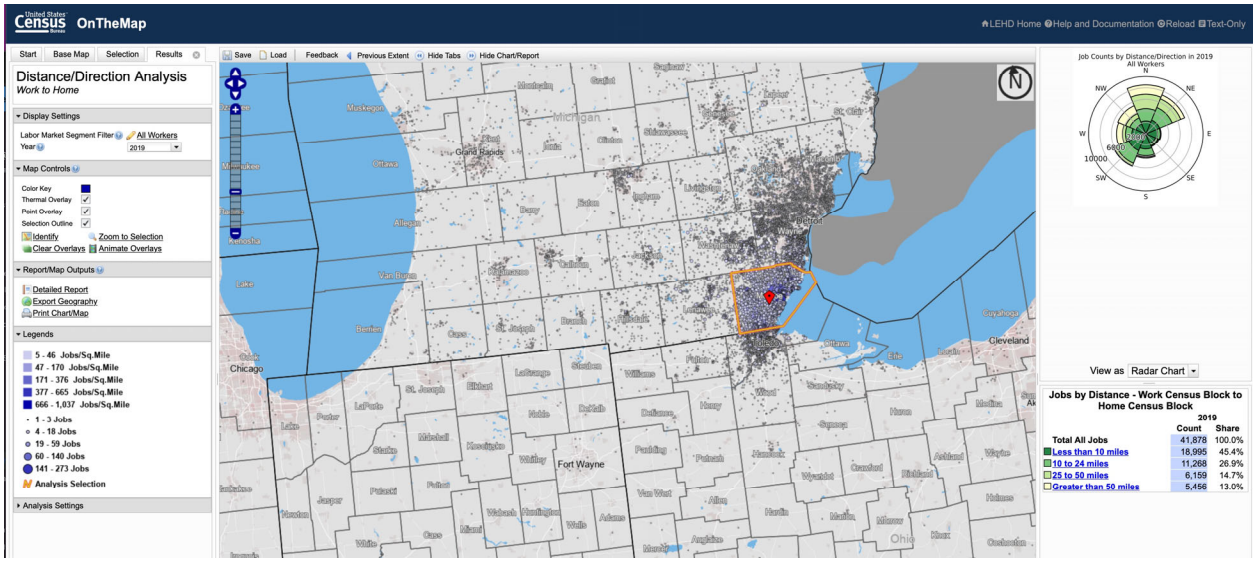
Voter-Intervenors cite Paul Gronke's expert report to justify the Commission's "community of interest" determinations. Voter-Intervenors' Br. in Opp. at 7 (ECF No. 39, PageID.646). Professor Gronke attests that, based upon his analysis, "it is extremely common for residents of the [Michigan] counties examined [in his report] to cross county boundaries to work and to travel along transportation corridors that connect them to other counties." Voter-Intervenors' Br. in Opp. at 7 (ECF No. 39, PageID.646) (quoting Ex. A ¶ 38). Given this entirely unremarkable finding, Professor Gronke believes that "[i]t does not seem unreasonable . . . that a map that prioritizes communities of interest may divide up some county and cities." *Id.* This surface-level conclusion sounds innocuous, but the decisions made by the Commissioners look more inconsistent when one looks more closely at the districts they actually constructed.

Congressional District 5 in the enacted map encompasses the entire southern border of Michigan stretching from the Detroit suburbs on the Canadian border at Lake Erie to the Indiana

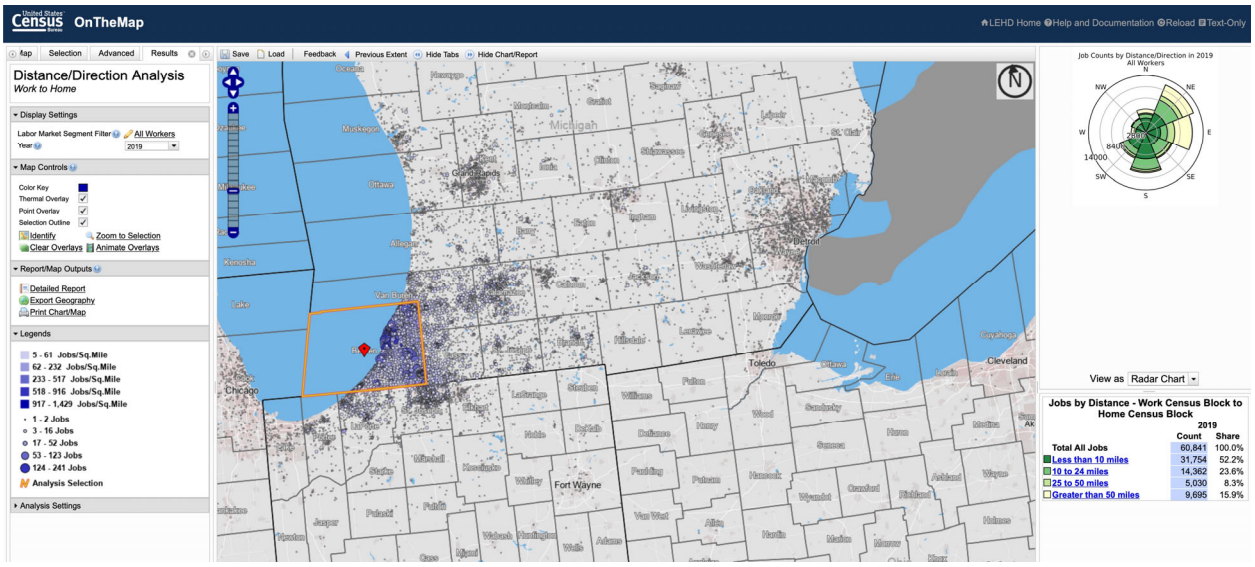
border at Lake Michigan. From east to west, the district stretches approximately 200 miles. To the Commission, that meandering district apparently constitutes a community of interest. But the Supreme Court rejected Texas's attempt to manufacture a community of interest between two Latino communities that were 300 miles apart. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 421, 441-442 (2006). And a three-judge panel in Maryland rejected an asserted community of interest containing the suburbs of Baltimore and Washington, D.C., two cities approximately 40 miles apart, because they had different economies and television markets. *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 899 (D. Md. 2011) (three-judge court) *sum. aff'd*, 567 U.S. 930 (2012). The counties along Michigan's southern border belong to five different media markets, and there is little public data supporting the assertion that Michigan's southern border constitutes a single continuous community of interest.

For example, the following chart from "On the Map" depicts Census Bureau data detailing where people who live in Monroe County work[1]:

[1] *See* U.S. Census *On The Map*, *Inflow/Outflow Analysis* for Monroe County, Michigan, *available at* https://onthemap.ces.census.gov/ (last visited Feb. 23, 2022) (search "Monroe County," select the appropriate entry, click "Perform Analysis on Selection Area," and check the box entitled "Inflow/Outflow").



A second graphic illustrates the same home and work dispersion for Berrien County on the opposite end of Michigan's southern border[2]:



[2] *See* U.S. Census *On The Map*, *Inflow/Outflow Analysis* for Berrien County, Michigan, *available at* https://onthemap.ces.census.gov/ (last visited Feb. 23, 2022) (search "Berrien County," select the appropriate entry, click "Perform Analysis on Selection Area," and check the box entitled "Inflow/Outflow").

What this demonstrates is a near total lack of economic connection between Berrien County and Monroe County. To assert that these two communities share a "community of interest" belies reality. No one doubts that people leave their counties for work, but to assert that southwestern Michigan's border counties constitute a community of interest with the southeastern border counties does not seem to comport with anyone's conceptions of a community of interest except for the Commission and Professor Gronke

Furthermore, the Third Congressional District is overpopulated and does not contain all of Kent County. *See* Pls. Mot. For Prelim. Inj. at 37 (ECF No. 9, PageID.130); Paciorek Decl. ¶ 7 (ECF No. 9-10, PageID.183-184). Voter-Intervenors assert simply that the Commission made its community of interest decisions in accordance with "hours of testimony and . . . numerous public comments[.]" Voter-Intervenors' Br. in Opp. at 7 (ECF No. 39, PageID.646). But from May 6 through December 11, 2021, over 40 public comments were submitted to the Commission requesting that Kent County be contained within a single congressional district.[3] Voter-Intervenors do not attempt to explain why these comments were discounted and Kent County was split between multiple districts. Plaintiffs' remedy map better adheres to Michigan's actual communities of interest by maintaining all of Kent and Berry Counties within a single district. Bryan Decl. ¶ 28 (ECF No. 9-3, PageID.155). According to Census data, 75.2% of those employed in Barry County work outside of the county and in the direction of Kent County and Grand Rapids.[4] Further,

[3] *See MI Redistricting Public Comment Portal* available at https://www.michigan-mapping.org/search (last visited Feb 22, 2022) (comment ID number P56 and w9288).

[4] *See* U.S. Census *On The Map*, *Inflow/Outflow Analysis* for Barry County, Michigan, *available at* https://onthemap.ces.census.gov/ (last visited Feb. 23, 2022) (search "Barry County," select the appropriate entry, click "Perform Analysis on Selection Area," and check the box entitled "Inflow/Outflow").

Muskegon is not among the top ten jurisdictions where Kent County residents hold jobs, and "an analysis of job counts by places for Muskegon County shows a 1.6% job interaction with Grand Rapids." Bryan Suppl. Decl. ¶¶ 11-12 (ECF 53-2) (emphasis added). Hence, no matter what public commenters might have claimed, the shared ties between Muskegon and Grand Rapids are infinitesimal, whereas Barry County exists within a single community of interest with Grand Rapids and Kent County.

Voter-Intervenors seem to believe that simply because Michigan voters created the Commission and tasked it with, among other things, drawing districts that "reflect the state's diverse population and communities of interest[,]" Mich. Const., Art. IV, § 6(13)(c), the Court is obligated to defer to the Commission's determinations of what constitutes a "community of interest." *See* Voter-Intervenors' Br. in Opp. at 7 (ECF No. 39, PageID.646) (noting that Commissioners "heard hours of testimony and received numerous public comments to help inform its understanding of what constitutes communities of interest in Michigan"). But "the Commissioners are not writing on a blank slate," so both federal and state caselaw preceding the 2018 enactment of the redistricting amendment is relevant to the Court's inquiry. Pls. Mot. For Prelim. Inj. at 31 (ECF No. 9, PageID.124). The Commission's decisions are not shielded from judicial review simply because it was the governmental body lawfully tasked with redistricting. Plaintiffs' remedy map does a better job of keeping counties whole and adhering to communities of interest supported by Census data and public comments.

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 to their right to vote, 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).

Voter-Intervenors barely respond to this argument, only referring to Plaintiffs' alleged constitutional injury as "window dressing" that "rises and falls with the merits of their claims." Voter-Intervenors' Br. in Opp. at 8 (ECF No. 39, PageID.647). Voter-Intervenors do not explain why they find the alleged harm to Plaintiffs' voting rights inconsequential, or how that injury could be redress in the absence of the requested injunction. Plaintiffs have been crystal-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, Voter-Intervenors only note that "if the Court disagrees with Plaintiffs on the merits, their harm argument also falls flat." Voter-Intervenors' Br. in Opp. at 8 (ECF No. 39, PageID.647). They do not offer any response for what happens if the Court *agrees* with Plaintiffs on the merits.

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).

Voter-Intervenors contend that "granting a preliminary injunction would cause harm to . . . millions of other Michigan residents who supported Michigan's independent redistricting process and approved the specific criteria spelled out in the Michigan Constitution that Plaintiffs now seek to upend." Voter-Intervenors' Br. in Opp. at 9 (ECF No. 39, PageID.648). Nowhere in all of their pleadings have Plaintiffs indicated that they seek to upend Michigan's constitutional criteria; instead, they have repeatedly indicated that they believe the Michigan criteria correspond with traditional redistricting criteria. Instead, Plaintiffs are seeking to *enforce* traditional criteria, now reflected in the Michigan Constitution, against the Commission's enactment of a map that flouts that same criteria in an arbitrary and nonsensical manner that violates the Equal Protection Clause.

It is an overstatement to claim, as Voter-Intervenors do, that a preliminary injunction "would elevate the voices of the Plaintiffs in this case over those of . . . every Michigander who voted to adopt Article IV, Section 6." Voter-Intervenors' Br. in Opp. at 9 (ECF No. 39, PageID.648). One could just as easily argue that it is improper to allow the choices of the Commissioners and those who were able to participate in this redistricting process to override the criteria ratified by the people of Michigan. With regard to the public interest, Voter-Intervenors fall back once again on their tired argument that "the Commission partook in hours and hours of testimony and expert opinions before it decided to adopt the Chestnut Plan." Voter-Intervenors' Br. in Opp. at 10 (ECF No. 39, PageID.649). This Court should recognize that the time the Commission expended on its task has no relevance to the question of whether the Commission acted in accordance with federal law.

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 Plaintiffs Motion for a Preliminary Injunction.

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 3,457 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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