STATE OF MICHIGAN
IN THE SUPREME COURT

DETROIT CAUCUS; ROMULUS CITY COUNCIL; INKSTER CITY COUNCIL; TENISHA YANCY, as a State Representative and individually; SHERRY GAY-DAGNOGO, as a Former State Representative and individually; TYRONE CARTER, as a State Representative and individually; BETTY JEAN ALEXANDER, as a State Senator and individually, Hon. STEPHEN CHISHOLM, as member of Inkster City Council and individually, TEOLA P. HUNTER, as a Former State Representative and individually; Hon. KEITH WILLIAMS, as Chair MDP Black Caucus and individually; DR. CAROL WEAVER, as 14th Congressional District Executive Board Member and individually; WENDELL BYRD, as a Former State Representative and individually; SHANELLE JACKSON, as a Former State Representative and individually; LAMAR LEMMONS, as a Former State Representative and individually; IRMA CLARK COLEMAN, as a Former Senator &Wayne County Commissioner and individually; LAVONIA PERRYMAN, as representative of the Shirley Chisholm Metro Congress of Black Women and individually; ALISHA BELL, as Wayne County Commissioner and individually; NATALIE BIENAIME; OLIVER COLE; ANDREA THOMPSON; DARRYL WOODS; NORMA D. MCDANIEL, MELISSA D. MCDANIEL; CHITARA WARREN; JAMES RICHARDSON; and ELENA HERRADA,

Plaintiffs,

v.

INDEPENDENT CITIZENS REDISTRICTING COMMISSION,

Defendant.

MSC No. 163926

Original Jurisdiction
Const 1963, art. 4, § 6(19).

DEFENDANT INDEPENDENT CITIZENS REDISTRICTING COMMISSION'S BRIEF IN SUPPORT OF ITS ANSWER TO PLAINTIFFS' FIRST AMENDED VERIFIED COMPLAINT

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JURISDICTIONAL SUMMARY

The Defendant, the Independent Citizens Redistricting Commission, agrees with Plaintiffs' jurisdictional summary.

STATEMENT OF QUESTION INVOLVED

Do Michigan's 2021 congressional and state legislative plans afford Black voters in and around Detroit an equal "opportunity . . . to participate in the political process and to elect representatives of their choice," as Section 2 of the Voting Rights Act requires, 52 USC 10301(b)?

The Commission answers: Yes.

INTRODUCTION

On December 28, 2021, the Independent Citizens Redistricting Commission (the "Commission") enacted new redistricting plans to govern legislative and congressional elections in Michigan. This concluded an effort that began in September 2020 with commissioners' orientation, involved some 139 public meetings and hearings, saw tens of thousands of public comments, and culminated with broad agreement on the Commission for the enacted plans—as Democratic, Republican, and independent commissioners supported each one.

As part of its constitutional mandate, the Commission worked to ensure that members of the Black community, like every community, have the same "opportunity [as] other members of the electorate to participate in the political process and to elect representatives of their choice," as Voting Rights Act (VRA) § 2 requires. 52 USC 10301(b). The Commission hired a former U.S. Department of Justice Voting Rights Section attorney, Bruce Adelson, and a nationally recognized VRA expert who has also served the Voting Rights Section, Dr. Lisa Handley. These professionals examined more than 100 probative elections, including Democratic primaries, to determine what level of Black voting-age population (BVAP) is needed in electoral districts to ensure equal minority opportunity. The Commission prepared and enacted its plans on the basis of this thorough evidentiary record and the advice of these seasoned professionals.

Plaintiffs contend that the VRA (and, therefore, Const 1963, art 4, § 13(a)) requires "two to four majority-Black districts in each of the three Plans" in the Detroit metropolitan region and challenge the enacted plans for purportedly failing to meet these targets (even though the house plan has *five* majority-Black districts in and around Detroit). Br. 12. While Plaintiffs' concerns are understandable, they incorrectly rely on "mechanical racial targets" with no basis in evidence. *Ala Legislative Black Caucus v Alabama*, 575 US 254, 267; 135 S Ct

1257; 191 L Ed 2d 314 (2015). Plaintiffs present no alternative redistricting plan showing superior district configurations, proffer no polarized voting study establishing the voting preferences of different racial groups, and erroneously rely on comparisons to prior redistricting plans—the focus of inoperative VRA § 5—to establish a violation of VRA § 2.

The Commission, by contrast, *did* have evidence and it undermines Plaintiffs' claim. The critical VRA question is the degree to which voting is racially polarized. The Commission determined, based on a thorough polarized voting study, that white voters consistently "cross over" to vote for Black-preferred candidates in and around Detroit. Dr. Handley determined that districts of 35% BVAP or more are likely to afford members of the Black community an equal electoral opportunity, given white crossover voting levels. Those levels are substantial: Dr. Handley's analysis shows that, in about 91% of congressional and state legislative elections analyzed, either the election was not racially polarized or else the Black-preferred candidate *prevailed*. As such, creating districts at 50% or greater BVAP is not only unnecessary to protect Black equal opportunity, but also harmful and potentially dilutive.

Plaintiffs' demand for districts drawn to achieve racial targets arbitrarily selected without accounting for evidence of white crossover voting contravenes controlling U.S. Supreme Court decisions on the VRA and Equal Protection Clause. See, e.g., *Cooper v Harris*, 137 S Ct 1455, 1470; 197 L Ed 2d 837 (2017) (striking down majority-Black congressional district given evidence of strong white crossover voting). And a three-judge federal court panel recently rejected a similar challenge to Illinois's legislative district plan based on a claim that Illinois's plan did not contain a sufficient number of majority-Latino or majority-Black districts in certain regions. *McConchie v Scholz*, --F Supp 3d--, 2021 WL 6197318 (ND Ill, Dec 30, 2021). In *McConchie*, the "record show[ed] ample evidence of crossover voting to defeat any claim of racially polarized voting sufficient to deny Latino and Black voters of the opportunity to elect candidates of their choice." *Id.* at 30. So too here.

Section 2 "allows States to choose their own method of complying with the Voting Rights Act," and this "may include drawing crossover districts." *Bartlett v Strickland*, 556 US 1, 23; 129 S Ct 1231; 173 L Ed 2d 173 (2009). That is what the Commission did here, and its choice was sound. *Id.* at 24 ("States can—and in proper cases should—defend against § 2 violations by pointing to crossover voting patterns and to effective crossover districts"). Plaintiffs' challenge mirrors the recent VRA errors of many redistricting authorities, who created majority-minority districts not required by the VRA and not supported by evidence and saw those districts invalidated as violations of the federal Equal Protection Clause. The Commission, by contrast, navigated these "competing hazards of liability," *Bush v Vera*, 517 US 952, 977; 116 S Ct 1941; 135 L Ed 2d 248 (1996) (plurality opinion), using a data-driven approach and tailoring VRA compliance goals to the best available estimates of voting patterns, rather than arbitrarily picking a BVAP target. That is the right way to comply with the VRA, and this Court should not undo the Commission's choices.

STATEMENT OF FACTS

I. The VRA and Equal Protection Clause Framework

After each decennial census, "[s]tates must redistrict to account for any changes or shifts in population." *Georgia v Ashcroft*, 539 US 461, 489 n 2; 123 S Ct 2498; 156 L Ed 2d 428 (2003). "Redistricting is never easy." *Abbott v Perez*, 138 S Ct 2305, 2314; 201 L Ed 2d 714 (2018). This is, in part, because "federal law impose[s] complex and delicately balanced requirements regarding the consideration of race." *Id.*

On the one hand, "federal law restrict[s] the use of race in making districting decisions." *Id.* Specifically, "[t]he Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Id.* (citing *Shaw v Reno*, 509 US 630, 641; 113 S Ct 2816; 125 L Ed 2d 511 (1993) (*Shaw*

I)). Under this doctrine, creating a majority-minority district, designed to ensure that BVAP exceeds 50% or more (or a different target), will likely subject the district to strict scrutiny. See *Cooper*, 137 S Ct at 1468–69 (applying strict scrutiny to, and invalidating, a North Carolina congressional district where legislators "repeatedly told their colleagues . . . [districts] had to be majority-minority, so as to comply with the VRA.").

On the other hand, "[a]t the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the Voting Rights Act of 1965, pulls in the opposite direction: It often insists that districts be created precisely because of race." *Abbott*, 138 S Ct at 2314 (citation omitted). "A State violates § 2 if its districting plan provides 'less opportunity' for racial minorities 'to elect representatives of their choice.'" *Id.* (quoting *League of United Latin American Citizens v Perry*, 548 US 399, 425; 126 S Ct 2594; 165 L Ed 2d 609 (2006) (*LULAC*)). "In a series of cases tracing back to *Thornburg v Gingles*, 478 US 30; 106 S Ct 2752; 92 L Ed 2d 25 (1986), [the U.S. Supreme Court has] interpreted this standard to mean that, under certain circumstance, States must draw 'opportunity' districts in which minority groups form 'effective majorit[ies].'" *Id.* (citation omitted).

But there are limits to this obligation. "[C]ourts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *Voinovich v Quilter*, 507 U.S. 146, 156; 113 S Ct 1149; 122 L Ed 2d 500 (1993). First, § 2 requires majority-minority districts only if "three threshold" elements are proven. *Cooper*, 137 S Ct at 1470. Those elements, known as the *Gingles* preconditions, are that: (1) the relevant minority group is "'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district"; (2) the relevant minority group is "politically cohesive," and (3) the "district's white majority . . . 'vote[s] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Id.* (quoting *Gingles*, 478 US at 50–51). Second, states must not

maximize the number of majority-minority districts in a plan. *Johnson v De Grandy*, 512 US 997, 1017; 114 S Ct 2647; 129 L Ed 2d 775 (1994) ("Failure to maximize cannot be the measure of § 2."). Third, in *Bartlett v Strickland*, 556 US at 1, the Supreme Court held that the first *Gingles* precondition is not satisfied, and § 2 is not implicated, "when the minority group makes up less than 50 percent of the voting-age population in the potential election district." *Id.* at 12. Thus, § 2 does not mandate that states create so-called "crossover" districts, in which "minority voters make up less than a majority of the voting-age population," but that community is "large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.* at 13. Nevertheless, crossover districts may be created "as a matter of legislative choice or discretion." *Id.* at 23. Further, "[s]tates can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts." *Id.* at 24.

"Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability.'" *Abbott*, 138 S Ct at 2315 (quoting *Bush*, 517 US at 977). The Supreme Court has attempted to ameliorate those competing hazards by "assum[ing] that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed"—i.e., that "complying with the VRA is a compelling state interest." *Id.* (citing *Bethune-Hill v Va State Bd of Elections*, 137 S Ct 788, 800–01; 197 L Ed 2d 85 (2017)). However, the state's burden in invoking this justification is demanding. See *Miller v Johnson*, 515 US 900, 915; 115 S Ct 2475, 2487–88; 132 L Ed 2d 762 (1995) (rejecting the view "that a State's assignment of voters on the basis of race would be subject to anything but our strictest scrutiny"). For a state to justify a purposefully created majority-minority district

under VRA § 2, it must adduce evidence—at the time of redistricting—establishing the three *Gingles* preconditions. *Id.* "If a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not." *Id.* (citation omitted).

II. Background and Framework Governing the Commission

A. Redistricting in Michigan has, historically, fallen short of the ideal. At the congressional level, the Legislature was unable to pass redistricting plans following the 1970, 1980, and 1990 censuses, requiring this Court to intervene and fashion plans. *LeRoux v Secretary of State*, 465 Mich 594, 598; 640 NW2d 849, 852 (2002). Likewise, this Court was called upon to draw state legislative plans in 1982 and 1992, after the political branches failed to do so. See, e.g., *In re Apportionment of the State Legislature-1992*, 439 Mich 251; 483 NW2d 52 (1992); *In re Apportionment of the Michigan Legislature-1982*, 413 Mich 143; 323 NW2d 269 (1982).

The 2010 redistricting cycle proved controversial. Shortly after the 2011 redistricting, a coalition of minority groups sued, alleging the state house districts in Detroit violated the VRA and the Equal Protection Clause by, among other things, splitting the Hispanic community into two districts and excessively pairing minority incumbents. This claim was dismissed. *NAACP v Snyder*, 879 F Supp 2d 662, 679–80 (ED Mich, 2012) (three-judge panel).

The 2011 plans were challenged again in December 2017, when plaintiffs alleged that they were partisan gerrymanders in violation of Democratic voters' constitutional rights. A three-judge panel enjoined the plans under this theory. *League of Women Voters of Mich v Benson*, 373 F Supp 3d 867, 953–54 (ED Mich, 2019). That court found, among other things, that districts near Detroit "packed" Democratic voters, "making the surrounding districts . . . more Republican." *Id.* at 918, 920, 922. That injunction was vacated in light of *Rucho*

v Common Cause, 139 S Ct 2484; 204 L Ed 2d 931 (2019), which held that partisan-gerrymandering claims are nonjusticiable in federal court. See *Chatfield v League of Women Voters of Mich*, 140 S Ct 429; 205 L Ed 2d 250 (2019). But the criticisms aired in *Benson* were well publicized.

B. Michigan's voters had enough. On November 6, 2018, they voted overwhelmingly to overhaul Michigan's redistricting process. The organization that led the initiative framed it as a vehicle to eject politicians from map-drawing, arguing that "[p]oliticians . . . manipulate our voting maps to keep themselves in power," which "allows politicians the power to choose their voters, instead of giving the voters the power to choose their politicians." Def. App. 001a. The resulting constitutional amendment created a comprehensive scheme to govern the Commission's work, with substantive and procedural dictates.

Substantively, the Commission is required to draw plans that comply with several exacting criteria, including that districts "be of equal population" and "comply with the voting rights act and other federal laws," "be geographically contiguous," "reflect the state's diverse population and communities of interest," "not provide a disproportionate advantage to any political party" as determined by "accepted measures of partisan fairness," "not favor or disfavor an incumbent elected official or a candidate," "reflect consideration of county, city, and township boundaries," and "be reasonably compact." Const 1963, art 4, § 6(13). The Commission is required to prioritize those criteria in the order stated. *Id.*

Procedurally, the Commission is structured beginning with a Commissioner-selection process designed to ensure partisan balance and exclude "an array of individuals with partisan ties" existing in "the past six years." *Daunt v Benson*, 999 F3d 299, 311 (CA 6, 2021); Const 1963, art 4, § 6(1). The Constitution also regulates the Commission's work, requiring it "to conduct all of its business at open meetings." Const. 1963, art 4, § 6(10); *Detroit News, Inc v Indep Citizens Redistricting Comm*, --NW2d--; 2021 WL 6058031, at *7 (Mich Dec 20, 2021).

Before drafting plans, the Commission was required to "hold at least ten public hearings throughout the state for the purpose of," among other things, "soliciting information from the public about potential plans." Const 1963, art. 4, § 6(8). Then, after commissioners drafted plans, which had to be published along with any "data and supporting materials," the Commission was required to hold "at least five public hearings throughout the state for the purpose of soliciting comment from the public about the proposed plans." *Id.* at § 6(9). Following that input, the Commission must select plans to be voted upon, triggering a mandatory 45-day public-comment period for each selected plan. *Id.* at § 14(b).

III. The 2021 Redistricting

The 2021 redistricting was uniquely challenging. The Commission found itself in "the difficult and unenviable position of undertaking its inaugural redistricting cycle without the full benefit of tabulated decennial census data," because the U.S. Census Bureau released the necessary redistricting data "six months late." *In re Indep Citizens Redistricting Comm for State Legislative & Congressional Dist's Duty to Redraw Districts by Nov 1, 2021*, 961 NW2d 211, 212 (Mich 2021) (WELCH, J., concurring). This delay made it impossible for the Commission to achieve its constitutional deadline to enact plans by November 1. Const 1963, art 4, § 6(7). Further, following the 2020 census, because Michigan's population growth lagged behind that of other states, Michigan was apportioned just 13 congressional seats, down from 14 in 2011. Another complexity arose from the fact that Detroit lost overall population and Black population.

Despite these challenges, the Commission "act[ed] diligently pursuant to its constitutional mandate." *In re Indep Citizens Redistricting Comm*, 961 NW2d at 212 (WELCH, J., concurring). The Commission met or surpassed every metric of public observation and participa-

tion. From September 17, 2020, through May 6, 2021, before mapdrawing began, the Commission held 35 public meetings to address preliminary matters like hiring staff, procurement activities, and adoption of procedures. While Subsection 8 required the Commission to hold ten public hearings before drafting, the Commission held sixteen. See Def. App. 118a–169a. After the release of redistricting data from the U.S. Census Bureau on August 12, 2021, the Commission, in a public process, created draft proposed maps. At this stage, the Commission held 38 more public meetings throughout the state. *Id.*

Next, after the Commission had drafted at least one set of plans, it held a second round of public hearings as required by Subsection 9. Collectively, the Commission has held 139 formal meetings and hearings as of this filing. *Id.* At each of the first two rounds of hearings, the Commission heard more than 1,000 live citizen comments. More than 10,000 public comments regarding proposed maps have been submitted to the Commission's "MyDistricting" website, and thousands more have been made on an online comment portal. The Commission has received thousands of additional written public comments. Comments continue to pour in.

The Commission finally held an additional four meetings before adopting, at its December 28, 2021, meeting, new redistricting plans. As the Constitution requires, each plan was adopted by the vote of at least two Commissioners affiliated with the two major parties and two Commissioners affiliated with no party. Const 1963, art. 4, § 6(14)(c). Unable to meet the November 1 deadline, the Commission committed itself to a December 31 deadline and achieved that goal.

IV. The Commission Protected Black Electoral Opportunity in Wayne County

A. To ensure its plans would "comply with the voting rights act and other federal laws," Const 1963, art 4, § 6(13)(a), the Commission engaged VRA experts to collect and

analyze data and provide advice. After competitive-bidding processes, the Commission hired a nationally recognized expert, Dr. Lisa Handley, to conduct a racial bloc voting analysis, Def. App. 003a, and a nationally recognized voting-rights attorney, Bruce Adelson, to serve as VRA counsel. Def. App. 004a. Mr. Adelson, a former lawyer at the U.S. Department of Justice Voting Rights Section, was hired to "provide the advice, counsel and analysis, work closely with [the Commission], staff, the mapping consultant, [and the Commission's] general counsel in producing [a] districting plan that is compliant." Def. App. 005a. Throughout the process, the Commission turned to these experts. Mr. Adelson or Dr. Handley (or both) spoke at 36 Commission meetings between April and December 2021.[1] Dr. Handley provided written reports to the Commission on September 2, 2021, November 1, 2021, December 28, 2021, and January 4, 2022. All are (and have always been) public.

B. On September 2, 2021, before Commissioners prepared final proposed maps, Dr. Handley presented initial findings. She conducted a thorough analysis of voting patterns statewide and specifically within Wayne, Oakland, Genesee, and Saginaw Counties, which she identified as the counties containing sufficiently large minority populations to merit analysis. Def. App. 021a.

Dr. Handley analyzed all federal and statewide general election contests from 2012 through 2020, including the only statewide Democratic primary in the last decade (the 2018 gubernatorial race). *Id.* at 022a. Dr. Handley also analyzed legislative races in relevant regions. *Id.* at 033a–034a. Dr. Handley used industry-leading ecological inference and ecological regression techniques to estimate levels of white and minority voter support for Black-preferred candidates. *Id.* at 020a. And while Dr. Handley identified racially polarized voting

[1] The specific dates included April 8, June 28 and 30, July 8 and 9, August 6 and 19, September 1, 2, 9, 14, 20, 21, 22, 23, 27, 28, 29, and 30, October 1, 2, 4, 5, 6, 7, 8, 11, 27, 28, 29, November 1, 3, 4, 5, and December 2 and 28, 2021. See Def. App. 118a–169a.

in Michigan (meaning that, as applicable here, white and Black voters tend to prefer different candidates), she identified significant white crossover voting (33.5% to 50.6% at the statewide level) in each of the four counties she studied. *Id.* at 028a–032a. That crossover voting affords Black voters an equal opportunity to elect representatives of their choice even in the absence of 50%+ majority-minority districts. Dr. Handley observed that, in state senate races, districts over 35% BVAP saw the election of Black candidates 67% of the time, and, in state house races, every contest in a district over 36% BVAP saw Black candidate success, and Black candidates were nearly always successful (89% of the time) in districts over 25% BVAP. See Def. App. 014a. Dr. Handley concluded that "statewide it's quite possible that you do not need a majority-minority District to elect a minority preferred candidate." *Id*. at 013a. In its October 27, 2021, session, the Commission received advice from Mr. Adelson that "the Voting Rights Act . . . does not require any numerical amount of majority-minority districts, indeed, does not even require majority-minority districts at all."[2]

C. On November 1, ahead of the Commission's final proposed maps deadline that would trigger the final 45-day comment period, Dr. Handley presented again on racially polarized voting. Dr. Handley focused her analysis on other minority populations like the Arab-American, Hispanic, and Bengali communities. Based on Dr. Handley's findings of cohesion among these minority communities, Mr. Adelson noted that Arab-Americans, Bengalis, and Latinos in the areas in and around Detroit prefer "generally the same candidates" as Black voters. See Def. App. 040a.

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[2] Oct 27, 2021 Hearing at 13:01 (statement of Bruce Adelson) <https://soundcloud.com/user-504859921/audio-closed-session-micrc-oct-27-released-dec-20-per-msc?si=6a87f383054a48b4bd27ad6c59c892b4&utm_source=clipboard&utm_medium=text&utm_campaign=social_sharing> (accessed Jan 18, 2022).

D. Dr. Handley conducted further analysis and subsequently presented a final report on polarized voting (the "Final Report").[3] The Final Report provided a more extensive analysis of elections. It identifies, in the appendices, over one hundred election outcomes, including both general and primary results from 2012 through 2020. Def. App. 076a–117a. The Final Report concludes that "in no county is a 50% BVAP district required for the Black-preferred candidates to carry the district in a general election." *Id.* at 062a. Dr. Handley also concluded that in Wayne County, the "Black-preferred candidate would win every general election in a district with a BVAP of 35% or more, and would win with at least 54.4% of the vote – and in most election contests, a substantially higher percentage . . . ." *Id.* The same result holds for Genesee County: at 35% BVAP, Black-preferred candidates win every general election analyzed in Dr. Handley's study. *Id.* For Oakland and Saginaw Counties, the Final Report concludes a 40% BVAP is required for Black-preferred candidates to win every single general election contest. *Id.*

Dr. Handley's analysis of congressional, senate, and house contests from 2018 to 2020 in Wayne, Genesee, Oakland and Saginaw Counties reached a similar result. First, she found that 69% (58 of 84) of contested elections she could analyze were not polarized, meaning white and Black voters preferred the same candidate(s). Def. App. 049–051a. Second, Dr. Handley found that in those general elections that were racially polarized, the minority-preferred candidate prevailed in 11 out of 12 elections (91.7%). *Id.* In polarized primaries, the minority-preferred candidate prevailed in 8 out of 14 elections (57.1%). *Id.* Combining the general and primary yields a total of 19 out of 26 elections, or 73%, in which the minority-

[3] The Final Report was originally dated December 28, 2021, but was slightly revised and republished on January 4, 2022.

preferred candidate prevailed in a racially polarized election. And many elections are not polarized, either because of a lack of Black cohesion or of white cohesion. Altogether, in 77 out of 84 contested races (91.6%), because Black and white voters supported the same candidates.

V. The Commission Adopts The 2021 Plans

On December 28, 2021, the Commission voted on, and adopted, Michigan's final maps. Prior to the final vote, the Commission reviewed its federal compliance tracker—a wide-ranging spreadsheet of data collected to inform the Commission's understanding of its legal obligations—to view VRA compliance data for each collaborative map.[4] The enacted plans afford Black voters in the Detroit metropolitan region significant opportunities to elect their preferred candidates, as measured by Dr. Handley's findings. The following charts identify the BVAP of every enacted district that contains any part of Wayne County:

Chestnut Map Congressional District	Counties	NH Black VAP
12	Oakland Wayne	43.81%
13	Wayne	44.70%

Linden Map Senate District	Counties	NH Black VAP
1	Wayne Washtenaw	35.03%
2	Wayne	24.47%
3	Oakland Macomb Wayne	42.09%
4	Wayne	13.32%
5	Wayne	18.25%
6	Oakland Wayne	39.15%
7	Oakland	44.78%

[4] See Dec 28, 2021 Hearing at 05:09:30 <https://youtu.be/IcKJ65GSfaM?t=18548> (accessed Jan. 18, 2022).

	Wayne	
8	Oakland Wayne	40.25%
10	Macomb Wayne	40.43%
11	Macomb Wayne	2.18%

Hickory Map House District	**Counties**	**NH Black VAP**
1	Wayne	38.03%
2	Wayne	11.04%
3	Wayne	32.82%
4	Wayne	55.60%
5	Oakland Wayne	55.31%
6	Oakland Wayne	54.93%
7	Oakland Wayne	44.29%
8	Oakland Wayne	43.70%
9	Wayne	51.65%
10	Wayne	38.79%
11	Macomb Wayne	42.82%
12	Macomb Wayne	40.99%
13	Macomb Wayne	38.36%
14	Macomb Wayne	41.11%
15	Wayne	7.18%
16	Wayne	54.92%
17	Wayne	42.43%
22	Wayne	2.24%
23	Oakland Washtenaw Wayne	4.78%

24	Wayne	9.84%
25	Wayne	19.62%
26	Wayne	35.82%
27	Wayne	2.93%
28	Monroe Wayne	9.14%
29	Monroe Wayne	11.83%
31	Monroe Washtenaw Lenawee	15.72%

Accordingly, for districts wholly or partially within Wayne County, there are two congressional districts (CD-12 and CD-13) that contain at least 40% BVAP; in the State Senate, there are six districts (SD-1, SD-3, and SD-6 to SD-8, and SD-10) that contain at least 35% BVAP; and in the State House, there are 15 districts (HD-1, HD-4 to HD-14, HD-16 to HD-17, and HD-26) with at least 35% BVAP, and five of those (HD-4, 5, 6, 9, and 16) have greater than 50% BVAP.[5]

STANDARD OF REVIEW

This case falls within this Court's "original jurisdiction" to "review a challenge to any plan adopted by the commission" and determine whether the plan "compl[ies] with the requirements of [the Michigan] constitution, the constitution of the United States or superseding federal law." Const 1963, art 4, § 6(19). As a result, "[i]t is this Court's duty . . . to determine what are the requirements of" the law and ascertain "the meaning of those requirements

[5] Plaintiffs allege that the congressional plan was backed only by eight of the thirteen commissioners. However, the enacted congressional plan (known as the "Chestnut plan") was listed as the first or second preference by eleven of the thirteen members of the commission. Chair Szetela noted that while both the Chestnut and another map (known as the "Birch plan") were favored by large numbers of public commenters, the Chestnut map contained districts with higher BVAPs. Likewise, the enacted senate map was listed as the first or second preference by eleven of the thirteen members of the commission, garnering a final vote of nine commissioners.

in specific applications." *In re Apportionment of State Legislature—1982*, 413 Mich at 114. The Commission's redistricting plans have the effect of Michigan laws. Const 1963, art 4, § 6(22). Accordingly, Plaintiffs "must overcome the presumption that" the plans are "constitutional, and" they "'will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt.'" *People v Carp*, 496 Mich 440, 460; 852 NW2d 801 (2014) (quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939)). To establish a VRA claim, the plaintiff bears the burden of proving the elements of the claim "by a preponderance of the evidence." *Rodriguez v Bexar County, Tex*, 385 F3d 853, 859 (CA 5, 2004).

ARGUMENT

I. Plaintiffs' Voting Rights Act Claim Lacks Merit

Plaintiffs fail to make any of the threshold showings essential to a viable Section 2 claim. As discussed above, a Section 2 plaintiff must establish each of three preconditions set forth in *Thornburg v Gingles*, 478 US at 30, known as the "*Gingles* preconditions": (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "the minority group must be able to show that it is politically cohesive," and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50–51. These are "three necessary, but not sufficient, conditions for a plaintiff to succeed in a Voting Rights Act claim." *Mallory v Ohio*, 173 F3d 377, 380 (CA 6, 1999). "If these preconditions are met, the court must then determine under the 'totality of circumstances' whether there has been a violation of Section 2." *Lewis v Alamance County, NC*, 99 F3d 600, 604 (CA 4, 1996) (citation omitted).

A. None of the Preconditions Is Satisfied

Each threshold *Gingles* precondition goes unsatisfied on Plaintiffs' evidentiary showing.

1. The First Precondition

The first *Gingles* precondition is not satisfied because Plaintiffs have presented no illustrative version of the house, senate, and congressional plans proving that "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 US at 50. They fail to do so even after insisting that "[a] knowledgeable expert could redraw Defendant's three Plans to conform to the Michigan Constitution and Voting Rights Act . . . in a matter of hours" and that "[t]he cost[] would be miniscule." Br. 24. If so, Plaintiffs should have presented alternative plans. To be sure, Plaintiffs point to demographics to contend "that Michigan's Black population in the Southeastern part of the state (in and around Detroit) could provide two to four majority-Black districts in each of the three Plans." Br. 12. Although there is no reason to doubt that some number of majority-minority districts may be created "in and around Detroit," that does not end the inquiry.

a. The first *Gingles* precondition "specifically contemplates the creation of hypothetical districts." *Magnolia Bar Ass'n, Inc v Lee*, 994 F 2d 1143, 1151 n 6 (CA 5, 1993); see also *Fairley v Hattiesburg, Miss*, 584 F3d 660, 669 n 8. (CA 5, 2009) (same). That need is apparent here because Plaintiffs' vague reference to "two to four" districts that are "majority-Black" somewhere "in and around Detroit" does little to inform the Court, the Commission, or the public precisely what, in their view, is needed to ensure minority equal opportunity—and, in turn, what maps would govern Michigan elections if they prevail. For example, their expert opines that a district that is "majority-Black" (i.e. 50% plus one) is insufficient; districts may

need to be drawn to 55% or even 65% BVAP. Expert Rep. ¶ 8. But it is unclear how many districts of that nature can be drawn.

What's more, the difference between two, three, and four opportunity districts could carry legal significance, so merely citing a range is not enough. For example, the enacted house plan already has *five* majority-minority districts, and Section 2 "requires a comparison between *a challenger's proposal* and the 'existing number of reasonably compact districts.'" *LULAC*, 548 US at 430 (citation omitted) (emphasis added). An imprecise invocation of "two to four districts" fails to establish that a better alternative to *five* majority-minority districts exists. It is also unclear whether alternative plans at 65% BVAP will comply with other criteria governing the Commission's plans. See *Abbott*, 138 S Ct at 2314 (recognizing that redistricting plans must "comply with special state-law districting rules"). The concept of concentrating Black voters at such high levels—like the prior decade's plan that was found to have "packed" Democratic voters for Republican advantage, *League of Women Voters*, 373 F Supp 3d at 918—would raise serious questions about the Commission's ability to "not provide a disproportionate advantage to any political party." Const 1963, art 4, § 6(12)(d). This concept would also raise its own VRA concerns, as vote dilution can occur through "packing" the Black community into a few districts as easily as through "cracking" it among many. See *Voinovich*, 507 US at 163. Plaintiffs should not be permitted to ignore these problems by failing to show viable alternatives.

Alternatives are essential for the additional reason that a § 2 claim fails "if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice." *Abbott*, 138 S Ct at 2332. Where a plaintiff fails to "present[] evidence regarding the 'functionality' of their proposed Remedial Plan," the claim cannot succeed. See *Harding v City of Dallas, Texas*, 948 F3d 302, 309 (CA 5, 2020) (rejecting § 2 claim

on this basis). Because no alternative is presented here, the analysis cannot even begin—and must end. An alternative plan would empower experts from both sides to assess likely performance of that alternative, but no such analysis can occur in their absence. It is unknown, for example, what neighborhoods remedial districts would cover, what Black turnout exists in those neighborhoods, and whether so-called remedial districts would perform. This analysis cannot wait until a later remedial phase because "inquiries into remedy and liability cannot be separated." *Burton v City of Belle Glade*, 178 F3d 1175, 1199 (CA 11, 1999) (quoting *Nipper v Smith*, 39 F3d 1494, 1530–31 (CA 11, 1994) (en banc) (alterations adopted)).

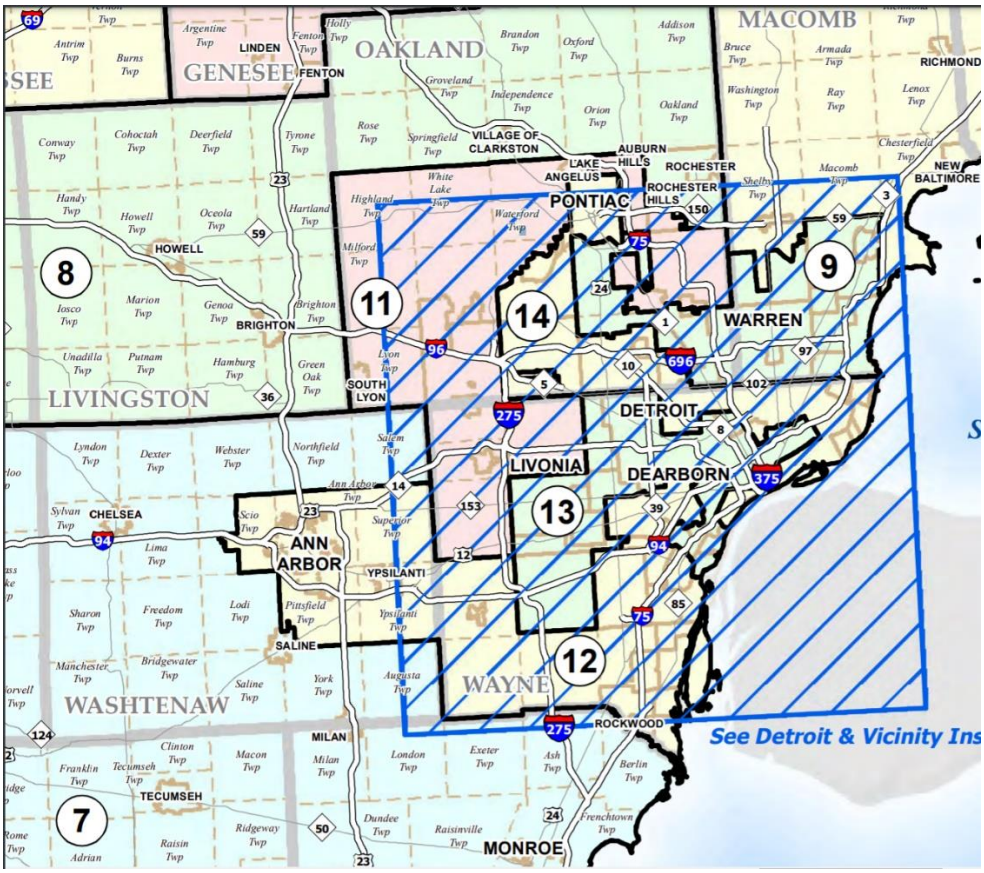
"Courts cannot find § 2 effects violations on the basis of *uncertainty*." *Abbott*, 138 S Ct at 2333. But "uncertainty" is the best that can be said of Plaintiffs' showing.

b. Plaintiffs' failure to provide an alternative is manifest further in their effort to avoid § 2 altogether and obtain an injunction under the completely different standard of VRA § 5—which does not apply. Plaintiffs emphasize that BVAP in some enacted districts is reduced compared to majority-minority districts of the 2011 plans. See, e.g., Br. 4, 5–6. But the standard Plaintiffs cite, called "retrogression," Amend. Compl. ¶ 9, is a § 5 standard that formerly required covered jurisdictions to establish in preclearance proceedings that new redistricting plans would "not bring about retrogression in respect to racial minorities' 'ability . . . to elect their preferred candidates of choice.'" *Alabama Legislative Black Caucus*, 575 US at 259 (quoting 52 USC 10304(b) (VRA § 5)). This standard is no longer in force because the Supreme Court disabled the coverage formula of VRA § 4. See *Shelby County v Holder*, 570 US 529; 133 S Ct 2612; 186 L Ed 2d 651 (2013). This standard does not apply today in Michigan or anywhere else.

Section 2 is different. As the Supreme Court explained in *Reno v Bossier Parochial School Bd*, 520 US 471; 117 S Ct 1491; 137 L Ed 2d 730 (1997), "[r]etrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Id.* at 479. "Section 2, on the other hand, was designed as a means of eradicating voting practices that 'minimize or cancel out the voting strength and political effectiveness of minority groups.'" *Id.* (citation omitted). "Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Id.* at 480. Stated differently, the § 2 analysis measures the claim, not against prior plans, but against a hypothetical plan proffered by the challengers. See *Holder v Hall*, 512 US 874, 881; 114 S Ct 2581; 129 L Ed 2d 687 (1994) (plurality opinion); *id.* at 950–51 (BLACKMUN, J., dissenting). Because Plaintiffs present no alternative plan, no § 2 analysis is possible. Plaintiffs' references to prior plans do not make up for this failure and are inapposite. See, e.g., *Little Rock Sch Dist v Pulaski County Special Sch Dist No 1*, 56 F3d 904, 910 (CA 8, 1995) (finding error in a district court's comparing a plan challenged under § 2 against the prior plan, mistaking retrogression for dilution).

c. And, indeed, this case is especially inappropriate for a retrogression standard because the plans Plaintiffs utilize for comparison were created by a partisan body under a very different set of laws and policies. The 2011 congressional plan's Wayne County-area districts are as follows:[6]

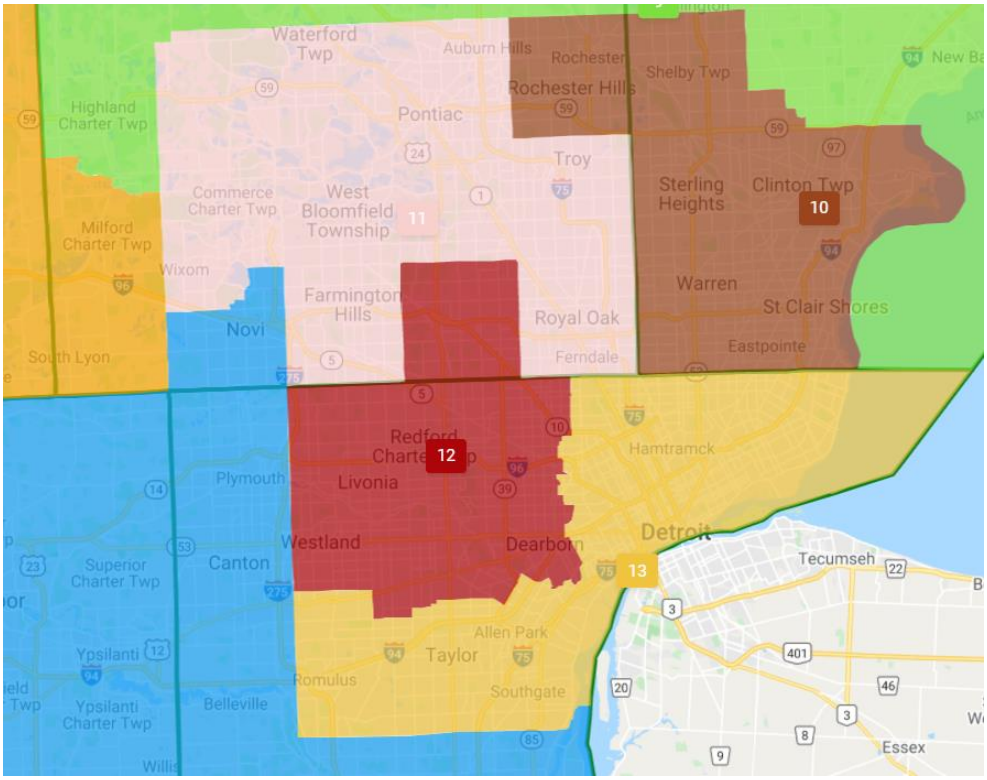
[6] Michigan Secretary of State, 2011 Congressional Districts (excerpt) <https://www.michigan.gov/documents/cgi/congress10statewide_371463_7.pdf> (accessed Jan 17, 2022).



The BVAP of District 13 in the 2011 plan was 54.78%, and the BVAP of District 14 was 55.16%. Def. App. 050a. While District 13 was entirely contained in Wayne County, District 14 carved out a large piece of northern and eastern Wayne County and meandered deep into Oakland County.

The Commission's adopted plan is an improvement. In it, the Wayne County-area districts are as follows:[7]

[7] MICRC, Chestnut Final Plan (excerpt) <https://michigan.mydistricting.com/legdistricting/comments/plan/279/23> (accessed Jan 17, 2022).



These districts better respect "traditional race-neutral districting principles," *Miller*, 515 US at 916, that did their predecessors. As noted, the BVAP of District 12 in this plan is 43.81%, and the BVAP of District 13 is 44.71%. District 13 is entirely contained in Wayne County, and District 12 is centered in Wayne County and takes in a square-shaped portion of Oakland County. The Commission's plan therefore affords Wayne County's Black voters an equal opportunity to elect the representatives of their choice, without creating the kind of "bizarre shape[d]" districts with "hook-like" appendages that "sprawl" through territory that the U.S. Supreme Court has identified as evidence of racial gerrymandering. *Bush*, 517 US at 965–66.

d. Yet another problem with Plaintiffs' failure to present an alternative plan is that "§ 2 allows States to choose their own method of complying with the Voting Rights Act," and this "may include drawing crossover districts." *Id.* The Commission chose this path of VRA compliance, and Plaintiffs have no basis to contest it.

Plaintiffs make spirited predictions that the Commission's enacted redistricting plans will result in minority inequality, *e.g.*, that they "would completely rob the Black minority of Michigan of its ability to elect their chosen representatives into the Michigan Senate, and halve the potential candidates they could elect to the Michigan House of Representatives." Br. 4. But Plaintiffs ignore "crossover voting patterns" and the "effective crossover districts" the Commission has created. *Bartlett*, 556 US at 24. As explained, Dr. Handley's Final Report finds high levels of white crossover voting, such that the Black community has an equal opportunity to elect its preferred candidates with 35% BVAP. Numerous districts in the Commission's plans qualify as equal-opportunity districts based on this evidence. In the House Plan, fifteen districts in Wayne County fall within that observed range, Def. App. 200a; in the Senate Plan, the number is six, Def. App. 185a; in the Congressional Plan, both of the Wayne County districts fall within the observed range. Def. App. 170a.

The proper comparison, then, is between those numbers and the number of opportunity districts in a reasonable alternative. *LULAC*, 548 US at 430 (citation omitted) (emphasis added) (Section 2 "requires a comparison between *a challenger's proposal* and the 'existing number of reasonably compact districts.'"). Plaintiffs leave the Court unable to make this comparison. Indeed, the assertion of "two to four" majority minority districts would, on its face, *disprove* a § 2 violation: with fifteen, six, and two opportunity districts, respectively, the enacted plans afford either *more* minority opportunity or the *same amount* as compared to Plaintiffs' own unsupported assertion. Plaintiffs cannot win a § 2 claim simply by proving "that lines could have been drawn elsewhere, nothing more." *Johnson*, 512 US at 1015.

In this way, the Commission followed the path the Supreme Court outlined in *Bartlett*, which held that states are not obligated to create minority crossover districts. 556 US at 13.

However, the Court left state redistricting authorities the "option to draw such districts" because they afford "a choice that can lead to less racial isolation, not more." *Id.* at 23. The Court explained that "§ 2 allows States to choose their own method of complying with the Voting Rights Act" and that this "may include drawing crossover districts." *Id.* That is what the Commission did here: it concluded—based on Dr. Handley's sound advice—that majority-minority districts are unnecessary, unjustified by the data-based body of evidence, and may concentrate Black voters in a small segment of districts in a way that diminishes, rather than enhances, Black voting strength. The Commission acted well within its discretion to choose a different "method of complying with the Voting Rights Act." *Id.*

2. The Second Precondition

The second *Gingles* precondition is not satisfied because Plaintiffs fall well short of showing that "the minority group . . . is politically cohesive." *Gingles*, 478 U.S. at 51. This requirement is often called in tandem with the third precondition "racially polarized voting." *Id.* at 52. "[T]he results test does not assume the existence of racial bloc voting; plaintiffs must prove it." *Id.* at 46; *Growe v Emison*, 507 US 25, 42; 113 S Ct 1075; 122 L Ed 2d 388 (1993) (same). Plaintiffs must show that "a significant number of minority group members usually vote for the same candidates." *Levy v Lexington County, SC*, 589 F3d 708, 719–20 (CA 4, 2009). "[A] pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Gingles*, 478 US at 57. Endogenous elections, involving the same office as the Section 2 challenge involves, are more probative than exogenous elections, involving different offices. See, e.g., *Bone Shirt v Hazeltine*, 461 F3d 1011, 1021 (CA 8, 2006); *Johnson v Hamrick*, 196 F3d 1216, 1222 (CA 11, 1999).

Plaintiffs fail to present a racial bloc voting analysis and rely solely on impermissible assumptions. To begin, their brief cites just two elections, Br. 12, which is an insufficient basis to prove voting trends, cf. *Uno v City of Holyoke*, 72 F3d 973, 989 (CA 1, 1995) (finding clear error where only four of eleven elections analyzed supported the second and third *Gingles* preconditions). Plaintiffs cite no case finding a Section 2 violation on the basis of just two elections. Nor is the Court likely to find one: "[S]ection 2 focuses on 'larger trends' and on 'pattern[s] of racial bloc voting that extend[ ] over a period of time.'" *Wright v Sumter County Bd of Elections & Registration*, 979 F3d 1282, 1310 (CA 11, 2020) (quoting *Johnson*, 196 F3d at 1074). Further, one of the elections, the 2020 presidential contest, is exogenous to all of the bodies at issue here. Br. 12 (relying on alleged voting patterns for candidates Trump and Biden). The other is exogenous to the House and Senate. *Id.* (relying on alleged voting patterns in a primary for the 13th Congressional district). These are the least probative of elections. *Bone Shirt*, 461 F3d at 1021. Plaintiffs cite no House or Senate election in which minority voting is even alleged to be cohesive. They simply ask the Court to "assume" cohesion, which is improper, *Gingles*, 478 US at 51.

Besides, Plaintiffs fail to substantiate voting patterns even as to the two races they cite. Because of the secret ballot, it is unknown from reported election results whether members of different racial groups tended to support different candidates, and § 2 plaintiffs therefore rely on statistical estimates to make reliable inferences on this topic. See, e.g., *Gingles*, 478 US at 52–53 (relying on an expert analysis that "evaluated data from 53 General Assembly primary and general elections" and "subjected the data to two complementary methods of analysis—extreme case analysis and bivariate ecological regression analysis—in order to determine whether blacks and whites in these districts differed in their voting behavior" (footnote omitted)); see also *Clerveaux v E Ramapo Cent Sch Dist*, 984 F3d 213, 225 (CA2, 2021)

(describing the current state of expert methods, including eological regression and ecological inference). Courts ignore election outcomes in the absence of a reliable statistical study establishing racial preferences in those elections. See *Wright v Sumter County Bd of Elections & Registration*, 301 F Supp 3d 1297, 1317 (MD Ga, 2018) (declining to consider results of races involving Black candidates because "[n]either side has presented a statistical analysis of these races. There is thus no evidence of whether there was a black-preferred candidate in those races."); *Wright*, 979 F3d at 1308 (affirming this ruling).

Plaintiffs offer no statistical analysis. They ask the Court to infer from the fact that the 13th Congressional District primary loss of a Black candidate to a "non-Black" candidate establishes cohesive support for the Black candidate. Br. 12. But, for all the Court knows, the loss was because of a lack of cohesive voting for the Black candidate—which may be suggested from the "very high Black voting age population" in the district, *id.* at 12—or else the Black candidate was not the candidate of choice of the Black community. In effect, Plaintiffs ask the Court to engage in racial stereotyping and assume that the Black community is cohesive around every Black candidate. That is improper.[8] See *Lewis*, 99 F3d at 607 ("[T]he minority-preferred candidate may be either a minority or a non-minority . . . ."). Plaintiffs also ask the Court to infer racial voting patterns from the 2020 presidential contest, but, without a statistical study, this calls for speculation. *Wright*, 979 F3d at 1308.

3. The Third Precondition

The third *Gingles* precondition is not satisfied because Plaintiffs present no evidence that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the mi-

[8] In fact, it is unfounded. Dr. Handley's Final Report shows that 62.7% of Black voters voted for the non-Black candidate, Rashida Tlaib. Def. App. 105a.

nority's preferred candidate." *Gingles*, 478 US at 51. As the term "usually" suggests, this showing requires proof that over the course of many elections, the minority-preferred candidate loses more often than not. *Lewis*, 99 F3d at 616 (observing that "a court would ineluctably find" failure on this element in "circumstances" where "minority-preferred candidates were successful fifty percent of the time"); see also *Cottier v City of Martin*, 604 F3d 553, 560 (CA 8, 2010) (en banc); *Clay v Bd of Ed of City of St Louis*, 90 F3d 1357, 1362 (CA 8, 1996). Plaintiffs' failure to present a pattern of elections forecloses their ability to establish this precondition.

Plaintiffs' arguments on this precondition miss the mark.

(a) The Handley Report

Plaintiffs contend that the Commission's expert, "Dr. Lisa Handley[,] conducted a racially polarized voting analysis for the Michigan Independent Citizens Redistricting Commission in which she concluded that racial bloc voting exists in Michigan." Br. 13 (footnote omitted). Plaintiffs argue that this is sufficient to prove the third precondition, but overlook the difference between "racially polarized voting" and "*legally significant* white bloc voting." *Gingles*, 478 US at 56 (emphasis added). In doing so, Plaintiffs ask this Court to make the same mistake that resulted in the invalidation of dozens of majority-minority districts in other states last decade.

A political scientist can accurately describe voting as "polarized" in any "circumstance in which 'different races vote in blocs for different candidates.'" *Covington v North Carolina*, 316 FRD 117, 167 (MDNC 2016) (three-judge court), *aff'd*, 137 S Ct 2211 (2017) (quoting *Gingles*, 478 US at 62). For example, if 51 percent of Black voters vote for a candidate who receives the vote of only 49 percent of white voters, voting would be "polarized." *Id.* at 170. "However, the third *Gingles* precondition requires racial bloc voting that is 'legally significant'—that is, majority bloc voting at such a level that it enables the majority group 'usually

to defeat the minority's preferred candidates.'" *Id.* at 167 (quoting *Gingles*, 478 U.S. at 56). Specifically, *Gingles* held that "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." 478 US at 56 (underlining added). In the above hypothetical, 49% white crossover voting is substantial, likely ensuring that the minority preferred candidates win, and making it unlikely that the polarized voting is legally significant. *Bartlett*, 556 US at 24 ("In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters.").

The problem with Plaintiffs' analysis is that they rely selectively on Dr. Handley's findings of "polarized" voting, without acknowledging the degree of "white 'crossover' votes." *Gingles*, 478 US at 56. Although Dr. Handley did determine that there is some degree of polarized voting in Michigan, she determined that it does not exist at sufficiently high levels to necessitate majority-minority districts. Dr. Handley explained that "in no county is a 50% BVAP district required for the Black-preferred candidates to carry the district in a general election." Def. App. 062a. In Wayne County, Dr. Handley relied on a thorough analysis of dozens of races—including Democratic primaries—to conclude that districts of 35% or more BVAP are likely to afford the Black community an equal opportunity to elect. *Id.*, Tbl. 5.

This expert opinion—based on an analysis dwarfing Plaintiffs' analysis by orders of magnitude—indicates that white bloc voting is not "legally significant." *Gingles*, 478 US at 56. As *Covington* explained, white bloc voting is only legally significant if it "exist[s] at such a level that the candidate of choice of African-American voters would usually be defeated without a VRA remedy." *Covington*, 316 FRD at 168 (underlining added). A VRA remedy is a 50% minority VAP district. See *Bartlett*, 556 US at 19. Dr. Handley's conclusion that white

crossover voting exists at a sufficient level that 50% BVAP districts are not necessary anywhere in Michigan, including in Detroit, means that white bloc voting does not rise to a legally significant level. *Voinovich*, 507 US at 157–58 ("[I]n the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters."); *Abrams v Johnson*, 521 US 74, 93; 117 S Ct 1925; 138 L Ed 2d 285 (1997) (finding the third precondition unmet because of a "the 'general willingness' of whites to vote for blacks"); *Cooper*, 137 S Ct at 1470 (finding no evidence of the third precondition where "a meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate").

Plaintiffs tender an argument strikingly similar to the one rejected in *Covington*. After finding that the North Carolina General Assembly engaged in racially predominant redistricting by purposefully creating majority-minority districts, 316 F.R.D. at 129–65, the *Covington* court concluded that the General Assembly failed to justify its race-based redistricting under § 2, because the record before it at the time of redistricting did not establish the third *Gingles* precondition, *id.* at 167–74. It concluded this, even though the General Assembly employed a statistical expert who opined "that there is 'statistically significant racially polarized voting in 50 of the 51 counties' studied." *Id.* at 169 (quoting the report). The *Covington* court held that legislators' choice to draw majority-minority districts based on this analysis "demonstrates their misunderstanding of *Gingles*' third factor," as they bypassed the "crucial difference between legally significant and statistically significant racially polarized voting." *Id.* at 170 (underlining in original). North Carolina's error was that the General Assembly "never made any determination whether majority bloc voting existed at such a level that the candidate of choice of African-American voters would usually be defeated without a VRA remedy." *Id.* at 168.

As a result of this error, the General Assembly's racially predominant redistricting (arbitrarily creating dozens of majority-minority districts without the required VRA analysis) lacked a § 2 justification, resulting in "the most extensive unconstitutional racial gerrymander ever encountered by a federal court." *Covington v North Carolina*, 270 F Supp 3d 881, 892 (MDNC 2017). The U.S. Supreme Court summarily affirmed that decision by a unanimous vote. *North Carolina v Covington*, 137 S Ct 2211 (2017); see also *Covington*, 270 F Supp 3d at 892 ("The Supreme Court affirmed that conclusion without argument and without dissent. And the Supreme Court unanimously held that Senator Rucho and Representative Lewis incorrectly believed that the Voting Rights Act required construction of majority-minority districts[.]" (underlining in original)).[9] A three-judge panel in Illinois reached a similar conclusion in a recent § 2 case, finding the third precondition unmet because of "significant crossover voting by non-Latino voters . . . , ranging from more than twenty-five to seventy percent non-Latino voter support for the Latino candidate of choice in at least eight [analyzed] elections." *McConchie*, 2021 WL 6197318, at *8.

Here, as in *Covington*, an expert has opined that there is polarized voting in Michigan. And, like the General Assembly in *Covington*, Plaintiffs believe that this finding is sufficient to

[9] Redistricting challenges to statewide redistricting plans are adjudicated in federal court by three-judge panels, including at least one judge from the local court of appeals (Fourth Circuit Judge James A. Winn, Jr., presided in *Covington*). 28 USC 2284(a); see *Shapiro v McManus*, 577 US 39; 136 S Ct 450; 193 L Ed 2d 279 (2015). Losing parties have an appeal as of right to the U.S. Supreme Court. 28 USC 1253. When the Supreme Court summarily affirms, it affords the judgment of the district court binding effect under the doctrine of stare decisis as to holdings "essential to sustain that judgment." *Illinois State Bd of Elections v Socialist Workers Party*, 440 US 173, 183; 99 S Ct 983; 59 L Ed 2d 230 (1979); *Comptroller of Treasury of Md v Wynne*, 575 US 542, 559–60; 135 S Ct 1787; 191 L Ed 2d 813 (2015). The Covington court's holding regarding the definition of legally significant racially polarized voting is such a holding, since the result would have been the opposite without it.

establish the third *Gingles* precondition. Br. 13. The difference in this case is that the Commission *avoided* North Carolina's error. Dr. Handley recognized that 50% BVAP districts are not necessary in Michigan because of the strong levels of white crossover voting, and her conclusion is amply supported in her thorough report. For example, in 2018 Wayne County State Senate races—endogenous elections—white crossover voting for Black-preferred candidates ranged from 43.8% to 48.8%.[10] Def. App. 095a. In 2018 Wayne County State House races—endogenous elections—white crossover voting for Black-preferred candidates ranged from 36.2% to **85.5%**. *Id.* at 097a. And in 2018 Congressional District 13 (in Detroit) saw 64.5% white support for the Black-preferred candidate. *Id.* at 094a; see *McConchie*, 2021 WL 6197318, at *8 (finding the third precondition unsatisfied on similar evidence).

Plaintiffs complain that "**Defendant looked only at general election data**," Br. 21 (emphasis in original), but they are wrong. Dr. Handley did review primary data. See Def. App. 105a–06a. Dr. Handley made use of the only primary data that was available, and it exhibits similarly high levels of white crossover voting, as 72% of white voters favored the Black-preferred candidate in the 2020 Congressional District 13 primary, *id.* at 105a, and white crossover voting for the Black-preferred candidate[11] in Senate races ranged from 19% to 56%, *id.* at 106a. It is *Plaintiffs* who make the error of not looking at primaries: the Court will not find any polarized voting analysis of any primary election (or any election at all) in their presentation. Meanwhile, Dr. Handley's analysis shows that Black-preferred candidates were

[10] This brief focuses on Dr. Handley's ecological inference (EI) estimates, as EI is the most robust estimation method. Def. App. 043a–044a.

[11] Many Senate races exhibit a lack of cohesion, as Black support did not exceed 50% for any candidate. See *Levy*, 589 F3d at 708 n.18 (holding that minority support at less than majority levels "demonstrate[s] a lack of political cohesiveness," even in multi-candidate races). The focus here is on races where a clear Black-preferred candidate drew cohesive support from the Black community.

successful in approximately 70% of contests that saw polarization. Plaintiffs cannot show that white bloc voting is "usually" sufficient "to defeat the minority's preferred candidate," *Gingles*, 478 U.S. at 50–51, when the minority-preferred candidate *usually wins*.

(b) Plaintiffs' Remaining Arguments On The Third *Gingles* Precondition

Plaintiffs offer scant additional evidence regarding the third *Gingles* precondition, and their arguments are unpersuasive.

First, Plaintiffs make references to elections held before 1954 and again in 1964. Br. 13. This information is inapposite and out of date. "The more recent an election, the higher its probative value." *Bone Shirt*, 461 F3d at 1021. Courts have found data from even a decade or two before a redistricting too old to be of any use. See *Bethune-Hill v Va State Bd of Elections*, 326 F Supp 3d 128, 179 n 61 (ED Va 2018) (three-judge court) ("We decline to consider the Loewen report here because, among other reasons, the underlying data was based on electoral results from the 1990s and thus was outdated for purposes of the 2011 redistricting."). Evidence from 58 years (and more) ago says nothing of current voting patterns in Detroit.

Second, Plaintiffs argue that "[a]nother example is the 2012 Michigan House of Representatives race in the 1st District (West Detroit),[12] in which Black candidate Brian Banks ran in the primary election, but the Grosse Point Democrats official organization flat out refused to endorse Banks, the Democratic nominee." Br. 13. This cryptic assertion speaks to party organizations, not the voting public. In fact, Mr. Banks *won* both the Democratic primary and the general election, notwithstanding the party's non-endorsement.[13]

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[12] The district was in east Detroit, not "West Detroit."

[13] *Detroiters Elect Ex-Con Brian Banks as State Rep*, Nov. 7, 2012 (available at https://detroit.cbslocal.com/2012/11/07/detroiters-elect-ex-con-brian-banks-as-state-rep/) (accessed Jan. 18, 2022).

Third, Plaintiffs rely on a memorandum of the Michigan Department of Civil Rights, Br. 6, but that memorandum exhibits the same flaws as Plaintiffs' contentions, Ex. A (relying on outdated elections and assertions unrelated to the *Gingles* preconditions). Importantly, the assertions of a state government civil-rights organization regarding vote dilution are insufficient to justify majority-minority districts. Indeed, the U.S. Supreme Court refused to "accord deference to the [U.S.] Justice Department's interpretation of the [Voting Rights] Act" and has invalidated as racial gerrymanders districts that the Justice Department's Voting Rights Section *ordered states to enact*. See *Miller*, 515 US at 923. In *Miller*, the Voting Rights Section refused to preclear a Georgia congressional redistricting plan under Section 5 of the Act without the inclusion of three majority-minority districts, and Georgia dutifully complied with that dictate. *Id.* at 906–08. That was a mistake. The Supreme Court found compliance with the Voting Rights Section's directive to amount to racial predominance, *id.* at 917–18, and concluded that the Voting Rights Section had gotten the law wrong: "Georgia's drawing of the Eleventh District was not required under the Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated § 5." *Id.* at 923. The legal error was the Voting Rights Section's, but the loser was Georgia, whose redistricting plan was invalidated as a racial gerrymander. If the Voting Rights Section cannot justify majority-minority districts, the Michigan Department of Civil Rights fares no better. See also *Shaw v Hunt*, 517 US 899, 912–13; 116 S Ct 1894, 1904; 135 L Ed 2d 207 (1996) (*Shaw II*); (similar invalidation of majority-minority districts demanded by the Voting Rights Section); see *id.* at 913 ("We again reject the Department's expansive interpretation of § 5.").

B. Totality of the Circumstances

Because Plaintiffs have failed to establish the *Gingles* preconditions, the Court need not, and should not, reach their arguments regarding the so-called "Senate Factors." See Br.

13–23. The *Gingles* preconditions are threshold factors that must be satisfied: "Unless these points are established, there neither has been a wrong nor can be a remedy." *Growe*, 507 U.S. at 40–41. In any event, virtually nothing Plaintiffs say on the topic comes supported with admissible evidence. Many of Plaintiffs' assertions appear to have been lifted directly from Wikipedia.[14]

C. Plaintiffs Ignore The Commission's Obligation To Avoid Or Justify Racially Predominant Redistricting

Plaintiffs ignore the difficulties the Commission faced, tendering the refrain that "drawing up redistricting plans . . . is relatively simple." Br. 20. The U.S. Supreme Court disagrees. "Redistricting is never easy." *Abbott*, 138 S Ct at 2314. What Plaintiffs miss in all their arguments is that the Commission was not free to create majority-minority districts simply to be safe. Only if the *Gingles* preconditions were established would majority-minority districts be justified, but "if not, then not." *Cooper*, 137 S Ct at 1470. Creating majority-minority districts presented a significant legal risk because doing so would trigger the "strictest scrutiny" under the federal Equal Protection Clause, *Miller*, 515 US at 915, and require the Commission to, in effect, prove a § 2 claim against itself with data available at the time of redistricting, *Cooper*, 137 S Ct at 1470. The Commission undertook this task with the utmost seriousness, hiring a renowned VRA expert and an attorney devoted solely to VRA advice, and using data, not arbitrary racial targets, to drive its decisions. That body of evidence undercuts any claim that the Commission could satisfy the *Gingles* preconditions—particularly, the third precondition—to justify districts drawn at or above 50% BVAP. To go ahead with creating racially

[14] *Compare* Br. at 17 (asserting 47% of adults in Detroit are functionally illiterate and that eighth graders scored lowest in math and reading in the nation) *with* https://en.wikipedia.org/wiki/Educational_inequality_in_southeast_Michigan#Literacy_rates (accessed Jan. 18, 2022); *compare id.* (citing Detroit poverty rate in 2016) *with* https://en.wikipedia.org/wiki/Educational_inequality_in_southeast_Michigan#Socioeconomic_status (accessed Jan. 18, 2022).

predominant majority-minority districts in spite of that evidence would be the redistricting equivalent of waltzing down I-94 during rush hour, blind-folded.

Indeed, Plaintiffs' case bears all the hallmarks of the kind of erroneous reasoning that recently led courts to strike down majority-minority districts as illegal racial gerrymanders. As explained, Plaintiffs' insistence that the third *Gingles* precondition is satisfied on any level of polarization, and without a reliable measure of white crossover voting, mirrors the North Carolina General Assembly's error in *Covington*. In addition, Plaintiffs' insistence that majority-minority districts be drawn to 55% or even 65% BVAP, Expert Rep. ¶ 8, has all the features of *Bethune-Hill*, 326 F Supp 3d at 128, which invalidated 11 majority-minority districts in Virginia because "the legislature employed a 55% BVAP threshold in drawing each of the challenged districts." *Id.* at 144. Like Plaintiffs' assertions here, the 55% figure in *Bethune-Hill* was infirm because there was no "analysis of any kind to determine the percentage of black voters necessary to comply" with the VRA. *Id.* at 176. Meanwhile, Plaintiffs' assertion that BVAP reductions should not have occurred follows the flawed path condemned in *Alabama Legislative Black Caucus*. 575 US at 277–78. And much of Plaintiffs' brief impliedly invokes "a policy of maximizing the number of majority-black districts," which doomed redistricting plans in North Carolina and Georgia, *Shaw II*, 517 US at 913, as well as Texas, *Bush*, 517 US at 957.

In short, Plaintiffs' papers read like a roadmap to equal-protection quagmires. They satisfy none of the *Gingles* factors and instead demand race-based redistricting based on "the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 US at 647. The Supreme Court "rejected such perceptions . . . as impermissible racial stereotypes, *id.*, and the Commission did not employ them in this redistricting. This Court should not compel the

Commission to employ them now. It should decline the invitation to force the state into an equal-protection violation the Commission soundly, and correctly, avoided.

II. Plaintiffs' Communities of Interest Arguments Lack Merit

Plaintiffs also contend that the enacted plans contravene Subsection 13(c) of Article 6, which mandates that districts "shall reflect the state's diverse population and communities of interest." Const 1963, art 4, § 6(13)(c); Amend. Compl. ¶ 51. This argument is undeveloped and, at times, appears coterminous with Plaintiffs' VRA argument. See *id.* Amend. Compl. ¶¶ 40–51 (alleging VRA claim and referencing Subsection 13(c) at the end). To the extent the position carries any independent weight in Plaintiffs' case, it carries no legal force, for two reasons.

A. This Court is not positioned to choose the Commission's communities of interest for it. The Constitution plainly delegates the task of identifying and "reflect[ing]" communities of interest to the Commission, Const 1963, art 4, § 6(13)(c), a political (though nonpartisan) body equipped to handle "that highly political task" of redistricting, *Growe*, 507 US at 33. To second guess the Commission's communities-of-interest choices would invade the Commission's constitutionally created sphere and decide a non-justiciable political question.

First, the political choices of identifying and preserving communities of interest is "committed by the text of the Constitution to" the Commission, see *House Speaker v Governor*, 443 Mich 560, 574; 506 NW2d 190 (1993), which the Constitution carefully structures to be trusted with redistricting discretion, see Const 1963, art 4, § 6(1). The Commission's authority, within its sphere, is exclusive: "No other body shall be established by law to perform functions that are the same or similar to those granted to the commission in this section." *Id.* art 4, § 6(22); see also *id.* art 4, § 6 ("In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.").

Second, for this Court to pick and choose communities of interest would "demand that [it] move beyond areas of judicial expertise," *Makowski v Governor*, 495 Mich 465, 472 (2014), as there is no "constitutionally based, judicially manageable standard" to decide what communities will be included within electoral districts, *Vieth v Jubelirer*, 541 US 267, 291; 124 S Ct 1769; 158 L Ed 2d 546 (2004) (plurality opinion). The concept of a community of interest is "inherently subjective." *Prejean v Foster*, 227 F3d 504, 513 n.15 (CA 5, 2000) (citation omitted). There are as many notions of how to "reflect" them as there are residents of Michigan. That is why the Commission exists: to make those choices through the carefully calibrated structure the Constitution creates.

Third, for that reason, "prudential considerations . . . counsel against judicial intervention" into this arena. *Makowski*, 495 Mich at 472. The Commission conducted innumerable public meetings and collected innumerable public comments in a process that cannot seriously be challenged as lacking responsiveness to public input. For the Court to intrude on the request of a few voters, with no public information-gathering process and no meaningful way—as a judicial body—to conduct one, would insult the Commission and the voting public that entrusted *it* with the task of fashioning plans to honor the state's diversity and communities of interest.

To be sure, the Court may have some role in enforcing this provision, but it is not implicated here. For one thing, there are judicially manageable standards for determining that the Commission chose an improper community of interest, as the Constitution clarifies that "Communities of interest do not include relationships with political parties, incumbents, or political candidates." Const 1963, art 4, § 6(13)(c). But there is no allegation here that the Commission established districts on any of these bases, and none could colorably be made. For another thing, the Court may have a role in assessing whether "there is evidence that the

[Commission] considered the constitutional requirement of [communities of interest] in reconciling the different demands upon it in drawing legislative districts." *Vesilind v Va State Bd of Elections*, 295 Va 427, 448; 813 SE2d 739 (2018). This good faith standard may empower judicial intervention if the Commission were, somehow, to completely ignore the requirement. But, again, no allegation to that effect is possible here. Plaintiffs' challenge, by contrast, amounts to mere disagreement with the Commission's choices. The fact that the Commission could have chosen differently cannot form the basis of a legal claim.

B. Even if some standard existed to adjudicate this claim, Plaintiffs' position would fall on the wrong side because the federal Equal Protection Clause forbids the Commission from defining communities of interest on the basis of race. As recounted above, the U.S. Supreme Court has repeatedly condemned racial stereotyping in redistricting. *Shaw I*, 509 U.S. at 647. As part of that doctrine, the Court has forbidden using race as "a proxy" for otherwise legitimate redistricting criteria, such as "political characteristics." *Bush*, 517 US at 968; *Bethune-Hill*, 326 F Supp 3d at 142 ("[I]f a legislature uses race as a proxy for a legitimate districting criterion . . . this consideration of race likewise is subject to strict scrutiny.").

Plaintiffs, however, define their communities-of-interest contention solely in racial terms, asking the Court to require the Commission to draw districts to (in an unknown way) reflect "the Black community of Michigan." Amend. Comp. ¶ 10. To enforce that request would force the Commission to use race as a proxy for communities of interest, triggering strict scrutiny and placing the State Constitution into conflict with the Equal Protection Clause. That would be an unforced error. See *Parents Involved in Community Sch v Seattle Sch Dist No 1*, 551 US 701, 748; 127 S Ct 2738; 168 L Ed2d 508 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

III. Plaintiffs Are Not Entitled To Declaratory or Injunctive Relief

Because Plaintiffs' claims do not succeed on the merits, they are not entitled to any relief, injunction, declaratory, or otherwise. Indeed, their arguments concerning injunctive relief are puzzling.

A. Plaintiffs invoke the standard governing "a preliminary injunction" and tender arguments concerning, among other things, the "the likelihood that the party seeking the injunction will prevail on the merits." Br. 8 (citation omitted); see also *id.* at 23–25. But the briefing before the Court *addresses* the merits. The rule governing original proceedings authorizes pleadings, an appellant opening and reply brief, an appellee brief, attachments—and then the case is "submitted for a decision." MCR 7.306(I). The case is ready for adjudication on the merits. As shown, Plaintiffs' claims fail and, besides, are not likely to succeed with further proceedings, if any were afforded. No injunction may issue for that reason.

B. Regardless, Plaintiffs fail to address unique factors governing "[c]ourt orders affecting elections," which "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v Gonzalez*, 549 US 1, 4–5; 127 S Ct 5; 166 L Ed 2d 1 (2006). Election-related injunctions are "so serious" that "the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation." *Sw Voter Registration Ed Project v Shelley*, 344 F3d 914, 918 (CA 9, 2003). Michigan precedent is to the same effect. See, e.g., *Kavanagh v Coash*, 347 Mich 579, 583; 81 NW2d 349 (1957); *Senior Accountants,, Analysts & Appraisers Ass'n v City of Detroit*, 218 Mich App 263, 270; 553 NW2d 679 (1996). The Court is therefore obligated to consider—even if it finds merit in Plaintiffs' claim—whether injunctive relief will do more harm than good, under the circumstances. Several factors compel an affirmative answer to that question.

First, this redistricting has already been plagued by delay, as the Commission, "*through no fault of its own*," was unable to meet the constitutionally established November 1 deadline.

In re Indep Citizens Redistricting Comm, 961 NW2d at 212. Through that deadline, the Michigan Constitution establishes an overriding directive that litigation over the plans be completed well in advance of the even-year election cycle, and an injunction and new round of redistricting at this time would contravene that directive.

Second, election deadlines are looming and would likely be frustrated by an injunction. The petition filing deadline for candidates is April 19, 2022. Def. App. 215a. The primary is scheduled by statute to occur on August 2, 2022. *Id.* The general election, established by federal law, is scheduled for November 8, 2022. *Id.* Election administrators need substantial lead time before those dates to administer redistricting plans, and an injunction would create a severe risk of an administrative meltdown, voter or candidate confusion, and voter disenfranchisement, possibly on a large scale.

Third, Plaintiffs are wrong that a remedial plan can be implemented "in a matter of hours." Br. 24. Even if a remedial *plan* can be fashioned promptly, the Commission is charged with enacting *legislation*. As an initial matter, this Court is constitutionally prohibited from implementing a remedial plan: "In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state." Const 1963, art. 4, § 6(19). The Court "*shall* remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution, the constitution of the United States or superseding federal law." *Id.* (citation omitted). That unmistakable text rules out a court-drawn plan "in a matter of hours."

And redistricting on remand would be measured in months, not hours. The Commission's work is strictly governed by a series of procedural rules, beginning with public-hearing requirements, progressing through a 45-day public-comment period, and culminating in a vote of the Commission. Const 1963, art 4, § 6(9) & (14). Even if it were physically possible,

the Commission is legally prohibited from whipping up a plan in a few hours and imposing it on the public. To be sure, it remains unclear to what extent the Commission is bound to these deadlines in a remedial proceeding, and the Court should issue directives on the question in the event of a remand. But, in all events, it seems inconceivable that the Commission would be permitted to prepare remedial plans with *no public hearings or notice period*—which is what Plaintiffs' inexplicably demand.

Fourth, the Court should consider the public's overriding interest in voting in elections governed by plans established by the Commission. Even if the Court concludes—against all law and evidence—that the Commission's plan falls short under the VRA, this is a case where the perfect can become the enemy of the good. For example, if the Court orders a new redistricting, and a new set of hearing and comment periods lasting months, a federal court may conclude that the "state branches will fail timely to perform [the] duty" to redistrict and that federal intervention is essential to prepare plans compliant with the equal-population rule. See *Growe*, 507 US at 34. A federal court may thereby disregard the unmistakable intention of Michiganders that "[n]o other body shall . . . perform functions that are the same or similar to those granted to the commission." Const 1963, art 4, § 6(22). Worse still, a federal court could conclude that *no* redistricting can occur and that the 2022 elections should proceed under *last* decade's plans. See *Reynolds v Sims*, 377 US 533, 585; 84 S Ct 1362; 12 L Ed 2d 506 (1964). That could create the baffling outcome that, even after so many Michiganders worked so hard to end partisan redistricting in this state, the inaugural election in the redistricting-commission era would occur under a plan that is (1) malapportioned and (2) drawn by a partisan body. An even more baffling, but possible, outcome is an order commanding at-large congressional elections. See 2 USC 2a(c); *Branch v Smith*, 538 US 254, 275; 123 S Ct 1429; 155 L Ed 2d 407 (2003) (plurality opinion).

To be sure, the Commission would vehemently oppose any such outcome in a future federal proceeding. But the buck should stop here: it is Michigan's institutions that are responsible for the smooth and effective administration of Michigan elections. This Court should not create an excuse for federal institutions to intervene and seize that power for themselves. As shown, the Commission's VRA choices are supported by a wealth of evidence, Plaintiffs' claim is supported by practically none, and the harms of an injunction would far outweigh any conceivable benefit.

CONCLUSION AND RELIEF REQUESTED

The Court should enter judgment in the Commission's favor and deny Plaintiffs' requested relief.

Dated: January 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed the foregoing paper with the Clerk of the court using the MiFILE system and I used the MiFILE system to serve a copy on counsel for Plaintiffs.

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